

Journal du Droit Transnational



Directeurs:
Ilias Bantekas
Catherine Maia
Tarcisio Gazzini
Francesco Seatzu

www.journaldudroittransnational.it

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

Armed to the Teeth: Navigating the Murky Waters of International Law and Private Maritime Security

Marco Odello e Edward Ditchfield

Abstract

Antipiracy activities were developed in the 1990s, particularly outside the coast of Somalia. Several international and national initiatives were taken by States and International Organizations to protect vessels in the more affected areas. The use of national armed forces and private security companies showed that problems raised by international law were quite complicated. The rules that would apply in the fight against piracy, but also concerning other international crimes that could occur on the sea, were not clearly regulated under the law of the sea and other international and national rules. This article tries to understand the problems that emerge in the quite unregulated area of the law that may affect the response by States and other entities, like International Organizations, shipping companies and security providers, in the fight against different types of crimes that may affect the international shipping trade. Even though antipiracy activities are not much in the news as in the 1990s, there is still a need for clearer regulations, standards and rules that would be applicable in addressing a series of crimes that may occur on the sea. International cooperation and coordination are an essential factor for effective responses to challenges that maritime trade is facing.

A. Introduction

There has been an increase in the activities related to maritime transport and commercial trade in recent years. Around 90% of traded goods are carried across the oceans, and the number of goods loaded worldwide has shown a regular increase, with a slight reduction due to the Covid-19 pandemic in 2020. The total amount of goods went from 5,984 million tons in 2010 to 10,648 million tons in 2020.¹

At the same time, there has been a growing international concern regarding the increase of different types of criminal activities that may take place in the sea and affect the security of vessels and their personnel.

Traditional piracy activities, which saw an expansion around certain coastal areas and on specific sea routes, has over the years been accompanied by other types of crimes. They include armed robbery, kidnapping, terrorism, illicit traffics and smuggled goods such as drugs and weapons, unlawful fishing, illegal immigration, human trafficking and smuggling.

¹ UNCTAD (2021). *Review of Maritime Transport 2021*. United Nations publication. Sales No. E.21.11.D.21. New York and Geneva, p. 3 Table 1.1.

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

Not all the above-mentioned activities would affect private and merchant ships in the same way. Different regulations and international agreements have been adopted to face some of the security challenges that affect maritime activities. Naval operations, often under a multinational agreement, have been deployed by international organizations and groups of States to address some of the security threats. In some cases, national security or military officers have been deployed on board, usually with the agreement of the officers' State. In other cases, private security personnel have been hired by shipping companies to ensure self-defense in case of criminal attacks against their vessels.

However, there are some unclear situations that are caused by existing regulations and international rules that apply to the maritime environment. Some of the problems related to security on the sea may also be linked to lack of clear international rules related to the obligations and rights of States, both coastal and flag States in terms of rules applicable to the maritime environment and on vessels. Some other problems affect flag States, shipping companies, and coastal States in areas that are not strictly linked to the maritime context, for instance in relation to the possible use of armed personnel on board and regulations concerning the use of firearms, which fit more into administrative and criminal law of different jurisdictions.

An example of the possible legal problems and conflict between different jurisdictions and rules is well illustrated by the *Enrica Lexie* case,² where the interpretation and application of both national and international legal rules led to a lengthy legal and diplomatic dispute between India and Italy that ended in 2021 with an arbitration award.

The scope of this article is to highlight the legal conundrum that surrounds the maritime environment when addressing and providing vessels' security. The article is divided into two parts. The first section shall provide an overview and discussion of the major legal issues that States, shipping companies, and private security services may face when they try to ensure the protection of ships and personnel against illegal activities usually performed by criminal gangs and groups.

The second section shall focus more specifically on the analysis of the legal complexities that would affect the use of private security personnel on board. This is particularly relevant in relation also to the fact that more and more shipping companies rely upon private security personnel because States' officials would not be able, due to the numbers and the possible jurisdictional problems that shall be discussed, to provide security in most cases. Therefore, there is a trend in hiring Private Maritime Security Companies (PMSCs) following the practice of Private Military and Security Companies who are hired with private contracts. This practice, which has been already used on many occasions on land, and that led to the adoption of the Montreux Document,³ is taken into consideration

² PCA, The 'Enrica Lexie' Incident, Italy v. India, Award, Case No 2015-28 (May 21, 2020).

³ ICRC, The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict (Geneva International Committee of the Red Cross/FDFA, 2009).

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

in relation to the maritime environment. However, the context and rules that surround and regulate the activities on board are quite different from the rules that would apply on land.

The scope of this article is to point out some specific problems and suggest the possible options that would help in providing a clearer set of rules in the context of maritime security.

B. Security at Sea: Piracy and Other Illegal Acts

When referring to the potential criminal activities at sea that mainly affect private vessels, the traditional and more familiar crime that most people would mention is piracy. For at least three centuries, piracy has been considered a major threat to international trade, affecting boats and their personnel. Without describing the historical evolution of international legal rules related to piracy, it is relevant for the purpose of this article to focus on some definitions and practices adopted by States and International Organizations (IOs), in particular the United Nations (UN) and the International Maritime Organization (IMO), to face the resurgence of piracy at the beginning of the Twenty First Century.

With the collapse of the situation in Somalia, in the late 1990s, due to the civil war and the lack of a central political authority, the coast of Somalia became one of the main operating bases for pirates. The position of Somalia, in the Horn of Africa, facing the Indian Ocean and the Gulf of Aden and therefore the access to the international trade through the Suez Canal, was an ideal point for conducting criminal operations that would take place on the sea. In that case, the Somali authorities were unable to control the shores and even less the coastal routes through which most merchant vessels were cruising.⁴ In 2008, a total of 135 piracy attacks were registered, with 44 seized ships and more than 600 seafarers kidnapped and held for ransom. These threats to the international maritime transportation, mainly bordering the coast of Somalia, led to a renewed international attention to the phenomenon of piracy.

Piracy is defined in Article 101 of the UN Convention on the Law of the Sea (UNCLOS)⁵ as:

‘(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

⁴ See generally Mario Silva, *Somalia: State Failure, Piracy, and the Challenge to International Law*, 50(3) VA. J. INT'L L. 553-578 (2010).

⁵ UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, UNTS (1994) Vol. 1833, 1-31363, pp. 397-581 available at: <https://www.refworld.org/docid/3dd8fd1b4.html> (accessed Aug. 4, 2022).

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)'.⁶

One of the main problems in the definition is that it limits the definition to acts committed on the high seas or in a place outside the jurisdiction of any State. This definition presumes that all coastal States would be able to effectively control the sea and waters under their jurisdiction. In 2006, the IMO adopted a resolution⁶ including the following definition of armed robbery at sea:

'Armed robbery against ships means any of the following acts:

1. any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea;
2. any act of inciting or of intentionally facilitating an act described above'.⁷

The definition is very similar to the one referring to piracy, however, it says that it refers to acts "other than an act of piracy". The only difference, the exclusion of aircraft aside, seems to be the location of the act, rather than the specific acts. Here as well, it is worth noting that two maritime areas, the Contiguous Zone and the Exclusive Economic Zone are not mentioned, but this issue shall be discussed later.

