

# The use of private maritime guards as an innovative means to fulfil states' duty to cooperate in the repression of maritime piracy. Part Two

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## Keywords

Maritime piracy, PCASPs, PMSCs, international law, UNCLOS

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## Abstract

*This article discusses the use of PCASPs as an alternative or additional layer of protection on board ships in the fight against maritime piracy and armed robbery at sea from an international law perspective based on legal positivism. A concern is that clear-cut, international legal rules are missing on PCASPs. A particular concern is the use of force by PCASPs.*

*The IMO, the shipping- and PMSC industry have had to resort to soft-law instruments and self-regulations. The perceived lack of legal rules concerning PCASPs and PMSCs has resulted in a lot of criticism. But does international law on maritime piracy need to develop binding international legal rules' that are directly applicable to PCASPs? My findings are that the existing legal framework, in the Law of the Sea, SOLAS Convention, customary international law on self-defence together with the non-binding IMO guidelines and the shipping industry's and PMSC's self-regulations, as implemented by national laws, gives the necessary framework to adequately address the issue of PCASPs as protection against maritime piracy.*

*The article describes maritime piracy, piracy hotspots and how interventions against piracy differ according to regions. It analyses the current legal framework on maritime piracy and armed robbery at sea in UNCLOS and the SUA Convention, flag-state jurisdiction and national laws. It defines "soft-law" and goes through regulations on PCASPs from the Montreux Document and ICoC to regulations that directly address the use of PCASPs on board ships, as the IMO Guidelines, ISO Standards, the industries standard agreements and the Guidance on the use of force.*

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First submission received: 15<sup>th</sup> September 2020

Revised submission received: 20<sup>th</sup> November 2020

Accepted: 14<sup>th</sup> April 2021

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## Introduction

A previous article in IJMCS<sup>i</sup> addressed the 'soft law' guidance, standards, agreements, regulations, and codes of conduct for the use of Privately Contracted Armed Security Personnel (PCASPs) and Private Military and Security Companies (PMSCs) on board ships in the global fight against maritime piracy. My findings were that the current regulations on PCASPs on board ships are soft law. This subsequent article addresses the consistency and uniformity of those 'soft law' measures and the scope for harmonizing them through an international legally binding statute.

## Uniformity of the Regulations

It is obvious that the guidance, standards, agreements, regulations, and codes of conduct in these different 'soft law' measures are very similar and hence indicates what norms apply to PCASPs in their

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deployment against maritime piracy. Below is a comparative study of their common regulations that gives good guidance on applicable provisions. Most likely, these provisions will cement into hard law.

A common denominator is that a thorough *risk assessment* needs to be done, found in most of the regulations. It is emphasized that a thorough risk assessment must be done after ensuring all other practical means of self-protection have been employed, so that PCASPs should only be an additional layer of protection to the BMP.<sup>ii</sup>

A *contract* is necessary, usually between the owner and the PMSC. In the choice of PMSC the shipowner needs to exercise *due diligence*. The contract should specify the route and can also cover seaborne armed robbery that takes place in territorial waters.<sup>iii</sup> But the *Global Counter Piracy Guidance for Companies, Masters and Seafarers* (GCPG) notes that the owner must ensure that PCASP are permitted by the governments of littoral states through whose waters the ship may pass and that the majority of, littoral states *do not allow PCASP in their territorial waters*.<sup>iv</sup> This follows from that the PMSC and the owner need to follow flag state regulations and all other *regulations*, as *between home, flag, coastal and port states*. The PMSC should incorporate all legal and regulatory requirements, as well as any applicable codes and conventions in its management system. These should form part of contract negotiations with a client and take account of differing jurisdictions and statutory requirements as between home, flag, coastal and port states.”<sup>v</sup>The ISO standard on PCASPs, ISO 28007-1:2015, details these *legal obligations* for the PMSC:

- 1) applicable and relevant requirements of UNCLOS and maritime law.
- 2) laws and regulations of the home states and flag and coastal states, recognizing that any decision whether to allow a PCASP on board is the prerogative of the flag state.<sup>vi</sup>

The IMO Circ.1333, *Recommendations for Preventing and Suppressing Piracy and Armed Robbery Against Ships*, MSC.1/Circ.1333/Rev.1 Annex, (2015) and the ISO standard 28007-1:2015, *Ships and marine technology – Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract)* (ISO 28007) emphasize Arts. 100 resp. 92 and 94 in UNCLOS. The ISO 28007 includes an important note that:” Article 92 of UNCLOS refers to the flag state’s exclusive jurisdiction on the high seas and Article 94 refers to “duties of the Flag State”. This is a reference to *lege lata*, that the flag state makes the decision if to allow PCASPs on board. Also, appropriate prior approval is needed for the deployment of PCASP from countries in which operations are conducted managed, or countries through which PCASP may transit.<sup>vii</sup> The responsibility of states to cooperate against pirates in UNCLOS Art.100 is cited in IMO Circ. 1333.<sup>viii</sup> The PMSC should also establish and document its processes for compliance with home state, coastal and flag state laws as regards firearms for each transit.<sup>ix</sup>

The PMSC should have an *insurance* that covers third party claims and negligent or criminal liability by the PCASPs.<sup>x</sup> The PMSC and its sub-contractors need to have sufficient insurance to cover risks and associated liabilities arising from its operations and activities, consistent with contractual requirements, such as general liability insurance for third party claims of bodily injury or property damage and negligent use of force by PCASPs.<sup>xi</sup>These obligations are fleshed out in GUARDCON, *Standard Contract for the Employment of Security Guards on Vessels* by BIMCO. One of the key features of GUARDCON is the all-important Insurance Policies Clauses.<sup>xii</sup> It uses knock-for-knock principles and maintain the principle that damage and loss to property or personnel suffered by a party’s ‘group’ is borne by that party regardless of fault.<sup>xiii</sup> Each party shall indemnify the other against claims by third parties with the exception of claims from third parties arising out of the owners’ or contractors’ own negligence.<sup>xiv</sup> Thus, third-party liability is still in the normal. The reference to “unlawful” or negligent act covers scenarios such as a fisherman being killed by a security guard using unlawful force.<sup>xv</sup> The individual PCASP is himself indemnified from any liability caused by a firearm being accidentally or negligently fired, such as a guard tripping while carrying

a loaded firearm.<sup>xvi</sup> Instead, the PMSC is liable. The necessity of enough insurance coverage is important as punitive damages can amount to large sums in civil liability, aimed to prevent rogue PMSC to use excessive or unnecessary force.<sup>xvii</sup>

The contract should comply with certain standards in its operations and the mission. The IMO MSC Circ. 1405, *Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, underscores: "A shipowner/operator should, in its contract with a PMSC, ensure that the command and control structure between owner, the ship's officers and the team-leader (TL) has been clearly defined and documented".<sup>xviii</sup> An important provision, common to all the regulations, is that the *Masters authority* should be recognized in a clear statement in the contract stating " [a]t all times the Master remains in command and retains the overriding authority on board".<sup>xix</sup> There shall be a documented list of duties, expected conduct and documentation of PCASP actions on board.<sup>xx</sup> GUARDCON sets the limit to a security team of a minimum of four members,<sup>xxi</sup> (but in practice the PCASP teams are often fewer). The TL should be competent in ship vulnerability and risk assessments and be able to advise on ship protection measures. It is recommended that one of the PCASP be qualified as the team medic.<sup>xxii</sup> The PMSC needs to have a *manage plan* and *procedures* in place for the PCASPs mission. However, it is only the ISO 28007 standard that provides for PMSCs having an ethics plan and respect for human rights, see *infra*.

The PMSC should guarantee that the PCASPs are *vetted and have licenses and permits necessary to function as PCASPs*. According to the IMO circulars, the responsibility for vetting PCASPs lies with the PMSCs, which themselves should be vetted by the appropriate authorities.<sup>xxiii</sup> The Circular 1405 emphasizes the importance of *background checking and vetting*: "particularly in the absence of a robust certification scheme for PMSC".<sup>xxiv</sup> Vetting, is found in the *International Police Handbook*, defined as "assessing integrity to determine suitability for public employment", and is seen as a necessary condition in an international police standard.<sup>xxv</sup> The ISO standard contains detailed information on how PCASPs should be selected such as criminal background checks; security and law enforcement service checks; assessment of medical, physical and mental fitness, history of drug and alcohol abuse.<sup>xxvi</sup> PCASPs should not have prior criminal convictions that would ordinarily exclude them from the use of firearms, and should have evidence of such checks/certificates.<sup>xxvii</sup> The background experience of the PCASPs is not limit to only ex-military personnel or ex-law enforcement personnel but those from other relevant backgrounds may be equally suited to the task, according to GUARDCON.<sup>xxviii</sup> PMSCs should guarantee that PCASPs *have security identity documentation, travel documents and visas*.<sup>xxix</sup> Records should be made available "to demonstrate that the security personnel have the skills, knowledge and experience to undertake the assigned security tasks", to cite GUARDCON.<sup>xxx</sup> It explains that the personnel should know "applicable and relevant international and national legal and regulatory requirements."<sup>xxxi</sup> They should subscribe to the Code of Ethics.<sup>xxxii</sup> They should be mentally fit and cannot drink alcohol or take drugs on board the ship.<sup>xxxiii</sup> No one under 21 years should be considered carrying firearms, according to GUARDCON.<sup>xxxiv</sup>

It is important that the PCASPs have all necessary *licensing and permissions* for their arms and equipment in compliance with national legislation and requirements from flag states and littoral states and ports.<sup>xxxv</sup> The GCPD emphasizes that it is necessary to check that the PMSC has credentials and licenses to operate legally, and weapons licensed.<sup>xxxvi</sup> They need to have relevant experience and training in the use of firearms and all personal handling licensing and certificates. This is important as "a sizable number of private maritime security firms are operating without the necessary permits and licenses to transport and carry weapons [thus] carrying weapons illegally", according to GUARDCON Explanatory Notes.<sup>xxxvii</sup> GUARDCON para.10, contains a comprehensive clause dealing with permits and licenses

which places a strict obligation on the contractors to ensure that they meet all such requirements, as the contractors otherwise need to indemnify the owner for any losses.<sup>xxxviii</sup>

The PMSC shall assure that all persons performing tasks on its behalf have received appropriate *training* to demonstrate competence.<sup>xxxix</sup> Most of the document's stress this point. It should be thorough and include understanding of the rules on the use of force and the right to self-defence.<sup>xl</sup> The ISO standard points out that PCASPs must know "relevant and applicable provisions of international and national law, and of SOLAS, International ship and Port Facility Security Code (ISPS), International Safety Management (ISM) and any current best management practice;"<sup>1</sup> They need to know procedures to report on any incident and prevented incident or threat.<sup>xli</sup> The PCASPs need to know the Rules of engagement (RUF). Most important is "that personnel have been trained and qualified to documented company standards in the appropriate use of force following recognized principles/guidelines recognized by the flag State;" to cite the ISO Standard.<sup>xlii</sup>

A cornerstone is the *Master's overall authority* on the vessel, which is a legal requirement in SOLAS, Chapter XI-2, Regulation 8 to which most of the documents refer.<sup>xliii</sup> However, they also point out the PCASPs team leader's (TL) right to activate the RUF pending an imminent attack, but first after alerting the Master (or if unavailable), the officer in charge.<sup>xliiv</sup> But the Master retains the authority to order a cease-fire. PCASPs must obey the Master's order to cease firing under all circumstances.<sup>xliiv</sup> But this does not compromise each PCASPs "right of self-defence in accordance with applicable national laws."<sup>xliiv</sup> Self-defence is interpreted as "necessary and proportionate to defend himself", in the GUARDCON Explanatory Note.<sup>xlvii</sup> The Master's decisions to stop the use of force if he deems it a danger to the security of the ship and crew will be binding, without derogating from "the inherent right of self-defence" for an individual PCASP, according to the ISO standard.<sup>xlviii</sup>

