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The Board of Editors encourages the submission of legally relevant manuscripts by legal scholars and practitioners as well as those versed in other disciplines relevant to law, such as criminology, sociology, political science and economics.
The *Erasmus Law Review* usually commissions articles around specific themes, although 'calls for papers' on specific topics might be issued occasionally and will be published on the Review's website. All prospective articles are submitted to double-blind peer review (two reviews per article), and final publication is dependent on the outcome of these reviews.

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Introduction by the Editorial Board - Piracy

Michiel van der Wolf

To some readers the subject of piracy may have a somewhat romantic ring to it. This may be understood from a literary and cinematographic perspective, because piracy has a history of being portrayed in a romanticized fashion from Treasure Island to the Pirates of the Caribbean series. But also from a societal and legal perspective, piracy may be regarded with a touch of romanticism. For example, the Buccaneers consisted of adventurers, exiles and runaway slaves and formed 'floating' societies, which were – as plunderers albeit outlawed from a mainland perspective – governed by their own 'codes'. What has survived in lore as the code of Bartholomew Roberts includes rules on egalitarian sharing of the loot, social schemes for those who could not contribute due to disability or illness, no fighting, gambling or women on board, sanctions such as death or exile to a desert island for not fulfilling duties, silence on subjects of personal pasts and futures, lights out at 8pm and of course a rest day for musicians on the Sabbath.

However, the fact that these codes share similarities with those of modern 'outlawed' groups such as mobsters and motor gangs, already suggests that reality was and is less romantic than grim. Already in the seventeenth century and still in this day and age, piracy plundering is a highly damaging criminal act that is hard to prevent through law enforcement because of several international legal issues. Not only because it is still a universal and topical issue, but also because of this interplay between legal issues in several domains, such as (comparative) criminal law and international (maritime and trade) law, the subject is especially fit for discussion in our law review. Recently, especially the prevention tactic of armed on-board protection of merchant vessels is often discussed.

Therefore we invited guest editors from Denmark and the Netherlands with expertise on the issue to form their on-going comparative efforts on this subject within Europe into a coherent special issue. The body of the issue therefore consists of 'country reports' from – in alphabetical order – Denmark, Germany, Italy and the Netherlands, preceded by an article on the international legal framework. These contributions are preceded by a further introduction to the subject which also lays out the comparative methodology and completed by a concluding chapter with comparative insights. Contrary to the contributions in the body of the issue, these two chapters are shorter in length, and do not qualify as independent academic articles. Hence, these have only undergone editorial (board member) review instead of peer review.

Allow me to end on a personal note, as I am glad that I can mark the finish of a six year period in the editorial board of the Erasmus Law Review with such a prototypical issue. The characteristics of this issue, discussing important issues in a debate between jurisdictions and legal disciplines, are exactly what have made this period more than worthwhile. For what I have learned in discussions with my fellow board members, I am thankful. As I am leaving the Erasmus School of Law my farewell is a given, but I rest assured that the criminal law expertise in the Editorial Board of ELR will be adequately maintained by my successors. All the best to ELR.

Michiel van der Wolf

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Introduction by the Guest Editors - On-board Protection of Merchant Vessels against Piracy: Models of Regulation

Birgit Feldtmann, Christian Frier & Paul Mevis*

'We may be dealing with a 17th century crime, but we need to bring 21st century solutions to bear.'
Former US Secretary of State Hillary Clinton in response to the Maersk Alabama incident in 2009.[1]

1 Why This Special Issue?

Maritime piracy is commonly described as one of the oldest 'occupations' at sea. The international law on piracy has historically evolved in customary law and case law.[2] After multiple attempts to craft legislation, it succeeded with the codification of piracy provisions in the 1958 Geneva Convention on the High Seas which is largely reprinted in the UN Convention of the Law of the Sea (UNCLOS). Interestingly, it can be argued that piracy has not really been a major topic in the legal debate in last half of the twentieth century. In fact, when drafting UNCLOS it was considered whether piracy should rather be conceived as a historic phenomenon no longer of real relevance.[3] Despite those considerations, the UNCLOS' articles concerning piracy were tested in the twenty-first century, when the surge in pirate attacks around the Horn of Africa and adjacent waters led to what is widely regarded as the modern era of piracy.

Contemporary piracy is a question of utmost relevance when taking into consideration the importance that seaborne transport has for the global economy. Around eighty per cent of world trade is carried by the international merchant fleet at some stage of the logistic chain of transport. The international merchant fleet comprises of 50,000 ships and employs around 1 million seafarers. Nevertheless, the fight against piracy cannot be approached with economic interests only. Piracy is not a victimless crime, but a violent form of crime with severe consequences for seafarers and families. The fight against piracy is also about organising a safer and peaceful world by promoting and maintaining rule-of-law conditions in the countries and regions from where the pirates originate. Counter-piracy is also a form of crime control, using criminal law enforcement tools not only against pirates at sea but also against the kingpins who operate on shore.

Throughout history, the problems associated with maritime piracy and other attacks against vessels have repeatedly needed to be addressed by the international community and the shipping industry. Today, in the context of Somali piracy, this includes, inter alia, naval efforts and different forms of self-protection measures. In addition, more long-term solutions are addressed in the form of regional capacity building.[4] From 2006 until 2011, the international community and the shipping industry witnessed a substantial increase in pirate attacks and successful hijackings in the wider Horn of Africa region.[5] This led to discussions on whether there was a need for additional 'tools in the toolbox' to protect commercial ships. One of those tools discussed was the deployment of on-board protection: should vessels be protected by armed guards placed on-board commercial ships? And if this would be the case, should the guards be either state representatives (Vessel Protection Detachments [VPDs]) or alternatively private actors (Privately Contracted Armed Security Personnel [PCASPs])?

The discussion is complex and has partly been held at the international level. However, the final decision to permit armed guards or not is ultimately an issue which each flag state must determine. Accordingly, many flag states reacted to the situation by considering the questions at hand and, if necessary, by supplementing existing or crafting new legislation to accommodate the use of armed guards. Thus, flag states have chosen different approaches, which have led to a multitude of national models of regulation. Most of the models have now been

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1. Cited from A.J. Shapiro, 'Counter-piracy Policy: Delivering Judicial Consequences'.
2. *See* M. Frostad, *Voldelige Hav; Pirateri og jus* (2016) 48-66.
3. *See* A. Petrig, 'Arrest, Detention and Transfer of Piracy Suspects: A Critical Appraisal of the German *Courier* Case Decision', in G. Andreone, G. Bevilacqua, G. Cataldi & C. Cinelli (eds.), *Insecurity at Sea: Piracy and Other Risks to Navigation* (2013) 160.
4. *See* the contribution by B. Feldtmann.
5. *See* B. Feldtmann, 'Fighting Maritime Piracy; On Possible Actions and Consequences', in T. Eger, S. Oeter & S. Voigt (eds.), *Economic Analysis of International Law; Contributions to the XIIIth Travemünde Symposium on the Economic Analysis of Law (March 29-31,2012)* (2014) 174.

in place for years, and it is therefore possible to reflect on the lessons learned.

2 The Scope of This Special Issue

The aim of this special issue is to examine and discuss a selection of national models of regulation pertaining to the use of armed guards as on-board protection. Perhaps this issue is no longer considered a burning issue, both with regards to the developments of pirate attacks off the coast of Somalia and with regards to other publications dealing with similar issues; however, it is still a very real issue with very serious consequences.[6] We believe that the issues at stake continue to be of great relevance and the need for on-board protection is a subject that is not going to go away. The current debate in the Netherlands clearly illustrates this.[7] And even if Somali-based piracy appears, at least to a certain extent, to be contained, the problem is far from solved. Newer incidents and hijackings suggest that Somali-based piracy could regain its strength if the focus moves on and counter-piracy operations are terminated or considerably downsized.[8] Furthermore, piracy and other types of attacks against maritime navigation are not only a phenomenon in the waters off the coast of East Africa. For example, the current situation in the Gulf of Guinea is of major concern to the shipping industry.[9] This concern is supported by recent attacks and hijackings in the region.[10] This means that the issue of on-board protection is still ongoing. Besides this, fundamental questions of (comparative) law might become clearer in a retrospective perspective, given the different models of regulation that have been developed in the designated countries. In this respect, the special issue may identify interesting questions for further research. The discussion could also be of relevance in other fields where public-private armed protection and the call for adequate regulation in the light of state responsibility is at stake.

Our perspective in this special issue is entirely a European one, as we are only dealing with European flag states. All of the chosen states perceive themselves as states with major shipping interests (even if their fleet is not among the largest). Furthermore, all of the states are members of the EU and the Council of Europe and share common international human rights obligations. All flag states have at some point taken active part in counter-piracy operations in the region of the Horn of Africa and in the international fora for cooperation, such as the Contact Group on Piracy off the Coast of Somalia (CGPCS).[11]

The European regulatory models discussed in this special issue are those of Denmark, Germany, Italy and the Netherlands. These states have been chosen because they could be perceived as a kind of 'blueprint' for quite different approaches: Denmark has allowed a PCASP model with very little state control and limited explicit regulation. Germany has chosen a PCASP model with quite tight regulation and state control by crafting a comprehensive legal framework, whereas Italy first introduced a hybrid model, but later turned to an exclusive PCASP model. Finally, for a considerable time, the Netherlands opted for an exclusive VPD model ('VDP only') but will soon introduce a hybrid model. Consequently, the models of regulation discussed in this special issue differ in view to what could be called the 'level of privatisation'; we will return to this question in the final contribution of this special issue.

3 The Content of This Special Issue

The different national regulatory models presented and discussed in this special issue have, as mentioned earlier, been created at the flag state level. Nevertheless, the development of those regulations did not materialise completely isolated from the international sphere. They were developed within the general principles and the framework of the international law of the sea. This special issue therefore begins with a contribution on the international perspective in connection with the issue of on-board protection and flag state regulation. This contribution by *Birgit Feldtmann* serves two purposes. First, it aims at briefly introducing the problem of piracy, the issues at stake and the reactions towards the problems at hand at the international level. Second, it discusses the international legal framework under which flag states draft their regulation of the matter at hand, as well as relevant international soft law instruments influencing the national level.

The main part of this special issue looks at the four country reports in the following order: the Danish model by *Christian Frier*, the German model by *Tim R. Salomon*, the Italian model by *Giorgia Bevilacqua* and the Dutch model by *Paul Mevis* and *Sari Eckhardt*. This order is based on the intensity of the above-mentioned

6. *See e.g.* the special issue of 46(2) *Ocean Development & International Law* (2015).
7. *See* the contribution on the Netherlands by P.A.M. Mevis and S. Eckhardt.
8. NATO Operation Ocean Shield was, *e.g.* concluded in December 2016, available at: https://www.mc.nato.int/missions/operation-ocean-shield.aspx
9. *See* Danske Rederier (*Danish Ship Owners*), 'Piracy', *Policy Paper* September 2017.
10. On the development *see* Oceans Beyond Piracy (OBP), 'The State of Maritime Piracy 2017', available at: http://oceansbeyondpiracy.org/reports/sop/east-africa
11. On CGPCS, *see* U. Trolle Smed, 'Small States in the CGPCS: Denmark, Working Group 2, and the End of the Debate on an International Piracy Court', *Working Paper of the Lessons Learned Project of the Contact Group om Piracy off the Coast of Somalia (CGPCS)*, s. 3 f, available at: http://www.lessonsfrompiracy.net/files/2015/03/Smed-Small-states-in-the-CGPCS-Denmark.pdf and B. Feldtmann, 'Jura som et led i dansk aktivistisk udenrigspolitik til søs', *Økonomi & Politik* 13, at 19-20 (2017).

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privatisation factors, starting with Denmark with its rather strong ties to the shipping industry, to delegation of competence and concluding with the Netherlands, which has (at least for the time being) a very low privatisation factor. The general similarity between the four flag states is that they have debated the questions at hand and allowed for some kind of on-board protection of merchant vessels. However, the chosen approaches towards on-board protection do vary quite strongly between these countries.

The four country reports do speak for themselves: the basic question to be answered in all of the country reports is what kind of on-board protection is allowed and how, and to which extent, this is regulated. The country reports differ in their structure to a certain extent. However, they all give a brief insight into the domestic discussions on the issues at hand and the development towards the chosen national approach. They all outline the legal framework for employing on-board protection and provide insight into the involvement of public authorities in the process. They also raise the specific question of the regulation of the use of force and the question of the relation and division of responsibilities between the master and the team leader to a certain extent. If relevant, the country reports are illustrated with specific examples and incidents within the chosen model.

The final contribution of this special issue is by *Feldtmann, Frier* and *Mevis* and reflects on some selected cross-cutting issues in connection with on-board protection of merchant vessels and the chosen approaches based on the country reports. It also highlights the perspective of the lessons learned so far.

4 Some Concluding Remarks

With this special issue of the *Erasmus Law Review*, we hope to contribute to the wider discussion of maritime security and specifically to the debate on the practical solutions and legal instruments for dealing with the problem of maritime piracy (or other attacks on vessels) and to the debate on the use of force and the adequate regulation of the use of force.

The idea of this special issue project is closely linked to – and is a part of – the Danish research project '*Policing at Sea (PolSEA)*' under the Danish Independent Research Fund. We are grateful that the Danish Independent Research Fund supports the PolSEA project and thereby made this publication possible.

We would also like to thank our authors for their valuable contributions; without their willingness to share their valuable knowledge and to invest their time and energy, this contribution would not be possible. Furthermore, we would like to thank the anonymous peer reviewers for their helpful comments. Finally, we would also like to thank the board of editors of the *Erasmus Law Review* for the opportunity to publish this special issue and for their support during the process.

Aalborg, Odense & Rotterdam
Birgit Feldtmann, Christian Frier & Paul Mevis

On-board Protection of Merchant Vessels from the Perspective of International Law

Birgit Feldtmann*

Abstract

The power to regulate on-board protection of merchant vessels lies with the flag state. However, the national models of regulation are not developed in a unilateral vacuum. In fact, the whole concept of flag state jurisdiction and legislative power has to be understood and exercised on the national level in close relation with the general regime of the international law of the sea. The aim of the article is therefore two-fold: first, it aims to provide a background for the country reports in this special issue by giving a brief insight into the problem of piracy in the twenty-first century and the international approaches towards this problem. Here the article also provides an insight into the legal background by presenting the concept of piracy in the law of the sea and connected law enforcement powers. Thus, this part of the article provides the overall context in which the discussions concerning on-board protection and the development of national regulations have occurred. Second, the article analyses the issue of on-board protection from the perspective of the legal framework in international law, as well as relevant international soft-law instruments, influencing the development on the national level. On-board protection of vessels as such is not regulated in the international law; however, international law provides a form of general legal setting, in which flags states navigate. Thus, this article aims to draw a picture of the international context in which flags states develop their specific legal approach.

Keywords: Piracy, international law, law of the sea, on-board protection of merchant vessels, use of force

1 Introduction

As mentioned in the introduction to this special issue, the power to regulate on-board protection of merchant vessels is placed on the flag state level. This does not mean that national models of regulation are developed in a unilateral vacuum. On the contrary, it can be argued that the whole concept of flag state jurisdiction and legislative power has always to be understood and exercised on the national level in close relation with the general regime of the international law of the sea and the particular system of governance set out in the UN Convention on the Law of the Sea (UNCLOS).[1] Furthermore, while the issue of on-board protection has to be – and in many flag states is – addressed on the national level, it has also been a topic high on the international agenda. It has been – and still is – a subject of international discussions, considerations and also of some forms of rule-making in different international fora. Against this background, it seems rather necessary to introduce a special issue on national models of regulation of on-board protection of merchant vessels with an international perspective.

The aim of this contribution is basically two-fold. First, it aims to provide a background for the four country reports in this special issue by giving a brief insight into the problem of piracy in the twenty-first century and the international approaches towards the problem. Second, this article provides an overview on the issue of on-board protection of merchant vessels from the perspective of the international law framework, as well as relevant international soft-law instruments, influencing the development on the national level. In this context, the contribution also provides an insight into the legal background by presenting the concept of piracy in the international law of the sea and connected law enforcement tools. This might not seem directly relevant in connection with the specific questions of on-board protection by private actors; however, it is relevant as the over-all context, in which the discussion on on-board protection is taken. In addition, as the country reports in this special issue illustrate, not all flag states have been initially turning to a model of regulation which is based on the involvement of private actors.

The international law perspective of this article raises a number of central questions, such as the use of force and the right to self-defence, which are at the core of the issues at stake in connection with on-board protection. On-board protection of vessels as such is not explicitly regulated in the international law of the sea; however, international law provides a kind of general legal setting in which flag states navigate. Thus, this contribution aims to draw an overall picture of the international context in which flag states developed their specific legal approach towards on-board protection.

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1. United Nations Convention of the Law of the Sea (adopted on 10 December 1982 and entered into force on 16 November 1994), 1833 UNTS 397.

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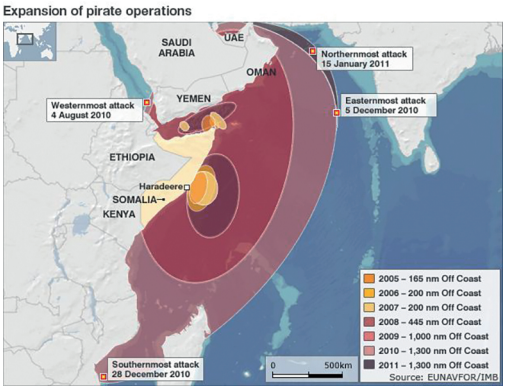
2 The Somali Problem of Piracy and the Approach of the International Community

The development of the models of regulation of on-board protection of merchant vessels in Denmark, Germany, Italy and the Netherlands is closely linked to the development of the problem of piracy in the Horn of Africa region at the beginning of the twenty-first century. While piracy was never fully eradicated on the oceans, in the legal debate of the twentieth century it was – as mentioned in the introduction to this special issue – primarily perceived as a historical phenomenon.[2] At the start of the new millennium, piracy and other forms of attacks against ships were, however, not necessarily perceived as a historical phenomenon by seafarers. It was a form of maritime crime occurring in different regions of the world, such as the waters in South-East Asia (Malacca Strait), the Caribbean and in West and East African waters and therefore a risk to be considered for seafarers, ship owners and insurers. Nevertheless, it was particular the *Somali problem of piracy*, meaning piracy activities launched from Somalia into the waters of the Horn of Africa region and wider Indian Ocean region, which put piracy on the international agenda and, in particular, triggered the development of national models of on-board protection of merchant vessels.