Other violent crimes can be considered acts of terrorism. However, there is a major difference in relation to the motivations for the criminal act because the act of terrorism would be determined by the "political" or "ideological" aims of the act, while piracy and armed robbery would be defined by "private ends". However, there could be some possible links between the two crimes, because a terrorist group could use violence to take a vessel that could then be used for a terrorist action or "ideological" aims.⁷

One of the most important cases of this type of potential link is the *Achille Lauro* hijack, a cruise ship taken by Palestine Liberation Organization members in the Mediterranean Sea

⁶ IMO, resolution A.1025(26), Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships (Jan. 18, 2010).

⁷ See generally Adam J. Young & Mark J. Valencia, *Conflation of Piracy and Terrorism in Southeast Asia: Rectitude and Utility*, 25(2) CONTEMPORARY SOUTHEAST ASIA, 269-283 (August 2003); Alexander Spencer, *Romantic Stories of the Pirate in IARRRH: The Failure of Linking Piracy and Terrorism, Narratives in Germany*, 15(3) INT. STUD. PERSPECT., 297-312 (Aug. 2014). On the discussion between 'private ends', 'non-political ends' and 'non-public ends' see generally Douglas Guilfoyle & Rob McLaughlin, *The Crime of Piracy in THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT: DEVELOPMENT AND CHALLENGES* 388-408 (Charles C. Jalloh, Kamari M. Clarke, & Vincent O. Nmehielle eds 2019).

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

in 1985.⁸ The case led the adoption of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA).⁹

The SUA Convention criminalizes acts that would endanger the navigation, including seizing control of a ship by force or threat of force, and committing an act of violence against a person on ship if it is likely to endanger the safety of the ship.¹⁰ A relevant aspect of the SUA Convention is that it fills up the gap between piracy and armed robbery, mentioned before, as it refers to unlawful acts committed on, or by ships navigating from, or to high seas (Article 4) and also to the offences committed in the State's territory (Article 6). As the condition of private ends is not mentioned in the text of the Convention, unlawful acts for both political and private purposes would be covered. This rule was later reinforced by the 2005 Protocol to the SUA Convention (SUA 2005),¹¹ in the new Article 3bis which extends the application of SUA 1988 "when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act",¹² which may include: using explosive, radioactive material or BCN (biological, chemical, nuclear) weapons; discharging oil, liquefied natural gas or other HNS from a ship; using a ship to cause death or injury; transporting on board a ship any explosive, radioactive material, any BCN weapons or any source material etc.¹³

Having considered the main legal instruments related to certain criminal acts that may affect the security of maritime traffic, it is now time to briefly consider the possible issues related to the protection and prevention of these acts under both national and international law.

C. Prevention and Protection Concerning Maritime Security: National and International Practices

To face the increasing number of criminal acts against merchant vessels, the international community developed a series of instruments, as mentioned before, and also recommendations and guidelines for States that were particularly affected by piracy, supporting governmental cooperation to detect security threats and take preventative measures against security incidents affecting ships or port facilities used in international

⁸ See generally Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82(2) AM. J. INT'L L. 269 (1988).

⁹ UN General Assembly, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (Mar. 10, 1988) No 29004, <https://www.refworld.org/docid/3ae6b3664.html> (hereinafter SUA)

¹⁰ SUA 1988, art. 3.

¹¹ IMO, Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Oct. 14, 2005), <https://www.refworld.org/docid/49f58c8a2.html>.

¹² SUA 2005, art. 3.bis 1(a).

¹³ SUA 2005, art. 3.bis 1(a) and (b).

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

trade.¹⁴ The IMO defined the Somali piracy High Risk Area (HRA)¹⁵ in the Indian Ocean in 2010 where there was considered a higher threat of attack from pirates, and where additional security requirements may be necessary.

International responses to piracy have not been uniform and resulted in a series of initiatives by individual States and by different organizations. Following several United Nations Resolutions,¹⁶ several States participated in military operations aimed at combating piracy, such as NATO's "Ocean Shield",¹⁷ EUNAVFOR's "Atalanta",¹⁸ EUCAP's "Nestor",¹⁹ Combined Task Force (CTF) 151.²⁰ These missions were conducted by States' navies deploying official State ships. This practice was based on directives adopted by IMO, which privileged State-led and controlled missions in antipiracy activities.²¹ For many years (between 1993 and 2015), the IMO's Maritime Safety Committee suggested that "flag States should strongly discourage the carrying and use of firearms by seafarers for personal protection or for the protection of a ship".²² Other options included:

- State Affiliated Escort: Escort by a State military asset.
- Vessel Protection Detachment (VPD): Uniformed military personnel embarked on a vessel with explicit approval of the Flag State.
- Private Maritime Security: Embarked private security force personnel hired by the shipping industry.
- Coastal State Embarked Personnel: Embarked armed personnel originating from the coastal State, based on arrangements between ship operators and the providing national authorities—not necessarily endorsed by the Flag State.

¹⁴ See amendments to the International Convention for the Safety of Life at Sea, 1974, and of the International Ship and Port Facility Security (ISPS) Code, both adopted on 12 December 2002 by the Conference of Contracting Governments to the SOLAS 1974 (London, Dec. 9 to 13, 2002); **Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security (Text with EEA relevance) (Apr. 29, 2004) O.J. (L 129), 6 – 91.**

¹⁵ According to IMO, the HRA is an area which is defined in the Best Management Practices for Protection against Somalia Based Piracy, MSC1/Circ.1339 (Sept. 14, 2011), unless otherwise defined by the flag State.

¹⁶ Between UNSC Res 1816 (June 2, 2008) and UNSC Res 2020 (Nov. 22, 2011), 15 resolutions were adopted in relation to piracy, affecting the Somalian coast and the Horn of Africa.

¹⁷ NATO—OPERATION OCEAN SHIELD, <http://www.mc.nato.int/missions/operation-ocean-shield.aspx> (Apr. 12, 2023).

¹⁸ NAVAL TODAY, ITALY TAKES OVER COMMAND OF COUNTER-PIRACY MISSION ATALANTA (Jul. 28, 2017), <http://navaltoday.com/2017/07/28/italy-takes-over-command-of-counter-piracy-mission-atalanta/>.

¹⁹ EU NAVFOR, EUCAP NESTOR, THE REPUBLIC OF SEYCHELLES COAST GUARD AND EU NAVAL FORCE WARSHIP CONDUCT COUNTER-PIRACY EXERCISE (Apr. 26, 2016), <https://eunavfor.eu/news/eucap-nestor-eu-naval-force-and-seychelles-coast-guard-hold-combined-counter-piracy-exercise>.

²⁰ COMBINED MARITIME FORCES, CTF 151: COUNTER-PIRACY, <https://combinedmaritimeforces.com/ctf-151-counter-piracy/> (Apr. 11, 2023).