The RUF is narrowly defined. However, as the *Guidance on RUF by BIMCO for Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV)*, provisions emphasize, ultimately, the content of RUF is a matter of national law.<sup>xlix</sup> But the documents give good guidance that "the use of force should only be taken under threat of an imminent attack or in an attack", a provision almost identical in all the documents. GUARDCON emphasizes that "the RUF are invoked only in response to a specific threat - they are therefore not necessarily in effect for the whole duration of a transit".<sup>1</sup> Rule 103 in *The 100 Series Rules: An International Model Set of Maritime Rules for the Use of Force (RUF)*, by Human Rights at Sea, defines: "When under attack or when an attack is imminent, reasonable and necessary use of force may be used in self-defence, including, as a last resort, *lethal force*."<sup>li</sup> The use of force should be applied in a *graduated response* according to the documents.<sup>lii</sup> This is detailed, so that first audible and visual warning signs are deployed, then warning shots, if necessary against an approaching vessel, then if the attack has started by pirates boarding the vessel, the use of force can be directed towards pirates.<sup>liii</sup> A most detailed account is given in the BMP5 on how PCASPs should behave under an attack against the ship.<sup>liv</sup> First, at the approach stage, "PCASP, will use actions to warn off attackers."<sup>lv</sup> Then at the attack stage "PCASP will conduct themselves as governed by the RUF".<sup>lvi</sup> When attackers do illegal boarding, PCASPs will follow procedures agreed with company and Master.<sup>lvii</sup> Then it should be ensured that all crew are present in the citadel or safe muster point, including PCASP.<sup>lviii</sup> The 100 Series explains that the use of force is the last step: "The firing of firearms directly at an attacking craft in order to disable the attacking craft is legitimate, in order to attempt to neutralize/prevent an on-going attack and when all other graduated RUF measures have failed to deter the attack."<sup>lix</sup>

The use of force should be strictly used *in self-defence*, this is set out in all the documents that have rules on the use of force.<sup>lx</sup> They refer to the "*inherent right*" to self-defence, a phrase used to describe self-

defence in international law, implying that it is a widely accepted norm of customary international law, as the International Court of Justice found in the Nicaragua case.<sup>lxii</sup> Such self-defence is to be *instant, necessary, and proportionate* to the circumstances, with the use of lethal force as the ultimate step.<sup>lxiii</sup> Interestingly, this draws on the criteria found in the *Caroline Case*, which is widely acknowledged as an expression of customary international law concerning the limits of self-defence in international law, however usually as between nations.<sup>lxiii</sup> The *Caroline* case was an incident with a Canadian steamboat being sent down the Niagara Falls by British troops. It resulted in a correspondence 1842, between US Secretary of State, Daniel Webster, and British Government's representatives in Washington (Mr Fox and Lord Ashburton), in which Webster repeatedly used the famous *Caroline* formula for the exercise of self-defence: "[t]he necessity for action must be instant, overwhelming and leaving no choice of means and no moment for deliberation."<sup>lxiv</sup> However, the applicability of the *Caroline* test to a piracy attack, is fair and make sense, as use of force is used in self-defence to protect against an attack by armed private perpetrators, not very different from the private militia in the *Caroline* incident. But of course, a difference is that PCASPs are not the official troops of a state. However, the reference to the inherent right to self-defence does refer to individual self-defence, which is a principle of law emanating from roman law and today inserted and accepted in most national laws around the globe, which qualifies it as a principle of international law, as Jan Arno Hessbruegge points out in a recent dissertation on *Human Rights and Personal Self-Defense in International Law*, see *infra* at *PCASPs Use of Force and Self-Defence in International Law*.<sup>lxv</sup>

The 100 Series rules starts with a disclaimer that: " Nothing in these Rules shall be interpreted in any way whatsoever as limiting an individual's right of self-defence as universally recognized as provided for under applicable and relevant national and international law." This corresponds with the current valid and recognized interpretation of self-defence under the criteria found in the *Caroline* test, that also admits preventive self-defence in case of an imminent attack, but not pre-emptive strikes that exceeds that limit, nor excessive or putative self-defence.<sup>lxvi</sup> MSC Circ.1405 formulate the borders for self-defence in para.5.14: "In no case should the use of force exceed what is strictly necessary and reasonable in the circumstances. Care should be taken to minimize damage and injury and preserve human life." The *Bimco Guidance on the Rules for the Use of Force* points out that the use of force not exceed what is *strictly necessary*; is *proportionate and appropriate to the situation*; PCASPs have clear and unambiguous instructions and take *all reasonable steps to avoid the use of lethal force*.<sup>lxvii</sup> The *100 Series Rules on the Use of Force*, has criteria for what is to be considered an imminent attack: "[A]n attack is imminent when the need to defend against it is manifest, instant and overwhelming,"<sup>lxviii</sup> criteria based on the *Caroline* test, that admits narrowly defined preventive self-defence in case of an imminent attack.

Self-defence in the provisions is interpreted as an individual PCASP's defence of life and against serious crimes. Sometimes, the documents include self-defence of others, which is in line with the international legal principle on individual self-defence, as will be discussed *infra*.<sup>lxix</sup> On the other hand, not all jurisdictions include of property under permitted self-defence, why this category is dependent on applicable national laws.<sup>lxx</sup> In the event of the use of force, respect for human dignity and the human rights of all persons should prevail, <sup>1</sup> according to GUARDCON para.7. The BMP 5 underscores: "There must be a clear understanding of the authority of the Master and the Rules for the Use of Force (RUF) under which the PCASP operate. RUF should provide for a graduated, reasonable, proportionate response and demonstrably necessary escalation in the application of force in defence of personnel on the ship. The Master always remains the ultimate authority on a ship."<sup>lxxi</sup>

It shall be noticed that the IMO disapprove of seafarers arming themselves: "flag States should strongly discourage the carrying and use of firearms by seafarers for personal protection or for the

protection of a ship".<sup>lxxii</sup> Instead the IMO acknowledge that a flag state can hire PCASPs if it wants to deploy armed personnel.<sup>lxxiii</sup>

Towards a third party the PMSC and the PCASPs are liable under criminal law of the national laws applicable, as well as for damages under the law of tort. Towards the shipowner the contract will provide guidance if there will be knock-for knock principles applicable. In the Enrica Lexie incident, the PCA found that Italy was liable to India for the damage caused to third parties by its two VPDs, however in their role of state agents, but that the damages would be settled outside of the court if possible.<sup>lxxiv</sup>

It is a general requirement in all the assessed documents above that there is a *post incident report* of any incident involving the use of force. Any attack should be reported immediately to authorities, such as the flag state, and the owner.<sup>lxxv</sup> The RUF should also consider the necessary reporting responsibilities for the PCASPs. An enquiry or investigation by the vessel's flag state or by the vessel's owners is foreseen. The contractors are obliged to assist in the investigation and make formal written records if national law so requires, from the Master and the security team/crew. The ISO standard is the most detailed on what to include in a Report. It ought to include, time and circumstances of the incident, witness reports from crew and PCASPs, identity of personnel involved in the incident, such as; number of attackers, physical appearance, language(s) spoken, craft used, method of approach and firearms used, nature of attack, details as to the discharge of any firearms, and details of notifications made to international liaison, client, insurer and relevant authorities including those of the flag state.<sup>lxxvi</sup> After the attack: "the team leader should cooperate with the Master in protecting the scene of any incident and potential forensic evidence which could lead to the later arrest and conviction of pirates/criminals *as far as is practicable*." (emph.add.)<sup>lxxvii</sup> Also, IMO has specific guidelines on dealing with crimes of piracy and armed robbery in its MSC/Circ.1404, *Guidelines to assist in the investigation of the crimes of piracy and armed robbery against ships*. Governments are encouraged to have trained investigators available who can collect the available evidence from a vessel immediately after its release. Failing this, every effort should be made to have an investigator available at the vessel's first port of call after release.<sup>lxxviii</sup>

The investigator shall take crew statements and there are guidelines on recovery and packaging of evidence.<sup>lxxix</sup> The guidelines establish that the Master is not a professional crime scene investigator and does not act in the capacity of a criminal law enforcement official. It should be noted that those provisions correspond to what national laws usually provide in cases of a crime on board a vessel. As most criminal acts occurring on board are investigated and prosecuted under national jurisdiction in national courts. In addition, international extradition treaties may be in place between states, moving the perpetrator to another state for trial or imprisonment.<sup>lxxx</sup>

### Separate Rules

Some of the regulations provide separate rules, that still can be considered important and relevant statements of soft law based on international principles. GUARDCON Para 9, sets out the important principle that the *contractors cannot guarantee the safety of the vessel and crew*. This means that all liabilities and losses does not pass to the contractors if the vessel is hijacked. The PCASPs ends their duty when captured and the ship is hijacked. Thus, they should not try to free the captives or flee, as they shall not do anything that can endanger the crew or Master. They are treated as part of the crew in relation to the demand for a ransom, while on board they are covered by the owner's insurance, and thus not liable to pay their own ransom. These provisions on hijacking and capture are only found in GUARDCON.<sup>lxxxi</sup>

Another, interesting provision, is found in the ISO 28007 standard. The PCASPs need to be *distinguishable* from the ship's crew and passengers, to ensure their safety, why they should at all times use uniforms and markings to identify their role as private security personnel."<sup>lxxxii</sup> This is a provision similar

that of combatants under LOAC, why it seems an important development that ought to transform into a customary norm.<sup>lxxxiii</sup>

The PCASPs and Master need to have a *common working language* according to GUARDCON.<sup>lxxxiv</sup> The provision draws on the SOLAS regulation V/14. 4, which provides that on ships where SOLAS Chapter I applies, English must be used on the bridge as the working language for bridge-to-bridge and bridge-to-shore safety communications as well as for communications on board between the pilot and bridge watchkeeping personnel, unless those directly involved in the communication speak a common language other than English.” These provisions are important as a problem has been poor capability to communicate between PCASPs and Crew.