2.1 The Somali Problem of Piracy

The reasons for focusing on the East African problem of piracy are multifaceted, but could be summed up by the following points: first, from the early years of the millennium and up to 2010-2011, the world witnessed a substantial increase in piracy attacks and hijackings in the waters of the region of the Horn of Africa.[3] At the same time, the radius of operation of Somali pirates was substantially widened. While the first attacks were registered close to certain parts of the Somali coast and in rather limited geographical areas (mostly in the Somaliland and Puntland coastal areas), attacks by Somali pirates were later registered in a vast area of the Indian Ocean. The widening of radius of operation of Somali pirates was connected to the pirates' use of – often hijacked – mother ships as a base for their illegal activity. The development of the Somali problem of piracy up to March 2010 was very illustratively visualised by EU NAVFOR and published in an Internet article by the BBC[4]:



In addition, part of the wider context of the Somali problem of piracy is that the increase in piracy attacks happened in a geographical area which is quite crucial for world trade: the passage from Asia via the Suez Channel to Europe. It was estimated in 2005-2006, when Somali piracy was seriously starting to present itself as a growing problem, that about 7.5 per cent of the world's seaborne transportation – about 18,000 vessels per year – navigated through the Suez Channel.[5]

The second reason for focusing on the Somali problem of piracy is that Somalia, the state in which the pirates were based and from which their unlawful activities were launched, could be – at least at that time – be categorised as a 'failed state'.[6] In the context of counter piracy, this means that the coastal state, which in the general regime of the law of the sea should play a crucial role in fighting piracy, was unable to secure its own waters, prevent its citizens committing acts of piracy or to initiate acceptable criminal proceedings against suspected pirates.[7] Thus, Somalia was basically allowing the international community take the lead.[8]

Third, Somali pirates developed a specific modus operandi for their criminal activity, which not only included different forms of violence and robbery against ships but also the long-term hijacking of vessels and kidnapping of crews with the aim of obtaining the payment of a substantial ransom by the ship owner. Thus, Somali piracy developed into 'big business', supported by well-organised criminal networks on the mainland.[9]

2. *See* R. Geiß and A. Petrig, *Piracy and Armed Robbery at Sea; the Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford, 2011), 40, who are referring to the discussions under the UN Conference on the Law of the Sea.
3. *See* B. Feldtmann, 'Fighting Maritime Piracy; on Possible Actions and Consequences', in T. Eger, Oeter & Voigt (eds.), *Economic Analysis of International Law; Contributions to the 13th Travemünde Symposium on the Economic Analysis of Law, 29-31 March 2012* (2014) 175.
4. BBC News, 1 April 2010, 'Kenya Ends Trials of Somali Pirates in Its Courts', available at: http://news.bbc.co.uk/2/hi/africa/8599347.stm (last visited 1 April 2019).
5. Berlingske, 13 September 2006, 'Fakta: Suez-kanalens historie', available at: https://www.berlingske.dk/videnskab/fakta-suez-kanalens-historie (last visited 1 April 2019).
6. J.P. Pham, 'The Failed State and Regional Dimensions of Somali Piracy', in B. van Ginkel and F.-P. v.d. Putten (eds.), *The International Response to Somali Piracy; Challenges and Opportunities* (2010) 31 ff.
7. *See* Feldtmann, above n. 3, 174.
8. *See* further below in Section 3 on SC resolution.
9. *See* UNDOC, 25 May 2011, 'Awash with Money – Organized Crime and Its Financial Links to Somali Piracy', available at: https://www.unodc.org/unodc/en/frontpage/2011/May/awash-with-money---organized-crime-and-its-financial-links-to-somali-piracy.html (last visited 1 April 2019). On the cost connect to maritime piracy *see, e.g.*: Oceans Beyond Piracy, 'The Economic Cost of Somali Piracy, 2012' (2013), available at: http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report_3.pdf (last visited 1 April 2019).

2.2 The International Approach towards the Somali Problem of Piracy

The response of the international community and the maritime stakeholder towards the Somali problem of piracy has been multifaceted. The overall discussions and coordination of the combined efforts against Somali piracy take part under the auspices of the *Contact Group on Piracy off the Coast of Somalia* (CGPCS),[10] which over time has been divided into a number of (changing) specific working groups. The CGPCS can be described as a governance mechanism that was created to ensure coordination of the responses to Somali piracy off the coast of Somalia. States, international organisations, NGOs and the industry use this forum to develop common and coordinated responses to piracy.[11] The CGPCS was created in 2009 pursuant to UNSC Resolution 1851, which encourages '… all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia coast; ….' The CGPCS was subsequently initiated by twenty-four states and developed over time into a strong governance mechanism including seventy states and nineteen organisations (both inter-governmental organisations and NGOs/private organisations).[12] The approaches discussed under the CGPCS and implemented under different schemes[13] are basically based on three pillars.

First, international naval cooperation to combat piracy and to secure a safe transfer in the Internationally Recommended Transit Corridor (IRTC) in the Gulf of Aden and the Indian Ocean. There have been three major international naval operations which at least in part had a counter-piracy mandate: Combined Task Force (CFT 151) under the multinational naval partnership Combined Maritime Force (CMF), NATO's Operation Ocean Shield and EU NAVFOR's operation Atalanta. Furthermore, a number of states, for example India, South Korea, Russia and China, which are not directly involved in these multinational operations, have deployed naval vessels in the region and have been closely working with the other stakeholders to combat piracy.[14] To enhance the cooperation and communication and to avoid conflict between the different stakeholders an informal mechanism was established: the *Shared Awareness and Deconfliction Mechanism (SHADE)* was established in 2008 to bring together both the multinational counter-piracy operations and states operating independently. One major tool under SHADE is the military communication system MERCURY, which is a kind of 'chat room type' communication tool accessible for all SHADE members enabling direct and 'real time' communication.[15] The international naval cooperation in the region is rather striking in this respect, as it involves various states cooperating and working quite closely together, allied by the aim to combat piracy; states that in other geopolitical contexts are not necessarily cooperating at all.

The second pillar in the effort to deal with the problem at hand is capacity building on land. This approach is based on the analysis that piracy is a crime which is committed at sea, but which has its root causes on land. Thus, a long-term, sustainable solution to Somali piracy depends not only on repressive operations at sea but also on long-term capacity building at land to deal with the piracy-supporting structures and to provide alternative occupation for the local population. It also involves the establishment of reliable law enforcement structures based on the rule of law on land and at sea.[16]

The third pillar is self-protection of the shipping industry. The shipping industry and other maritime stakeholders have developed a number of recommendations and guidelines to prepare vessels and crews for navigating in high-risk areas and to prevent successful piracy attacks.[17] Those recommendations include, for example, guidelines on threat assessment, navigation, training and the 'hardening of the vessel'. The 'hardening' can for instance be archived by securing the vessel against unwanted access with razor wire and other measures such as water spray rails. One possible means in the industry's self-protection approach is the use of armed on-board protection either by Vessel Protection Detachment (VPDs) or by Privately Contracted Armed Security Personnel (PCASPs) provided by a Private Maritime Security Company (PMSC). The issue of on-board protection and, in particular, the use of PCASPs, is far from uncontroversial, and guidelines usually avoid explicitly recommending or encouraging the use of PCASPs. The shipping industry's *Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea, version 5 from June 2018 (BMP5)* is, for example, stating that it 'does not recommend or endorse the general use of PMSCs on-board merchant ships; this is a decision taken by the individual ship operators where

10. The author has since 2013 been involved in the work under CGPCS as a legal advisor to the legal working group (WG2 on legal issues), a participator in the Lessons Learned Project and a member of the Danish delegation.
11. *See* information on the GCPCS's website, available at: www.lessonsfrompiracy.net (last visited 1 April 2019).
12. C. Bueger, 'Responses to Contemporary Piracy: Disentangling the Organizational Field', in D. Guilfoyle (ed.), *Modern Piracy: Legal Challenges and Responses* (2013) 98.
13. *Ibid*., 96-113.
14. *See* M. Buch, 'Managing Pirates; Mandate, Detention and International Aspects', in P. Vedel Kessing and A. Laursen (eds.), *Robust mandat; juridiske udfordringer ved danske militære missioner i det 21. århundrede* (2016) 323 ff.; B. Feldtmann, 'Jura som et led i dansk aktivistisk udenrigspolitik til søs', *Økonomi & Politik 2017*, 1415 (2017).
15. *See* C. Bueger, 'Responses to Contemporary Piracy: Disentangling the Organizational Field', in D. Guilfoyle (ed.), *Modern Piracy: Legal Challenges and Responses* (2013) 106.
16. *See, e.g.*, the Danish Counter-piracy Strategy for the years 2011-2014: 'Strategy for the Danish counter-piracy effort 2011-2014', 29-39. The Strategy is available at: http://um.dk/en/foreign-policy/piracy/ (last visited 1 April 2019).
17. *See, e.g.*, BMP 5 (Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea, version 5 from June 2018), which will be briefly introduced below.

permitted by the ship's Flag State….'[18] However, it can be argued that some factors, for example, insurance policies, might in fact encourage or even prescribe the use of PCASPs.[19] The issues of on-board protection in general and PCASPs in particular has also been on the international agenda under the CGPCS. Real consensus was never reached in this matter apart from the general consensus that the issue first of all should be dealt with at the flag state level. Nevertheless, the issue of an international legal framework for PCASPs is still occasionally raised in international discussions.[20]

In conclusion, it can be argued that the combined efforts of all of the stakeholders against Somali piracy under the three pillars have been a general success: at the height of Somali piracy in January 2011, 736 hostages and 32 ships were held by pirates, and by October 2016,[21] no hostages or ships were held. This could lead to the conclusion that the problem has been solved and no further action is needed. This is a conclusion which is feared and challenged by the shipping industry, which has pointed out that the problem is not solved but has only been effectively contained. If the efforts are terminated, Somali piracy would most likely regain strength because its root causes and supporting structures still exist on the mainland. This conclusion is supported by the fact that Somali pirates managed to hijack a vessel in March 2017 and that there has been an increase in the registration of piracy attacks in 2017 and 2018.[22] Also in 2019 attacks by Somali pirates have been registered.[23]

It can also be argued that the positive effects of the three-pillar approach might have an unintended side effect with regard to on-board protection. It seems that the states' willingness to engage in counter-piracy operations is decreasing. Fewer vessels are deployed in the region, and NATOs Operation Ocean Shield was terminated at the end of 2016. EU NAVFOR's operation Atalanta has been extended to the end of 2020; however, the naval capacity under Atalanta has been reduced quite substantially in recent years.[24] This means that the shipping industry's efforts are even more crucial than before and might lead to the mind-set that on-board protection is unavoidable.

18. BMP 5, Section 5 (Ship Protection Measures), 22.
19. The role of insurers in connection with the problem of piracy is analysed by A. Shortland, *Kidnap; Inside the Ransom Business* (2019).
20. *See, e.g.*, Final Communiqué of the 21st Plenary Session of the CGPCS (12-13 July 2018), para. 20, available at: www.lessonsfrompiracy.net/files/2018/07/Communique-of-the-CGPCS-21st-Plenary-Session.pdf (last visited 1 April 2019).
21. EU NAVFOR, Operation ATALANTA, available at: https://eunavfor.eu/mission/ (last visited 1 April 2019)
22. *See* Danske Rederier (Danish Ship Owners), Policy Paper 'Piracy', November 2018.
23. EU NAVFOR, 24 April 2019, 'Piracy Attack Deterred off the Coast of Somalia', available at: https://eunavfor.eu/piracy-attack-deterred-off-the-coast-of-somalia/ (last visited 1 May 2019).
24. For example are currently only two naval vessels deployed under Atalanta, *see*: EU NAVFOR, available at: https://eunavfor.eu/deployed-units/surface-vessels/#news-tabs (last visited 1 April 2019).

3 The Concept of Piracy in International Law and Connected Obligations and Powers

As mentioned in the introduction to this special issue, piracy is by far not a new concept; not in practical terms for seafarers or in a legal sense. Today's perception and codification of piracy dates back to the legal discussions and consideration that took place at the beginning of the twentieth century. Piracy and related obligations and enforcement powers were first codified in the 1958 Convention on the High Seas, which was based on the Harvard Draft Convention on Piracy of 1932. The piracy provisions of the 1958 Convention on the High Seas were subsequently incorporated into UNCLOS with only minor changes.[25]

The starting point for today's international approach towards piracy is set out in Article 100, which emphasises that all states '… shall cooperate to the fullest possible extent in the repression of piracy …'. The concept of piracy in international law is defined in Article 101 ('definition of piracy'):

> Piracy consists of any of the following acts:
> 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;
> ii. against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;….

The definition in Article 101 entails a number of elements that are central in order to determine whether a certain activity is piracy in the sense of international law or not. Subsections (b) and (c) of Article 101, here not quoted, are widening the piracy definition to certain acts of participation, inciting or facilitating.[26] The determination of an act as piracy according to Article 101 is a precondition for states' legitimate use of UNCLOS' counter-piracy powers which are granted in the following articles.[27] Piracy is in Article 101 defined by a number of unlawful acts (acts of violence, detention or depredation) which are carried out from one ship to another (so-called two-ship requirement). These two criteria have not given rise to real challenges in the context of problem in the Horn of Africa region, as the attacks are usually committed from small skiffs or open whalers under the use of firearms or rocket propelled grenades

25. *See* Geiß and Petrig, above n. 2, 37 ff.
26. T. Treves, 'Piracy and the International Law of the Sea', in D. Guilfoyle (ed.), *Modern Piracy; Legal Challenges and Responses* (2013) 120 f.
27. Geiß and Petrig, above n. 2, 59 ff.

(RPGs).[28] More challenging is Article 101's requirement that these acts be committed 'for private ends'. The question at hand is, albeit slightly simplified, whether the criterion excludes all actions that have not exclusively an enrichment purpose but, for example, are carried out on the basis of political/terrorist motives. The opposite argumentation is that the criterion should be understood as a delimitation between state-initiated or state-sanctioned actions and actions made by private individuals.[29] The question of the interpretation of the 'for private ends' criterion is relevant in the context of Somali piracy as it would be decisive for the determination of whether the international community is dealing with piracy in UNCLOS' sense or not if there could be a proven connection between Somali pirate groups and the terrorist organisation Al Shabaab. In practice, however, it is widely assumed today that Somali pirates fall under the 'for private ends' criterion and the international counter-piracy operations are based on that assumption.[30] The last central criterion in Article 101 is that the specific acts must be committed 'on the high seas' or 'outside the jurisdiction of any state'. This means that piracy can only be committed outside territorial waters. If the same actions are committed within territorial waters, these are typically referred to as 'armed robbery at sea' or similar terminology.[31] Against those acts, which are very similar to piracy but committed in territorial waters, UNCLOS' counter-piracy powers cannot be used. The reason for this geographical limitation in the definition of piracy is that actions in territorial waters in principle are subjected to the coastal state's jurisdiction and enforcement powers and thus not a shared responsibility of all states.

In connection with piracy in the Horn of Africa region, the geographical limitation of UNCLOS has to a certain extent been evaded, since two Security Council Resolutions, SC Res. 1846 (2008) and 1851 (2008), blur the difference between piracy and 'armed robbery at sea' by allowing, under specified circumstances, the possibility of counter-piracy operations by other states both in Somali waters and on Somali soil.[32] The specific powers granted by SC Res. 1846 (2008) and 1851 (2008) have been time-limited, but are frequently renewed, latest with SC Res. 2442 (2018).[33]

3.1 UNCLOS' Counter-piracy Powers

The starting point for the states' counter-piracy powers is that there is an initial suspicion of piracy or a suspicion that a given ship is a 'pirate ship' (Art. 103), meaning it is a ship being used for piracy activities as defined in Article 101 or is controlled by pirates. The initial requirement for using UNCLOS' counter-piracy powers against another ship and the persons on board is a 'reasonable ground for suspecting' an engagement in piracy. If this suspicion is confirmed, UNCLOS grants a number of specific law enforcement powers, such as rights to visit, inspection and boarding, and the search and seizure of items on board (Arts. 105 and 110). The general principle here is that the enforcement powers are extended proportionally to an increasing confirmation of the suspicion. If the suspicion cannot be confirmed in due course, no further law enforcement actions can be taken.[34] If the suspicion is confirmed, Article 105 grants every state the right to 'seize a pirate ship … and arrests the persons'. The Convention does, however, not contain any further provisions on such arrest; for example, the issue of legal control in connection with detention is not addressed in UNCLOS.[35] UNCLOS also states that 'The courts of the State which carried out the seizure may decide upon the penalties to be imposed…. This means that UNCLOS' provisions include an explicit right for states to arrest persons suspected of piracy and to initiate criminal proceedings in the state's domestic courts. While the wording in UNCLOS could indicate an exclusive right of the seizing state, state practice indicates that the right to initiate criminal proceedings is not understood as being exclusively granted to the seizing state and suspected pirates have in fact been transferred between different states on a somewhat questionable legal basis.[36]

While UNCLOS provides provisions on a number of counter-piracy powers, it does not explicitly deal with the question of the use of force in counter-piracy operations or otherwise. It is, however, argued with reference to other international legal instruments, in particular the nonbinding *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (UN Basic Principles)*,[37] and to the case law of the International Tribunal of the Law of the Sea (ITLOS), in particular the *M/V Saiga Case No. 2*,[38] that the use of proportional force as a last resort is implicitly permitted under UNCLOS and therefore also permitted in the context of counter-piracy operations.[39] In relation to the question of the use of force in counter-piracy operations, it is relevant to point out that UNCLOS emphasises that counter-piracy operations can only be carried out by state actors and in particular by military entities. Article 107 provides that

28. *See* BMP 5, 4.
29. *See* D. Guilfoyle, 'Counter-Piracy Law Enforcement and Human Rights', 59(1) *International and Comparative Law Quarterly* 143 (2010).
30. Feldtmann, above n. 3, 179.
31. *Ibid.*, 178 f.
32. Geiß and Petrig, above n. 2, 70 ff.
33. Resolution 2442 (2018), para. 14, from November 2018 is granting the powers for further thirteen months.
34. B. Feldtmann, 'Pirateribekæmpelse i komplekse juridiske farvande', in S. Bønsig, T. Elholm, S.S. Jakobsen & L.W. Lentz (eds.), *I forskningens og formidlingens tjeneste* (2018) 101.
35. *Ibid.*, 105 ff.
36. *See* A. Petrig, *Human Rights and Law Enforcement at Sea; Arrest, Detention and Transfer of Piracy Suspects* (2014) 315 ff.
37. The UN Basic Principles are a 'soft law instrument', which was adopted by consensus of 127 states in 1990, *see* A/CONF.144/28/Rev1 (7 September 1990).
38. M/V Saiga (No.2), *San Vincent and the Grenadines* v *Guinea*, ITLOS Case No. 2 (1999).
39. Geiß and Petrig, above n. 2, 69. *See* also D. Guilfoyle, 'Prosecuting Somali Pirates: A Critical Evaluation of the Options', 10(4) *Journal of International Criminal Justice* 773-4 (2012); D. Guilfoyle, 'The Use of Force against Pirates', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 1063 ff.