²¹ IMO, MSC1/Circ.1332 (June 16, 2009) and MSC1/Circ1337 (Aug. 4, 2010); for the latest revised version of IMO, BEST MANAGEMENT PRACTICES FOR PROTECTION AGAINST SOMALIA BASED PIRACY (BMP4) see MSC1/Circ1339 (Sept. 14, 2011); BMP4 was withdrawn in June 2018 and replaced by BIMCO, ICS, IGP&I CLUBS, INTERTANKO AND OCIMF, BMP5: BEST MANAGEMENT PRACTICES TO DETER PIRACY AND ENHANCE MARITIME SECURITY IN THE RED SEA, GULF OF ADEN, INDIAN OCEAN AND ARABIAN SEA, Version 5 (Jun. 2018), <https://www.ics-shipping.org/publication/bmp5-hi-res-needs-further-compression-not-clear-on-date-only-one-available-is-for-a-related-file/>.

²² IMO, MSC/Circ 623 (June 18, 1993) Annex, para. 40; MSC1/Circ1333, Annex, para. 5 (June 26, 2009) which was then revoked by MSC1-Circ 1333-Rev.1 (June 12, 2015), Annex, paras 3–8.

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

The IMO supported regional initiatives that led in 2006 to the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)²³ and in 2009 to the Djibouti Declaration and Code of Conduct,²⁴ adopted by States in the HRA under the auspices of the IMO. In 2008, African States under the Maritime Organisation of West and Central Africa (MOWCA) adopted a draft Memorandum of Understanding (MoU)²⁵ that should provide shared and coordinated activities by coastguards in relation not only against piracy but also against other criminal acts, such as human trafficking, terrorism, and pollution, around the coast of Africa. Proposals in the draft MOU were later included in the so-called Yaoundé Code of Conduct as a regional maritime security framework.²⁶

All these initiatives show a willingness of collaboration and coordination among States that are particularly affected by illegal acts that occur on the sea. Such forms of cooperation are in line with the obligation under Article 100 UNCLOS.

However, the number of criminal activities that affect vessels, and the problems that arise in terms of coastal States' jurisdictions, may bring further complications in the use of security personnel on board. Some of these issues shall be discussed below, before addressing more specifically the use of different options by flag States and coastal States to ensure the protection of maritime traffic and seafarers.

D. Law of the Sea, Coastal States, Port States and Flag States

The maritime environment is mainly regulated by the 1982 Convention on the Law of the Sea (UNCLOS),²⁷ which defined several marine zones based on previous regulations. The zones are Internal Waters and Territorial Sea, Contiguous Zone, Exclusive Economic Zone (EEZ) and the High Sea, and Archipelagic Waters. It is not the scope of this article to

²³ ReCAAP has 20 Contracting Parties today, including 14 Asian and 4 European countries, Australia, and the USA, <https://www.recaap.org/> (Apr. 2, 2023).

²⁴ IMO, The Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, also referred to as the 'Djibouti Code of Conduct', adopted on Jan. 29, 2009; Jeddah Amendment to the Djibouti Code of Conduct, Jeddah (Jan. 10–12, 2017); so far, 20 countries from the 21 eligible ones have signed the document, <https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/A2%20Revised%20Code%20Of%20Conduct%20Concerning%20The%20Repression%20Of%20Piracy%20Armed%20Robbery%20Against%20Ships%20Secretariat.pdf> (Apr. 1, 2023).

²⁵ MOWCA, Memorandum of Understanding on the establishment of a Sub-regional Coastguard Network for the West and Central African Sub-region, 13th General Assembly of Ministers, Dakar, Senegal (Jul. 30, 2008), <https://www.imo.org/en/OurWork/Security/Pages/Code-of-Conduct-against-illicit-maritime-activity.aspx> (Apr. 2, 2023).

²⁶ ECCAS, ECOWAS, GGC, Code of Conduct Concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activity in West and Central Africa, adopted by a Heads of State Meeting in Cameroon's capital Yaoundé (Jun. 25, 2013), signed by ministerial level representatives of 22 States immediately afterwards https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/code_of_conduct%20signed%20from%20ECOWAS%20site.pdf (Mar. 21, 2023).

²⁷ UN General Assembly, Convention on the Law of the Sea (Dec. 10, 1982), 1833 U.N.T.S. 397, UNTS, Vol 1833, 1994 p. 397, No. 32363.

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

discuss these zones in detail. What is relevant for present purposes is to highlight some problems that emerge in relation to the obligations and rights of States and ships when it comes to the protection of vessels, which navigate from one area to the other of the sea, and the use of security personnel on board.

Article 2(3) UNCLOS provides that sovereignty over the territorial sea is exercised subject to the Convention as well as “other rules of international law” and Article 56(2) UNCLOS which obliges coastal States to give “due regard to the rights and duties of other States”. In principle, the rights of the coastal State over the territorial sea, up to 12 nautical miles, provide full jurisdiction in the area. For other parts of the sea, beyond the 12 nautical miles, in particular the Contiguous Zone and the EEZ which may extend to 24 and 200 nautical miles, respectively, the rights of coastal states are much more limited. According to Article 33(1) UNCLOS:

‘In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

- (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;
- (b) punish infringement of the above laws and regulations committed within its territory or territorial sea’.

This means that in the Contiguous Zone coastal States have only limited jurisdiction. According to UNCLOS a State has the right to both prevent and punish infringement of fiscal, immigration, sanitary, and customs laws within its territory and territorial sea, to strengthen a State’s law enforcement capacity and prevent criminals from fleeing or entering the territorial sea.²⁸ More limited rights apply in the EEZ.²⁹ However, other international law obligations may apply to address unlawful acts covered by the SUA Convention in Article 3, including the seizure of ships by force; acts of violence against persons on board ships; and the placing of devices on board a ship which are likely to destroy or damage it. According to Article 4 SUA “This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States”.

This means that crimes that fit into the SUA Convention would fall under the coastal State’s jurisdiction and enforcement powers.

On the other side, the flag State rules apply on board based on Article 92(1) UNCLOS and the exclusive flag jurisdiction,³⁰ apart from some exceptions based on International Law³¹

²⁸ U.S. DEPARTMENT OF THE NAVY, *ANNOTATED SUPPLEMENT FOR THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS*, NWP 9 (Rev. A)/FMFM 1-10), paras 1.5.1 & 2.4.1 (1989).

²⁹ UNCLOS, art. 56.

³⁰ See also art. 5(1) Convention on the High Seas (Apr. 29, 1958), A/CONF.13/L.58, 1958, UNCLOS, Off. Rec., vol. 2, 146, 450 U.N.T.S 1, 82.

³¹ See generally Zwinge, Tamo, *Duties of Flag States to Implement and Enforce International Standards and Regulations - And Measures to Counter Their Failure to Do So*, 10(2) J. INT’L BUS. & L., 297 (2011).

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

which may allow for concurrent jurisdiction by two or more States. Article 94 (1) UNCLOS provides that every State is required to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”.

For the purposes of this article, the relevant obligations and rights of flag States concerns the control and regulations on the use of armed personnel on board for security purposes.

I. Anti-piracy and Vessels’ Security

As mentioned before, the focus in the early years of the 2000s was on piracy in the areas outside the coast of Somalia. Missions were planned and deployed by States’ navies and the IMO recommended the deployment of Vessel Protection Deployment (VPD) units composed of State officials (like marines’ corps or Navy units). Multinational Navy Operations (MNO) were protected by official State immunity because they mainly operated with States’ agreement, under the UN and IMO resolutions and on the high seas.