Respect for *human rights* is required according to the ISO standard 28007.<sup>lxxxv</sup> But also GUARDCON refers to human rights in the RUF, where the use of force must show respect for human dignity and the human rights of all persons.<sup>lxxxvi</sup> Human rights and the *United Nations Guiding Principles on Business and Human Rights* (the Guiding Principles) applies to the PCASPs on board ships and in their security service, according to the ISO standard 28007.<sup>lxxxvii</sup> The ISO Standard lists that the PMSC should: a) have an accessible, written Code of Ethics including its human rights policy and Code of Conduct; b) be able to demonstrate that personnel are conversant with its Code of Ethics, also when outsourcing.<sup>lxxxviii</sup> The PMSC must comply with “employment law and human rights obligations and any other commitments to which the organization may subscribe.”<sup>lxxxix</sup> ISO requires that the PMSC should have a written Code of Ethics including a Human Rights Policy in its Code of Conduct and that the PMSC shall guarantee that its personnel are conversant with its Code of Ethics, procedures and plans.<sup>xc</sup> This is in line with International Police Standards, that are based on art.8, par.2, of the *United Nations Convention against Corruption*: “in particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honorable and proper performance of public functions.” Thus, most countries train police students in human rights principles as well as police ethics, however it is not a requirement.<sup>xcii</sup> The United Kingdom Accreditation Service (UKAS), has human rights as a standard that the bodies that will run a 28007 certification system need to audit in their check of compliance of PMSCs.<sup>xciii</sup> These standards point to key human rights declarations and treaties, relevant to PMSCs, such as the International Bill of Rights, The ILO Declaration on the Fundamental Principles and Rights at Work and the UN Guiding Principles on Business and Human Rights. It points out human rights risk areas relevant to PMSCs and stakeholders, and its personnel:

“[r]isks related to the rights to life, liberty and security of the person, freedom from torture, cruel, inhuman or degrading treatment or punishment, freedom from slavery, forced and bonded labour, human trafficking, sexual abuse and harassment, rights to fair and just conditions of work, freedom of association, freedom from discrimination in employment and other labour rights including child labour.”<sup>xciii</sup>

The ISO 28007 standard requires active respect for human rights in the PMSC’s business and conduct of the PCASPs, (see also GUARDCON para.7 on RUF), the respect for fundamental human rights is part of corporate social responsibility (CSR), which is too a degree enforceable through a states’ commitment to respect human rights under its national laws. For example, a PCASP who intentionally or unnecessarily inflicts seriously bodily harm or other degrading treatment to a pirate, can be held liable for torture and inhumane and degrading treatment, according to ICCPR para.7, which reflects customary international law and give rise to criminal liability.<sup>xciv</sup> Civil liability could expose the shipping company to possible liability if they have hired an inadequately trained PMSC, and liability for the PMSC if it has not followed the regulations on selection, vetting and training of its personnel.<sup>xcv</sup>

## Conclusions on Uniformity of PCASP Regulations

Many of the norms set out in the different IMO Circulars and the industry's self-regulations, are copies of already existing norms in international law, such as the SOLAS Convention or UNCLOS, or from customary international law, such as the provisions on self-defence based on the Caroline case, RUF and the use of force. Many of the provisions also reflect common principles existing in national legal systems, on individual self-defence, and the vetting and licensing and use of firearms by PCASPs. In as much as they reflect already existing norms, such as in UNCLOS or SOLAS or customary international law those rules are already hard law. Also, when they set out existing principles of international law such principles are also hard law.

But mostly, the regulations are an example of the emerging *soft law*, forged in the dwellings of corporate interests, that is benign to the development of hard law along its lines – *the so-called bottom-up law-making*.<sup>xcvi</sup> The core commitments in those regulations are today seen as accepted custom for the industry.<sup>xcvii</sup> The UNSC has also endorsed these regulations in its resolutions.<sup>xcviii</sup> It is a good example of how stake-holders are influenced by international and national provisions in their ambition to shape rules for a new area. Thus, the content is not actually new but borrowed from similar settings, such as norms on police enforcement or the principles on self-defence and adapted to the maritime environment and PCASPs fight against piracy, taking into account maritime rules, such as the master's responsibility in SOLAS and UNCLOS rules on piracy. They build on UNCLOS provisions on flag state and coastal state jurisdiction, hence leaving room for national law to take precedence, and seeking to solve normative conflicts. Together a blend is made that certainly provides detailed provisions ready to turn into hard law, either by adherence by many states to the regulations turning them into customary international law, or through the application of the provisions by domestic and international courts, and maybe finally by converting them into treaty provisions.

## Legal Cases

There is none known international court case dealing directly with PCASPs guarding against maritime piracy. However, recently the PCA made its judgement on a case with VPDs use of force against Indian fishermen in India's EEZ. Also, the MV Saiga from ITLOS has interest on the use of excessive force. There is also a case concerning PCASPs, the M/V Seaman Guard Ohio, that is from India domestic courts.

### M/V Enrica Lexie, PCA Award 2020

This is the only known international case, where the use of force by *armed security* was tried by an international tribunal, the "Permanent Court of Arbitration, (PCA) in *The Enrica Lexie Incident (Italy v. India)*".<sup>xcix</sup> However, no PCASPs, but two serving naval officers of the Italian navy, VPDs, were involved as guards against maritime piracy on board the Enrica Lexie, in accordance with requirements in Italian national law. The two Italian VPDs were accused of shooting and killing two unarmed Indian fishermen in a fishing vessel off the coast of Kerala, India. The incident occurred allegedly in India's EEZ, when the Enrica Lexie was en route from Galle in Sri Lanka to Port Said, Egypt.

The VPDs and the Captain on Enrica Lexie made the following testimony: "When the fishing vessel "St. Antony" was at a distance of approximately 800 metres visual signals were made, at approximately 500 metres, the VPDs each fired four rounds of a mix of tracer and ordinary bullets. This "first burst of warning shots did not succeed in persuading the craft to drift away". At a distance of 300 metres from the Enrica Lexie, one of the VPDs fired four rounds of a mix of tracer and ordinary bullets as second warning shots. The craft ignored them and kept its course. When it was at distance of approximately 80-100 metres, Sergeant Latorre and Sergeant Girone, each fired four further rounds of a mix of tracer and ordinary bullets. Then the fishing vessel "St. Antony", approximately 30 metres away, changed its course away



from the *Enrica Lexie*.<sup>c</sup>The Captain on the fishing vessel, gave testimony, that he was asleep, giving the wheel to a crew member, when shots were heard outside, and bullets shot into the boat and the crewmember steering was shot, as was another crewmember on board. No warning signals had been heard.<sup>ci</sup>

Shortly after the incident the Indian Navy intercepted the *MV Enrica Lexie* and detained the two Italian marines. They were charged of homicide under section 302 of the Indian Penal Code. That sparked a conflict of opinions over legal jurisdiction and functional immunity between the governments of India and Italy. The marines were detained in India with no formal charges for two and four years, respectively, then released and returned to Italy.

The central questions before PCA were whether India was entitled to circumvent and oust Italy's flag state jurisdiction? Whether the VPD had immunity as Italian state officials for Italy to exercise its own jurisdiction over the marines?<sup>cii</sup>

The use of force by armed security was highlighted. India argued that excessive and unnecessary force was used in breach of its right" under Art.88 in UNCLOS "to have its EEZ reserved for peaceful purposes", read together with Article 301 of the Convention, which prohibits the threat or use of force or any other action inconsistent with the UN Charter.<sup>ciii</sup> The PCA found that:

"It clearly follows from the articles of the Convention related to the fight against piracy that all States can take the necessary measures, including enforcement measures consistent with the Convention and the Charter of the United Nations, to protect their vessels against pirate attacks. Such measures cannot be viewed as a violation of Article 88."<sup>civ</sup>

PCA pointed out that enforcement measures under Chapter VII are in place through UNSC resolution 2077 (2011), which especially "commend[ed] the efforts of flag states for taking appropriate measures to permit vessels sailing under their flag transiting the High Risk Area to embark vessel protection detachments and privately contracted armed security personnel".<sup>cv</sup>In light of this analysis the PCA found there was no breach of Art.88, as both UNCLOS and UNSC resolutions under Chapter VII authorized interventions against piracy in a state's EEZ.<sup>cvi</sup>

The PCA recognized the functional immunity of the two Italian marines, noting that they were engaged in a mission on behalf of the Italian Government, being part of Italy's armed forces deployed on board the *Enrica Lexie* as VPDs pursuant to a mandate from the Italian state legislation:

"In this role, the Marines were not only acting as officers of the Italian Navy but also as officers and agents of the judicial police in respect of crimes related to piracy. The fact that the Marines were stationed on a merchant vessel, and not a warship, in the view of the Arbitral Tribunal, does not alter their status."<sup>cvi</sup>

The PCA decision on immunity was based on customary international law. Since the VPDs had immunity the use of force was not measured if excessive. Instead, the PCA found that exclusive flag state jurisdiction applied, but limited exclusive flag state jurisdiction to enforcement jurisdiction, as per the restrictive approach.<sup>cvi</sup>

The VPDs had interfered with the fishing vessels freedom of navigation on the high seas in UNCLOS, Arts. 87(1a) and 90. Thus, Italy was required to compensate for the two deaths and for damages suffered in interfering with the navigation of the fishing vessel:

"India is entitled to payment of compensation in connection with loss of life, physical harm, material damage to property (including to the vessel and moral harm suffered by the captain and other crew members of the "St. Antony", which by its nature cannot be made good through restitution."<sup>cix</sup>

The compensation would be settled through a subsequent agreement between India and Italy, but if that would not be possible the compensation amount can return to the PCA.

### **M/V "Saiga" No.2 Case (Saint Vincent and The Grenadines v. Guinea), International tribunal for the Law of the Sea Judgement 1999 <sup>cx</sup>**

This case in the International Tribunal for the Law of the Sea (ITLOS) was about a supply vessel registered in Saint Vincent and the Grenadines, that gave gas and oil to fishing vessels legally fishing in Guinea's EEZ in 1997. The ship was fired at by Guinea patrol boats in Guinea's EEZ. Two persons onboard were wounded, and the ship was arrested off the coast of Sierra Leone. The Master was prosecuted for custom violations, the crew detained. ITLOS found Guinea had no right to exercise its customs laws in the EEZ and held that Guinea did not satisfy the requirements of hot pursuit under Article 111 of UNCLOS.<sup>cx</sup> By firing ammunition from high calibre weapons at the oil tanker, Guinea used excessive force in its arrest: "The use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances".<sup>cxii</sup> ITLOS particularly noting that warning shots and other non-lethal options should have been exhausted before lethal options were considered. The M/V Saiga was cited in the Enrica Lexie case, as an example of excessive force by state agents.<sup>cxiii</sup>

### **M/V Seaman Guard Ohio, 2013**

US-owned and Sierra Leone-flagged MV Seaman Guard Ohio got caught in 2013 by the Indian coast guard. The ship, owned by a US-based maritime security firm was intercepted off the coast of Tamil Nadu and later escorted to Tuticorin port in India. India's coast guard detained 10 crew and 25 PCASPs for carrying 35 assault rifles and around 5,680 rounds of ammunition in Indian waters without valid permits, for alleged offences under India Essential Commodities Act 1955, as well as its Arms Act 1959.<sup>cxiv</sup> The owner of Seaman Guard Ohio stated that the arms and ammunition on the ship were purchased legally and meant for use in counterpiracy operations to safeguard vessels in high-risk areas.

The case raised jurisdictional issues when the owner argued that the ship was outside India's territorial waters when it was intercepted by the Coast Guard. According to a Coast Guard official, the ship was 15 nautical miles off the coast when it was intercepted, but outside the 12 nautical mile-limit for India's territorial waters. The Indian government labelled the vessel a floating armory; the company's spokesman denied the categorization saying the ship serves as an escort vessel that was unable to dispose of its weapons prior to entering port due to the sudden nature of the detainment by the Indian Coast Guard.<sup>cxv</sup>

After detention and investigation, the multinational crews were set free by the Madras High Court, but their passports were taken due to an appeal by the Indian police and in 2016, judge of Tuticorin District Principal Sessions Court sentenced all the 10 crew and 25 guards to undergo 5 years of imprisonment and a fine of Rs. 3000 each. However, the Madras High Court acquitted them in 2017, after 4 years of actual imprisonment. A key finding of the High Court supporting the acquittal was that anti-piracy operations were legitimate and the ship, even if it was in Indian coastal waters, was in "innocent passage" and no threat to the peace and security of India.<sup>cxvi</sup>

### **PCASPs Use of Force and Self-Defence in International Law**

A pertinent question is the level of the use of force that can be used by PCASPs against pirates. The question has to do with which set of rules that are applicable, which in turn depends on which subject that uses force and the factual situation. Hence, the use of force by PCASPs onboard vessels is perceived different than the use of force carried out by a state's law enforcement officers and armed services members, as well as by navies given a UNSC mandate to use force under Chapter VII of the UN Charter.