> A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

This means that only military units, in practice mainly navies, are granted UNCLOS' law enforcement powers and therefore are enabled to conduct counter-piracy operations. In connection with the military's role in combating piracy it should be noted that the use of UNCLOS' powers against piracy happens in a *law enforcement context* and not in the context of an armed conflict. This means that it is a policing task, an issue of crime control and that 'the laws of war' do not apply.[40] The overall framework for a given counter-piracy operation will be further elaborated and concretised in the specific mandate of the operation and its associated *Rules of Engagement*, and further in the mandate defined by the national parliament for its own forces.[41]

The fact that UNCLOS places the counter-piracy powers, and therefore indirectly also the connected right to use proportional force, on naval entities does not exclude the existence of an individual right of self-defence against a piracy attack. The concept of individual self-defence raised here is not to be mixed with the concept of the state's right to self-defence under Article 51 of the UN Charter. The individual right of self-defence is as a starting point based in domestic law (*e.g.* in the flag states' legislation or legal principles); thus, certain differences in the scope and application of the right to self-defence might occur.[42] It can be assumed that many flag states might permit the use of deadly force in self-defence as a last response to an imminent danger to life, but it is more questionable if states, for example, also permit the use of deadly force to defend property.[43]

The individual right to self-defence as a legal concept is not only rooted in a given state's national legal system but is also accepted as a concept in international law, for example, in Article 31(1) of the Rome Statute.[44] From a general perspective, it can be argued that the individual right to self-defence is (indirectly) based on, or at least closely connected to, the individual right to life. The line of thought can be summarised as follows: Article 2 of the European Convention on Human Rights (ECHR) is protecting the right to life, both of the 'innocent' citizen and the 'wrong doer'. Article 2(II) is explicitly stating that the taking of a life by a state representative '…shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary … in defence of any person from unlawful violence'. This implies that the protection of the individual right to life of the 'innocent victim' can justify the taking of the life of the 'wrongful attacker'. Article 2(II) is directed at states, but it can be argued that the provision is also indirectly implying that there is a right to individual (personal) self-defence. It is in this context argued that human rights law seems to indicate that states actually may not prohibit proportional individual self-defence altogether; however, the right to life of the 'wrong doer' implies that states must ensure tight, proportional boundaries to individual self-defence rights.[45]

The issue of the individual right to self-defence was also raised in the legal debate under the discussions under the ILC in connection with Article 45, which is the predecessor of UNCLOS's Article 107. Under the discussions, it was emphasised that the placing of counter-piracy powers exclusively on states, represented by military entities, does not apply 'in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defence, overpowers the pirate ship and subsequently hands it over to a warship…. This is not a "seizure" within the meaning of this article.'[46] This statement is interesting for at least two reasons; first, it confirms that the counter-piracy powers granted to states do not exclude the exercise of the individual right to self-defence against piracy attacks. It is accepted that merchant ships (*e.g.* the persons on board) have a right to self-defence and can exercise this right; this is a crucial precondition for the employment of PCASPs on merchant vessel. Second, it places a right to a civil arrest on non-state actors exercising the right of self-defence.

3.2 SUA Convention

The counter-piracy powers under UNCLOS are supplemented by other international legal acts. One legal instrument, which is of special importance in the Horn of Africa context is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention).[47] The SUA Convention is not directly aimed against acts of piracy, but more generally against unlawful attacks against ships; its history is closely linked to the *Achille Lauro* incident of 1985, which highlighted some limitations of the existing regulatory system.[48] The background of the SUA Convention is thus linked to terrorist attacks against ships and this background is also evident from its preamble. This

40. M. Buch, 'Håndtering af pirater; mandat, frihedsberøvelse og internationale aspekter', 330 ff. and L. Plum, 'Håndtering af pirater; tilbageholdelse/frihedsberøvelse/varetægtsfængsling, retsforfølgning m.v.', 349 ff., both in P. Vedel Kessing and A. Laursen (eds.), *Robust mandat; juridiske udfordringer ved danske militære missioner i det 21. århundrede* (2016). *See* also D. Guilfoyle, 'The Laws of War and the Fight against Somali Piracy: Combatants or Criminals', 11 *Melbourne Journal of International Law* s. 1 ff. (2010) and C. Oehmke, *Der Einsatz privater Sicherheitsdienste auf Handelsschiffen zur Abwehr gegen Piraterie* (2016) 137-72.
41. *See* Buch, above n. 40, 322 ff. and Feldtmann, above n. 3, 192 ff.
42. *See* Oehmke, above n. 40, 184-5.
43. *See* Guilfoyle, above n. 39, 1067-1068.
44. Rome Statute of the International Criminal Court (17 July 1998; in force on 1 July 2002; United Nations, Treaty Series, Vol. 2187, No. 38544 (last amended 2010).
45. *See* J.A. Hessbruegge, *Human Rights Standards for Self-Defense between Private Persons* (2017).
46. ILC, 'Articles Concerning the Law of the Sea with Commentaries', 2 *Y.B Int'l L. Comm'n* 283 (1956).
47. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), adopted 10 March 1988, 1678 U.N.T.S. 221.
48. Geiß and Petrig, above n. 2, 40.

does not mean that the scope of the SUA Convention is limited to terrorist activities; it is generally aimed at unlawful acts against safe navigation. Those acts can be acts covered by UNCLOS Article 101, but the SUA Convention covers also other illegal acts against ships, for example, internal attacks (*e.g.* attacks by passengers on board) which would fail the two-ship requirement in the definition of piracy in Article 101.[49]

One issue that has been raised in connection with the SUA Convention's role in combating piracy is whether the Convention as such can be used by state actors in a counter-piracy context. The background for this discussion is that the SUA Convention in Article 2 states that the Convention does not apply to warships and other state-owned ships. It is, however, argued that this restriction is aimed at the group of vessels that the Convention is seeking to protect and which are the potential targets of the Convention's considered forms of unlawful attacks.[50] In other words, the SUA Convention aims to protect civilian ships – not state ships. The law enforcement obligations and powers provided for in the SUA Convention are in contrast targeted at states and will in practice be used by state actors, including warships and other state ships. The practices of states in the Horn of Africa region illustrate that the SUA Convention is considered by many states as a supplement to the counter-piracy powers under the UNCLOS regime, for example, in connection with the handling of suspected pirates.[51] It can, however, be questioned whether the SUA Convention adds anything to UNCLOS' enforcement powers, since the SUA Convention does not contain more specific law enforcement powers such as the stopping and boarding of foreign ships.[52] On the other hand, state practices seem to indicate that states/state authorities explicitly invoke the provisions in the SUA Convention when dealing with piracy cases, for example, in connection with the transfer of suspected pirates.[53]

Furthermore, the SUA Convention places a number of obligations on states; for example, Article 5 of the Convention requires that states criminalise a number of actions that are further defined in Article 3. Those actions, which each state has to criminalise in its own domestic legal system, include various forms of attacks against ships or their crews or passengers. These actions can be piracy but also other illegal acts outside the scope of the definition of piracy in Article 101 in UNCLOS. The illegal acts concerned include also acts committed in territorial waters if the affected ship has sailed, or intends to sail, in or out of a given state's territorial waters (Art. 4). States are obliged not only to criminalise these actions but also to have criminal jurisdiction in a number of specified situations.[54]

The SUA Convention, as mentioned above, does not directly grant states specific law enforcement powers to arrest suspected perpetrators with the exception of Article 7(2) which obligates states '…, in accordance with its law, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted', if another state issues an arrest warrant. The procedure for such detention must be in accordance with the national law of that state. The overall aim of the SUA convention is that there are no safe havens for potential perpetrators. This has led to a legal debate on whether the SUA Convention in combination with the counter-piracy provisions of UNCLOS might in fact obligate states to initiate criminal proceedings against suspected pirates in their own domestic courts. One line of argumentation is that the SUA Convention contains an *aut dedere – aut iudicare* clause which in its sum means that there is an obligation of the state of apprehension to prosecute at least if no other state is prosecuting.[55] Another line of argumentation is that it is questionable whether the SUA Convention is in fact establishing a general obligation to prosecute or only an obligation to prosecute or extradite if there is an extradition request by another state. Furthermore, it is argued that the provisions of the SUA Convention are not covering the specific situation of counter piracy and that UNCLOS' provisions (even in combination with the provisions of the SUA Convention) are not establishing an obligation to prosecute. The central argument here is that UNCLOS' Article 105 is using the term 'may' in connection with the seizing state's right to initiate criminal proceedings.[56] State practice in the Horn of Africa region indicates that states do not necessarily accept the idea of a general obligation to prosecute suspected pirates. Thus, there are several examples of a 'catch and release' approach where suspected pirates were released without any further consequences. This can be illustrated by the Danish example: Danish naval forces have seized 295 persons under the suspicion of piracy, and only 50 of those were transferred to prosecution.[57] At the same time has the establishment of a system for the prosecution of suspected pirates been a central part in the efforts under the CGPCS and resulted in what can be called 'chain of criminal justice' where one state might arrest the suspected pirates and transfers them to another state which is hosting the criminal proceedings. If convicted, the pirates get transferred to serve their sentence in Somalia.[58]

The SUA Convention does not explicitly deal with possible powers of private actors. However, the Convention

49. D. Guilfoyle, 'Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes', report prepared for *Contact Group on Piracy off the Coast of Somalia*, 26-27 August 2009 (New York: Contact Group on Piracy off the Coast of Somalia, 2009), 12.
50. *See* Guilfoyle, above n. 29, 149; Petrig, above n. 36, 44.
51. *See* A. Petrig, above n. 36, 235, on Art. 7 of the SUA Convention as a legal basis for detention.
52. *See* M. Frostad, *Voldelige Hav; Pirateri og Jus* (2016) 120 f.
53. *See* A. Petrig, above n. 36, 43-47, who herself is concluding that states cannot use Art. 8 of the SUA Convention as a basis for a delivery/transfer.
54. *See* Feldtmann, above n. 34, 103.
55. Geiß and Petrig, above n. 2, 163 f.
56. On this discussion, *see* Geiß and Petrig, above n. 2, 163 f.; Guilfoyle, above n. 49, 14 ff.; Feldtmann, above n. 3, 181 f. and 187 ff.
57. *See* Feldtmann, above n. 14, 16 ff.
58. *Ibid*., 20.

indicates indirectly the master's right to make a civil arrest in connection with attacks against his vessel since Article 8(1) provides the master with a right to hand over any person suspected of having carried out an attack on board or against his ship to any state. This must of course mean that the master can withhold the person on board until they can be handed over in due course. The SUA convention does not deal with the issue of the use of force or the right to self-defence; however, the above-mentioned principles are also applied in the context of the SUA Convention.

3.3 Summing Up

From the perspective of PCASPs it might not be of particular relevance whether a violent attack against the vessel falls under UNCLOS definition of piracy or not. Private actors are not granted any specific law enforcement powers under UNCLOS, and it is rather questionable if they indeed would be interested in such powers if those were an option. From a PCASP perspective the question of the right to self-defence as a basis for the PCASPs function on board is the central issue at stake. The conclusion from an international law perspective is that an individual's right to self-defence is generally accepted and that the particularities of such a right are determined by domestic legislation or principles. This approach might seem attractive from a domestic flag state perspective and fit fine with the general idea of exclusive flag state jurisdiction in UNCLOS Article 94(1). On the other hand, such a national approach towards the issue at hand has certain inherent risks; national concepts of self-defence vary, for example, in relation to the exact point in time when the right is triggered or to the question of whether the right is only triggered by attacks against human life or also by attacks against property. This means that an act which is a legitimate act of self-defence in one legal system is not necessarily (yet) covered by the concept of self-defence in another system. This means that PCASPs are exercising their task on board with some legal uncertainty and could in a worst-case scenario face criminal proceedings in the flag state of the vessel where the intended act of self-defence was aimed at or in the state where the attackers came from.

From a broader perspective of on-board protection of merchant vessels, the question of the definition of piracy in UNCLOS is rather crucial. If the on-board protection is carried out by a VPD model, the task of protecting a specific vessel might be combined with certain law enforcement elements which can only be exercised by state representatives. The individual's right to self-defence and the state's right of the use of force in counter piracy are not necessarily identical. Thus, the choice of approach on the national level has implications on the question of whether the employment of on-board protection on merchant vessels is only with a view to a specific protective task under the domestic right of self-defence or could be also seen in the wider context of the state's approaches and powers under counter piracy and law enforcement.

4 The Issue of On-board Protection, VPDs and PCASPs in International Law

The issue of on-board protection of merchant vessels by VPDs or PCASPs is, as mentioned earlier, not directly addressed in UNCLOS or directly regulated in other sources of international law. It can of course be considered whether the general counter-piracy powers under UNCLOS (and under other international laws) might influence the role of VPDs on merchant vessels. In this context, it is important to remember that the right to seizure under UNCLOS, as briefly raised previously, may only be enforced 'by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect' (Art. 107). This implies that if a flag state wishes to use the VPD model and seeks to combine the protection of a specific vessel with a more proactive counter-piracy approach, it might be necessary to formally put the vessel under government service and mark it accordingly. However, if the setting is not a proactive law enforcement approach it could be argued that in a responsive situation, where the pirates attack and are repelled by the VPDs, the VPDs subsequently can arrest the perpetrators and use the powers under UNCLOS even if the vessel was not in government service and marked accordingly.[59]

Another crucial question in connection with the use of VPDs is whether the government personnel on board the merchant vessel can benefit from the immunities connected to warships and government vessels under Articles 95 and 96. In this context, it has been pointed out that in a case of alleged wrongful death of a person mistakenly identified as a pirate, the state embarking the VPDs on the private vessel will be held responsible under state responsibility. Furthermore, while it could be argued for the immunity of the particular guard as a state agent, domestic courts are not necessarily following that line of thought. In the *Enrica Lexie* incident from 2012, Italian VPDs employed on an Italian merchant vessel shot dead two Indian fishermen who were mistaken for being pirates. The two Italian officers involved in the incident were brought in front of an Indian court, which denied their claim of immunity.[60]

For states which choose to opt for a PCASP model instead of a VPD model, international law has little specific guidance to offer. The law of the sea and in particular UNCLOS is not addressing the topic as such, and the international community could neither achieve any real common ground on the issues at stake in the discus-

59. *See* D. Guilfoyle, 'Commentary on UNCLOS Article 107', in A. Proelss (ed.), *United Nations Convention on the Law of the Sea: A Commentary* (2017) 758-9.

60. *See* Y. Tanaka, 'Dual Provisional Measures Prescribed by ITLOS and Annex VII Arbitral Tribunal: Reflections on the "Enrica Lexie" Incident Case', *The Global Community Yearbook of International Law and Jurisprudence* (2017) 265 ff.

sion under the CGPCS or anywhere else. This means that international law provides only a general legal background for flag state regulation, but no specific guidelines for the domestic regulation of PCASPs and their employment on board. As a result of this gap in the regulation on the international level, a body of soft-law instruments and self-regulation by the industry has been developed to address the issues at stake and to supplement flag state regulation. Those instruments include, for example, four specific IMO interim recommendations on PCASPs addressed to flag states, coastal/port states, ship owners and security companies and drafted by IMO's Maritime Security Committee (MSC).[61] Another example is the above-mentioned BMP5 drafted by the shipping industry.[62] BMP5 is not dealing primarily with the issue of PCASP as such but is providing more general recommendations '… to help ships plan their voyage and to detect, avoid, deter, delay and report attacks'.[63] BMP5 is as a starting point a nonbinding self-regulatory guidance by the shipping industry to private actors; however, as some of the country reports in this special issue indicate, BMP5 has a strong influence on national regulation, and it can even be argued that some flag states implement BMP5 in their own regulation and thereby transform nonbinding industry self-regulation into binding national legislation. This is for example the case in Denmark, where a ministerial order[64] is prescribing in its § 8 that ships have to develop their counter-piracy security procedures in the light of the recommendations of the BMP (in its most recent version). What is even more interesting is that the ministerial order in its § 13 criminalises the situation where a ship owner/operator is not following the obligations set out in the ministerial order. This could mean in its consequence that a ship owner could get punished if he is not implementing the recommendations of the BMP in the ship's security procedures.

In the context of nonbinding instruments and self-regulation two more instruments should be briefly mentioned: first, the world's leading shipping association *Baltic and International Maritime Council* (BIMCO) has developed a standard contract for the employment of security guards on vessels, the so-called GUARDCON.[65] GUARDCON seeks to regulate the contractual relationship between the ship owner and the security provider; however, GUARDCON also affects areas of public law, for example, by dealing with the relationship between the master and the team leader of the PCASP.[66] Second, the International Organization for Standardization (ISO) has developed a standard for the accreditation of Private Maritime Security Companies (PMSCs).[67]

The lack of specific regulation of PCASPs and connected questions in international law combined with the development of soft-law and self-regulation instruments leads to the conclusion that the topic of PCASPs is complex and leads to certain legal uncertainties. IMO's Maritime Safety Committee (MSC) noted in connection with their recommendations that the absence of applicable regulation and industry self-regulation coupled with complex legal requirements gives cause for concern.[68] While international law is not specifically addressing PCASP, it still provides the general framework for the governance of the oceans and for the regulation on the flag state level. This means that international law is highly relevant in connection with a number of issues which are linked to the use of PCASP, some of these will be briefly raised in the following subsections.

4.1 Weapons On-board and the Issue of Innocent Passage

One central issue which has been raised in particular with the question of PCASP, but to a certain extent is also relevant in a VPD context, is the question of whether the fact that a merchant vessel has weapons on board influences its right to innocent passage through a given coastal states' territorial waters. The right to innocent passage is one of the central elements in the balance between the coastal states interest to rule and govern its own territorial waters and flag states' interest of free navigation without any interference.[69] The right to innocent passage is codified in Article 17 and basically limits a coastal state's jurisdiction on vessels passing thought its territorial waters. Article 18 clarifies passage by stating it 'means navigation through the territorial sea for the purpose of … traversing that sea without

61. MSC.1/Circ.1443; IMO Maritime Safety Committee, 'Revised Interim Recommendations for Flag States regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (12 June 2015) MSC.1/Circ.1406/Rev.3; IMO Maritime Safety Committee, 'Interim Recommendations for Port and Coastal States regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (16 September 2011) MSC.1/Circ.1408; IMO Maritime Safety Committee, 'Revised Interim Recommendations for Port and Coastal States regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1408/Rev.1; IMO Maritime Safety Committee, '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' (25 May 2012) MSC.1/Circ.1405/Rev.2.
62. Best Management Practice to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea from June 2018 (BMP5) replacing Best Management Practice for Protection against Somalia Based Piracy from August 2011 (BMP4).
63. BMP5, 1.
64. Bekendtgørelse om teknisk forskrift om forholdsregler til forebyggelse af pirateri og væbnede overfald på danske skibe, bek. 1084/2011 (23 November 2011).
65. Baltic and International Maritime Council's standard contract for the employment of security guards on vessels (GUARDCON). *See* BIMCO's webpage, available at: https://www.bimco.org/ (last visited 1 April 2019).
66. GUARDCON, Part II, cl. 8.
67. 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 Proforma Contract), ISO 28007.
68. IMO Maritime Safety Committee (MSC), 'Revised Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1443, Annex (1).
69. *See* K. Siig and B. Feldtmann, 'UNCLOS as a System of Regulation and Connected Methodology: Some Reflections', 502 *SIMPLY (Marlus)* 74 f. (2018).

entering internal waters or calling at a roadstead or port facility outside internal waters; or … proceeding to or from internal waters or a call at such roadstead or port facility…. Passage shall be continuous and expeditious.' This means that, for example, a vessel on a journey through the Red Sea passing through a given state's territorial waters would be on a passage according to Article 18. The second criterion is that the passage must be innocent. According to Article 19(1) a passage is innocent 'so long as it is not prejudicial to the peace, good order or security of the coastal State.' This is more specified in the following Subsection (2), which lists a number of activities which result in that the passage should be considered as not innocent. In the context of armed on-board protection litra (a) and (b) are relevant in particular. Litra (a) excludes 'any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations' from the concept of innocent, while litra (b) deals with 'any exercise or practice with weapons of any kind'. This could lead to the conclusion that a passage is not innocent if weapons are on board; this would be a hasty conclusion. It is argued in the legal debate that Article 19 describes certain activities which are prejudicial to the peace, good order or security of the coastal state. The carriage of safely stored weapons on a voyage is not in itself a threat or an activity in the sense of Article 19(2) and could, for example, be compared to the carrying of dangerous cargo, which in itself does not contradict innocent passage. It is therefore not convincing to conclude that weapons on board in itself would contradict innocent passage.[70] Things get more complicated if the weapons are actually used, even in self-defence, and it is argued that the wide wording of Article 19(2) litra (b) referring to 'any exercise or practice with weapons' indicates that the use of weapons for whatever reason interferes with the concept of innocent passage.[71] And even if the use of weapons in self-defence would not interfere with the concept of innocent passage, it could still trigger the right of the coastal state to investigate the incident and exercise criminal jurisdiction under Article 27(1)(a) or (b).