However, as the *Enrica Lexie* case showed, the use of State officials on private merchant ships created a series of problems related to the application of State official immunities. Other problems are linked to the rules that would apply in relation to the presence and use of firearms on board. These rules may be in conformity with the flag State’s rules. However, they may apply when the ship is located on the high seas, but when entering the coastal States’ and port States’ waters, the rules might be different, and the ship would fall under the specific States’ jurisdictions. Similar problems would apply in case merchant vessels and shipping companies would employ PMSCs and personnel instead of State officials.

Following the controversial *Enrica Lexie* dispute, States and the IMO became less reluctant—or more open—to the use of PMSCs.³² In 2012, three months after the *Enrica Lexie* incident, the IMO provided some regulations for port and coastal States,³³ for flag States³⁴ and for shipowners, ship operators, and shipmasters³⁵ in relation to the use of PMSCs and their personnel.

A recent example of States’ developments in the regulation of vessels’ security is provided by The Netherlands. The *Merchant Shipping (Protection) Act* which entered into force in February 2022,³⁶ and *Decree of 22 December 2021, laying down rules for the implementation of the Protection Act Merchant’s (Decision protection merchant navy) as well as fixing the time of entry into force of the Merchant Protection Act*³⁷ followed by the

³² IMO, MSC1/Circ. 1443 (May 25, 2012).

³³ IMO, MSC1/Circ. 1408/Rev.1 (May 25, 2012).

³⁴ IMO, MSC1/Circ.1406/Rev. 2 (May 25, 2012).

³⁵ IMO, MSC1/Circ. 1405/Rev.2 (May 25, 2012).

³⁶ The Minister of Justice and Security (The Netherlands), *Merchant Shipping (Protection) Act*, The Hague, 15 May 2019, (entered into force 1 February 2022), https://www.ndfr.nl/content/BWBS0000985-20220201#BWBS0000985-20220201_16259244, [accessed May 11, 2024].

³⁷ The Minister of Justice and Security (The Netherlands), *Decree of 22 December 2021, laying down rules for the implementation of the Protection Act Merchant’s (Decision protection merchant navy) as well as fixing the*

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

Merchant Shipping Protection Regulation³⁸ amended the previous 2011 legislation that allowed only VPD units from the Ministry of Defense.³⁹ With the new legislation and regulations, Dutch merchant shipping companies may ask the Dutch Coastguard for an authorization to employ PMSC's personnel, based on decisions by the Minister of Justice and Security and the Minister of Defence.⁴⁰

It is worth noting that the basic principle of the 2022 *Merchant Shipping (Protection) Act* is that the protection of merchant shipping vessels will be offered as far as possible by military personnel, in accordance with the operational concept of the Commander of the Armed Forces. Therefore, the priority is still for Government protection. The option of protection by a licensed maritime security company arises if the requested protection cannot be provided, or if costs become excessive".⁴¹

This option is subject to several conditions. For instance, PMSCs must hold certificates issued in accordance with international standards and Dutch regulations;⁴² the conditions under which private security guards are authorized to use force in the event of an imminent risk of piracy are partly laid down in the 2022 *Act*⁴³ and partly in the 2021 *Decree*.⁴⁴

Finally, it is relevant noting that PMSCs can be used on Dutch vessels only in the Somali piracy area, around the Horn of Africa and the Gulf of Aden.⁴⁵ Therefore, private security personnel cannot be used in other piracy affected areas, like the Gulf of Guinea or the Malacca Strait.

It is not possible in this context to submit more detailed discussion on the development and debate on the use of PMSCs and the examination on their role in relation to State security options. Some of these issues shall be further discussed in the second part of this article.⁴⁶

time of entry into force of the Merchant Protection Act, Official Journal 2022(3) of 4 January 2022, <https://zoek.officielebekendmakingen.nl/stb-2022-3.html#extrainformatie> (accessed 12 May 2024)

³⁸ The Minister of Justice and Security (The Netherlands), Merchant Shipping Protection Regulation, The Hague, January 19th 2022, and Explanatory Notes,

<https://www.government.nl/documents/regulations/2022/03/28/merchant-shipping-protection-regulation-and-explanatory-notes> [accessed May 11, 2024].

³⁹ Tweede Kamer der Staten Generaal (The Netherlands), *Beveiliging zeevaartroutes tegen piraterij; Brief regering; Beleidskader militaire Vessel Protection Detachment (VPD) ter bescherming van individueel zeetransport* (15-06-2011), Kamerstuk 32706 Nr. 9 (24-06-2011).

⁴⁰ 2022 *Act*, *supra*, note 22, arts 3-5.

⁴¹ 2021 *Decree*, *supra*, note 37, art. 2.2.

⁴² Art 13.2 of the 2022 *Act*, *supra*, note 22; and art. 5.1 of the 2021 *Decree*, *supra*, note 37.

⁴³ 2022 *Act*, *supra*, note 22, arts. 9-11.

⁴⁴ 2021 *Decree*, *supra*, note 37, Ch. 3.

⁴⁵ 2021 *Decree*, *supra*, note 37, art. 1.2.

⁴⁶ For more analysis and discussions on the regulation and problems related to the use of vessels' security, see: Christopher Spearin, 'Private Military and Security Companies v. International Naval Endeavours v. Somali Pirates', *Journal of International Criminal Justice*, (10) 2012, pp. 823–837; Bibi van Ginkel, Frans-Paul van der Putten and Willem Molenaar, *State or Private Protection against Maritime Piracy? A Dutch Perspective*, Clingendael Report (The Hague: Clingendael, 2013); Giles Scott-Smith and Marcel Jansen, 'Holding on to the

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

Furthermore, it should be stressed that the problem of maritime security is not limited to piracy. As mentioned before, there are other illegal and criminal acts that may affect vessels while navigating. Armed robbery and kidnapping could occur in maritime zones that are not necessarily the high seas. The definition of piracy is usually limited to activities conducted on the high seas; however, as shall be discussed below, for certain purposes, including combating piracy, the Contiguous Zone and the EEZ are treated as high seas, whereas for other activities they are not.

It is also worth mentioning that many flag States would not be able to provide enough State official units to protect the vessels registered with them, because the great majority of merchant vessels are registered in only a few States, for reasons that it is not possible to discuss here. For instance, according to the London based Lloyd's insurance company, 16% of the world's fleet is registered with Panama, followed by Liberia and the Marshall Islands,⁴⁷ with a total of more than 18,000 vessels.

Therefore, the question is whether it would be more realistic and feasible to split States' international anti-piracy activities and operations—policing—from protection for private vessels in a clearer way.

National Navies and official State ships, including coastguard units, could focus on patrolling the high seas for prevention purposes. They would be protected and justified by multilateral agreements and other international rules addressing maritime security, including specific UN Security Council resolutions. They would also be covered by official State immunity due to the international protection of maritime shipping routes that includes the fight against piracy. Those obligations, that are incorporated within an international crime's definition, would concern the generality of States, including their obligation to cooperate to address and deal with the fight against the specific crime.