Today, the common view is to find interventions against pirates and armed robbers at sea as *law enforcement operations* against criminals distinguishing the rules applicable from the use of force admissible in armed conflicts. This is explained by the private ends' requirement in UNCLOS Art.101 (a); that pirate

must commit their illegal acts using a private ship in an attack for private ends against another ship. Piracy attacks usually are carried out against privately owned ships and vessels. Thus, the crime is committed by *private actors against other private subjects*, why it suitable to be handled as a law enforcement operation.<sup>cxvii</sup>

The level of the use of force used is dependent on the circumstances of the attack, and the status of the personnel that carry out the use of force against the pirates. When force is used by law enforcement officers and armed services members, regulations exist for those state actors, and authority is given based on such regulations.<sup>cxviii</sup> The *Enrica Lexie* case confirms that armed service members have immunity from other states jurisdiction.<sup>cxix</sup>

In international law, the 1990 *Basic Principles on the Use of Force or Firearms by Law Enforcement Officials*, that is a soft-law instrument adopted within the context of the United Nations, is the established international law enforcement standard for the use of firearms by the Police.<sup>cxx</sup> There is also a *Code of Conduct for Law Enforcement Officials* adopted by the General Assembly in its resolution 34/169 of 17 December 1979 with *Guidelines for the Effective Implementation of the Code of Conduct for Law Enforcement Officials* adopted by the Economic and Social Council in its resolution 1989/61, 24 May 1989, endorsed by the General Assembly in its resolution 44/162, 15 Dec. 1989. There is a body of jurisprudence from international human rights courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights on the liability of individual state agents (in most cases police officers) for ill-treatment and unlawful killings as well as on responsibility for the planning and control of individual operations and proper legal frameworks for the use of force and firearms.<sup>xxxi</sup> Domestic laws are applicable to law enforcement officers and armed service members, why the degree of force that may lawfully be used in self-defence can differ somewhat across countries.<sup>xxxii</sup>

However, the level of the use of force that a police officer can use is not equivalent to that of a PCASP, as the latter is neither a police officer nor a civil servant. When PCASPs use force, they will have a more limited right to immediate self-defence, because their exercise of self-defence will fall under the rules for *private persons*, so actually the PCASPs are legally not in a better position than an ordinary crew member, although their training and arms make them much more prepared to defend themselves and others.<sup>xxxiii</sup> In fact, IMO advise against crew members being armed but are neutral on the deployment of PCASPs.<sup>xxxiv</sup>

The recent *Enrica Lexie* case, shows that a VPD from the Italian navy had immunity as part “as officers and agents of the judicial police in respect of crimes related to piracy”.<sup>xxxv</sup> The argument succeeds that even if the Marines’ acts were found to be *ultra vires*, that is unlawful, or as having involved an excessive use of force, the Marines would still have immunity *ratione materiae* because the conduct at issue was nevertheless engaged under public authority.<sup>xxxvi</sup> Hence the case had been different if it had concerned PCASPs, as they are not state agents and thus barred from immunity for their actions. However, as the *Enrica Lexie* case occurred in the HRA it might be that the UNSC resolutions applicable still would have superseded Art.88 in UNCLOS even with PCASPs on board, because the PCA found that Chapter VII in the UN Charter authorized interventions against piracy in a state’s EEZ, but it is unlikely the PCASPs would have had immunity. Actually, the rules on the use of force by PCASPs are stricter than for army members and police, see *infra*.

An individual’s right to self-defence is a principle of international law, emanating from Roman law, clearly enunciated by the Roman statesman Cicero (106–43 B.C.) and other stoic philosophers, influenced by Greek law and Aristotle, but also such as Spanish law, Jewish law, Islamic law, Canon law, Chinese law, and Anglo-American law have contributed, and it exists also in Buddhism and Hinduism.<sup>xxxvii</sup> This leads some scholars to perceive personal self-defence as a human right building on Hugo Grotius and natural law.<sup>xxxviii</sup>

Jan Arno Hessbruegge points out in a recent dissertation on *Human Rights and Personal Self-Defense in International Law*, that personal self-defence is a principle of international law common to all legal systems.<sup>cxix</sup> As a matter of legal principle, every state in the world recognizes that private individuals may defend themselves against unlawful attacks.<sup>cxx</sup> This is evidenced by the fact that it is already present in core disciplines such as the *law of the sea*, international humanitarian law, international criminal law and diplomatic relations.<sup>cxxi</sup> Basic requirements of the right to self-defence applies, such as imminence of the attack, necessity and proportionality of the response, and defensive intent.<sup>cxxii</sup> According to ITLOS the use of force during law enforcement operations at sea is legal as long as it is *unavoidable, necessary and reasonable*.<sup>cxxiii</sup>

But Hessbruegge does not perceive self-defence as a human right but rather as a general principle of international law. He finds that: "[t]here are good reasons not to equate it with established human rights and instead regard it as an individual right *sui generis*."<sup>cxxiv</sup> It is true that an individual's right to defend themselves against unlawful violence has long been recognized at the domestic level across virtually all jurisdictions and it cannot be denied that it classifies as a principle of international law under Article 38 (1)(c) of the ICJ Statute.<sup>cxxv</sup> Its content may vary in different jurisdictions but its core value is the same, the right to use force absolutely necessary and proportionate to defend yourself and other persons from grave unlawful violence.<sup>cxxvi</sup> Self-defence manifests itself in international treaties, such as Article 2(2)(a) of the *European Convention on Human Rights*, that stipulates that the intentional deprivation of life does not contravene the right to life, when it results from the use of force which is no more than absolutely necessary to defend any person from unlawful violence.<sup>cxxvii</sup> Article 31(c) of the *Rome Statute of the International Criminal Court* lists self-defence among the grounds excluding criminal responsibility.<sup>cxxviii</sup>

Thus, even if self-defence might not qualify as a human right by itself, it is a manifest principle of international law, why:

"It does seem apparent that it would be a violation of human rights law for a government to forbid self-defence, to forbid defensive training, or to forbid the possession of reasonably necessary defensive arms. No government has the legitimate authority to forbid a person from ... defend herself against a violent attack, or to forbid her from taking the steps and acquiring the tools ... necessary to exercise that right."<sup>cxxix</sup>

To return to the issue of PCASPs, there are differences between a PCASP and a crew member using force against a piracy attack. This is due to the fact that PCASPs have a higher capacity to use force than the average private citizen, are trained to use force, work as an organized collective, and are usually armed and are regularly placed in situations where they have to use defensive force, why a higher degree of preparedness can be expected of them.<sup>cxl</sup> That is why the IMO disapprove of seafarers arming themselves and instead acknowledge the use of PCAPs.<sup>cxli</sup> Moreover, PCASPs are deployed to protect others and their property (the ship and cargo), (although self-defence to protect others and their property is not accepted in all jurisdictions, neither the use of lethal force to protect them). Thus, PCASPs need to be aware that self-defence to save others, are dependent on applicable national law, as the *Handbook on the Use of Force for Private Security Companies*, Ocean Beyond Borders, remarks.<sup>cxlii</sup>

Hessbruegge argues that legally binding requirements relating to PMSCs and PCASPs flow from the general norms of international human rights law.<sup>cxliii</sup> Hence, although the PMSCs and PCASPs are considered private actors according to the law on self-defence, states have to impose more comprehensive requirements on PCASPs use of force to uphold human rights such as the right to life and physical security.<sup>cxliv</sup> This is illustrated by the infamous *Almezaan Incident in 2010*, the first known incident on PCASPs use of force, however, not leading to any international responsibility. Here PCASPs onboard a United Arab Emirates (UAE) owned cargo ship killed a pirate attempting to board the ship off the coast of

Somalia. Heavy firing at the pirate schiff, made it crash into the Almezään. According to the Public Affairs Office of the EU Naval Force (EU NAVFOR), the pirates fleet engaged the M/V Almezään first. This Report says that the PCASPs returned fire, successfully repelling the first attack, but as the pirates continued to pursue, a second attack was repelled, and the pirates fled the area. Later, the Spanish EUNAVFOR Navarro, took custody of apprehended pirates, and their boat, but released them subsequently, finding that numerous shots had been fired at the pirates and killed one.<sup>cxlv</sup> The incident raises questions about the law applicable to the action of the PCASPs and the how the investigation of the incident was conducted. Applicable jurisdiction was not clear; was it the flag state Panama; the UAE, where the ship's owners are based; or the nation to which the security contractors belong.<sup>cxlvi</sup>

International human rights bodies, such as the U.N. human rights mechanisms, the Inter-American Commission and the African Commission on Human and Peoples' Rights, demand that states impose comprehensive regulation on PMSCs.<sup>cxlvii</sup>

It can be argued that customary international law, as evidenced by current soft-law regulations on PCASPs and PMSCs, now is developing to provide that the domestic legal system should regulate the functions that private security services can perform; the types of weapons and materials they are authorized to use; the proper mechanisms to oversee their activities; the introduction of licensing. Hessbrugge finds that: "In addition to requirements for mandatory training of staff, the state should impose vetting requirements concerning the selection of staff."<sup>cxlviii</sup> Many flag states that allow PCASPs on board have already incorporated such provisions in their national codes, which evidences a prevailing state practice. True, most are from national laws in "Western "states, from Europe, US and Canada, but also Japan and India, Madagascar, have similar provisions, however e.g., Indonesia, China, Nigeria, oppose the use of PCASPs, and most states, e.g., India, South Africa as the majority of African states, do not allow them in their internal waters.<sup>cxlix</sup> Some states, like Italy, Netherlands, and Nigeria, allows for national VPDs or Security Escort Vessels (SEVs) . Flags of convenience like, Liberia, Panama, Marshall Islands, Isle of Man, Antigua and Barbuda, Bermuda, Cyprus, Malta, and the Bahama's, which represents about 34% of the worlds fleet of large merchant vessels, do permit PCASPs on board, however under certain regulations, with many providing for authorization or permits required from governmental agencies, and there might be rules on vetting, selection, and the use of force. Thus, it has been argued that there seems to be a lack of uniform approach that could hamper the development of customary international law norms when it comes to the shipping industry's use of PCASP against pirates.<sup>cl</sup>But, looking at the quite similar approaches in their regulations taken by states that allow for PCASPs, including flags of convenience, one could make the opposite claim, that for those states that allow for PCASPs, their regulations provides a base for customary law development.

The use of force by the PCASPs are defined by existing international law on self-defence and human rights, as a minimum standard applicable, adding to national laws on self-defence. Thus, the international hard and soft law landscape seems to be relatively well articulated for the industry of PMSCs <sup>cli</sup>In exercising the duty to protect the rights to life and physical security, the state must investigate serious acts of violence by PMSCs and PCASPs. Unlawful violence resulting in death or serious injury should be prosecuted and appropriately punished. There need to be mandatory reporting requirements of incidents where private companies' use of force might have led to physical harm, injury or death of suspected pirates or others. The state must also have in place laws for criminally accountability for PCASPs that intentionally or out of gross negligence, use excessive force resulting in death or serious injury.<sup>clii</sup> The state must also guarantee the right to fair trial for both the pirates and the PCASPs and/or crew.<sup>cliii</sup> Such provisions imminent in the requirement of the human right to a fair trial and the rule of law, as well as maritime law concerning crimes at sea.<sup>cliv</sup>

That states already have such laws in place are evident from both case-law on PCASPs use of force, as well as UNSC resolutions on Somali piracy that demands that the use of force authorized by the UNSC "...shall be undertaken consistent with applicable international humanitarian and human rights law."<sup>clv</sup> On the high seas and the EEZ, the flag state will have jurisdiction while in territorial waters, the coastal states have jurisdiction. But it is apparent from the *Enrica Lexie* case, that a UNSC resolution under Chapter VII that authorizes enforcement measures by endorsing the use of both VPDs and PCASPs in the protection against piracy, is an exception to the prohibition on the use of force in Art. 2(4) in the UN Charter. Thus, a good case can be made for that PCASPs acting under such a Chapter VII mandate ought to be seen as authorized to use force at the same levels as members of the navy, in the area where the UNSC resolution is applicable, and due to their UNSC mandate should be equivalent with a VPD.<sup>clvi</sup>

The applicable laws governing the use of force will also depend on the court where criminal charges are brought, depending not only on where the offence took place, the flag state, but also where the victim or alleged perpetrator is from.<sup>clvii</sup> This because most criminal acts occurring on board are investigated and prosecuted under national jurisdiction in national courts. The use of armed security can create third-party liabilities if security officers harm innocent mariners or vessels and give rise to big compensation claims.<sup>clviii</sup>

While it is legal for a state to pursue and seize pirates with its military or police, this is not true as regards to PCASPs. This is because only "every state" has the competence to seize a pirate ship or aircraft on the high seas and arrest the persons and seize the property on board, according to Art. 105 in UNCLOS. This, because Art.107 in UNCLOS highlights states exclusive competence to seizure pirates. Thus, PCASPs are not under international law permitted to "go after" and make offensive operations against pirates.<sup>clix</sup> Also, "a ship's Master retains control of the ship, being in charge of executing any decision which is necessary to maintain the safety and security of the ship", according to SOLAS Regulation 8(1), a binding treaty provision that reflects customary international law, this rule also inserted in the *International Ship and Port Facilities Security (ISPS) Code*. The Master's control is a principle cited in the soft-law regulations on PCASPs from IMO and ISO and in most of the industry's self-regulations.<sup>clx</sup> Thus, a ships Master would not authorize unlawful and expensive offensive use of force to capture pirates.