In addition, the foregoing conclusions and considerations are not unopposed: the reality in the Horn of Africa region indicates, for example, that some coastal states draw a different legal conclusion and perceive safely stored weapons on board as incompatible with the concept of innocent passage with the consequence that they reserve the option of law enforcement against vessels passaging with weapons on board.[72] The legal uncertainties in connection with the carriage of weapons and the concept of innocent passage is most likely a factor in the development of so-called floating armouries, which briefly described are commercial vessels placed out of territorial waters and functioning as a kind of sea-based weapon and equipment storage facility. The establishment of floating armouries is not uncontroversial; some states in the Indian Ocean region perceive them as a protentional threat to security in the region. Floating armouries lead to a number of legal concerns and legal challenges; they are not explicitly regulated in international law and in fact subject to the general regulation of vessels and the regulation by the flag state and the state where the company is registered.[73] Nevertheless, today they are part of the reality in the wider Indian Ocean region.[74] It is therefore interesting to see whether the flag states' models of regulation of on-board protection presented in this special issue address the question of how to get weapons transported and on-board or not or even might prohibit the use of the services of floating armouries.

4.2 The Issue of the Role of the Master and the Team Leader

A very crucial, but also somewhat complicated, issue in connection with the employment of PCASPs (and to a far lesser extent of VPDs) is the role of the master and the division of powers between the master and the team leader. The problem in a nutshell can be summarised by the question of who has the final say in issuing the weapons and ordering the end of the self-defence. The starting point for the legal considerations is the general status and role of the master in the law of the sea. The master is the final authority on board. In addition, some flag states might understand the master, under certain circumstances, as a formal representative of the state. A central element in the master's function is to ensure the safety of the vessel and all persons on board. This is, for example, emphasised in the International Convention for the Safety of Life at Sea (SOLAS) Regulation 34.1: neither the owner, the charterer, the operating company nor any other person can prevent or restrict decisions taken by the master with view to the safety of life at sea. The dangers of a piracy attack are an issue of the safety of life at sea and therefore under Regulation 34.1. On the other hand, it can be argued that the master does not have the necessary training and tactical knowledge in this arena; this is the qualification the team leader and his personnel should add. Furthermore, the right to self-defence is an individual right and cannot be easily overruled by a master.[75]

These here only briefly raised aspects illustrate that the employment of PCASP creates a certain overlap or clash of competences and powers. The shipping industry and

70. Oehmke, above n. 40, 226-30.
71. *Ibid*., 230-3.
72. This conclusion was supported by a Danish questionnaire-based study conducted by the University of Southern Denmark. The results of this study are with the author.
73. Floating armouries and connected legal questions are a topic several times raised under the discussion of the CGPCS, *see, e.g.*, Final Communiqué of the 21st Plenary Session of the CGPCS (12-13 July 2018), para. 20, available at: www.lessonsfrompiracy.net/files/2018/07/Communique-of-the-CGPCS-21st-Plenary-Session.pdf (last visited 1 April 2019).
74. A. Wilpon, 'Floating Armories: A Legal Grey Area in Arms Trade and the Law of the Sea', 48 *Georgetown Journal of International Law* 873 ff. (2016).
75. *See* Oehmke, above n. 40, 201-6.

other maritime stakeholders have tried to deal with the problems at hand by issuing guidelines and thereby trying to provide for a functioning division between the role of the master and the team leader. One example is BIMCO's widely used standard contract GUARDCON, which in Clause 8 on the one hand tries to confirm the authority of the master and on the other hand puts the decision of the use of force on the team leader while the master keeps the overruling right to end the self-defence.[76] It is not certain that GUARDCON's model will solve all possible conflicts, but the example shows that the maritime stakeholders seek to create their own regulation if the law is of little guidance. It is interesting to see in the following country reports in this special issue if the issue of division of powers between the master and the team leader is explicitly dealt with on the national level.

The question of division of powers is linked to another question which could be raised on the national level. Who is held responsible if things go wrong? If, for example, a master after consulting the team leader issues the weapons and a PCASP wrongly shoots an innocent fisherman, could the master be criminally liable as an associate to the crime? The answer towards that question has ultimately to be answered on the level of national criminal law (*e.g.*, of the flag state or the state of the victim) and depends on the concept of participation in a crime. In general, it can be assumed that it seems possible, of course depending on the specific circumstances of a given case, that a master can be liable as an associate to a crime committed by a PCASP if he is involved in the wrongful decision to open fire.

4.3 The Duty to Render Assistance and the Protection of Vessels

One of the deeply rooted principles of the law of the sea, which today is codified in a number of different legal acts, is the duty to render assistance. The duty is, for example, codified in UNCLOS Article 98 and SOLAS Regulation 33. The specific wording of the codification in the different legal acts varies; the wording in SOLAS seems, for example, to indicate a direct obligation of the master while the provision in UNCLOS puts the obligation on the flag state which subsequently has to ensure that the master is following the duty.[77] Beyond those differences, all codifications have some shared core elements. One of those elements is that the duty to render assistance is triggered by a distress situation, in particular where lives are at risk. The crucial question here is *if* there is a distress situation where the safety of the vessel and its crew is at peril and not *why* this situation has occurred. Another of these core elements is the principle of own safety first. The duty to render assistance is limited by (or preconditioned by) the safety of the rescuer's own vessel and crew.

In the context of on-board protection, the duty to render assistance might be relevant in two situations. First, a duty to render assistance can be triggered if a vessel has employed PCASPs or VPDs and gets a distressed call from another vessel under attack. It is argued that the specific duty would be here to get to the vessel under attack and assist by using the weapons to repel the attacker.[78] Second, the duty to render assistance comes into play if the PCASPs or VPDs have repelled an attack and the attackers are seriously harmed or their vessel is unable to navigate or is sinking.[79]

When considering the duty to render assistance it must be kept in mind that the duty, as mentioned earlier, is limited by the principle of own safety first. This means that the master has a certain room for assessing the specific situation at hand and the inherent risks. This means also that the master must not necessarily pick up the same persons who attacked his vessel only a few minutes ago. However, the master must be aware of the duty and take it into account.[80] If not, he bears the risk of criminal prosecution before domestic courts.

In connection with possible obligations after a repelled attack another question might come into play. Are the PCASPs or the VPDs obliged to try to arrest the perpetrators? As shown earlier, state representatives have under certain circumstances law enforcement powers against suspected pirates. It is, however, from an international law perspective questionable if those powers can be understood as an actual obligation. Also, PCASPs have, as mentioned earlier, the right to perform a civil arrest with a view to handing the perpetrators over to the authorities. This is a right but not an obligation. If PCASPs or VPDs do in fact arrest suspected pirates a number of connected issues arise, such as their treatment on board and other human rights issues.

4.4 Summing Up

The international law of the sea does not directly deal with the issue of armed on-board protection of merchant vessels; it is neither encouraging nor prohibiting such approaches. Flag states that wish to regulate the issues at hand receive only limited guidance from the law of the sea; it is merely functioning as a general legal framework, when PCASPs or VPDs are employed. The employment of armed guards leads to complex and diverse legal questions and one of the conclusions in the light of the above brief considerations is that it seems that soft-law instruments play a crucial role in the attempt to clarify the issues at stake and to operationalise the general rules and principles.

76. *Ibid.*, 205-6.
77. *See* B. Feldtmann, 'What Happens After the Defense? Considering "Post Incident" Obligations of Masters from the Perspective of International and Danish Law', 46 *Ocean Development & International Law (ODIL)* 98 ff. (2015); Oehmke, above n. 40, 206 ff.
78. *See* D. König and T. Salomon, 'Private Sicherheitsdienste auf Handelsschiffen; Rechtliche Implikationen', 2 *PiraT-Arbeitspapire zur Maritimen Sicherheit* (2011).
79. Feldtmann, above n. 77, 98 ff.
80. *Ibid.*, 103 ff.

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5 Concluding Remarks

The issue of armed on-board protection of merchant vessels is not an easy one, neither in the public debate nor from a legal perspective. PCASP and VPD are, as the country reports in this special issue illustrate, topics which lead to diverse approaches and models of regulation. International law is not providing much guidance on the issues at stake; it neither explicitly prohibits nor actively supports the use of armed on-board protection and seems to express no specific preference for either the PCASP or VPD model. The task of on-board protection of specific merchant vessels is as such not part of the counter-piracy powers under UNCLOS, and the legal status of different types of guards give rise to a number of legal concerns. The PCASP and the VPD models have from an international law perspective some shared legal challenges to face, as well as challenges more specifically relevant for one or the other model. One of the conclusions which can be drawn from the international perspective is that the use of on-board protection give rise to certain legal uncertainties; some of those are connected to the fact that coastal states (or other flag states) might exercise an interpretation of international law which could be questionable but nevertheless could have an impact on the guards employed on foreign vessels. This means that every flag state and every ship owner must reflect on the issues at stake and the connected legal risks and on this basis choose the way to proceed.

One consideration that from an international perspective could be raised is that the lack of international regulation of on-board protection, the right of self-defence and the connected security marked could lead to a 'race to the bottom', meaning that certain flag states, for example, flag states which could be perceived as 'flags of convenience'[81] with little interest in and control of their ship register and the actual conditions on board, could give way to a situation where there is no control with armed protection and no legal guidance for the use of weapons on board. It can be argued that a part of the shipping industry, which perceives themselves as 'responsible quality shipping', could in this sense have an interest in at least some binding minimum standards for all PCASPs and thereby avoid unfair competition from the 'race to the bottom'.

Another conclusion of the international law perspective is that a lack of formal, binding international regulation in the field gives way to a soft-law approach, meaning nonbinding attempts of regulation in different fora. This can be perceived as a smooth and flexible way to deal with the problem at hand; the other side of the medal is, however, that the problem is not necessarily solved. Nonbinding regulation might work well if it is widely accepted and implemented; if it is not followed in real life, it could be argued that it functions more as a kind of alibi. One possible way to strengthen the impact of nonbinding international rules and guidelines would be where states decide to implement soft-law principles or rules in their own legislation; the country reports in this special issue are casting some light on the question of whether this is the case or not.

81. Guilfoyle, above n. 59, 694.

Armed On-board Protection of Danish Vessels Authorisation and Use of Force in Self-defence in a Legal Perspective

Christian Frier*

Abstract

This article examines the legal issues pertaining to the use of civilian armed guards on board Danish-flagged ships for protection against piracy. The Danish model of regulation is interesting for several reasons. Firstly, the Danish Government was among the first European flag States to allow and formalise their use in a commercial setting. Secondly, the distribution of assignments between public authorities and private actors stands out as very pragmatic, as ship owners and contracting private security companies are empowered with competences which are traditionally considered as public administrative powers. Thirdly, the lex specialis framework governing the authorisation and use of force in self-defence is non-exhaustive, thus referring to lex generalis regulation, which does not take the special circumstances surrounding the use of armed guards into consideration. As a derived effect the private actors involved rely heavily on soft law and industry self-regulation instrument to complement the international and national legal framework.

Keywords: Piracy, Private security companies (PSC), Privately contracted armed security personnel (PCASP), Use of force, Denmark

1 Introduction

Danish ships and foreign-flagged ships controlled by Danish-based ship owners[1] are represented in statistics as victims of what is commonly referred to as modern piracy.[2] Pirate attacks in the waters off the coast of Somalia constitutes a continuous threat to one of the most vital trading areas, as the Gulf of Aden serves as the passage to the Suez Canal, which ties together the Red Sea with the Mediterranean Sea. This pivotal trading route is often navigated by commercial ships flying the Danish flag. When Somali-based piracy peaked in 2011, the number of Danish ships passing the canal represented the seventh largest total, and only surpassed by the Maltese and the British fleet when non-European States are overlooked.[3] Keeping in mind that the transit ratio does not provide a full-scale picture of the number of Danish ships engaged in commercial activities in the adjacent waters, it does indicate the minimum number of ships exposed to Somali-based piracy.[4] As a result of such presence, several hijacking attempts and successful kidnappings involving Danish ships have taken place in the past decade. Starting with the hijacking of DANICA WHITE in 2007,[5] this incident was special because the coaster kept a safe distance of 200 nautical miles to the Somalian shore, which at that time complied to international safety recommendations.[6] Other noteworthy hijackings involved the tugboat SVITZER KORSAKOV and the Bahamas-flagged, but Danish-operated, freighter CEC FUTURE in 2008.[7] In all these cases, the seafarers were held captive on board their respective vessels for a period between forty-six and eighty-three days before being released against ransom payments. The most notable incident followed in the beginning of 2011 with the hijacking of the Danish coaster LEOPARD.[8] The crew, two Danes and four Filipinos, was held captive on Somalian ground for 838 days before the seafarers were released against ransom payment in 2013. This hijacking incident was subject to extensive media coverage under the slogan 'get our seafarers home'. The

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1. The trade and employer organisation 'Danish Shipping' represents around ninety ship owners and offshore companies. An estimated twenty ship owners operate ships under Danish flag, and the same number of ship owners operate ships under foreign flags, available at: https://www.danishshipping.dk/en/om-os/ (last visited 2 January 2019).
2. D. Guilfoyle, *Modern Piracy: Legal Challenges and Responses* (2013), x. *See* for other phrasing with similar meaning 'contemporary piracy'; *see also* A. Petrig, 'Piracy', in D. Rothwell, A.O. Elferink, K. Scott and T. Stephens (eds.), *The Oxford Handbook of the Law of the Sea* (2015) 843.
3. Suez Canal Annual Report 2011, Part 1: Ship Traffic, Table 15. All annual reports can be obtained on www.suezcanal.gov.eg/English/Pages/default.aspx (last visited 1 February 2019).
4. Around seventy Danish ships are at Any Given Time Navigating in Piracy-prone Waters, available at: https://www.danishshipping.dk/en/policy/pirateri/ (last visited 1 February 2019).
5. 'DANICA WHITE – Piratoverfald og kapring den 1. juni 2007' (Danish text), Danish Maritime Authority Investigation, November 2007.
6. A. Petrig and R. Geiss, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-piracy Operations in Somalia and the Gulf of Aden* (2011) 10, note 46.
7. The incident was subject to Danish criminal jurisdiction, because the kidnappers contacted the Danish branch to negotiate ransom payment; *see* B. Feldtmann, 'Er strafferet et effektivt middel i kampen mod sørøveri?', in *Liber Amicarum et Amicorum Karin Cornlis* (2010) 113-117.
8. Danish Maritime Accident Investigation Board Report: 'Piratoverfald d. 12. januar 2011' (Danish text) can be obtained on http://www.dmaib.dk/Sider/Forside.aspx (last visited 1 February 2019).

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combined ransom payments in the mentioned cases amounted to a staggering 8 million euros and impelled both criminal investigations and civil lawsuits.[9] Through that prism, Somali-based piracy has a direct impact on Danish interests' in the broadest sense. As a result, counter-piracy responses were swiftly considered a key policy issue as stipulated by the Danish Government in the first 'Strategy for the Danish Counter-Piracy Effort' dating back from 2011.[10]

1.1 The 'Three Pillars' of the Strategy

The governments' reaction towards piracy has been holistic and encompasses all three 'pillars' as described by Feldtmann in her contribution to this special issue. Danish warships have been deployed in coalition forces, including, but not limited to, Operation Ocean Shield and the EU Operation ATALANTA.[11] The presence of warships brought some stability to the region in the form of the International Recommended Transit Corridor (IRTC). But efforts also revealed shortcomings, as pirates started to expand their operation area by using so-called mother ships, which are able to carry smaller skiffs and equipment on much longer distances.[12] In addition to this development, law enforcement operations led to frustration due to so-called catch and release-strategies and unsuccessful attempts to prosecute alleged pirates in Danish courts. Moreover, the Prosecution Service was criticised by the Danish High Court for neglecting constitutional rights of individuals retained on a Danish warship[13] as well as scholarly criticism for completing an extradition of individuals to the Seychelles. Also, the government's attention has been directed to diplomacy and regional capacity building to address the root courses of piracy.[14] Among the drivers is the non-functional government of Somalia with the subsequent lack of stewardship and effective control of own territorial waters. Other factors include dumping and illegal fishing, which have a negative impact on fish stocks and marine environment,[15] ultimately 'pushing' local fishermen to pursue other sources of income. These underlying issues, whether acting alone or in concert, have led the Danish Government to support long-haul initiatives to eradicate Somali-based piracy.[16] Nevertheless, such efforts provide no immediate comfort against pirates on the lurk for venerable commercial ships and on that background the way was paved for the controversial policy of allowing Privately Contracted Armed Security Personnel (PCASP) on board Danish-flagged ships. At the time of writing, the Danish naval fleet is no longer active in counter-piracy operations and no individuals have been prosecuted for the act of piracy in Danish courtrooms.

When discussions for additional security measures first took off in 2008, the initial call from the shipping industry focused on the use of 'state agents' in the form of marine or military personnel, commonly referred as vessel protection detachment personnel teams (VPD teams).[17] The industry's line of argumentation followed from the concept of state protection, theoretically captured in the doctrine of 'monopoly of force', despite not voicing the notion itself. VPD teams had previously been deployed on commercial ships for transportation of military equipment to the Danish troops' campaign in Afghanistan, and on board ships carrying supplies to Somalia on behalf of the UN World Food Programme.[18] These deployments were nevertheless considered as exceptions, and it was clear from the very beginning that the government did not intend to formalise the arrangement, as the request was swiftly turned down. The reasoning, according to the Minister of Defence, was that it would create an undesirable precedent if Danish soldiers were to provide protection for Danish ships rather than take part in international coalitions to the greater benefit of the international commercial fleet. Furthermore, the use of such personnel was not assessed to be a cost-effective use of sparse military resources.[19] Based on that argumentation, the use of private security companies (PSCs) and ultimately PCASP teams in a commercial setting was pursued as the alternative solution. Accordingly, a dire need for national and international legal instruments emerged to define authorisation criteria, set standards for the application of PCASP teams and ensure control in the form of oversight mechanisms. It is especially distinct within the field of shipping because of the structural compliance deficit following from the great distance between Danish authorities and piracy-prone waters, where it can become relevant to deploy armed guards.