Protection of individual vessels could be delegated to PMSCs. However, this option would need further clarification and regulations, both under national and international law, due to the overlapping jurisdictional and regulatory matters that may involve different States' regulations and private actors' duties. These aspects shall be addressed in the next section of the article.

E. The Regulatory Evolution of (Armed) Private Maritime Security

Monopoly on Violence? The Use of Armed Force, the Dutch Approach to PMSCs, and the Anti-Piracy Case', *St Antony's International Review*, 9(2) 2014, 54–70. Eugenio Cusumano and Stefano Ruzza, 'Contractors as a Second Best Option: The Italian Hybrid Approach to Maritime Security', *Ocean Development & International Law*, 46(2), 2015, pp. 111–22; Renée de Nevers, 'Sovereignty at Sea: States and Security in the Maritime Domain', *Security Studies*, 24(4), 2015, 597–630; Eugenio Cusumano, Stefano Ruzza, *Piracy and the Privatisation of Maritime Security* (Palgrave Macmillan: 2020).

⁴⁷ LLOYD'S LIST, TOP 10 FLAG STATES 2020 (Dec. 3, 2020), <https://lloydslist.maritimeintelligence.informa.com/LL1134965/Top-10-flag-states-2020>.

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

The use of private security at sea either as deterrent or as a manifestation of force is hardly new. Indeed, for centuries, privately armed ships, even effectively private navies, were, depending upon the prevailing political needs of the day, either covertly tolerated or even actively encouraged as a privatization of the State's use of violence to settle inter-State disputes, cloaked with legal legitimacy under letters of marque and reprisal.⁴⁸ During his career, a mariner could alternate between the roles of naval officer, privateer, or even pirate, depending upon contemporary political exigencies.

So blurred did the boundaries become, and so abused as an instrument of State foreign policy, that, in arguably the most concise exercise of international legal drafting in history, privateering was abolished by a mere five words⁴⁹ under the Declaration of Paris 1856⁵⁰—a prohibition today accepted as a broader rule of customary international law.⁵¹ Thus was broken the link between public and private force and security at sea, with legal violence reserved for States either under the laws of war or in the sphere of maritime security, such as the interdiction of suspected pirates.⁵² For private shipping, the use of force became limited to a right of self-defense.⁵³

Yet effective maritime security is an expensive business. For example, in 2010, just past the peak of Somali piracy, the One Earth Future Foundation, as part of its Oceans Beyond Piracy project, estimated the combined cost of the naval resources required to police the Horn of Africa that year to be in the region of \$2 billion,⁵⁴ with ship owners spending up to an additional \$2.5 billion on onboard security equipment and personnel.⁵⁵ In these current, straightened economic times, with the ongoing conflict in Ukraine further refocusing military spending priorities, it is hardly surprising that greater reliance is being placed on PMSCs—including those providing armed guards. What is surprising, however, is the speed with which the presence of such companies, and indeed of armed guards, has been accepted.

While never actually illegal under international law,⁵⁶ at least on the high seas where each ship sails under the exclusive jurisdiction of its flag State,⁵⁷ the IMO's Maritime Safety Committee's (MSC) position on the deployment of armed guards has evolved considerably in recent years. A mere 30 years ago, in 1993, the MSC categorically stated: "the carrying

⁴⁸ See for example art. 1, Section 8 of the Constitution of the United States of America, *USA: Constitution* (Sept. 17, 1787, still in force), which allocates, alongside the power to declare war, the granting of "Letters of Marque and Reprisal" to the Congress.

⁴⁹ "Privateering is, and remains, abolished".

⁵⁰ Declaration Respecting Maritime Law, Paris (Apr. 16, 1856), art. 1.

⁵¹ See Michael P. Scharf, *Accelerated Formation of Customary International Law*, *ILSA J. INT'L & COMP. L.* 305, at 320 (2014).

⁵² See UNCLOS, arts. 105 & 107; see also Convention on the High Seas, arts. 19 & 21.

⁵³ See generally Chandler P. Anderson, Ellery C. Stowell & Maurice Leon, *The Status of Armed Merchantmen*, 11 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW AT ITS ANNUAL MEETING (1907-1917), 11 (1917).

⁵⁴ One Earth Future, *The Economic Cost of Maritime Piracy*, One Earth Future Working Paper (Dec. 2010), at 16. ⁵⁵ *Id.*, at 14–15.

⁵⁶ See, for example, IMO, MSC.1/Circ.1333, Annex, para. 7 (June 26, 2009).

⁵⁷ See UNCLOS, art. 92.

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

and use of firearms for personal protection or protection of a ship is strongly discouraged.”⁵⁸ Indeed, in 2009, during the height of Somali piracy, the MSC, “for legal and safety reasons”,⁵⁹ admonished flag States to “strongly discourage the carrying and use of firearms by seafarers for personal protection or for the protection of a ship”,⁶⁰ before adding: “The use of privately contracted armed security personnel on board ships may lead to an escalation of violence.”⁶¹ Unarmed private security personnel, by comparison, “should be fully acceptable to provide an enhanced lookout capability”.⁶² Moreover, in referring to the measures ships “should”⁶³ take to protect themselves,⁶⁴ the MSC was again at pains to stress the potential for legal and safety issues “[w]ith respect to the carriage of firearms on board”.⁶⁵

Although such recommendations remain in place,⁶⁶ just two years later in 2011, the MSC issued detailed guidance on the use of on board armed private security personnel for the shipping industry,⁶⁷ for flag States,⁶⁸ and for port and coastal States,⁶⁹ with recommendations for PMSCs themselves following in 2012.⁷⁰ Nevertheless, the MSC was at pains to stress both to the shipping industry⁷¹ and to flag States⁷² that this was not intended as an endorsement of their use—with port and coastal States further reassured that such recommendations were not intended to interfere with their sovereign rights or exercise of jurisdiction.⁷³ Rather, the guidance simply reflected the changing reality that “the deployment of armed security personnel on board ships has become an accepted industry and flag state practice in certain circumstances.”⁷⁴

Notwithstanding such increased reliance on PMSCs and their armed guards by many shipping companies and flag States, the shipping industry’s BMP5 “does not recommend or endorse the general use of PMSCs onboard merchant ships”,⁷⁵ though it does still recognize the value of “experienced and competent unarmed PMSCs”.⁷⁶ When it comes to Privately Contracted Armed Security Personnel (PCASP), BMP5 simply recasts its

⁵⁸ IMO, MSC/Circ.623, Annex, para. 40 (June 18, 1993).

⁵⁹ IMO, MSC.1/Circ.1333, Annex, para. 5 (June 26, 2009).

⁶⁰ *Id.*

⁶¹ *Id.*, at Annex, para. 7.

⁶² *Id.*, at Annex, para. 6.

⁶³ *Id.*, Annex, para. 3.

⁶⁴ For the measures recommended by the MSC, see IMO, MSC.1/Circ.1334 (June 23, 2009).

⁶⁵ IMO, MSC.1/Circ.1333, Annex, para. 4 (June 26, 2009).

⁶⁶ Note: IMO, MSC.1/Circ.1333 was revoked and replaced by MSC.1/Circ.1333/Rev.1 (June 12, 2015)—though, substantively, Annex, paras 3–7 have been replicated in the latter instrument.