### **UNSC Resolutions that Endorse the Use of PCASPs**

In its resolutions the UNSC has endorsed and emphasized the importance of the development of regulations on PCASPs by the IMO and ISO in its anti-piracy resolutions on Somalia.<sup>clxi</sup> This is important because those resolutions are mandatory being adopted under binding Chapter VII of the UN Charter.

In most of its resolutions on Somali piracy up from the date of 2011, explicit references and welcoming of the use of PCASPs have been inserted. This has been done both in the preamble and the operative paragraphs. The UNSC resolutions do emphasize the need for national provisions allowing PCASPs.

The first resolution to cite the use of PCASPs is UNSC Res. 2020 (2011):

"Noting with appreciation the efforts made by IMO and the shipping industry to develop and update guidance, best management practices, and recommendations to assist ships to prevent and suppress piracy attacks off the coast of Somalia, including in the Gulf of Aden and the Indian Ocean area, and recognizing the work of the IMO and the Contact Group on Piracy off the Coast of Somalia ("CGPCS") on privately contracted armed security personnel on board ships in high-risk areas". In its operative part, para. 26, it recognizes the shipping industry's and IMO's role:" ...concerning privately contracted armed security personnel on board ships in high-risk areas".

Later on, the UNSC resolutions becomes more detailed on PCASPs. The most recent UNSC Res.2554 (Dec.2020) that renews the authorization for International Naval Forces Fighting Piracy Off Somali Coast, unanimously, explicitly endorses the use of PCASPs as a tool for prevention of piracy , see para 26: "*Welcomes and encourages* efforts by flag States and port States to further consider the development of safety and security measures on board vessels, including, S/RES/2554 (2020) 20-16409 7/7 where applicable, developing regulations for the use of privately contracted armed security personnel (PCASP) on board ships, aimed at preventing and suppressing piracy off the coast of Somalia, through a consultative process, including through the IMO and ISO;" Also, in para.27, the UNSC:"....*recognizes* the IMO's role concerning privately contracted armed security personnel on board ships in high-risk areas". These paragraphs are identical repetitions from previous UNSC Res.2500 (2019) on Somali piracy, in para.26 and 27.

Prior UNSC Res. 2383 (2017), makes the following statement in its preamble:

" *[N]oting* with appreciation the efforts made by the IMO and the shipping industry to develop and update guidance, best management practices, and recommendations to assist ships to prevent and suppress piracy attacks off the coast of Somalia, including in the Gulf of Aden, and in relevant parts of the Indian Ocean that are still within the High Risk Area and recognizing the work of the IMO and the CGPCS in this regard, *noting* the efforts of the International Organization for Standardization, which has developed industry standards of training and certification for Private Maritime Security Companies when providing PCASP on board ships in high-risk areas".

In para.30 of resolution 2383 (2017) IMO's work to suppress piracy through deployment of PCASPs in the HRA is highlighted: "*Invites* the IMO to continue its contributions to the prevention and suppression of acts of piracy and armed robbery against ships, in coordination, in particular, with the UNODC, the World Food Program (WFP), the shipping industry, and all other parties concerned, and recognizes the IMO's role concerning privately contracted armed security personnel on board ships in high-risk areas".

Identical provisions are included in the preamble to UNSC Res. 2125 (2013) in Somalia in its para.27. Moreover, in the second last paragraph in its preamble the UNSC:" *Noting* that the joint counter-piracy efforts of the international community and private sector have resulted in a sharp decline in pirate attacks as well as hijackings since 2011."

Also, UNSC Res. 2077 (2012) emphasizes the use of PCASPs in the same way as the other resolutions. In addition, in its preamble it commends and encourages their use:

"*Commending* the efforts of flag States for taking appropriate measures to permit vessels sailing under their flag transiting the High-Risk Area to embark vessel protection detachments and privately contracted armed security personnel and encouraging States to regulate such activities in accordance with applicable international law and permit charters to favor arrangements that make use of such measures". Para.31 of the resolution: "*[r]ecognizes* the IMO's role concerning privately contracted armed security personnel on board ships in high-risk areas".

The UNSC resolutions could be perceived as a license for PCASPs to go after pirates.<sup>clxii</sup> They do authorize them to seize the pirates and bring them to justice, see the preamble in UNSC res.2554 (2020):

"Recognizing the need and commending the efforts of States, including in particular States in the region, to investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy including those who plan, organize, facilitate or illicitly finance or profit from such attacks, and reiterating its concern over persons suspected of piracy having been released without facing justice,"

In para. 5 resolution 2554 (2020) emphasizes this edict by:" *urges States*, working in conjunction with relevant international organizations, to adopt legislation to facilitate prosecution of suspected pirates off

the coast of Somalia"; Resolution 2500 (2019) in para 25, underscores the importance of investigation immediately after a piracy incident. This is such an investigation as the current regulations on PCASPs from IMO and the shipping industry already have in its reporting requirement.: " ... urges States to make their citizens and vessels available for forensic investigation as appropriate at the first suitable port of call immediately following an act or attempted act of piracy or armed robbery at sea or release from captivity;".

However, the UNSC resolutions refer to respect for existing international norms in UNCLOS, as well as emphasize that the provisions in its Somalia resolutions on piracy should not be seen as creating customary international law. Hence, the resolutions contain an exception clause, also stressing the request from the Somali authorities, see e.g. resolution 2554 para.15.: "...underscores in particular that this resolution shall not be considered as establishing customary international law; and affirms further that such authorizations have been renewed in response to the 2 December 2020 letter conveying the request of Somali authorities;<sup>clxiii</sup> This means that the resolutions should not be seen as an attempt to create new rules outside of the Somalia situation. But mandatory UNSC resolutions can anyway work as elements in the creation of customary international law, by their binding effect on most of the international community of states (all the UN members), creating a practice (*usus*) and a sense of obligation (*opinion juris*), the two very requisites that creates customary international law.<sup>clxiv</sup>

## Conclusions

It could be perceived as a failure when private actors like the shipping industry need to use private security to protect themselves. There has been much criticism as to the fact that there exists no uniform international rules or conventions on maritime armed security guards deployed to guard against maritime piracy on board ships that puts innocent lives at stake and risks escalating levels of violence at sea.<sup>clxv</sup> The issue of maritime piracy and PCASPs and PMSCs companies being private, non-state actors, raises the broader question if the use of private security providers contradicts the fundamental monopoly of the state over the use of force.<sup>clxvi</sup> Especially, since PCASPs on board ships fighting piracy are not covered by the Montreux Document nor the ICoC, since their missions are considered conducted outside of an armed conflict and interventions against piracy labelled as law enforcement.<sup>clxvii</sup>

Still, the existing legal framework in UNCLOS, SOLAS, SUA and the International Convention against the Taking of Hostages, read together with national legislation and the industry's current self-regulation on the topic of maritime security appears to be enough. My study of the existing non-binding regulations on PCASPs on board ships guarding against maritime piracy and armed robbery at sea, shows a uniformity on the main rules on PCASPs, whether they emanate from the IMO and ISO standards or soft-law self-regulations from the shipping and PMSC industry itself. These uniform provisions draw from existing norms in international law as well as national law on PCASPs on land, as well as from nearby fields, such as police work. This development of uniform standards has paved way for their inclusion in national laws and today these soft-law provisions most likely qualify as global standards.<sup>clxviii</sup>

Moreover, the UNSC has explicitly supported the use of PCASPs in its mandatory piracy resolutions on Somalia, to be used in the HRA in the Indian Ocean. These are binding under Chapter VII in the UN Charter and thus create legal obligations for states to support the use of PCASPs in the HRA, which the Permanent court of Arbitration (PCA) noted in the *Enrica Lexie* case.<sup>clxix</sup> However, the UNSC did subjugate its authorization to customary international law by underscoring that the piracy resolutions on Somalia should not "be considered as establishing customary international law".<sup>clxx</sup> It shall be noted that the Security Council has emphasized the importance of the development of regulations on PCASPs by the IMO and ISO in its anti-piracy resolutions.<sup>clxxi</sup> The national laws and the international regulations on the



use of PCASPs on board ships deployed against piracy, also endorsed by the UNSC, show that PCASPs are a legal and successful tool in the fight against maritime piracy.<sup>clxxii</sup>

Existing international law as referred to in the soft-law regulations clearly shows that PCASPs and PMSCs do not operate in a legal vacuum. PCASPs and PMSCs are bound by treaties and customary international law, such as UNCLOS and SOLAS provisions, human rights, and principles of individual self-defence.<sup>clxxiii</sup> International customary law supplies principles for how a right to individual self-defence should be carried out on board ships. A PCASP has the same right to self-defence as an ordinary person but with more responsibilities, due to his profession. Interestingly, an exception might be when PCASPs are deployed in accordance with a UNSC resolution under Chapter VII mandating enforcement action against pirates, because then the use of force might be less restrictive, to meet the UNSC resolutions criteria "necessary measures, including enforcement measures consistent with UNCLOS and the Charter of the United Nations, to protect their vessels against pirate attacks", to cite PCA in the *Enrica Lexie* case.<sup>clxxiv</sup> Why, endorsement of PCASPs by the UNSC under Chapter VII of the UN Charter might carve out a wider right for them to use force against pirates!

International law provides human rights guarantees such as criminal responsibility and effective remedies against PCASPs abuse of their role. Basic state responsibility principles on compensation for damages applies, if a PCASP is liable for the negligent killing on the high seas or in the EEZ in a piracy incident, why compensation to third parties for damages need to be paid.<sup>clxxv</sup> Also the UNSC resolutions underscores pirates should be treated consistent with applicable international human rights law.<sup>clxxvi</sup> The rights to life, prohibition on torture and other inhumane and degrading treatment, the right to liberty, fair trial of all piracy suspects applies. But it seems easy to forget that human rights of course apply to seafarers and the PCASPs, as well! They are exposed to mental and physical abuse by pirates. They can face kidnap for ransom, injuries and murders, prolonged captivity, and other forms of ill treatment. This concerns PCASPs safe working environment, so that it is important they received proper training, licensing, and orders. However, PCASPs status as employees will improve if each flag state decides to include them under the category "seafarers" in the Maritime Labour Convention. Human rights may also include the failure to provide decent working and living conditions in contravention of the Maritime Labour Convention 2006 and criminal failures to ensure maritime safety such as unqualified or insufficient PCASPs or inadequate lookout and faulty use of force.