9. U2011.354 Ø (Danish case law) in which the High Court in a civil lawsuit ruled against the crew members of DANICA WHITE. The judges argued on the merits of the case, especially that the ship owner was not negligent.
10. 'Strategy for the Danish Counter-Piracy Effort 2011-2014', Ministry of Foreign Affairs of Denmark, May 2011 (hereafter antipiracy strategy 2011); replaced by the 'Strategy for the Danish Measures against Piracy and Armed Robbery at Sea 2015-2018', Ministry of Foreign Affairs of Denmark, March 2015 (hereafter antipiracy strategy 2015); and currently in force the 'Priority Paper for the Danish Efforts to Combat Piracy and Other Types of Maritime Crime 2019-2022', Ministry of Foreign Affairs of Denmark, November 2018 (hereafter antipiracy strategy 2019).
11. B. Feldtmann, 'Jura som led i dansk aktivistisk udenrigspolitik til søs', 90(1) *Økonomi og Politik* 11-23 (2017).
12. Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea (hereinafter BMP5); *see also* A. Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates', 62(3) *ICLQ* 668 (2013).
13. U 2014.1044 Ø (Danish case law).
14. M.D. Evans and S. Galani, 'Piracy and the Development of International Law', in P. Koutrakos and A. Skordas (eds.), *The Law and Practice of Piracy at Sea* (2015) 362.
15. United Nations, Monitoring Group on Somalia, Report, 10 December 2008, para. 131.
16. Antipiracy strategy 2015, 16.
17. Petrig, above n. 12, 669.
18. Antipiracy strategy 2011, 23.
19. *Ibid*.

1.2 Overview of the Regulatory Framework

According to the flag State principle as defined in the United Nations Convention on the Law of the Sea,[20] ships are subject to the nationality of the state whose flag they are entitled to fly.[21] This includes the obligation to 'effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'.[22] The exclusive jurisdiction bestowed upon flag States grants primary prescriptive competence and enforcement powers. For many good reasons, however, the overall regulation of shipping follows from the international and regional levels.[23] Shipping is one of the most global industries, which is fortified by the profound number of marine and maritime-specific treaties governing the sector.[24] Denmark holds a long-standing tradition of submission when it comes to ratifying regional and international agreements. As most treaties were drafted in a time when piracy was considered as a historical phenomenon,[25] these instruments do not entail much regulation regarding piracy and especially the use of armed guards.[26] As articulated in 2011 by the UN's specialised agency, the International Maritime Organization (IMO), the absence of applicable regulation and industry self-regulation coupled with complex legal requirements gives cause for concern.[27] Accordingly, the legal framework is generally described as complex and in a state of flux.[28] To mend the lacunas in international law, a body of what is commonly referred to as soft law and industry self-regulation (ISR) has emerged to supplement flag State rules. It includes, inter alia, the four IMO interim guidances drafted by the Maritime Security Committee (MSC)[29] and the industry's Best Management Practices[30] as the most prominent examples. Other instruments that have gained momentum include the world's leading shipping association BIMCO's standard contract, Guardcon, for the employment of security guards on vessels.[31] The ambit of Guardcon is to govern the contractual relationship between the ship owner and the PSC; however, Guardcon also affects areas of public law. Most notably, the contract seeks to govern the relationship between the master of the ship and the PCASP team, which is basically a question of maritime law and criminal law.[32] Another entity of relevance is the International Organization for Standardization (ISO). ISO has promoted a standard for PSC accreditation.[33] This standard is voluntary unless made mandatory in national law or according to a de facto requirement articulated by ship owners themselves or other relevant stakeholders, for example, cargo owners and insurance companies.[34] Both BIMCO and ISO's status in shipping 'governance' is fortified by their consultative status to IMO. In addition to these international legal instruments, Danish stakeholders have issued a guideline in which compliance to international guidelines and standards is emphasised.[35] Though it makes sense – at least from a more practical perspective to involve private actors in law-making initiatives – it also underpins the regulatory uncertainty, as the interaction between traditional state-based sources of law and ISR is immensely complex.

A follow-up question triggered by the mosaic of different sources of law pertains to administrative and criminal sanctions. This is especially relevant from a Danish perspective, as the transition from a state-controlled regime to delegation of authority to private actors basically means that the ship owner or the contracting PSC becomes responsible for actions which affect the authorisation and the actual deterrence act at sea. Obligations that are traditionally considered as administrative tasks performed by governmental institutions and state agents only. Such degree of flexibility comes with a price in the form of potential criminal liability. Accordingly, formal sanctions can be imposed in case of any violations, for example, if the vetting of the guards does not meet the requirements or the permit has expired. This is not less

20. The 1982 United Nation Convention on the Law of the Sea (hereinafter the UNCLOS).
21. UNCLOS Art. 91.
22. UNCLOS Art. 94, Subsection 1.
23. K.M. Siig, 'Private Classification Societies Acting on Behalf of the Regulatory Authorities within the Shipping Industry', 482 *SIMPLY* 220 (2016).
24. Available at: http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/Default.aspx (last visited 1 February 2019).
25. Petrig, above n. 2, 843.
26. UNCLOS Arts. 100-07 and 110 focusing on state's rights and obligations pertaining to the repression of piracy.
27. IMO Maritime Safety Committee (MSC), 'Revised Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1443, Annex (1).
28. Petrig, above n. 12, 668.
29. MSC.1/Circ.1443; IMO Maritime Safety Committee, 'Revised Interim Recommendations for Flag States regarding the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area' (12 June 2015) MSC.1/Circ.1406/Rev.3; IMO Maritime Safety Committee, 'Interim Recommendations for Port and Coastal States regarding the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area' (16 September 2011) MSC.1/Circ.1408; IMO Maritime Safety Committee, 'Revised Interim Recommendations for Port and Coastal States regarding the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1408/Rev.1; IMO Maritime Safety Committee, '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' (25 May 2012) MSC.1/Circ.1405/Rev.2.
30. Best Management Practice to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea (June 2018; hereinafter BMP5) replacing Best Management Practice for Protection against Somalia-Based Piracy (August 2011; hereinafter BMP4).
31. Baltic and International Maritime Council's standard contract for the employment of security guards on vessels (Guardcon). A copy of Guardcon can be obtained from BIMCO's webpage https://www.bimco.org/
32. Guardcon, Part II, cl. 8.
33. 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) – Part 1: General (ISO 28007).
34. Protection and indemnity insurance (P&I insurance) are immensely important to the ship owners, as any loss of insurance can have detrimental implications.
35. Guidelines for navigation waters with a piracy threat, including the use of private armed guards, no. 3/2014. Available at: https://www.danishshipping.dk/politik/pirateri/ (last visited 1 February 2019).

relevant to the potential use of force in self-defence. From a normative perspective, less is often required to impose administrative penalties, such as when it comes to withdrawing an existing license. From a criminal law perspective, however, the fundamental principles of legality and *lex certa* may constitute a curtailment on applying various soft laws and ISR instruments as a legal basis.

1.3 Objective and Content

The purpose of this article is to examine and evaluate the current state of law for the use of PCASP on Danish ships, by focusing on the authorisation scheme and the use of force in self-defence, respectively. On the background of these thematic cornerstones it is argued throughout this contribution that the Danish form of regulation can be characterised by a high degree of involvement from private actors. This statement is supported by the level of delegation of authority admitted to private actors as well as the fact that the legal framework relies on the interplay between formal and informal sources of law. The latter category covers soft law and ISR instruments which are fully or in part formulated by private actors. This interrelationship is a well-known feature in shipping regulation, but when it comes to gun regulation and the use thereof, it is unprecedented in Danish law. From a methodological perspective some distinct challenges can therefore be identified when analysing the use of private armed guards from a Danish flag State perspective. First, attention is devoted to the interplay between the various sources of law and to what degree the soft law and ISR instruments are binding. Second, taking the sparse specific national regulation into consideration, the question of interpretation arises. The article is structured in four parts. Section 2 focuses on the authorisation. It outlines the background and development towards the current dual licensing, comprising the individual license and the general license, respectively.[36] On that background the analysis is conducted. Section 3 concerns the protection against piracy with a special emphasis on how to operationalise the use of force in self-defence as well as the interaction between the master of the ship and the PCASP team. The examination is concluded in Section 4 with some general remarks reflecting on the nexus between the need for flexibility and fundamental principles of state control. Finally, an outlook for the future of the Danish form of regulation and some *de lege ferenda* proposals are articulated.

2 Authorisation

From the time it was decided to allow PCASPs on board Danish ships, the process of formalising an authorisation scheme commenced. In that process, two regulatory barriers needed to be addressed.[37] One is the question of obtaining weapon permits and the other aspect concerns the selection of PSCs and vetting of their personnel. Taking these themes into consideration, both areas of law are subject to fundamental principles, including but not limited to state control and oversight mechanisms.[38] In accordance with the introductory articles of the Weapons Act,[39] it is illegal to import, manufacture, possess or use firearms and related equipment unless a certificate is obtained beforehand.[40] Certificates are issued on a strict basis, and a prerequisite for granting a certificate is the applicant's personal behaviour and mental fitness, proving that the person is not considered 'unfit'. Denmark has a very strict gun regulation, thus only allowing firearms for hunting. Likewise, it is a basic requirement for private actors engaging in commercial security-related services, that an authorisation has been granted and that all individuals acting as guards are vetted by the authorities.[41] Private security guards acting in civil society are not allowed to carry weapons of any kind, nor do such persons have any formal competence to use force. Private security guards are thus bound by, and confined to, the same rules as all individuals when it comes to acting in self-defence and making civil arrests. As a result, no obvious link can be drawn between the Weapons Act and the Private Security Service Act apart from the underlying principles articulated here.

Keeping these regulatory barriers in mind, the Ministry of Justice decided to broaden the scope for issuing weapon permits to allow the so-called individual license. Furthermore, the need for rules on the scope of application, type of ships and maritime safety aspects had to be taken into consideration. As a result, the first individual license for the use of PCASP was granted in March 2011 pursuant to the legislation in force at that time. No amendment was thus required, solving the need for a legal basis. This hands-on ministerial approach was fortified by the government's promise to 'adopt a more open approach to the use of armed civilian guards, so that it will no longer – as it has previously been the case – be necessary to substantiate a specific and extraordinary threat against the ship in question' and the government further committed to maintain a 'close dialogue with the industry in order to make the application process as flexible and un-bureaucratic as possible'.[42] This policy statement underpins the delicate balance between upholding the fundamental principles of state control, within an industry well-known for its structural lack of

36. The notions 'individual license' and 'general license' are not terminologically defined in Danish law, but the terms are commonly used by the Ministry of Justice and accordingly applied in this article.

37. The Danish model of regulation is heavily inspired by the Norwegian pilot scheme, which was among the first regulatory frameworks with substantive content; *see* Bill proposal L 116 (2011-2012), 7-8.

38. C. Frier, 'Autorisation af vagtvirksomhed og godkendelse af vagter i dansk ret', in *Juridiske emner ved Syddansk Universitet 2015* (2015) 277-278.

39. Weapons Act (LBK no. 1005, 22 October 2012).

40. Weapons Act, Arts. 1 and 2.

41. Private Security Service Act (LBK no. 112, 11 January 2016) Art. 3 and the supplementary Private Security Service Ordinance (BEK no. 1408, 4 December 2017) Art. 5.

42. Antipiracy strategy 2011, 25.

oversight mechanism, and the dire need to accommodate the industry's call for a more flexible authorisation.

An individual license is granted on a single basis and is tied to an individual person with a specific weapon for a named ship and a predetermined route. The authorisation is subject to thorough vetting procedures in the form of personal background checks of the potential guards. It also includes information regarding the applied ship protection measures and the intended voyage. The list of information which the ship owners must be adhering to is promulgated on the ministry's webpage.[43] The examination involves at least two state institutions besides the Ministry of Justice, namely, the Ministry of Defence (routing) and the Danish Maritime Authorities under the auspices of the Ministry of Industry, Business and Financial Affairs (procedure).[44] Consequently, the individual license largely observes the fundamental principle of administrative control. One important point to note, however, is the case processing, which takes at least two weeks and possibly longer if the application includes persons with foreign nationality.[45] For practical reasons, this timespan was subject to continuous industry criticism, as the level of flexibility did not match the business model of shipping.[46] To fully understand the individual license's lack of flexibility and the reason for ship owners becoming more vocal, it is essential to understand some features pertaining to the carriage of goods by sea. There are many ways in which a ship can be utilised in trade, and the decisive factors are related to economic incentives.[47] A general distinction can be drawn between liner trade and chartering. Liner trade, or carriage of general cargo as referred in international conventions,[48] is generically defined as transportation of cargo against freight on a predetermined schedule and route. The prefixed conditions ensure that the line operator can foresee the need for rerouting or additional protection depending on the anticipated threat in the given trading area. This is vastly different in chartering. Especially if a ship is fixed on a time charter under which the charterer assumes the commercial control, meaning that the master is bound to perform voyages as per instruction by the charterer, subject to the contract of carriage. Shipping is a financially sensitive business, and it is therefore of utmost importance that ships can be redirected on a short notice, and even shorter than the two weeks expected for granting an individual license. Because the waters around Africa, particularly the waters off the coast of Somalia, are pivotal to everyday trade, it would constitute a considerable contractual curtailment, if this region was not part of the so-called ordinary 'worldwide trading' clause agreed in many time charter parties. Another point of criticism has been directed at the specific tie to a named guard, meaning that a weapon permit cannot be transferred in case the original holder is prevented, ultimately placing the ship owners between a stone and a hard place, when deciding to honour a contractual promise of transport and taking the seafarer's safety into consideration.

Eventually, the practical shortcoming prompted a legal reform in 2012 with the scope of granting easier access for ship owners to obtain a 'general license'. This policy change reflected the intention of industry dialogue. The Minister of Justice stated in his bill proposal speech that 'the underlying reason for the proposed bill is that the current licensing scheme [the individual license] has proven to be difficult to reconcile to the needs of the shipping industry, which is to the detriments of the safety of the seafarers'.[49] Consequently, the transition from a state-controlled baseline to delegation of authority to private actors means that the ship owners or contracting PSCs become responsible for different assignments pertaining to the authorisation and vetting process.

The outcome is laid down in Article 4c in the Weapons Act, which stipulates that 'the Minister of Justice…, grants shipping companies a general license to use civilian armed guards aboard cargo ships flying the Danish flag.' According to paragraph 2, 'the Minister of Justice shall lay down terms and conditions for the issuing and use of permits pursuant to subsections 1.' Article 4c is structured so that the first rule concerns the authority to grant a general license, whereas the second rule addresses the subject matters which the ministry must take into consideration when drafting secondary legislation at the administrative level. This entails: the form and content of an application, requirements for weapons and ammunition types and their storage, keeping a weapon log, the eligibility of the guards, reporting in case of attacks and the validity of the license.[50] The rules are codified in the ministerial ordinance named the Use of Armed Civilian Guards on Danish Cargo Ships (ACG Ordinance).[51] As the ACG Ordinance also accompanied the bill proposal, it could be argued that it is rubber-stamped by the parliament's voting.

Ultimately, when a Danish ship owner decides to hire a PSC team for any given voyage, it is possible to apply for an individual or general license. Keeping in mind that the latter was modelled to meet the needs of the shipping industry and reduce administrative bureaucracy, it is fair to assume that it has developed into the preferred solution. According to information obtained

43. Now available on the homepage of the Danish Police *see* https://politi.dk/soeg-om-tilladelse/vaaben/civile-bevaebnede-vagter-paa-danske-lastskibe (last visited 1 February 2019).
44. *See* particularly Section 2.1.
45. P. Cullen, *Surveying the Market in Maritime Private Security Services in Maritime Private Security, Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century* (2012) 31-35.
46. J. Berndtsson and Å.G. Østensen, 'The Scandinavian Approach to Private Maritime Security – A Regulatory Façade?', 46 *ODIL* 144 (2015).
47. T. Falkanger, H.J. Bull and L. Brautaset, *Scandinavian Maritime Law* (2017), 255-7.
48. The Norwegian Maritime Code, which is the best available translation of the Danish 'Søloven' can be obtained on http://folk.uio.no/erikro/WWW/NMC.pdf (last visited 1 February 2019).
49. *See* L 116, 'Skriftlig fremsættelse' (28 March 2012). Author's underlining and translation.
50. Weapons Act, Art. 4c(2).
51. BKG no. 698 om brug af civile bevæbnede vagter på danske lastskibe (27 June 2012).

from a requested access to formal records from the Ministry of Justice, it is indeed the case. To break down the numbers, three cut-off dates should be noted. The first date is March 2011 when the first individual licenses were granted. The second date is June 2012 when the general license came into force, providing ship owners with an alternative solution. Finally, ultimo 2017 when the information was obtained.[52] During this time span, a total of 158 individual licenses had been issued, but only 17 in the wake of the legal reforms. This indicates the ship owner's preference. With regard to the general license, a total of sixty-nine have been issued within the period. The general license is granted on a one-year basis. When dividing the number of licenses against the six-year time span, it indicates that around ten to twelve shipping companies hold a general license at any given time.[53] It seems plausible given the number of ship owners with Danish-flagged ships under their command. On that background the following analysis focuses primarily on the form, content and effect of the general license as it has developed into the preferred license.

2.1 Ship Protection Measures

It is important to note that the use of PCASP is considered as a supplement and not an alternative to general ship protection measures. A prerequisite for granting a license in the first place is that the ship is sufficiently secured according to vessel type and an overall risk assessment of the intended voyage. The ambit is to ensure that shipping activities are performed in a safe manner, without putting the seafarer's lives at risk or endangering the marine environment.[54] The special ordinance is the Technical Standard for Precautionary Measures for Piracy and Armed Robbery (Antipiracy Ordinance) administered by the maritime authorities.[55] The ordinance must be adhered to for all voyages in piracy-prone waters, regardless of the use of PCASP teams. The main obligation bestowed upon the ship owner is to make a procedure as introduced in Section 2 earlier. Procedure in the most simplistic meaning of the word refers to a series of acts in a particular order of succession. In relation to a ship's safety management system, a procedure sets standards of conduct, and the instrument functions as a barrier against unwanted and unsafe activities.[56] The procedure must, according to Article 6 of the Antipiracy Ordinance, encompass instructions on prevention of pirate attacks. This includes, inter alia, a general risk assessment of the intended route, application of appropriate measure for the protection of crew and ship, and training and information sharing.[57] The ordinance consists partly of substantive rules, such as reporting requirements, and partly of references to other legal instruments. Thus, the Antipiracy Ordinance is an example of national support to international guidelines, which is developed by IMO as well as the industry in the form of Best Management Practices. It is not a formal codification *in casu*,[58] but rather a 'rule of reference', meaning that the ship owners must take the various legal instruments into consideration, when preparing the procedure. A supple style of regulation well-known within maritime safety that tolerates changes without the need of amendments in national law. On the other hand, this approach allows rather drastic changes to the underlying guidelines.

In assessing the precautionary measures to be taken on each ship, the risk assessment shall be evaluated on the basis of the ship's characteristics, for example, size, type of cargo, freeboard and speed. This means that the threshold for compliance pertaining to coasters and vessels with cargo stowed below the water surface are generally higher than large container vessels. If the ship is intended to navigate in the defined high-risk area,[59] the ship owner must also adhere to additional measures, including those listed in BMP.[60] Accordingly, it can be concluded that IMO guidelines and ISR instruments are mandatory, despite the combination of vague recommendations leave the ship owner with an assessment.

To evaluate procedures a distinct system has evolved in shipping, as compliance control is generally exercised by private classification societies acting on behalf of the maritime authorities.[61] This is also the case with the Antipiracy Ordinance.[62] This practice supports the notion of 'privatisation' because it relies on each ship owner's ability to adopt high-standard procedures as well as the recognised organisations control hereof.

2.2 Scope of Application and Requirements

The ACG Ordinance is almost only governing the authorisation process itself. Few articles, however, are governing the situation on board the ship. One article details the obligation to keep a weapons log and another article refers to the duty of reporting in case of an incident that has caused the use of force in self-defence.[63] These obligations will be discussed more in detail in Section 3.