⁶⁷ IMO, MSC.1/Circ.1405 (May 23, 2011); since replaced by IMO, MSC.1/Circ.1405/Rev.2 (May 25, 2012).

⁶⁸ IMO, MSC.1/Circ.1406 (May 23, 2011); since replaced by IMO, MSC.1/Circ.1406/Rev.3 (June 12, 2015).

⁶⁹ IMO, MSC.1/Circ.1408 (September 16, 2011); since replaced by IMO, MSC.1/Circ.1408/Rev.1 (May 25, 2012).

⁷⁰ IMO, MSC.1/Circ.1443 (May 25, 2012).

⁷¹ See IMO, MSC.1/Circ.1405, Annex, para. 1 (May 23, 2011).

⁷² See IMO, MSC.1/Circ.1406, Annex, para. 1 (May 23, 2011).

⁷³ See IMO, MSC.1/Circ.1408, Annex, para. 2 (Sept. 16, 2011).

⁷⁴ IMO, ‘Private Armed Security’, <https://www.imo.org/en/OurWork/Security/Pages/Private-Armed-Security.aspx> [accessed April 11, 2023].

⁷⁵ BMP5, *supra*, note 21, at 19.

⁷⁶ *Id.*

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

formulaic response: “BMP does not recommend or endorse the general use of PCASP onboard merchant ships.”⁷⁷ Whether utilizing armed or unarmed personnel, it simply recommends compliance with ISO 28007-1:2015,⁷⁸ a somewhat paradoxically IMO-supported standard for a practice the MSC prefers not to encourage,⁷⁹ but which it helped to guide despite “not support[ing] self-certification or self-regulation by the private maritime security sector”.⁸⁰

Although both the IMO’s MSC and major shipping associations such as the International Chamber of Shipping, BIMCO, and INTERTANKIO—all three among the authors of BMP5—may prefer a world without armed guards, or indeed even PMSCs at all, on merchant ships traversing the world’s shipping lanes, such views no longer reflect the reality; as they themselves reluctantly acknowledged. Still, new realities often bring with them new legal complexities and problems, some of which will be considered below.

F. The Question of Jurisdiction(s)

In drafting its guidance to maritime stakeholders in 2011 and 2012, the MSC stressed “the need for extreme caution in matters relating to liability, jurisdiction, sovereignty, ships in transit and rights of innocent passage, among other issues.”⁸¹ Space precludes discussion of all of these here, but in the sphere of private maritime security, jurisdiction is by far the most important complexity to arise; for all of the MSC’s other concerns turn, to a greater or lesser extent, on the key nexus of jurisdiction—who can exercise it, who cannot, and when its bases clash, such as when State sovereignty and the varying pre-eminence afforded to littoral States under UNCLOS’s zonal system qualifies or overrides flag State exclusivity.

While this is an issue applicable to the conduct of PMSCs across the board, it bears especial significance when it comes to those deploying armed guards, which this article will focus on. Because, as the *Enrica Lexie* case demonstrated all too clearly, States generally take exception to armed personnel entering their waters without their express permission. Where those personnel are private actors, shorn of the immunities potentially available to their public counterparts and acting for pecuniary motives, the consequences, such as criminal liability, may be significantly more serious.

So, to whom does the task of regulating PMSCs fall? As is hardly surprising of a general Law of the Sea treaty designed to enumerate the rights of States and to regulate their general conduct, UNCLOS does not cover this specific matter. True, it codifies certain

⁷⁷ *Id.*

⁷⁸ ISO, *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) — General* (ISO 28007-1:2015) (2015).

⁷⁹ See, respectively IMO, MSC.1/Circ.1405, Annex, para. 1 (May 23, 2011) and IMO, MSC.1/Circ.1406, Annex, para.1 (May 23, 2011).

⁸⁰ IMO, ‘Private Armed Security’, <https://www.imo.org/en/OurWork/Security/Pages/Private-Armed-Security.aspx> [accessed Apr. 11, 2023].

⁸¹ *Id.*

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

maritime conduct as criminal under international law, such as piracy,⁸² but notwithstanding the essential requirement of being a private actor in order to commit piracy,⁸³ it exclusively reserves maritime security enforcement therefor to public actors⁸⁴—or at least to those acting with State sanction.⁸⁵ Equally, no other international treaty currently exists to provide a legal framework for the existence, operation, or accountability of PMSCs. Nor, as seen above, does the IMO actively regulate such actors; it merely provides guidance to them, their principals, and flag and littoral States. Any question of jurisdiction, and the possible regulation that comes with it, must therefore, for now at least, be determined by recourse to general rules of international law.

The starting point for matters of jurisdiction at sea is UNCLOS. Should a ship never sail out of its own State's⁸⁶ territorial sea, the issue of security—be it provided by private or public actors—would be purely a matter for the municipal law of that State, such waters being designated under Article 2 as the littoral State's sovereign territory.⁸⁷ Beyond those 12 nautical miles,⁸⁸ however, things start to get a little more nuanced.

By virtue of Article 91 UNCLOS, it is for each State to “fix the conditions for the grant of its nationality to ships”,⁸⁹ with ships entitled to fly that State's flag possessing that State's nationality.⁹⁰ Furthermore, under Article 92, ships “shall be subject to [the flag State's] exclusive jurisdiction on the high seas.”⁹¹ Although the ‘high seas’ are defined under Article 86 as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State”,⁹² the combined effect of Articles 58⁹³ and 86⁹⁴ is for most purposes to treat all waters seawards of the territorial sea as the high seas, with littoral States exercising only limited jurisdiction over both the Contiguous Zone⁹⁵ and the EEZ.⁹⁶

What this means in terms of armed guards on private shipping is that, legally, in the words of the MSC, such authorization is at “the prerogative of flag States”,⁹⁷ falling under that State's exclusive jurisdiction.⁹⁸ As such, ultimately not just the lawfulness of armed guards, but also the regulations concerning their qualifications, permitted arms and ammunition, as well as their rules of engagement fall to be determined by the municipal

⁸² See UNCLOS, arts. 100–107.

⁸³ See UNCLOS, art. 101.

⁸⁴ UNCLOS, arts. 105 and 107.

⁸⁵ See UNCLOS, art. 107.

⁸⁶ See UNCLOS, art. 91.

⁸⁷ UNCLOS, art. 2.

⁸⁸ See UNCLOS, art. 3; *see also* UNCLOS, art. 4.

⁸⁹ UNCLOS, art. 91.

⁹⁰ *Id.*

⁹¹ UNCLOS, art. 92.

⁹² UNCLOS, art. 86.

⁹³ Entitled ‘Rights and duties of other States in the exclusive economic zone’.

⁹⁴ Which defines the concept of ‘High Sea’.

⁹⁵ See UNCLOS, art. 33(1).

⁹⁶ See UNCLOS, art. 56(1)(b).

⁹⁷ IMO, MSC.1/Circ.1443, Annex, para. 1.2 (May 25, 2012).

⁹⁸ *Id.* See also UNCLOS, art. 92; and *see, further*, UNCLOS, art. 94.