Besides international legal rules, national laws apply to PCASPs and PMSCs. State authorities that may exercise jurisdiction over PCASP in varying circumstances include first the flag state, because it is within the prerogative of flag states to allow (PCASP) on board ships, as Art. 92 of (UNCLOS) gives each flag state "exclusive jurisdiction on the high seas." However, also the laws of the state where the PCASP are registered, the state in which operations are conducted or managed, and the state where the PCASP may transit, are applicable.<sup>clxxvii</sup> Coastal states have jurisdiction in their territorial waters in UNCLOS Art 2. Although ships have a right to innocent passage in territorial waters, the use of PCASPs is not considered innocent as they are armed.<sup>clxxviii</sup> The nationality of the victim, as well as the nationality of the PCASP, and flag state may regulate claims from third parties as can contracts and agreements. Victims on board other vessels, also have flag state jurisdiction, why compensation could arise from their flag state laws as well. Jurisdiction can also be found in the domestic legislation of a particular state, which is seeking to apply its laws to the crime on board, based on, for example, the citizenship of the victim or perpetrator, the nature of the crime, or the position of the ship.<sup>clxxix</sup>

Self-regulations on PCASPs by voluntary soft-law regulations are prone to make an impression and imprint on both national legislation and international law and will most likely influence coming court decisions. However, still international court cases on the topic of PCASPs are missing.

It can be argued that the use of PCASPs is a modern way to fulfil states responsibility to cooperate against piracy in UNCLOS, as it is very successful in defending against maritime piracy. It supplements the use of navies, as navies are shrinking around the world and “thus the the ratio between the number of naval platforms available to protect sea lanes and the quantity of commercial vessels is becoming more and more disproportionate”, to cite Petre Cook.<sup>clxxx</sup> The use of PCASPs is a cheaper way to protect against piracy on the high seas, the EEZ or outside the jurisdiction of any state. The fundamental monopoly of the state over the use of force is not absolute, as the UNSC resolutions on piracy shows. Clearly the UNSC can extend an authorization to use force to PCASPs, when deployed with the consent of the flag state (and the coastal state if used in territorial waters). It is important that when PCASPs fulfils such a state responsibility, they ought to be upgraded to a role of law enforcement in their right to use force, and the immunity that applies to police officers and naval members. The role of PCASP should also be extended to a right to seize and capture pirates, which would better guard against killings of pirates. On the other hand, such an expanded role for PCASPs redistributes the responsibility for fighting piracy and threatens to become a major cost to the shipping industry. However, it is obvious that private military security companies and PCASPs are part of the modern security landscape that we cannot close our eyes to, when the burden of security overall is shifting towards private actors.<sup>clxxxi</sup>

“[R]egulating PMSCs at the international level is a hard game to play because of the interlocking competencies between flag states, coastal/port states and home states of the PMSC”, to cite Da Cruz.<sup>clxxxii</sup> The current international legal framework seems not ready to be officially amended to incorporate new legal regimes on PCASPs. But today’s system apparently contends all parties involved. The current soft law helps to shape the conduct of the PMSCs and PCASPs so that the safety of ship and crew are guaranteed against the hire of unfit PMSCS and PCASPs, or the excessive and dangerous use of force that can cause huge liability and damage costs, as well as suffering and delays. States national regulations often follow soft-law standards and implement international legal requirements. Thus, they provide mechanisms that prevent PMSCs and PCASPs excessive use of force, such as imposition of licensing, requirements regarding training, equipment, and oversight on private security companies, imposing measures similar those applicable to law enforcement authorities.<sup>clxxxiii</sup> ISO standards and industry contracts, such as GUARDCON or the 100 Series, provide economic incentives through accreditation and insurance principles that also force compliance with the self-regulations.

“UNCLOS is a flexible treaty with ‘constructive ambiguity’ and conduciveness, that allows for domestic contextualization, interpretation, and implementation. What is needed is not any changes to the UNCLOS, neither concern that PCASPs and PMSCs would operate like wild cowboys upon a lawless sea”, to quote Robert McLaughlin.<sup>clxxxiv</sup>

What is needed is adapting and interpreting the existing legal framework in UNCLOS, as well as existing soft-law regimes on PCASPs, to the reality of PCASPs working on board ships as a hitherto the most successful defence against maritime piracy. It is important that we catch up with this reality and work with it rather than against any developments of soft law on the subject of PCASPs deployed on board to guard against maritime piracy!

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#### End notes

- <sup>i</sup> Katinka Svanberg, the use of private maritime guards as an innovative means to fulfil states duty to cooperate in the repression of maritime piracy. Part 1, *IJMCS*, Vol.2, (2020), p.32.
- <sup>ii</sup> MSC.1/Circ.1333/Rev.1 Annex, (2015), *Recommendations for Preventing and Suppressing Piracy and Armed Robbery Against Ships*, (IMO Circ. 1333), *Guidance to shipowners and ship operators, shipmasters, and crews on preventing and suppressing acts of piracy and armed robbery against ships*, MSC.1/Circ.1334 (2009). para.16.1, *BMP5 - Best*

*Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea*, June 2018, (BMP 5). para.3.3, ISO 28007-1:2015, *Ships and marine technology – Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract)*, para.4.1.1., *The 100 Series Rules: An International Model Set of Maritime Rules for the Use of Force (RUF)*, An International Model Set of Maritime Rules for the Use of Force (RUF), Human Rights at Sea, para. 7.

iii GUARDCON, *Standard Contract for the Employment of Security Guards on Vessels*, BIMCO 2012, para.3(b).

iv *Global Counter Piracy Guidance for Companies, Masters and Seafarers*, reprinted in IMO, MSC.1/Circ.1601 (8 Dec.2018) Annex 1, Witherby publishing Group (June 2018), (GCPG), at 7.15.

v ISO Standard 28007-1:2015, *Ships and marine technology – Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract)*, para. 4.2.4.

vi *Ibid.*

vii *Ibid.* para. 4.2.4 c).

viii MSC Circ. 1333, para.14.

ix *Ibid.*, at para.4.2.5.

x See MSC Circular 1405, at para.5.2, ISO 28007, para 4.1.11.

xi *Ibid.* at para. 4.1.11.

xii Mišo Mudrić, The Guardcon contract, knock-for knock clauses, DCFR and unfair terms (Part II), *Journal of International Maritime Law*, Vol. 21(2), 2015, pp.114-132.

xiii Robert Meade, Nicholas Neuberger of Bracewell, *Knock-for-knock indemnities: risk allocation in offshore oil and gas contracts*, Neuberger of Braswell (UK) LLP, Lexis PSL, Brief, 2 Dec.2019,

[<https://bracewell.com/sites/default/files/news-files/Knock-for-Knock%20Indemnities%20%E2%80%93%20Risk%20Allocation%20in%20Offshore%20Oil%20and%20Gas%20Contracts.pdf>], see also Gideon Parchomovsky, Endre Stavang, *Contracting Around Tort Defaults: The Knock-for-Knock Principle and Accident Costs*, Cree Working Paper 14/2013. See para.15(b) i) and ii) in GUARCON, that shows how it works.

xiv GUARDCON, para.15b).

xv GUARDCON Explanatory Note, Sec.7, para.15, at p.10.

xvi *Ibid.*

xvii Greg A. Keef, PMSCs and Civil Liability, *Maritime Security Review*, 11 May 2011,

[<https://www.marsecreview.com/2012/05/pmscs-and-civil-liability/>].

xviii IMO MSC Circ. 1405, *Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High-Risk Area*, (2012), para.5.7.

xix *Ibid.* para.5.9 (1).

xx *Ibid.* para. 5.9(3).

xxi GUARDCON para.4.2.

xxii *Ibid.*, para.4.3.

xxiii MSC. Circ. 1334, see para. 26.

xxiv MSC Circ. 1405, para.4.

xxv UNODC, *Handbook on police accountability, oversight, and integrity*, *infra*, p.82.

xxvi MSC.Circ.1405, para. 4.3.2.

xxvii GUARDCON para. 6 b), p. 5.

xxviii GUARDON, Explanatory Notes, Section 6, p.5.

xxix *Ibid.*

xxx *Ibid.*

xxxi *Ibid.*, para. 4.4.2 c).

xxxii *Ibid.*, 4.4.2.e).

xxxiii ISO standard 28007, 4.4.2. (a) and (b) bis, GUARDCON, 4.1.10 a).

xxxiv However, this age limit is only found in GUARDCON, but bigger PMSC's only hire 21+.

xxxv *Ibid.* sec.7, para.15.

- xxxvi *Ibid.*
- xxxvii GUARDCON Explanatory note, p. 4.
- xxxviii *Ibid.*, para.10 (b), that the contractors fulfil permit requirements in a) country of incorporation/operation of the contractors, b) each PCASPs country of nationality, c) countries of embarkation and disembarkation points.
- xxxix ISO Standard 28007, para. 4.4.2.
- xl *Ibid.*, paras. 4.4.3 f) and 4.4.3. c) and e).
- xli MSC. Circ.1405, para. 4.4.3.n).
- xlii *Ibid.*, para.4.7(3).
- xliii The BMP5, in Section 5, p.19, GUARDCON para.8(a), The 100 Series, Rule.100, in note 2.
- xliv Both *Guidance on RUF by BIMCO for Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV)*, para.6, and the 100 Series have identical rules“... in the event of an perceived or threatened attack by third parties the Team Leader (TL) or, in the TL’s absence, other PCASP, shall advise the Master or (in the Master’s absence) the Officer of the Watch that he intends to invoke these Rules for the Use of Force.” The first Rule 100 in the 100 Series contains three separate Notes that defines the different responsibilities. Note 1:” Nothing in these Rules shall be construed as a derogation of the master’s authority under SOLAS. Accordingly, the Master always retains the authority to order the PCASP to cease firing. However, for the avoidance of doubt, nothing in these rules shall compromise each of the PCASP’s right of self-defence in accordance with applicable and relevant national and international law.”
- xlvi See e.g., GUARDON para.8d) and BIMCO’s *Guidance on the Rules for the Use of Force*, para.6.
- xlvii Rule 100 in the 100’ Series, cited above in note 44.
- xlviii The 100 Series Rule 100, note 1, p. 7, where the following interpretation of a PCASPs right to self-defence is made:” If a guard thinks that to stop shooting would lead directly to him being killed or injured, then he can take the sole decision to continue firing regardless of orders to the contrary.”
- xlvi *GUARDCON*, Sec. 5.3. f).
- lix *GUARDCON Explanatory Note, Annexes*, at p.13.
- <sup>1</sup> *GUARDCON Explanatory Note, Section 4, para.8, at p.7.*
- li *The 100 Series Rules: An International Model Set of Maritime Rules for the Use of Force (RUF)*, An International Model Set of Maritime Rules for the Use of Force (RUF), Human Rights at Sea, Rule 103, in Note 3. See also *Guidance on the RUF*, para.5 on self-defence.
- lii See IMO Circular 1405, BMP 5, 100’ Series rule 101 and *Guidance on the Use of Force*, para.7.
- liii *Guidance on the Rules for the Use of Force*, para.7. According to the *Guidance* the types of fire that shall be defined in the RUF, with account taken to the distance and behaviour of the suspect craft:1 First, warning shots should be fired into the air a safe distance above the skiff/over the pirates' heads or, to the side of the skiff, to display the armed capability of the PCASP. 2.Second, disabling fire should be used against the skiff engine or hull in order to stop the attack 3. Third, deliberate direct fire should be used against the attackers when all other methods have failed.
- liv BMP5, Section 7, *Ships under attack*.
- lv *Ibid.*, para.22.
- lvi *Ibid.*, para.24.
- lvii *Ibid.*
- lviii *Ibid.*
- lix See 100 Series, Rule 103.
- lx MSC Circ. 1405, Para. 5.14-15, GCPG *Annex 1* at, 7.15, and BMP5 at p.20, ISO Standard para 4.3, *GUARDCON* para.8c) and para.7(7), where the following interpretation of a PCASPs right to self-defence is made:” If a guard thinks that to stop shooting would lead directly to him being killed or injured, then he can take the sole decision to continue firing regardless of orders to the contrary.”
- lxi *Militaro and Puramilitary Activities in und aguinst Nicaragua (Nicaragua v. United States of America)*. *Merits, Judgment*. I.C.J. Reports 1986, p. 14, para 176. Here the International Court of Justice clearly established that the right of self-defence exists as an inherent right under customary international law as well as under the UN Charter.