52. Obtaining this information has proven to be quite laborious because it requires formal consultation from each ship owner. Apparently, this information is considered a 'trade security', which means the Ministry of Justice is reluctant to provide numbers.
53. A license is linked to the document of compliance (DOC). For more information on the DOCs, *see* Falkanger, Bull and Brautaset, above n. 47, chapter 3. Separate DOCs will usually be issued for each division, *e.g.* tanker division and container division. Ship-owning companies will potentially have to obtain multiple general licenses.
54. Sea Safety Act (LBKG no. 1629, 17 December 2018) Art. 2 mirroring the principles in the SOLAS Convention.
55. BEK no. 1084, 23 November 2011.
56. Danish Maritime Accident Investigation Board, Safety Report (June 2016), Tilted 'Proceduralizing Marine Safety – Procedures in Accident Causation', 6.
57. Art. 6, para. 1, no. 1-6.
58. An example of more formal codification of IMO guidelines can be seen in the German model of regulation, *see* the contribution of *Salomon* in this special issue.
59. BMP5, 2.
60. BMP5 entails a comprehensive list of actions and precautionary measures, such as razor wire, CCTV-monitoring citadels/safe muster points, *see* BMP5, 11-20.
61. *See e.g.* T. Falkanger, 'Hans Jacob Bull and Lasse Brautaset', *Scandinavian Maritime Law* 92 (2017).
62. Antipiracy ordinance, Art. 12.
63. Arts. 6 and 8.

A general license can be obtained for commercial voyages performed by cargo ships within a geographical area with a risk of pirate attacks or armed robbery.[64] Passenger ships, fishing vessels and pleasure crafts are instead referred to the individual license.[65] An application according to Article 3 must include identification of the ship-owning company, including its place of business and relevant contact details. If the ship owner and the ISM responsible are not the same entity, the latter must also support the application.[66] The applicant shall also confirm that procedures for precautionary measures are developed and circulated among relevant parties, for example, crew members, for familiarisation.[67] Finally, it is required by the ship owner to state the concrete need for PCASP protection and why the precautionary measures are not adequate to prevent pirate attacks.[68] The latter requirement appears to be irrelevant, as the general license is not related to one specific voyage, as it is the case with the individual license.

The obligation to present the necessary information is not subject to criminal liability, as any lack of compliance will lead to rejection. The validity of a general license extents to one year,[69] and during that period it may be utilised as often as the ship owner finds it necessary, of course within the scope of application. Surprisingly, there is no duty to inform Danish authorities prior to the embarkment of PCASP. On that background it can broadly be stated that the lax requirements accommodate the industry's call for flexibility.

2.3 Regulation of Private Security Companies

Another issue that must be addressed in detail is the regulation of PSCs which offer services in the Danish market. The regulation of PSCs has become the centre of attention in the international debate, which can be traced to similar discussions on the use of PSCs in warzones and areas of conflict.[70] The concerns relating to the use of private security providers are generally overlapping, focusing on accountability and liability.[71] However, the legal framework governing the two distinct areas is vastly different. Humanitarian law and the laws of war are generally applicable in war and conflict situations, whereas maritime law is applicable at sea.[72] Accordingly, IMO is thus regarded as a pioneer when it comes to PSC initiatives, essentially suggesting that flag States should have a firm policy and establish an appropriate legal framework for the use of PSCs.[73] Dating back to 2009 and in the following years, the question pertaining to the use of PSCs has been a recurring item on the agenda of IMO. States, industry stakeholders, NGOs and private entities have all taken part in influencing IMO's position and guidelines,[74] with an emphasis on flag State responsibility. Surprisingly, the Danish Government has to a certain point derogated from this point, as PSCs' services performed on ships in international and foreign waters fall outside the scope of the Security Service Act, thus leaving maritime PSCs unregulated. This is clarified by the Ministry of Justice on several occasions because the statute is confined to the Danish territory.[75] Whether this interpretation can be substantiated or not is subject to some scholarly debate,[76] but it seems striking that the government refrained from regulating the topic at all. The absence of a PSC-specific regulation might very well be preferable from an economic point of view because Danish ship owners are not confined to what can perhaps develop into a monopolistic or oligopolistic market, with few authorised providers and limited competition. On the other hand, it raises the question of how it can be ensured that PSCs are fit for the task. This is relevant to avoid risking a race to the bottom-push by precluding substandard contractors. Furthermore, it might be difficult for well-established PSCs to demonstrate their qualifications. As an alternative, parties tend to turn to private accreditation.

Most notable is the ISO 28007 standard,[77] which has gained international momentum as well as support from IMO itself.[78] Standards as a tool of control and harmonisation hold a pivotal position in shipping in general.[79] In that context, standards are instruments which define criteria for the purpose of reaching an ideal, prearranged model or outcome. Thus, it makes good sense to take advantages of the organisational structure already in place in ISO. However, standards do not create legal obligations just by the mere fact of their existence, and their 'binding effect' is based on voluntary support, unless induced by a public legal norm.[80] The current state of Danish law does not induce a de jure obligation

64. Art. 1, para. 2.
65. Art. 1, para. 1.
66. Art. 3, para. 2, no. 2.
67. Art. 3, para. 2, no. 5.
68. Art. 3, para. 2, no. 6.
69. Art. 9.
70. *E.g.* A. Petrig, 'Looking at the Montreux Document from a Maritime Perspective', 2 *Maritime Safety and Security Law Journal* (2016).
71. Y.M. Dutton, 'Gunslingers on the High Seas: A Call for Regulation', 24 *Duke JCIL* 107, at 123-8 (2013); J. Kraska, 'International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy', in D. Guilfoyle (ed.), *Modern Piracy: Legal Challenges and Responses* (2013) 222.
72. D. Guilfoyle, 'The Use of Force against Pirates', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 1063-1064.
73. IMO, MSC.1/Circ.1443, annex.
74. J. Kraska, 'International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-piracy', *Modern Piracy: Legal Challenges and Responses* 224 (2013).
75. Bill Proposal (L116 2011-2012), Q&A, S 1084 dated 7 December 2011.
76. Frier, above n. 38, 278-9.
77. Originally issued as a PAS (Publicly Available Specification); *see* IMO, MSC 91/17/1 (21 September 2012), ISO PAS 28007 Ships and marine technology – Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on boar ships (and pro forma contract – Part 1, submitted by ISO.
78. IMO MSC.1/Circ.1443, annex.
79. C.N. Murphy and J. Yates, *The International Organization for Standardization: Global Governance through Voluntary Consensus* (2009) 50-51; S. Wood, *The International Organization for Standardization, Business Regulation and Non-State Actors – Whose standards? Whose Development?* (2012) 82.
80. M.A. Carreira da Cruz, 'Regulating Private Maritime Security Companies by Standards: Causes and Legal Consequences', 3 *Maritime Safety and Security Law Journal* 66 (2017).

to comply to the standard, though it appears that a de facto demand from industry stakeholders has promoted the use of ISO 28007. The standard is thus supported in the Danish guideline.[81] Nevertheless, this assumption does not fully safeguard against careless ship owners.

The standard itself is directed to PSCs as the principal addressee. Consequently, it is bestowed upon every security provider to demonstrate ISO compliance. It intends to delineate a comprehensive set of requirements to which a PSC must abide. This includes, inter alia, legal, financial, management and risk perspectives within its own internal organisation. It also adds external relationships to the list, including national authorities, ship owners, insurance companies and subcontractors. The standard is divided into six separate parts; Parts 4 to 6 detail the normative content. Regarding the question of authorisation, Section 4 concerning security management system elements for PSCs stands out. It serves as the basis of the standard and stipulates in subsections what is expected from PSCs to comply with the standard. For obvious reasons the standard exceeds the non-existing demands in Danish law, but it also goes further than the requirements listed in the Service Security Act for PSCs operating at land. In summary, it is fair to consider the standard as a wide-ranging due diligence examination that aims to raise the bar significantly.

2.4 Eligibility of the Guards

One of the most delicate topics concerns the eligibility of the guards. According to Article 7 of the ACG Ordinance, the ship-owning company must either undertake to vet the guards or ensure that the contracting PSC can provide documentation on adequate procedures. Given the nature of shipping and the distribution of tasks, it is fair to assume that the latter option is exercised on a general basis. This represents a more extreme example of delegation of authority between private actors, which is most unusual in a Danish context. In the following section, the requirements under Danish law are examined. On that background it is evaluated if these requirements are higher or lower than international standards.

To be considered eligible under Danish law, six criteria shall be fulfilled,[82] including identification, age of at least twenty years and submission of criminal records. These criteria are straightforward and do not presuppose any subjective assessment. The more critical criteria include: (i) that the person has not been charged with a felony, making him or her unfit to handle and use firearms; (ii) that the person has sufficient experience using firearms; (iii) that the person must possess the required level of knowledge pertaining to the legal concepts of self-defence and necessity;[83] and finally, (iv) that personal circumstances may not make the approval alarming. Regarding the criminal record assessment, eligibility is not equal to zero tolerance. According to the preparatory work, any conviction for offences inflicting 'longer imprisonments', because of homicide, manslaughter, arson and rape shall automatically be disqualifying. Minor offences, unless following from the Weapons Act, are not disqualifying per se. A colourful example is provided in the preparatory work. 'If a person by mistake brings an otherwise illegal knife to public areas, because he or she has used it legally for fishing an forgot to store it properly, the person is not automatically disqualified.' Likewise, in the case of 'bar fights the underlying circumstances shall be taken into consideration'.[84] The complexity of such an assessment makes it controversial to leave it with a ship owner or potentially a foreign PSC, especially because it induces an overlap between the entitled and entrusted party. Experience with firearms is considered fulfilled if the person can demonstrate at least two years of police or military employment.[85] In this case it is not a factual requirement that experience is gained form Danish services, and in most cases the guards are of foreign nationality. In relation to the applicant's personal circumstances, the person should be deemed unfit, if he or she, appears to be mentally or physically unable to function as a guard. Surprisingly, the ordinance is silent when it comes to how this kind of information should be obtained in the first place. Consequently, the likelihood that such information will come to the ship owner's attention is questionable, meaning that the PSCs' willingness to abide by the law and adopt high standards is pivotal to secure the quality of PCASP teams.

When conducting a side-by-side examination of Article 7 and recommendations articulated in the IMO guideline and ISO standard, respectively, it becomes apparent that both instruments impose higher standards than Danish law. To name a few examples, the IMO guideline specifies that all guards shall receive a minimum shipboard familiarisation training, demonstrate knowledge of the ISPS and ISM codes and undertake medical training.[86] The ISO standard consist of four pages divided into the following topics: training and communication, with detailed instructions on qualifications.[87] When it comes to the actual number of guards to be deployed, the ordinance is also silent. According to general recommendations, a PCASP team should be no less than four persons.[88] This allows the team to work in pairs and in shifts. It would also mean that the team can cover all angles on the ships and thereby eliminate blind spots. Consequently, it is fair to conclude that the recommendations set forth in IMO guidelines and international standards are well over the threshold of Danish law. But since neither the IMO guideline nor the ISO

81. Guidelines for Navigation Waters with a Piracy Threat, Including the Use of Private Armed Guards, No. 3/2014. Available at: https://www.danishshipping.dk/politik/pirateri/ (last visited 1 February 2019).
82. ACG Ordinance, Art. 7, nos. 1-6.
83. Criteria further discussed in Section 3.
84. Preparatory work (L 116 2011-2012) 15; I.B. Møberg and C.A. Gulisano, *Civile, bevæbnede vagter på danske lastskibe*, Juristen nr. 4 (2012) 208.
85. Preparatory work (L 116 2011-2012), at 15 (author's underlining and interpretation).
86. MSC.1/Circ.1405/Rev. 2, Annex, at 4.
87. ISO 28007, at 12-16.
88. Guardcon, Part II, cl. 3.

Assignments	Individual license	General license
Competence to issue a license	Ministry of Justice	Ministry of Justice
Approve procedures include ship protection measures	Private classification societies on behalf of the Maritime Authority	Private classification societies on behalf of the Maritime Authority
Approve routing	Ministry of Defence	Ship owners
Approve weapons, including types and ammunition	Ministry of Justice	Ship owners within the ambit of the ordinance
Competence to vet the guards	Ministry of Justice	Ship owners or PSCs

Table 1 compiled by author.

standard is considered mandatory in regard to the ACG Ordinance it is ultimately entrusted to private actors to ensure the guard's quality.

2.5 Evaluation

The previous sections contain an examination of the requirements to obtain an authorisation applicable under Danish law. It entails two different licensing schemes, which is vastly different in form and content. The key issues discussed previously are competence to issue a license, formulation of procedure for precautionary measures, approval of routing, weapons, and especially the competence to vet the guards, as summarised in Table 1.

The column to the left entails the assignments that must be observed during the authorisation process. As shown, the individual license is subject to strict state control, whereas the tasks are delegated to private actors according to the general license. Consequently, the main differences in terms of the individual and general licensing schemes is two-fold. First, the purpose of the general license is to untie the link between the individual guards and the weapons certificates. Instead, the permit is issued to the ship owner, which makes it less complicated to embark and disembark weapons and guards. Second, the general license is subject to a high degree of delegation of authority, which is untraditional from a Danish legal perspective. Thus, the industry-friendly authorisation scheme demonstrates a minimum of state involvement when it comes to gun regulation and control of private security providers.

3 The Use of Force in Self-defence

Up until this point, the analysis has focused on the authorisation, broadly speaking what is required before a PCASP team can legally embark on a Danish-flagged ship. From this point on, the scenery changes to the situation on board the ship at sea and the guard's potential use of force in self-defence. This perspective is only subject to limited political consideration, despite being at the absolute centre of attention in the international debate.[89] No focus has been allocated to discussing the concept of 'monopoly of force', indicating that the government's perception of the act is merely use of force exercised by private actors in some form of 'improved' self-defence.

The problems of using private actors to protect commercial ships against piracy are crystallised in three ways. First, it is a question of using firearms without inflicting unlawful harm to attackers and thereby risking criminal liability. Second, the chain of command between the ship's master and the PCASP team has turned out to be complicated as a potential dichotomy between the master's competence as the highest authority on the ship and the individual right to self-defence may collide. Especially if the master believes the safety of the ship is at risk,[90] it raises the question of whether the master has the authority, or even an obligation, to order ceasefire. Legal issues can also materialise in the form of complicity, as it is generally recommended that the team leader consult the master when suspicious activity is detected. Nevertheless, the master should exercise caution in giving instructions to the team leader, as it could be perceived as incitement for which criminal liability can be imposed.[91] Third, in the wake of an attack the master must take certain post-incident obligations into consideration.

3.1 Legal framework

International law does not provide an answer to the question of use of force in self-defence for private actors at sea. The legal framework for use of force by states

89. Dutton, above n. 71.
90. SOLAS Convention, chapter XI-2, regulation 8.
91. Penal Code Art. 21 '(1) Acts aimed at inciting or assisting the commission of an offence are punishable as attempts if the offence is not completed. (2) The penalty prescribed for an offence may be reduced for attempts, especially where an attempt reflects little strength or persistence of criminal intent. (3) Unless otherwise provided, attempts will only be punished if the offence is punishable by imprisonment for a term exceeding four months.'

cannot be adopted for PCASP teams.[92] Instead, the main source to consult is the law of the flag State.[93]

In relation to a legal basis, the preparatory work is silent.[94] This is presumably because the authority to the use of force in self-defence does not differ from the situation according to an individual license, meaning the continuous application of the Penal Code as the normative framework. This assumption is also supported by the ACG Ordinance's Article 7(5) which stipulates that all guards must possess a minimum level of knowledge on self-defence (nødværge) and emergency law (nødret). As it is the ship owner or the contracting PSC who must ensure the eligibility of the individual guard, criminal liability will fall to either party should the requirements not be met; however, the individual guard must be answerable for his or her actions. In summary, the use of force shall be evaluated on the basis of the generic rule on self-defence in the Penal Code.[95] From a theoretical standpoint, it is less problematic to apply the same rule for actions following from a pirate attack or an 'ordinary' attack in society. But the controversial and disputable fact is the lack of substantive rules on how to operationalise concepts such as proportionality and necessity in practice. Especially, as the risk of using weapons is relatively high, given the fact that PCASP teams should only be deployed in piracy-prone waters. In addition, the likelihood of causing personal injuries or fatal harm in the case of shooting is apparent. Such kind of improved self-defence by allowing guns is otherwise reserved for state agents, such as police officers and military staff. Apart from the obvious difference between services of state agents and PCASP teams, respectively, the former group is officially mandated. Likewise, such personnel's actions are clarified with the help of administratively formulated guidance in the form of the so-called use-of-force barometer drafted by public authorities.[96]

To mend the lacunas, various ISR guidelines and, to a certain degree the IMO, have addressed the subject matter. The most pronounced examples are BIMCO's guidance on the use of force[97] and the '100 Series Rules' commonly dubbed RUF.[98] The former guideline is adopted by BIMCO as a supplement to the standard contract Guardcon, and the latter is drafted by an English lawyer, both taking a starting point in English law. For obvious reasons, it is plausible for private actors to resort to existing instruments rather than drafting their own set of guidelines. The drawback however is the likely risk that 'one size does not fit all.' Although the right to self-defence, as a legal norm negating criminal liability, is considered as an almost universal principle, the concrete objective and content of the rule may vary among states.[99] The same can be argued with regards to the mental requirement of *mens rea*. To pinpoint a practical example, some jurisdictions detail a duty to retreat before using force.[100] Simply to rely on recommendations is therefore not only controversial but is also likely in conflict with the principles of legality and *lex certa*. In addition, it is not convincing to base a justification on the line of argumentation that actions simply comply to international soft laws or ISR instruments, which also jeopardises the guard's legal position. Notwithstanding, the lack of alternatives in the ambit of these guidelines must be examined.

According to the guidelines, the deterrence act can be divided into an escalation phase and a de-escalation phase, respectively, providing a graduated approach. This is to ensure that guns are not used before the attack is initiated or after it is fended off. When evaluating the guidelines, it becomes evident that the escalation phase is more nuanced and accordingly easier to operationalise in practice. As a first and second step, the team leader, shall advise the master, that he intends to invoke the rules, allowing the guards to use non-kinetic warnings.[101] Such actions will *in casu* not quality as use of force. Second, the guards can resort to firing warning shots if the attackers fail to react. In case they continue to approach the ship, it indicates that a pirate attack is most likely in effect. Consequently, lethal force can be used, but only as a last resort. This also means if less harm can be exercised by firing at the skiff's engine or non-vital parts of the body, the guards shall choose to cause a lesser degree of personal harm. In contrast to the escalation phase, the de-escalation phase can be more difficult in practice, as successive or prolonged use of force is not allowed. It raises the question of how to determine whether the pirates have withdrawn from the attack. The guidelines do not provide much guidance on this end of the spectrum but simply refer to the overarching principles of proportionality and necessity.[102]

92. D. Guilfoyle, 'The Use of Force against Pirates', *The Oxford Handbook of the Use of Force in International Law* (2015); B. Feldtmann, 'Må man skyde en pirat – Et indblik I den retlige ramme for statslige aktørers magtanvendelse', *Fetsskrift til Nis Jul Clausen* (2013) 130.
93. Petrig, above n. 12, 689.
94. K. Østergaard and M.L. Holle, 'Pirateri – anvendelse af civile bevæbnede vagter om bord på danskflagede lastskibe', *Juristen* (6) (2012) 292.
95. Danish Penal Code, Art. 13(1) 'Acts committed in self-defence are exempt from punishment if they were necessary to resist or ward off a present or imminent wrongful assault and do not manifestly exceed the limits of what is reasonable in view of the danger from the assault, the assailant himself and the importance of the interest assaulted. (2) Any person who exceeds the limits of lawful self-defence will be exempt from punishment if the irregular act could reasonably be attributed to the fear or excitement produced by the assault.'
96. I. Henricson, *Politiret* (2016) 271.
97. BIMCO Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV; hereinafter BIMCO RUF). Can be obtained on BIMCO's webpage https://www.bimco.org/ (last visited 1 February 2019).
98. The 100 Series Rules: An International Model Set for Maritime Rules for the Use of Force, can be obtained by a simple search on the Internet (hereinafter 100 series).
99. Petrig, above n. 12, 668.
100. U. Sieber and C. Kornils, 5 *Nationales Strafrecht in rechtsvergleichender Darstellung*, (2010).
101. 100 Series Rule 1 and Rule 2. BIMCO RUF is divided into different weapon stages: normal, heightened and stand to. It also contains different types of firing, *e.g.* warning shots, disabling fire, deliberate direct fire and, finally, use of lethal force, 4-5.
102. 100 Series Rule, 2; BIMCO RUF, 2.