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

law of the flag State. Whilst legally that concept may be clear, practically, the inherent lack of uniformity of such a system is problematic—with ship owners and their operators, often with vessels flagged as is convenient, needing to determine and navigate a raft of different legal regimes, some far laxer than others. As context, the most recent guide⁹⁹ available from the website of the International Chamber of Shipping is already at least six years out of date.

Still, all well and good on the high seas. However, ships must sail to land at some point. Indeed, for merchant ships, that is their very purpose: to transfer goods and materials from one port to another. In doing so, they may not just traverse from the ports of State A to State B (each of which must permit the embarkation/disembarkation of armed guards) but pass through the waters of other States on route. Each of those littoral States must thus also permit private armed guards. If they do not, then a ship carrying such personnel through their territorial sea would likely not be complying with the rules of innocent passage,¹⁰⁰ triggering littoral State jurisdiction.¹⁰¹ Moreover, as the possession of firearms is often relevant to customs laws, such jurisdiction could conceivably similarly arise within the Contiguous Zone.¹⁰²

What is more, these are just the ‘simple’ jurisdictional issues concerning authorization. With shipowners, charterers, operators, and insurers potentially all based in different States, each with their own regulatory frameworks concerning private armed guards, issues such as liability arising from their improper use could well trigger overlapping jurisdictional claims—even before one considers the nationalities of the private security personnel (or their ‘victims’) themselves. Brevity prevents consideration of the details of such additional complexities here. Nevertheless, what it is important to consider is whether an appropriate regulatory framework could be developed to reconcile in broader terms potential jurisdictional issues arising from the deployment of PCASP.

G. Coherent Regulation on the Horizon, or Hidden Rocks Ahead?

What is abundantly clear from the above discussion is that no such overarching legal framework currently exists. Moreover, while the present regulatory patchwork of international law in the form of general jurisdictional principles arising both under UNCLOS and via customary international law, fleshed-out by individual States, both flag and littoral, as a matter of domestic law, and buttressed by IMO guidance and general industry compliance with ISO 28007-1:2015 may practically limp along like an antiquated slow steamer, it could hardly be labelled as satisfactory.

⁹⁹ International Chamber of Shipping, *Comparison of Flag State Laws on Armed Guards and Arms on Board, 2017* (Mar. 2017), <https://www.ics-shipping.org/publication/comparison-of-flag-state-laws-on-armed-guards-2017/> [accessed Apr. 11, 2024].

¹⁰⁰ For the right of innocent passage, *see* UNCLOS, art. 17.

¹⁰¹ *See* UNCLOS, arts. 17–19 & 21, especially arts. 19(1) & 21(1)(a).

¹⁰² *See* UNCLOS, art. 33(1)(a); and *see*, further, the (admittedly limited) consultation exercise with littoral States conducted by the World Customs Organization in 2013: <https://www.wcoomd.org/en/topics/facilitation/activities-and-programmes/firearms.aspx> [accessed April 11, 2023].

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

The shipping industry operates today in a maritime sphere where flag States are more willing to authorize the deployment of private armed guards,¹⁰³ on the one hand, while, on the other, a majority of littoral States do not allow them to operate in their territorial waters.¹⁰⁴ With this tension between different regulations operating in different jurisdictions, practical solutions inevitably arise. Should private armed guards be a necessity, ships can always be re-flagged to more accommodating flag States. Overcoming prohibition by littoral States, however, cannot be so easily cloaked with legal legitimacy. After all, the very purpose of the voyage is to sail to or from such States.

Faced with potential legal sanctions upon entering the territorial sea, or perhaps even the Contiguous Zone's customs regime, of the littoral State, and with their task of escorting the ship through potentially hostile waters complete, some PCASP may simply elect to dump their arms and ammunition overboard.¹⁰⁵ Indeed, by 2012, the "most cost-effective approach"¹⁰⁶ to the problem was the innovative development of floating armories,¹⁰⁷ anchored beyond the geographical limits of littoral State jurisdiction,¹⁰⁸ where PCASP, their arms, ammunition, and other kit can be embarked and disembarked¹⁰⁹ almost as easily as borrowing and returning a library book.¹¹⁰ Like the shipboard presence of PMSCs more generally, with no international legal regime expressly regulating floating armories,¹¹¹ under Article 92 UNCLOS, they and their conduct ultimately fall under their flag State's jurisdiction just like any other ship—provided they remain on the high seas.

Indeed, so pervasive has the presence of floating armories become, that in 2020 the United Nations Office on Drugs and Crime (UNODC) issued a Manual for Criminal Justice Practitioners, specifically highlighting the complex web of international and municipal laws that may cover their operation, as well as potential pitfalls to their operation such as compliance with international sanctions and arms embargoes.¹¹² Whilst they recognized both the "legal and logistical concerns"¹¹³ arising from the use of floating armories, PCASP, and PMSCs more generally, the UNODC stopped short of calling for increased international regulation.

¹⁰³ See, for example, the UK Government's *Interim guidance for UK flagged shipping on the use of armed guards* (2015) <https://www.gov.uk/government/publications/interim-guidance-to-uk-flagged-shipping-on-the-use-of-armed-guards-to-defend-against-the-threat-of-piracy-in-exceptional-circumstances/dddd> [accessed Apr. 11, 2023].

¹⁰⁴ IMCO, ICS, IFSMA, IGP&I, INTERTANKO, INTERCARGO, INTERMANAGER, and OCIMF, *Global Counter Piracy: Guidance for Companies, Masters and Seafarers* (2018), at 38.

¹⁰⁵ See Anna Petrig, *The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates*, 62 INT'L & COMP. L.Q., 667, at 686 (2013).

¹⁰⁶ UNODC, *Summary of Laws Regulating Floating Armouries and their Operations: Annex A to Maritime Crime: A Manual for Criminal Justice Practitioners* (2020), at 4.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*, at 4–5.

¹¹¹ *Id.*, at 10.

¹¹² *Id.*, at 15.

¹¹³ *Id.* at 4 & 5.

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

Faced with the jurisdictional complexities highlighted above, such regulation would certainly appear desirable. Given the vital importance of shipping to the global economy, it is somewhat nonsensical that such a significant aspect of maritime security is left to a disparate patchwork of general international law and specific flag and littoral State laws and policies, with those private actors operating in this arena often having to resort to practical wrangling and maneuvering, such as dumping arms and floating armories, in order to navigate it. With the IMO's (and many States') approach having shifted from condemnation to tacit acceptance, matched by industry's growing utilization of PMSCs and PCASP, the matter has become more acute as the number of privately armed actors at sea has proliferated.¹¹⁴

Moreover, increased regulation—and, perhaps more importantly, the standardization of regulations—concerning PCASP is needed not just to ensure effective protection of the globe's maritime spaces, but also to protect those personnel so engaged. As the *Enrica Lexie* case demonstrated all too clearly, armed personnel can easily fall foul of littoral State laws concerning the mere possession of arms, not just when and how they are used. PCASP, devoid of the immunities potentially available to uniformed personnel comprising a VPD, are particularly vulnerable to being detained as pawns in broader intra-State disputes—for example, in the State of Hormuz or in the disputed waters of the South China Sea—especially during times of heightened geopolitical tensions.