- lxii Guidance on the Use of Force, para.5: " RUF should reflect that each of the PCASPs shall always have the sole responsibility for any decision taken by him for the use of lethal force, always in accordance with the RUF and applicable national law."
- lxiii The *Caroline* test is a 19th-century formulation of customary international law, reaffirmed by the Nuremberg Tribunal after World War II, see Craig Forcese, *Destroying the Caroline: The Frontier Raid that Reshaped the Right to War* (Irwin Law, 2018).
- lxiv Webster's letters are found in *The Avalon Project*, Yale Lillian Goldman Law Library, [ [https://avalon.law.yale.edu/19th\\_century/br-1842d.asp](https://avalon.law.yale.edu/19th_century/br-1842d.asp)], Tom Ruys, Olivier Corten, Alexandra Hofe, eds, *The Use of Force in International Law: A Case-Based Approach*, Oxford Scholarly Authorities on International, 2018, p.135.
- lxv At note 125.
- lxvi The *Nisour Square incident* illustrates this point. Two teams of from Blackwater and a regional police officer tried to stop a motor vehicle approaching a military convoy, but soon opened direct and lethal fire, leaving many dead. This resulted in claims of excessive force and putative self-defence. *United States v. Slough*, Criminal No. 2008-0360 (D.C. 2014), District Court, District of Columbia, Filed: May 23rd, 2014.
- lxvii Guidance on the RUF, para.5: "Under most national laws individuals have a right to use reasonable force to prevent a serious crime and the right to use force in their own personal self-defence, and the RUF should reflect these rights as appropriate."
- lxviii The 100 Series para.103, Note 2.
- lxix See *infra* at *PCASPs Use of Force in International Law*.
- lxx Phillip Drew, Rob McLaughlin, *Handbook on the Use of Force for Private Security Companies*, Ocean Beyond Piracy, One Earth Foundation, (2016), p.25.
- lxxi The BMP5, in Section 5, on PMSCs, p.19.
- lxxii (MSC.1/Circ.1333, annex, paragraph 5 (June 26, 2009) – Updated and revoked by MSC.1-Circ.1333-Rev.1 in June 2015).
- lxxiii IMO, Private Armed Security, [<https://www.imo.org/en/OurWork/Security/Pages/Private-Armed-Security.aspx>, accessed 19 July 2021].
- lxxiv *Enrica Lexie*, PCA Case No. 2015-28, Awards (2020), para.6 b): "India is entitled to payment of compensation in connection with loss of life, physical harm, material damage to property (including to the "St. Antony") and moral harm suffered by the captain and other crew members..."
- lxxv MSC Circ. 1405, Para.5.16, GCDG at 7.15, and BMP5 at p.20, The 100 Series, para.8, providing that any attack should be reported immediately to UKMTO (the UK Maritime Trade Operations office in Dubai) and other authorities, as appropriate; the use of firearms needs to be reported to the Flag State, MSC Circ.1405, para.5.16, produce a formal written report of the incident, for the shipowner/operator to forward to the flag State, GUARDCON para.11, the PMSC is obliged to assist in the investigation, and make formal written records if national law so requires, thus from the Master and the security team/crew.
- lxxvi *Ibid.*, 5.5.
- lxxvii *Ibid.*, 5.6.
- lxxviii MSC.1/Circ.1404 (23 May 2011), Annex 1, GUIDELINES TO ASSIST IN THE INVESTIGATION OF THE CRIMES OF PIRACY AND ARMED ROBBERY AGAINST SHIPS, Introduction.
- lxxix *Ibid.*, Sec. 2.
- lxxx Katinka Svanberg, *Crime at Sea, The NCM/IMHA textbook of maritime medicine*, ed. Tim Carter, 3<sup>rd</sup> ed, forthcoming Nov. 2021.
- lxxxi GUARDCON p.9.
- lxxxii ISO standard 28007, 5.2 *bis*.
- lxxxiii Art.48 of the 1977 Additional Protocol I to the 1949 Geneva Conventions, provides: "[T]he Parties to the conflict shall at all times distinguish between the civilian population and combatants."
- lxxxiv GUARDCON, para. 6(b)9(ii).
- lxxxv ISO standard 28007.
- lxxxvi See GUARDCON para.7.

- lxxxvii ISO standard 28007.
- lxxxviii *Ibid.* para. 4.1.10 a)
- lxxxix *Ibid.*, para. 4.2.5.
- xc *Ibid.* para. 4.1.10 a).
- xcii UNODC, *Handbook on police accountability, oversight and integrity*, United Nations Office on Drugs and Crime (UNODC) /Criminal Justice Handbook Series, New York 2011, p.84.
- xciii UKAS Guidance for Certification Bodies Certifying Private Maritime Security Companies against ISO 28000/ISO 28007-1:2015, 2 Dec. 2019, para.6g).
- xciii *Ibid.*, para.6 g).
- xciv Mac Leod, S., Dewinter-Schmitt, R., *Certifying Private Security Companies: Effectively Ensuring the Corporate Responsibility to Respect Human Rights?* *Business and Human Rights Journal*, 4(1), (2019), pp.55-77.
- xcv Keef, *supra*.
- xcvi Marin J., Mudrić M., Mikac R. *Private Maritime Security Contractors and Use of Lethal Force in Maritime Domain*, Andreone G. (ed.) *The Future of the Law of the Sea*, (2017), Springer, Cham, pp.191.
- xcvii See e.g., Dryad Global, *Hiring Ship Security Personnel and Armed Guards - What You Need to Know*, 13 Sep 2020, [https://channel16.dryadglobal.com/hiring-ship-security-personnel-and-armed-guards-what-you-need-to-know?utm\_campaign=Armed%20Guards%20-20Orion%20Protect&utm].
- xcviii To quote from UNSC/Res/2183 (2017) in its preambel: “*Noting* with appreciation the efforts made by the IMO and the shipping industry to develop and update guidance, best management practices, and recommendations to assist ships to prevent and suppress piracy attacks off the coast of Somalia, including in the Gulf of Aden, and in relevant parts of the Indian Ocean that are still within the High Risk Area and *recognizing* the work of the IMO and the CGPCS in this regard, *noting* the efforts of the International Organization for Standardization, which has developed industry standards of training and certification for Private Maritime Security Companies when providing PCASP on board ships in high-risk areas,” The resolution also emphasizes the need for PCASPs and the development of safety and security measures on board vessels, including, where applicable, developing regulations for the use of PCASP on board ships, aimed at preventing and suppressing piracy off the coast of Somalia, through a consultative process, including through the IMO and ISO; see para 30: “*Invites* the IMO to continue its contributions to the prevention and suppression of acts of piracy and armed robbery against ships, in coordination, in particular, with the UNODC, the World Food Program (WFP), the shipping industry, and all other parties concerned, and recognizes the IMO’s role concerning privately contracted armed security personnel on board ships in high-risk areas;”
- xcix PCA Case No. 2015-28, *An Arbitral Tribunal Constituted Under Annex VII to the 1982 UNCLOS, Italian Republic v. The Republic of India - concerning - The “ENRICA LEXIE” Incident*, AWARD, 21 May 2020.
- c *Ibid.*, paras.94-101.
- ci *Ibid.*, paras.105-116.
- cii *Ibid.*, para.225.
- ciii *Ibid.* para.1065.
- civ *Ibid.* para.1074.
- cv *Ibid.* para.1075
- cvi *Ibid.* para.1077.
- cvi *Ibid.* para 859.
- cviii Aron N. Honniball, *The Enrica Lexie Incident Award and Exclusive Flag-state Jurisdiction*, CIL, Centre for International Law, Singapore, 10 Aug.2020, blogpost [https://cil.nus.edu.sg/the-enrica-lexie-incident-award-and-exclusive-flag-state-jurisdiction-by-aron-n-honniball/]
- cix *Enrica Lexie*, Awards, 2020, para.6b).
- cx M/V “SAIGA” (No. 2) (Saint Vincent and the Grenadines v. Guinea), Judgment, ITLOS Reports 1999, p. 10, See Bernhard, H. Oxman, *The M/V Saiga, No.2, (St Vincent and the Grenadines v. Guinea) Judgement (ITLOS Case No.2, AJIL, Vol.94(1), pp.140-150.*
- cxii M/V “SAIGA case, para.125.

- cxii *Ibid.* para.155.
- cxiii *Enrica Lexie*, Awards,2020, para.1050.
- cxiv THE ESSENTIAL COMMODITIES ACT, 19551 ACT NO. 10 OF 1955, THE ARMS ACT, 1959, [https://legislative.gov.in/sites/default/files/A1959-54\_0.pdf] [https://legislative.gov.in/sites/default/files/A1955-10.pdf]
- cxv Srilatha Vallabu. Privately Contracted Armed Security Personnel in Indian Ocean Region. Patrick Chaumette, (ed) *ESPACES MARINS: SURVEILLANCE ET PRÉVENTION DES TRAFICS ILLICITES EN MER*, Gomylex, (2016), pp.265-279, p.270.
- cxvi *Queen Mary "Framing of Charges in Armed Vessel Case"* The Hindu, August 13, 2015.
- cxvii Michael H. Passman, Protections Afforded to Captured Pirates Under the Law of War and International Law, *Tul. Mar. L.J.* Vol.33 (2008), p.1,12ff.
- cxviii Vanessa Zehnder, Private Maritime Security Companies v. Pirates: The Battle of Legality, *Md. J. Int'l L.*, Vol.33 (2018), pp. 335, 345. See the *Enrica Lexie* case, *supra*, where two Italian marines hired as VPDs had immunity as Italian army service members.
- cxix *Enrica Lexie*, *supra* at para 859.
- cxx *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 Aug to 7 Sep. 1990, US Coast Guard and the Department of Homeland Security, *Guidance on Self-Defense, or Defense of Others by U.S. Flagged Commercial Vessels Operating in High-Risk Waters: Port Security Advisory (3-09)*, 18 June 2009.
- cxxi *Handbook on police accountability, oversight, and integrity*, *supra*, p.30.
- cxvii Alice Priddy; Stuart Casey-Maslen, Counter-Piracy Operations by Private Maritime Security Contractors: Key Legal Issues and Challenges, *Journal of International Criminal Justice*, Vol. 10: 4 (2012): 839-856, p.846. See e.g., US Coast Guard and the Department of Homeland Security, *Guidance on Self-Defense, or Defense of Others by U.S. Flagged Commercial Vessels Operating in High-Risk Waters: Port Security Advisory (3-09)*, 18 June 2009. This reflects the US domestic law standard for the intentional lethal use of force by police, which sets a lower threshold than the 1990 UN *Basic Principles on the Use of Force or Firearms by Law Enforcement Officials*. The US standard was set out in *Tennessee v. Garner*, 471 US 1 (1985).
- cxviii Jan Arno Hessbruegge, *Human Rights and Personal Self-Defense in International Law*, OUP, (2017), p.257.
- cxvix See *supra* at note 74.
- cxv See *Enrica Lexie*, PCA Case No. 2015-28, para.859, cited *infra*.
- cxvi *Ibid.* para.819.
- cxvii Will Tysse, The Roman Legal Treatment of Self Defense and the Private Possession of Weapons in the Codex Justinianus, *J. on Firearms & Pub. Pol'y*, Vol.16, (2004), p.163.
- cxviii1 GROTIUS, Prolog. § 41, quoted in Henry Wheaton, *Elements of International Law with a Sketch of the History of the Science*, 29 n.13 (2002) (1836), cited in David B. Kopel, Paul Gallant, Joanne D. Eisen, The Human Right of Self-Defense, *BYU Journal of Public Law*, Vol.22, (2008), p.1-119.
- cxix "In light of the broad support that the right to personal self-defense enjoys across different cultural, philosophical, and religious traditions, it is no wonder that it also constitutes a universal principle shared by all major legal systems in the world today", Hessbruegge, p.74.
- xxx *Ibid.*, p.239.
- cxvii *Ibid.*
- cxviii *Ibid.*
- cxviii ITLOS, *The M/V "Saiga"*, *supra* paras. 153 ff, see Alessandra Annoni, International Action against Piracy and Armed Robbery at Sea Off the Coast of Somalia, *Italian Y.B. Int'l L.*, Vol.23, (2013), p.175,181.
- cxvix Hessbruegge, *supra*, p.85.
- cxv Hessbruegge, *supra*, at p.76.
- cxvii *Ibid.*, p.21ff and 73ff.
- cxviii *European Convention for the Protection of Human Rights and Fundamental Freedoms* Rome, 4.XI.1950.