3.2 Chain of Command

The previous section addressed the question of use of force in self-defence as it was to be performed in a physical vacuum, with no interference from other parties than the attackers (pirates) and the defenders (guards). This is of course in stark contrast to reality and the situation on ships which are isolated at sea. This circumstance has given rise to concerns regarding authority and chain of command. The reason for this potential conflict is the possible clash between the master's position as the highest authority on the ship as reflected in international as well as national laws, and the guard's individual right to act in self-defence and in defence of others. From the perspective of the master, the question is basically to what degree he or she can maintain full authority without being held criminally liable for the actions of others. From the guard's perceptive the question can be summarised to whether they shall obey the master, should he or she give instructions that a continuous use of force is either considered unlawful or is likely to bring the ship in distress at sea.

The starting point is that special competences are bestowed on the master compared to most other private employment relationships, as stipulated in the Seaman's Act.[103] Once considered as 'master under God', the rhetorical statement illustrates the almost unlimited powers bestowed on the master to act on behalf of the ship owner and instruct crew and passengers. The authority of the master to act on behalf of the ship owner has been downgraded during the past century, due to the development of electronic communication.[104] Nevertheless, when it comes to the daily operation, navigation and situations of peril to which actions without hesitation are required, the master is undoubtedly in charge.

The interplay between the master and PCASP team has not been debated by the parliament; however, the issue is addressed in international law and various other legal instruments. The narrative of most instruments is that nothing shall be construed as a derogation of the master's authority. Instruments such as the 100 Series and BIMCO RUF seek to mitigate the dichotomy by means of communication. According to the guidelines, the team leader shall not only advise the master in case of an imminent threat but also inform the master that the RUF is about to be invoked, meaning that the PCASP team will step in front, and the team leader will be responsible for all decisions in such a situation, except for the master's right to order a ceasefire.[105] From a criminal law perspective, this seems questionable, as the right to self-defence cannot be confined by agreement, and the individual guard's right to self-defence it not confined by *lex specials*, meaning the argumentation becomes circular.

103. The Seaman's Act (LBK no. 73; 17 January 2014), para. 51.
104. E.V. Hooydonk, 'The Law of Unmanned Merchant Shipping – An Exploration', *JIML* 412 (2012).
105. BIMCO Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV), at 3.

3.3 Post-incident Obligations

Surprisingly little attention has been directed to post-incident obligations. This section will not present a detailed analysis but merely provide an overview of the problems arising after a pirate attack has been repelled.

The ACG Ordinance stipulates a reporting obligation in the case of use of force. It is laid down in Article 8, which consists of four subparagraphs. The starting point is that the responsible ship owner must report any use of force in writing within seventy-two hours of the incident. A report shall include a description of the incident, including the persons involved and the intensity of the use of force.[106] In case audio and video recordings are available, this should be included in the report.[107] If, however, there is reason to believe that the actions have caused personal injury or death, reporting shall be given immediately to the police.[108] Special obligations are also listed in the Antipiracy Ordinance. According to section 6, subparagraph 1, no. 6, the previously discussed procedures must entail recommendations to the master on reporting to other ships in the area in case of a pirate attack. The master is to inform and alert other ships, whereas the obligation according to the ACG Ordinance is to ensure that law enforcement measure can be taken if necessary.[109]

Apart from the two special rules, both international laws and national laws impose general obligations on the master. One relevant issue is the obligation to render assistance for persons at distress at sea as formulated in the SOLAS convention chapter V, regulation 33.1. It states that the

> The master of a ship at sea which is in a position to be able to provide assistance (…), is bound to proceed with all speed to their assistance (…). The duty to assist must always be evaluated in regard to the safety of the ship and persons on board.[110]

Another delicate issue is the master's duty to investigate potential offences and if necessary take further actions to detain the parties.[111] It means in theory that the master, if possible, must evaluate the actions of the guards. This is for obvious reasons a rather controversial, however necessary, obligation.

4 Concluding Remarks and Outlook

At the time of writing, roughly hundred Danish-controlled ships are navigating in piracy-prone areas at any

106. Art. 8, subpara. 2.
107. Art. 8, subpara. 4.
108. Art. 8, subpara. 3.
109. Bill proposal L 116 (2011-2012) 15-16.
110. *See* further discussions on the topic in B. Feldtmann, 'What Happens after the Defense: Considering Post-Incident Obligations of Masters from the Perspective of International and Danish Law', *ODIL* (2015).
111. The Seaman's Act, Section 63.

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given time.[112] Accordingly, most ship owners employing Danish-flagged ships in one of these areas are expected to hold a general license for the potential use of PCASP teams. Since the LEOPARD incident in 2011 no successful hijackings have been recorded against Danish ships, albeit TORM announced two pirate attacks in 2013 and 2014, respectively.[113] Unlike the hijacking incidents, both of TORM's ships were equipped with armed guards that repelled the attacks, without inflicting personal injuries to the crew or the pirates. Hence, the use of armed guards is generally considered successful.

Surprisingly little attention has been devoted to discussing the topic in the political and national scholarly debate. On that backdrop of the analysis it is fair to argue that the Danish model of regulation holds a high privatisation factor. Not only are PCASP teams the preferred solution over VPD teams, but the intensity of delegation of authority to private actors is also unique. This is evident by comparing with equivalent areas of Danish law and the current state of law in other flag States. Furthermore, it is demonstrated throughout this article that the Danish form of regulation to some extent relies on soft law and industry self-regulation, which serve as guidance, without automatically obtaining the status of formal law. In summary, Danish lawmakers have chosen to regulate this complex area of law, traditionally subject to strict rules within the characteristic regulatory framework of maritime law. As noted in the introduction, the legal framework corresponds with the legal policy concerns articulated by the parliament. Nevertheless, as the nature of shipping hampers state control and oversight mechanics, the Danish form of regulation is not prone to criticism. Especially the fact that it is the ship-owning company or the contracting private security company that undertakes the selection and vetting of the guards is disputable. Consequently, the decision-making powers of the beneficiary party and competent party are overlapping. In the case of the guard's use of force in self-defence and the question pertaining to the mater's authority, the lack of *lex specialis* leaves the involved parties in a grey zone. Fortunately, no serious incidents have occurred so far, but one could be fearful of skeletons in the closet, should harm come to attackers or defenders.

Looking back in time, Danish lawmakers acted on the request of the shipping industry and adopted new regulations which accommodate the call for more flexibility. This is largely praised by industry stakeholders, opposed to the scepticism voiced by scholars. As the subject matter is not currently on the political agenda, no ambition to amend the current state of law has been expressed. In summary, the Danish form of regulation can be described as commercially convenient but doctrinally dubious.[114]

112. Danish Shipping, *Policy Paper on Piracy* 2017.

113. Statements: available at: http://www.torm.com/uploads/media_items/10-11-2013-torm-kansas-deters-pirate-attack-1.original.pdf and http://www.torm.com/uploads/media_items/torm-sofia-deters-suspicious-approach-by-pirates.original.pdf (last visited 1 February 2019).

114. Siig, above n. 23, 242.

Armed On-board Protection of German Ships (and by German Companies)

Tim R. Salomon*

Abstract

Germany reacted to the rise of piracy around the Horn of Africa not only by deploying its armed forces to the region, but also by overhauling the legal regime concerning private security providers. It introduced a dedicated licensing scheme mandatory for German maritime security providers and maritime security providers wishing to offer their services on German-flagged vessels. This legal reform resulted in a licensing system with detailed standards for the internal organisation of a security company and the execution of maritime security services. Content wise, the German law borrows broadly from internationally accepted standards. Despite deficits in state oversight and compliance control, the licensing scheme sets a high standard e.g. by mandating that a security team must consist of a minimum of four security guards. The lacking success of the scheme suggested by the low number of companies still holding a license may be due to the fact that ship-owners have traditionally been reluctant to travel high-risk areas under the German flag. Nevertheless, the German law is an example of a national regulation that has had some impact on the industry at large.

Keywords: German maritime security, private armed security, privately contracted armed security personnel, anti-piracy-measures, state oversight

1 Introduction

It is seemingly a long time ago that piracy has risen and fallen around the Gulf of Aden. Discussing piracy today feels almost like it used to be, that is, discussing a historical topic. This of course is in stark contrast to the lively debate that took place five to ten years ago, when piracy was a public topic of most paramount interest. However, the comparative silence that surrounds piracy today is misleading to an extent. Piracy and maritime violence in general are still very much alive. While there has been a significant decrease of successful and attempted piratical attacks on trade vessels around the Horn of Africa, the phenomenon has shifted regionally, and, as long as there will be wealthy nations and flourishing world trade, there will be maritime traffic and attempts of criminal gangs to benefit from it.[1]

Looking back to the high time of Somali piracy, Germany has reacted primarily by deploying its armed forces to the Horn of Africa as part of the EU Operation ATALANTA.[2] The Federal Republic of Germany is a nation that has traditionally been very reluctant to deploy its military. Its constitution entails a restrictive framework reflecting the understanding that Germany, having learned from its dark history, is a nation of peace.[3] It is a recent development that many Germans have come to terms with the fact that preserving and living up to this self-image in today's world means to act when atrocities happen and/or world peace is at peril. Accordingly, the armed forces are no longer restricted to territorial defence, but are increasingly understood as a means to counter crises internationally.[4] This started with deployments in Cambodia and the Balkan region, both in 1992.[5] The fight against piracy off the coast of Somalia has become a part of this development.

EU ATALANTA has had significant success. It met its primary objective, the protection of the World Food

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1. For the development of piracy *see* the popular accounts of D. Heller-Roazen, *The Enemy of All* (2009) and A. Konstam, *Piracy* (2008); for the rise of (relatively) more modern forms of piracy from 1500 to 1900 *see* M. Kempe, *Fluch der Weltmeere* (2010).
2. *See* the decision of the German government to participate in the EU-led operation ATALANTA, Bundestagsdrucksache (BT-Drs.) 16/11337, 10 December 2008 on the basis of the Security Council resolution regime starting with 1816 (2008) of 2 June 2008 and the EU Joint Action 2008/851/CFSP of 10 November 2008.
3. For an account hereof in the English language *see* R.A. Miller, 'Germany's Basic Law and the Use of Force', 17(2) *Indiana Journal of Global Legal Studies* 197, at 198 et seq. (Summer 2010).
4. *See e.g.* the speech of the Federal President, as he then was, Gauck on 31 January 2014 at the Munich Security Conference, accessible in English available at: http://www.bundespraesident.de/SharedDocs/Downloads/DE/Reden/2014/01/140131-Muenchner-Sicherheitskonferenz-Englisch.pdf. In the recent past, the willingness to deploy armed forces in ad hoc coalitions, *e.g.* to counter the threat posed by the so-called Islamic State, evidences this tendency; *see e.g. Weißbuch 2016 zur Sicherheitspolitik und zur Zukunft der Bundeswehr*, at 81, 108 et seq., available at: https://www.bmvg.de/de/themen/weissbuch; Federal Ministry of Defence, 'Konzeption der Bundeswehr', 20 July 2018, at 6 and 25 https://www.bmvg.de/de/aktuelles/konzeption-der-bundeswehr-26384. Prior to this step, deployments were limited almost exclusively to NATO operations or operations based on Security Council resolutions pursuant to Chapter VII of the UN Charter.
5. W. Link, *Deutsche Außenpolitik* (2006), at 197; H. Kundnani, *German Power: Das Paradox der deutschen Stärke* (2016), at 75; M. Görtemaker, *Geschichte der Bundesrepublik Deutschland* (2004), at 784.

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Programme deliveries to Somalia,[6] without fail. However, the vast area of operation of Somali pirates who had started using motherships in 2008-2009 to venture further and further into the Indian Ocean[7] made it apparent that even the combined (military) engagement of all nations willing to participate would fall significantly short of being able to guarantee the security of all trade vessels.

2 Development towards a Legal Reform

This set the stage for ship owners becoming more vocal about their situation and engaging with the public to build up pressure on the political actors. In Germany, they quickly and vehemently pushed for further state action during the high time of piracy off the coast of Somalia.[8] Understandably so, after all their ships were under attack and other countries provided 'their vessels' with further security measures, that is, by making the armed forces available for private ships in the case of the Netherlands[9] or by opening ways to allow ship owners to employ armed guards for their vessels as was the case, for example, in Greece and Denmark.[10] At this point of time in Germany, politics and the shipping industry had been at odds with each other for a while. Germany, being the largest container ship-owning country, is widely seen as a global maritime player.[11] However, while many shipping companies are seated in Germany, German ship owners traditionally resort to flags of convenience.[12] Consequently, the size of its flag has never really reflected Germany's status as a major player in the field. There have been political agreements between the German government and the shipping industry, in which the political players promised better (financial) conditions in numerous ways for German companies, if they agreed to increase the number of ships flying the German flag.[13] Yet, with the global economic crisis still ongoing in 2010, ship owners were generally hesitant to fulfil such commitments due to the higher costs associated with the German flag, and used piracy, especially the perceived inaction of the German government, as an explanation. They also used this argument as a lever to push for further state action.[14] At this point, many German ship owners had already started employing armed security personnel to protect their ships, which sailed under flags such as Liberia,[15] a flag renowned for being very forthcoming with allowing armed personnel.

Against this backdrop, a public discussion ensued. The main union of the Federal Police positioned the Federal Police as a possible key actor touting their ability to train vessel protection detachments (VPD) and offer police protection to German-flagged vessels.[16] The Federal Police (former Bundesgrenzschutz, the German border police) was still recovering from a loss in significance after the German reunification and the creation of Europe's Schengen Area, which made new areas of responsibilities attractive. Furthermore, it could legally rely on § 6 Bundespolizeigesetz (Act on the Federal Police), awarding the Federal Police broad jurisdiction including antipiracy measures and arguably VPD services.[17] Such a step also would have added to the appeal of the German flag. However, factually, the Federal Police were lacking the equipment and trained personnel for such specific duties, and it soon became clear that both deficiencies would not be remediable on short notice.[18] The German Armed Forces, which – in contrast to the Federal Police – already had the capability to provide VPD services, were lacking personnel also, seeing that they calculated the number of soldiers needed to protect one vessel as being between ten and twelve[19] –

6. *See* the first indent of Art. 1(1) of the EU Joint Action 2008/851/CFSP of 10 November 2008.
7. *See e.g.* A. Palmer, *The New Pirates* (2014), at 167 et seq.
8. *See e.g.* H. Friederichs, 'Reeder fordern Ausweitung des Anti-Piraten-Einsatzes', *Zeit Online*, available at: https://www.zeit.de/online/2009/18/piraten-tagung (last visited 22 June 2009).
9. *See* the contribution by Paul Mevis in this volume.
10. *See* the contribution of Christian Frier in this volume; for the whole development, *see also* Y. Dutton, 'Gunslingers on the High Seas: A Call for Regulation', in J. Basedow, U. Magnus & R. Wolfrum (eds.), *The Hamburg Lectures on Maritime Affairs 2011-2013* (2014) 251, at 274 et seq.
11. *See* UNCTAD, *Review of Maritime Transport 2018* (2018), 29 et seq.
12. *See* C. Koenig and D. König, in von Mangoldt/Klein/Starck, *Grundgesetz*, Art. 27, paras. 8, 12; for the long-standing practice of using flags of convenience, *see e.g.* B.A. Boczek, *Flags of Convenience* (1962); E. Osieke, 'Flags of Convenience Vessels: Recent Developments', 73(4) *AJIL* 604-27 (1979); D. König, 'Flags of Convenience', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law online edition* (2008). This practice is the (unintended) consequence of Art. 91(1) sentence 2 UNCLOS mandating a genuine link between the flag state and the ship flying its flag, but not defining the concept. It has since been construed widely by the International Tribunal for the Law of the Sea in its judgments *SAIGA (No. 2) Case* (*Saint Vincent and the Grenadines* v. *Guinea* [Merits]), judgment of 1 June 1999, paras. 75et seq., 83 and *Grand Prince Case* (*Belize* v. *France* [Prompt Release]), judgment of 20 April 2001, paras. 82et seq.; *Virginia G Case* (*Panama* v. *Guinea-Bissau*), judgment of 14 April 2014, paras. 108 et seq., 110, 113; Available at: https://www.itlos.org/en/cases/list-of-cases; *see* C. Koenig and D. König, in von Mangoldt/Klein/Starck, *Grundgesetz*, Art. 27, para. 7.
13. *See e.g.* O. Preuß and R. Zamponi, 'Schwarz-Rot-Streit: Konflikt unter deutschen Reedern', *Hamburger Abendblatt*, 31 December 2010, available at: http://bit.ly/2DNVMEM.
14. *See e.g.* M. Lutz, 'Reeder verlangen von Regierung mehr Schutz vor Piraten', *WeltOnline*, 11 August 2011, available at: https://bit.ly/2Qfv9BC.
15. P. Hagen, 'German Owners Flag Out to Carry Private Security Forces', *Lloyd's List*, 15 June 2010.
16. *See e.g.* B. Witthaut, 'Einsatz der Bundespolizei am Horn von Afrika', *BehördenSpiegel*, 8 February 2012, available at: http://bit.ly/2BISKDF; M. Lutz, 'Polizei fordert 500 Soldaten zur Piraten-Bekämpfung', *Welt*, 10 August 2011, available at: http://bit.ly/2D9LeP8.
17. The norm states: 'Without prejudice to the competence of other authorities or of the armed forces, the Federal Police shall take the measures outside the German territorial sea to which the Federal Republic of Germany is entitled under international law. This does not apply to measures assigned by federal law to other authorities or departments or reserved exclusively for warships.'
18. *See e.g.* Walter, 'Einsatz der BPol am Horn von Afrika derzeit nicht darstellbar', *BehördenSpiegel*, 16 February 2012, available at: http://bit.ly/2oDjj84.
19. 'Schutz durch Soldaten auf dem Prüfstand', *MaritimHeute.de*, 17 December 2010 (article on file with the author); the Federal Police

a number too large to present a realistic option for ship owners. Consequently, the pressure was building on the political actors. Would desperate Somalis with their small skiffs and rusty (albeit dangerous) guns be enough to result in an all-too-public display of the inability of the German government to protect its trading fleet's vessels? In this situation, the political actors aligned with the international tendency to support privately contracted armed guards on commercial vessels.[20] This stance was prone to significant controversy in Germany. There were well-founded worries that such a move would escalate the phenomenon of piracy, since the pirates had seldom used their guns on board the vessels, knowing they would not meet armed resistance there.[21] In the same vein, members of the ATALANTA operation warned that their work would become more complicated, if armed guards of varying qualities would be inserted into the equation, for example, in hostage situations.[22] Furthermore, the image of private armed guards on trade vessels in shooting battles with pirates while the crew and possibly passengers or potentially hazardous cargo were on board was unattractive to say the least.