Clearer regulation would also better protect PCASP (as well as those shipping companies hiring them) from potential liability, both criminal and civil, not just from their onboard presence but also from their actual use of force should it be deployed. For example, legally, PCASP can clearly use their weapons defensively, invoking the inherent right of self-defense, to protect either themselves or their/another ship.¹¹⁵ Should the force they direct against a vessel be excessive or unreasonably deployed, their conduct could meet the definition of piracy under Article 101 UNCLOS, rendering them subject to criminal enforcement by any State, some of which still impose the death penalty for piracy.¹¹⁶ Such conduct could also fall foul of Article 3(b) SUA's endangerment of safe navigation offence—and, the SUA being subject to national interpretation, could even conceivably risk being deemed as 'terrorism' under Article 3bis(1)(a)(iii).

Yet is regulation practical? Drawing a comparison with the position of Private Military/Security Companies on land is illustrative. In 2008, the International Committee of the Red Cross, in consensus with 17 States, and having consulted industry representatives and other civil society actors, issued the Montreux Document, designed to set out both “[p]ertinent international legal obligations relating to private military and security companies”¹¹⁷ and “[g]ood practices relating to private military and security

¹¹⁴ See, for example, Clive R. Symmons, *Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea*, 51 *MILITARY LAW AND THE LAW OF WAR REVIEW*, 21, (2012) at 24,

¹¹⁵ See generally, in relation to vessels flying the UK's flag, the UK Government's 2015 *Interim guidance for UK flagged shipping on the use of armed guards*, *supra*, note 103.

¹¹⁶ See, for example, India, *Maritime Anti-Piracy Act*, Section 3, Bill No. 369 of 2019 (Dec. 19, 2022).

¹¹⁷ ICRC, *supra*, note 3, Part One, at 11, *et seq.*

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

companies”.¹¹⁸ The document itself did not seek to legitimize or delegitimize the use of such companies;¹¹⁹ rather, it simply recognized the reality of their use.¹²⁰ Crucially, it is not a legally binding instrument;¹²¹ though it is clearly intended to help guide the future practice of both States and industry.¹²²

Formulated around the height of Somali piracy, the Montreux Document, does acknowledge “the contracting of PMSCs to protect merchant shipping against acts of piracy”,¹²³ although it goes on to label the fight against piracy “as a matter of law enforcement”.¹²⁴ This is important, for despite the document not distinguishing between the use of private military and security companies on land or at sea, its focus is exclusively on the use of such companies during armed conflicts, and on ensuring that they comply with international humanitarian law.¹²⁵ So far, at least, the problems giving rise to security concerns at sea sufficient to trigger the presence of armed private maritime security—piracy, terrorism, smuggling, trafficking, illicit trade in weapons or narcotics, etc.—arise not from armed conflict but from the criminal actions of non-State actors. Therefore, they do not trigger issues of international humanitarian law.

Perhaps that is part of the problem, explaining why oversight of the maritime realm has been neglected for so long. The backdrop to the Montreux Document was the significant presence of private military and security companies in Iraq in the early 2000s, as well as the abuses linked to them.¹²⁶ On land, such companies will inevitably encounter enemy combatants and/or civilians. When they do, those events will often play out very publicly under the glare of the world’s 24/7 media, with public outcry for accountability.

This is not the case at sea, however. What happens on the waters over the horizon is hidden from public view, with no civilians at risk of getting in the way, other than seafarers who are seen to have voluntarily signed on for such dangers. Indeed, successfully defended attacks may never come to light, shipping interests not wishing to raise their insurance premiums or risk investigation by reporting them, or what ultimately happened to their perpetrators. Accordingly, the impetus for increased regulation is lacking, especially if that would increase the burden on industry. Increased regulation of private armed guards, whilst certainly desirable, would thus appear not to be that high a priority—at least for now.

H. Conclusion

¹¹⁸ *Id.*, Part Two, at 16, *et seq.*

¹¹⁹ *Id.* at 41.

¹²⁰ *Id.*

¹²¹ *Id.*, at 9.

¹²² *Id.*, at 10.

¹²³ *Id.*, at 39.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See Nigel D. White, *The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group’s Draft Convention*, 11 H.R.L.REV, 133, at 133–135 (2011).

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

Security threats and challenges at sea are nothing new; they have existed since Antiquity. That the burden of these threats falls disproportionately on private maritime actors is not new either. What has changed in recent years, however, is the growing acceptance that private actors can play an important role in helping to defend global maritime interests and combating those threats, such as piracy. Initially strongly discouraged, both the IMO and States—albeit to differing degrees—have moved to a position somewhere between tacit acceptance and ‘soft law regulation’ (in the form of guidance and best practices) of an increased private security role.

The growing use of PMSCs, and PCASP in particular, however, raises important practical and legal questions, especially in relation to jurisdiction concerning such personnel, their conduct, their weaponry, and their rules of engagement. With an expanding disconnect between more permissive flag States, on the one hand, and restrictive littoral States on the other, the potential for jurisdictional conflict to arise has increased significantly. As the number of different legal regimes grows, so too does the complexity for individual maritime and security operators seeking to navigate them—a problem likely only to worsen in the immediate future.

Although few might argue with private shipping interests expending their own (often significant) resources to protect their interests and security, thus removing that burden from States, the increasing weaponization of merchant ships is an issue that should not be ignored. So far, serious incidents and jurisdictional conflicts have been avoided, partly by using practical measures such as the dumping of weapons at sea or the anchoring of floating armories beyond the boundaries of littoral State jurisdiction. Nevertheless, safety and security at sea should not be left to float or sink on such practical maneuvering. A solid regulatory bedrock to adequately govern armed private security personnel is required to protect all legitimate maritime actors, including those personnel themselves.

PCASP form an effective deterrent and protective force: with the UNODC reporting that no ship fielding such guards had been successfully taken by pirates as of 2019.¹²⁷ The PMSC armed guard genie is thus well and truly out of its bottle; and it will not be going back in, especially in today’s world of heightened security threats.

In the end, if regulation is to come, it can only come from States, either directly or via the IMO. At present, such a development does not appear likely; nor, indeed, a priority. Perhaps then, in the short term, the answer lies in soft, non-legally binding but widely recognized instruments, such as the IMO’s MSC’s guidance, ISO 28007-1:2015, and the shipping industry’s own BMP5. More useful may be an equivalent of the Montreux Document to help stimulate future practice, but one reflective of the roles of PMSCs in a security and law enforcement context—especially a maritime one—not set against a backdrop of armed conflict.

¹²⁷ UNODC, *supra*, note 106, at 4.

ARMED TO THE TEETH: NAVIGATING THE MURKY WATERS OF INTERNATIONAL LAW AND PRIVATE MARITIME SECURITY

Vol. 1 – 2024

Ultimately, perhaps ‘security issues’ at sea such as piracy and robbery are best categorized as just that: law enforcement. Whether private actors should play a role—any role—in such processes may well be debatable. Yet for now, at least, that debate has passed unargued. Real questions concerning the private use of force at sea do, however, remain. There was a reason, after all, why the frustrated community of States ultimately outlawed privateering. That, though, remains a matter for a future voyage.