- cxviii *Rome Statute of the International Criminal Court*, Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544.
- cxvix Kopel, Gallant, Eisen, *supra*, p.119.
- cxl Hessbruegge, (2017), *supra*, p.273.
- cxli (MSC.1/Circ.1333, annex, paragraph 5 (June 26, 2009) – Updated and revoked by MSC.1-Circ.1333-Rev.1 in June 2015). See *supra* at note 73 and 74.
- cxlii “ While in most States, a citizen is permitted to use reasonable and necessary force to defend other individuals from suffering a serious injury or death, in some States the right to use force to defend others may be restricted”, see Philip Drew, Rob McLaughlin, *Handbook on the Use of Force for Private Security Companies*, Ocean Beyond Borders, (2016), p.25,
- cxliii Hessbruegge, *supra*, at 271.
- cxliv *Ibid.*
- cxlv Jody Ray Bennett,, *Pirate vs. Private Security*, *ISN Security Watch*, April 14, 2010, [<https://www.globalpolicy.org/nations-a-states/48948-pirate-vs-private-security.html>]
- cxlvi Mazyar Ahmad, Maritime piracy operations: Some legal issues, *Journal of International Maritime Safety, Environmental Affairs and Shipping*, (2020), p.3-4.
- cxlvii See Hessbruegge, *supra*, at p.273, citing the Human Rights Committee, Concluding Observations on Guatemala, Committee against Torture, Concluding Observations on Guatemala, U.N.Doc. CAT/C/GTM/C05-6 (2013), para. 16; U.N. Special Rapporteur on extrajudicial, Summary, or arbitrary executions, para. 120; Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination, Report to the General Assembly, U.N. Doc. A/68/339 (2013), para. 56; Inter-American Commission on Human Rights, Report on Citizen Security and Human Rights, OEA/Ser.L/V/II.Doc. 57 (2009), para. 73. See also *African Commission on Human and Peoples' Rights, Principles and Guidelines on Human and Peoples' Rights while Countering Terrorism in Africa*, adopted by its 56th Ordinary Session (2015), p. 32, para. 8: A.
- cxlviii Hessbruegge, *supra*, at 273.
- cxlix Birgit Feldtmann, Christian Frier & Paul Mevis, National Models for Regulating on-Board Protection of Vessels: Some Cross-Cutting Issues, *Erasmus L. Rev.*, Vol.11, p. 267, (2018), that use a case-study of four European states, Germany, Denmark, Italy and the Netherlands, see also Hespen, Ilja Van, Protecting Merchant Ships from Maritime Piracy by Privately Contracted Armed Security Personnel: A Comparative Analysis of Flag State Legislation and Port and Coastal State Requirements, *Journal of Maritime Law and Commerce*, Vol. 45: 3 (2014), pp. 361-400, who makes a more global, but schematic study, covering states from Europe, Asia, and the Americas.
- cl Hespen, Ilja Van, *supra*, at 379ff.
- cli Rebecca DeWinter-Schmitt and Heather Elms, *A Critical Analysis of Proliferation, Dynamic Interaction, and Evolution of Self-regulation within the Private Security Industry*, working paper presented at the International Studies Association Annual Convention, San Francisco, (6 Apr.2013), p.7.
- clii *Ibid.*
- cliii See Hessbruegge, *supra*, p.274.
- cliv Katinka Svanberg, *Crime at Sea*, *supra* note 81.
- clv UNSC Res. 1851(2008), para.6, 2020 (2011). On bad selection of personnel without vetting, see US cases, e.g., *Hawa Abdi JAMA, et al., Plaintiffs, UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, et al., Defendants.Samson Brown, et al., Plaintiff, on behalf of themselves and all others similarly situated, v. Esmor Correctional Services, Inc., et al., Defendants*, Civ. Nos. 97-3093(DRD), 98-1282(DRD), Sept. 9, 2004.
- clvi Enrica Lexie, PCA Case No. 2015-28, paras.1073-75.
- clvii Department for Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*, Nov. 2011, paras. 8, 6-7.
- clviii Lauren Ploch, Christopher M. Blanchard, Ronald O'Rourke, R. Chuck Mason, Rawle O. King, *Piracy off the Horn of Africa*, CRS Report for Congress, Congressional Research Service 7-5700, [www.crs.gov](http://www.crs.gov), Apr. 27, 2011.
- clix Christopher Spearin, *A Private Security Solution to Somali Piracy? The U.S. Call for Private Security Engagement and the Implications for Canada*, *Naval War College Review*, (2010), Vol. 63:4, pp.56, 61.



- clx *International Convention for the Safety of Life at Sea*, opened for signature 1 Nov 1974, (as amended) ch XI-2 (SOLAS Convention), Guidance Regarding the Provisions of Chapter XI-2 of the Annex to the SOLAS Convention as amended, pt 4.10. On the soft-law regulations, see *supra* at *Uniformity of PCASP Regulations*.
- clxi See UNSC/RES 2383 (2017), para 29-30, UNSC Res. 2500 (Dec.2019), para.26.
- clxii UNSC Res.2554 (2020) in para.7 spells out: "Calls upon the Somali authorities to make all efforts to bring to justice those who are using Somali territory to plan, facilitate, or undertake criminal acts of piracy and armed robbery at sea, and calls upon Member States to assist Somalia, at the request of Somali authorities and with notification to the Secretary-General, to strengthen maritime capacity in Somalia, including regional authorities and, stresses that any measures undertaken pursuant to this paragraph shall be consistent with applicable international law, in particular international human rights law;"[Emph.added]. The same provision was included in 2500 (2019), para.26. and UNSC/RES 2383 (2017), para.29-30.
- clxiii UNSC/RES. 1844 (2008), 2077 (2011), 2383 (2017), 2500 (2019), 2554 /2020).
- clxiv Svanberg, Katinka, FN: s säkerhetsråd i rättens tjänst - en studie av säkerhetsrådets ingripande under kap.VII i FN-stadgan för rätten till demokrati, (The UNSC Serving in a Legal Capacity- a Study of UNSC's Interventions Under Chapter VIII of the UN Charter for the Right to Democracy), Doctoral Thesis, Jure, Stockholm, (2014), pp.696-769.
- clxv Yvonne M. Dutton, Gunslingers on the High Seas: A Call for More Regulation," *Duke J. Comp. & Int'l Law*, Vol.24 (2013), p.105, Barry Hart Dubner & Claudia Pastorius, On the Effectiveness of Private Security Guards on Board Merchant Ships off the Coast of Somalia - Where Is the Piracy; What Are the Legal Ramifications, *N.C.J. Int'l L. & Com. Reg.* Vol.39 (2014) pp. 1029.1040.
- clxvi Jasenko Marin, Mis'co Mudric', Robert Mikac, Private Maritime Security Contractors and Use of Lethal Force in Maritime Domain, in *The Future of the Law of the Sea, Bridging Gaps Between National, Individual and Common Interests*, ed., Gemma Andreone, (2017), pp.191-212.
- clxvii The UN has developed a *Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies* 2009, which emphasizes, the responsibility to protect all persons, whether civilian or military, in violation of their human rights by nonstate actors, including private military and security companies, but it is in doubt if it will ever be adopted.
- clxviii Marc-Antoine Carreira Da Cruz, regulating private maritime security companies by standards causes and legal consequences, *Maritime Safety and Security Law*, Vol.3, (2017), p.63,79.
- clxix See UNSC Res. 2077 (2011), 2500 (Dec.2019), 2554 (2020) and the. Enrica Lexie, PCA Case No. 2015-28, para.1075.
- clxx See e.g., UNSC Res. 1897 (2009),2500 (2019), Douglas Guilfoyle, Piracy off Somalia: UN Security Council Resolution 1816 and IMO Regional Counter-Piracy Efforts, *The International and Comparative Law Quarterly*, Vol. 57: 3 (2008), pp. 690-699.
- clxxi See S/RES 2383 (2017), para 29-30, UNSC Res. 2500 (Dec.2019), para.26, 2554 (2020), para.26.
- clxxii See *supra* at UNSC Resolutions that Endorse the Use of PCASPs.
- clxxiii Hessbruegge, *supra*, p.273.
- clxxiv Enrica Lexie, PCA Case No. 2015-28, para.1076.
- clxxv *Ibid*, paras. 1087-88.
- clxxvi See e.g., UNSC Res.2500 (2019) and 2383 (2017).
- clxxvii Dubner, Pastorius, *supra*, pp.1030, 1040.
- clxxviii UNCLOS Art.19(2). But see *M/V Seaman Guard Ohio*, where the Indian Madras High Court found that the PCASPs on board the ship used as a floating armory, was innocent passage, as it participated in the fight against piracy as authorized by the UNSC.
- clxxix Svanberg, *Crimes at Sea, supra*.
- clxxx Peter Cook, *Opinion: The World's Navies and Merchant Fleets, Need a Stronger Bond*, *The Maritime Executive*, 6 May 2021, [https://www.maritime-executive.com/editorials/opinion-the-world-s-navies-and-merchant-fleets-need-a-stronger-bond].
- clxxxi Rita Abrahamsen, Michael C. Williams, Review: Selling Security: Assessing the Impact of Military Privatization, *Review of International Political Economy*, Vol. 15, No. 1 (2007), pp. 131-146, Eugenio Cusumano, Stefano Ruzza, Security

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<sup>clxxxii</sup> Da Cruz, *supra*, p. 84.

<sup>clxxxiii</sup> Hessbruegge, *supra*, p.257.

<sup>clxxxiv</sup> Robert McLaughlin, Reinforcing the Law of the Sea Convention of 1982 Through Clarification and Implementation, *OCEAN & COASTAL L.J.*, Vol.25 (2020), pp.130,159, finds: "... whilst there is clear law on jurisdiction as applicable to the deployment of private security personnel ashore, the challenge for PCASP at sea is not the absence of a correlative legal framework, but rather accounting for and incorporating the additional jurisdictional framework that applies at sea. That is, there is no "gap" in the law for PCASP, but rather an additional analytical step or legal overlay. ...Rather, this merely points to the need for more nuanced legal assessment. Similarly, legal regulation of use of force by PCASP is not a lacuna in the law. Any assessment simply requires additional contextualized legal analysis."

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