The nevertheless swift passing of the legal reform had different reasons. First, there was the already described lack of alternatives. The government was cornered by the calls for action from the maritime industry, which were amplified by the publics' concern over shocking displays of destruction on the hijacked vessels and the trauma caused to mariners who fell victim to pirate attacks.[23] While the opponents of such a legislative reform could find numerous arguments against allowing private armed guards, it was hard (and still is) to rally behind a position which provides no viable alternative to protect German trade vessels from pirate attacks. However, the real driver for reaching a swift political agreement on such a controversial topic was that there was general agreement about the deficiency of the legal framework as it was. Contrary to the public perception and political statements,[24] rather than outlawing private armed guards on trade vessels, the legal framework as it stood actually permitted their use without providing adequate measures of quality control.[25]

3 Legal Framework before 2013

While the phenomenon of armed security personnel on trade vessels was new, the existing national legislation on security guards, especially § 34a of the Trade Regulation Act (Gewerbeordnung, in the following: GewO) and § 28 Weapons Act (Waffengesetz, in the following: WaffG), applied to private armed guards on vessels flying the German flag. The flag state principle means that the jurisdiction of the flag state applies to a ship flying its flag. Furthermore, the aforementioned norms were not limited to the German territory.[26] The following segment focusses on the law as it was until 2013, in order to allow a side-by-side view of the law before and after the legislative overhaul to illustrate the far-reaching effects of the reform.

3.1 Starting and Running a Security Company Pursuant to § 34a GewO

3.1.1 Basic Requirements to Start and Run a Security Company

Pursuant to § 34a(1), sentence 1, GewO, the commercial provision of protection for the life and property of people or businesses was subject to government authorisation.[27] § 34a GewO in principle awarded the competent German authorities discretion (*Ermessen*) to authorise the owner of a company offering protection services. However, if the authorities had grounds to assume that the person seeking such authorisation was 'unreliable', lacked the means and securities needed or could not produce a certificate, attesting that he or she has been instructed by the Chamber of Commerce and Industry, they were bound by law to deny their authorisation as provided by § 34a(1), sentence 3, GewO. Furthermore,

also calculated ten to twelve police officers to counter pirate attacks effectively, *see* Walter, above n. 18.

20. *See* T. Wiegold, 'Immer mehr private Sicherheitsteams gegen Piraten', 29 June 2011, available at: http://augengeradeaus.net/2011/06/immer-mehr-private-sicherheitsteams-gegen-piraten; for the international tendency, *see* Dutton, above n. 10, at 274 et seq.; *see also* the representation of IMO's evolving position on the issue, available at: http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Pages/Private-Armed-Security.aspx.
21. *See* D. König and T.R. Salomon, 'Private Sicherheitsdienste im Einsatz gegen Piraten', *Rechtswissenschaft (RW)* 303, at 331 (2011).
22. D. Osler, 'EU NAVFOR Warns Private Security Will Complicate Rescue Operations', *Lloyd's List*, 15 September 2010.
23. *See* the case of the Beluga Nomination, 'Die Piraten haben den Bootsmann erschossen', *FAZ*, 1 February 2011, available at: http://www.faz.net/-gqi-daq.
24. The former maritime coordinator of the German government famously stated that the traffic lights would be changed from red to yellow on the issue of maritime security providers, T. Wiegold, 'Private gegen Piraten: "Wir stellen die Ampel von Rot auf Gelb"', *augengeradeaus.net*, 20 July 2011, available at: http://augengeradeaus.net/2011/07/private-gegen-piraten-wir-stellen-die-ampel-von-rot-auf-gelb.
25. *See* R. Brinktrine, 'Der Einsatz privater Sicherheitsdienste zum Schutz vor Piraterie und maritimen Terrorismus', in Stober (ed.), *Der Schutz vor Piraterie und maritimem Terrorismus zwischen internationaler, nationaler und unternehmerischer Verantwortung* (2010) 39, at 47 et seq.; König and Salomon (2011), above n. 21, at 319 et seq.; T.R. Salomon and S. tho Pesch, 'Das Zulassungsregime für bewaffnete Sicherheitsdienste auf Handelsschiffen', *DÖV* 760, at 762 (2013); C. Oehmke, *Der Einsatz privater Sicherheitsdienste auf Handelsschiffen zur Abwehr gegen Piraterie* (2017), at 441; Working Group of the Conference of the Ministers of the Interior, *Bekämpfung der Seepiraterie*, 29 November 2011, at 27, available at: https://www.innenministerkonferenz.de/IMK/DE/termine/to-beschluesse/11-12-09/Anlage14.pdf.
26. With further references König and Salomon (2011), above n. 21, at 319; *see also* Oehmke, above n. 25, at 441.
27. In this segment, the past tense will be used, as the law as it stood before 2013 is assessed. While many of those rules are still in force and still regulate the private security sector in Germany, after the newly introduced rules discussed as follows, they no longer apply to private maritime security, as the new rules are *lex specialis*, *see* Oehmke, above n. 25, at 443.

if the requirements were fulfilled, that is, there were no grounds for refusal, the competent authorities were under a duty to grant the authorisation following from constitutional law's influences on § 34a GewO protecting everyone's occupational freedom and the freedom of commerce.[28]

A company owner authorised to offer protection services pursuant to § 34a(1) GewO in turn was only allowed to employ people who were 'reliable' and could produce a certificate, attesting that they had been instructed by the Chamber of Commerce and Industry concerning their rights and obligations. Slightly higher requirements were in place for private security guards working in public areas, protecting retail shops against shoplifters and working as doormen in nightclubs. Those had to pass an exam pursuant to § 34a(1), sentence 5, GewO, evidencing that they had sufficient knowledge of their rights and obligations under the law.[29]

In summary, apart from possibly having to pass a general knowledge examination, persons needed to fulfil three requirements to start and run a security company offering protection services. They had to be reliable, have the necessary means and securities (to get through the first six months[30]), be able to produce a certificate that they received instructions on their rights and duties and basic training concerning de-escalation and so on. Of course, reliability is a vague legal term, but it is regularly used for the regulation of all kinds of industries in the GewO, is sufficiently open to interpretation to allow it to be applied differently in different industries and has been given contours by the courts. In summary, persons are unreliable, when there are grounds to suspect that they are incapable or unwilling to fulfil their obligations and execute their work in a proper form.[31] For the security industry, this has been held to be the case, for example, if a person running a security company has a criminal record, especially entailing convictions for assault or economic crimes.[32] To ascertain this, the authorities may access the criminal records of a person.[33]

28. With further references König and Salomon (2011), above n. 21, at 320; U. Schönleitner, 'Erlaubnisbedürftiges Bewachungsgewerbe', in R. Stober and H. Olschok (eds.), *Handbuch des Sicherheitsgewerberechts* (2004) 191, at 194.
29. For a general overview, König and Salomon (2011), above n. 21, at 319 et seq.; D. König and T. R. Salomon, 'Fighting Piracy – The German Perspective', in P. Koutrakos and A. Skordas (eds.), *The Law and Practice of Piracy at Sea* (2014) 225, at 240 et seq.; for a closer focus on the statutory exam, F. Jungk and C. Deutschland, in J.C. Pielow (ed.), *Beck-OK GewO* (2017), § 34a, para. 34 et seq. The content of the exam is regulated by Annex 4 to the Ordinance on the Guard Profession (Verordnung über das Bewachungsgewerbe), as published on 10 July 2003 (Bundesgesetzblatt [Federal Law Gazette, in the following: BGBl.] I 1378), last amended by Art. 1 of the ordinance of 1 December 2016 (BGBl. I 2692).
30. *See* F. Jungk and C. Deutschland, in J.C. Pielow (ed.), *Beck-OK-GewO* (2010), § 34a, para. 33.
31. P. Marcks, in Landmann/Rohmer (ed.), *Gewerbeordnung* (2009), § 34a GewO, para. 29; Jungk and Deutschland (2017), above n. 29, para. 30.
32. Jungk and Deutschland (2017), above n. 29, para. 32.
33. This is today regulated in § 34a(1) sentence 5 GewO; § 34a(1) sentence 6 GewO also allows an information request to the local Office for the Protection of the Constitution, *see* Jungk and Deutschland (2017), above n. 29, para. 32.

3.1.2 Further Aspects of § 34a GewO

§ 34a GewO also authorised the Federal Ministry for Economic Affairs and Energy to issue ordinances,[34] which was used in December 1995.[35] This ordinance detailed, among other matters, mandatory insurance policies for security companies, the necessity of carrying special identification and the modalities of the instruction by the Chamber of Commerce and Industry pursuant to § 34a(1), sentence 3, GewO as well as the examination needed pursuant to § 34a(1), sentence 5, GewO, especially the number of hours this instruction takes and the subject matter it covers.[36]

§ 34a(4) GewO authorised the authorities to mandate a company to discontinue an employee because facts suggest that he or she is unreliable, that is, because of a recent criminal conviction.[37] § 34a(5) GewO explained in how far private security companies were allowed to use force. It outlined that private security providers may only exercise the rights enjoyed by all citizens, especially the right to self-defence, unless public powers have been conferred upon them, which was rarely the case. This was a general feature of the discussion leading up to the new regulation on maritime security providers. It is generally accepted on a constitutional law level that the state has the monopoly to use force.[38] Thus, the question arose whether the use of privately contracted security providers would contradict or infringe upon this monopoly. In Germany, there is widespread agreement that this was not the case, since such guards do not exercise public powers or have public authority.[39] Employing armed guards on board ships – from a legal standpoint – is no different from employing armed guards to protect a money transport to and from a bank in Germany.[40] However, in the case of private armed guards protecting vessels there may be additional legal duties of the German state to regulate this industry.[41]

3.1.3 State Oversight and Sanctions

Security companies fell under the same regime of industrial inspection as other trades. Pursuant to this control regime, authorities could step in if a business was run without authorisation and mandate the closure of the business.[42] If a business was run with an authorisation but the prerequisites for the authorisation were no longer met, that is, the business owner became unreliable,

34. § 34a(2) GewO.
35. *See* above n. 29; *see also* Marcks, above n. 31, para. 35.
36. Jungk and Deutschland (2017), above n. 29, para. 64.
37. *See* Jungk and Deutschland (2017), above n. 29, para. 71. This may also result in the revocation of an authorisation vis-à-vis the employer, since a misconduct of an employee may be attributable to the employer or reflect the employer's unreliability, *see* Marcks, above n. 31, at 40.
38. König and Salomon (2011), above n. 21, at 322 et seq.; Oehmke, above n. 25, at 386 et seq., both with further references.
39. *See* Working Group of the Conference of the Ministers of the Interior, above n. 25, at 27.
40. König and Salomon (2011), above n. 21, at 322 et seq.; *see also* J. Ennuschat, 'Der neue § 31 GewO – ein Schritt zur Privatisierung der öffentlichen Sicherheit?' *Gewerbearchiv* 329, at 331 (2014).
41. For a discussion, *see* Oehmke, above n. 25, at 412 et seq. and 435 et seq.
42. § 15(2) GewO. G. Sydow, in J.C. Pielow (ed.), *Beck-OK-GewO* (2010), § 15, para. 31.

the authorisation could be withdrawn[43] and the business closure mandated.[44]

For the purposes of effective state oversight, the competent authorities could mandate the business owner to disclose information on certain aspects.[45] Such a request could only be denied if a business owner would otherwise expose himself or herself or his or her own relatives to the danger of criminal prosecution.[46] Moreover, authorities had the right to enter the premises of businesses during business hours to inspect the business records.[47]

The GewO also contained norms on sanctions, for example, if a business owner runs a security company without authorisation. Such behaviour was – and still is – an administrative offence which may result in a fine of up to 5,000 euros.[48] The repetition of such behaviour may amount to a criminal offence pursuant to § 148 no. 1 GewO punishable with a fine or imprisonment of up to one year.

3.2 The Prerequisites for the Provision of Armed Security Pursuant to § 28 WaffG

Anyone who protected goods or people using weapons not only needed the authorisation pursuant to the GewO but also had to comply with the Weapons Act. The material prerequisites of the Weapons Act were a bit stricter in comparison to the relatively lax § 34a GewO, since armed protection results in a higher risk. A person seeking authorisation to protect people in an armed fashion first had to be reliable pursuant to § 5 Weapons Act. This notion of reliability was a bit stricter or at least more detailed compared to that in § 34a GewO, because in contrast to the GewO, § 5 WaffG outlined in some detail what it meant by reliability and did not leave it up to the executive and judicative branch to decide. For example, a person was deemed to be unreliable in the sense of the norm, if facts justified the assumption that he or she would handle weapons or ammunition carelessly.[49]

Other than having to prove reliability, a person wanting to offer armed protection also had to show the personal aptitude for the task, which is deemed to be lacking, for example, if facts justify the assumption that he or she is addicted to alcohol or other controlled substances.[50] Furthermore, the person had to evidence their expertise with weapons.[51] The details of how to prove expertise and which standards applied were outlined in secondary legislation.[52] Usually, the participation in detailed courses and examinations were required. The WaffG also included an age restriction, resulting in a minimum age limit of eighteen years pursuant to § 2(1) WaffG.

Other than reliability, personal aptitude and expertise, a person furthermore had to evidence a need or necessity to use weapons pursuant to § 8 WaffG. § 28 WaffG, which regulated the specific case of security guards, obliged security guards to demonstrate that the specific service they intended to offer required the use of arms, due to the circumstances of the single case, namely, the nature of the person or object under protection.[53]

The Weapons Act also restricted the kinds of weapons allowable under the law,[54] for example, by disallowing weapons of war, especially automatic weapons. The German Federal Criminal Police Office had jurisdiction to decide in cases of doubt whether a weapon was allowable or not.[55]

If all prerequisites were fulfilled, a person was able to apply for permission to purchase and own a specific weapon.[56] However, carrying a weapon necessitated a separate permission[57] and yet another permission was needed to actually fire a weapon.[58]

3.3 Interim Conclusion

In conclusion, 34a GewO and § 28 WaffG did not distinguish between privately contracted armed guards protecting trade vessels in high-risk areas and store detectives or nightclub bouncers. The rules applied to all kinds of armed guarding activities and did not fall short of applying to private maritime guards.[59] This led to problematic results. On the one hand, the material standards ensuring that people offering armed protection to trade vessels were highly trained and skilled was lacking.[60] On the other hand, the old law would have proven to be factually prohibitive. Mandating that maritime armed guards show up in person before a German Chamber of Commerce and Industry to be instructed in German on their rights and obligations under German law among other matters would have been impractical. The same applies for the need to obtain the necessary

43. Pursuant to the general rules, *e.g.* § 49 Verwaltungsverfahrensgesetz (VwVfG, Administrative Procedure Act) (or § 48 VwVfG, if the prerequisites of an authorisation pursuant to § 34a GewO were never met, but the authorisation was nevertheless granted); *see* B. Handan, 'Grundzüge des Gewerberechts', *JA* 249, at 253 (2007).
44. § 15(2) GewO.
45. § 29(1) GewO.
46. § 29(3) GewO.
47. § 29(2) GewO.
48. § 144(1) no. 1(f); (4) GewO.
49. § 5(1) no. 2(a) WaffG.
50. § 6(1) sentence 1, no. 2 WaffG.
51. § 7 WaffG.
52. General Order to the Weapons Act (Allgemeine Waffengesetz-Verordnung) of 27 October 2003 (BGBl. I 2123), last amended by Art. 2 of the Law of 30 June 2017 (BGBl. I 2133).
53. König and Salomon (2011), above n. 21, at 325, with further references.
54. § 2(2) WaffG; Annex 2 to the WaffG.
55. §§ 2(5), 48(3) WaffG.
56. § 10(1) WaffG.
57. § 10(4) WaffG; *see* A.V. König and C. Papsthart, in *NomosKommentar WaffG* (2012), § 10, para. 11.
58. § 10(5) WaffG, which does not apply in cases of self-defence; *see* König and Papsthart, above n. 57, para. 14. This requirement is still in place today, resulting in a prohibition to train the shooting of weapons at sea unless a permission pursuant to § 10(5) WaffG has been granted; *see* the information provided by the BAFA in the FAQ section on their webpage, 'Is it permitted to organise the weapons training on the high seas?', available at: http://www.bafa.de/EN/Foreign_Trade/Maritime_Security/maritime_security_node.html (last visited 27 December 2017).
59. See the widely accepted definition of guard profession in Jungk and Deutschland (2017), above n. 29, para. 4 et seq. including the exercise of active personal care to intentionally protect a person or good against external threats.
60. Oehmke, above n. 25, at 441.

permission pursuant to the Weapons Act, again requiring mandatory classes in German. Such a procedural necessity would have proven at least extremely cumbersome for companies from foreign countries, much more so, if they in turn employed maritime guards who came from yet different countries.

Overall, one would have to assess the legal regime established by § 34a GewO and § 28 WaffG as fundamentally unfit for the dangerous practice of protecting vessels with armed guards against piratical attacks. 'Reliability' alone is insufficient as the main quality standard for armed guards on trade vessels, and the GewO did not provide for much more. In addition, the regulatory system lacked a proper regime of state control and sanctions in that it did not address the challenges of regulating an industry that operated far away from German territory. Furthermore, it failed to provide the procedural standards needed to regulate an international industry made up mainly of companies from foreign countries.

This regulatory framework left the government with two options:

1. Leave the law as it is and allow armed guards on board trade vessels without mandating meaningful vetting and quality control, while factually discouraging the practice by upholding the cumbersome national authorisation process with its focus on instructions and examinations in the German language. This option would have most likely resulted in numerous violations of the GewO and WaffG norms by ship owners or – much more likely – a further decrease in the number of vessels flying the German flag.
2. Regulate privately contracted maritime security companies and thus attempt to introduce a normative framework tailor-made for the regulation of such a dynamic and international trade.

It chose the second alternative.

4 Legal Reform of Maritime Security Providers in German Law

In doing so, German legislators had to deal with the tension that typically exists when regulating the maritime industry. On the one hand, introducing high-quality standards for armed guards operating on German vessels could drive ship owners away from the German flag, since rendering the German legislation inapplicable requires no more than that – a change of flags. Thus, any such regulation would have been a 'paper tiger', a regulation of merely, if at all, theoretical value. Introducing low-quality standards, on the other hand, would not have increased the security of trade vessels, but factually would have been to its detriment, for example, by allowing 'cowboys'[61] with guns on board German-flagged vessels. Moreover, such a move would have significantly shifted the burden of quality control to the ship owners. Without being able to rely on high-quality standards set by the German government they would have had to adopt their own vetting and quality assurance mechanisms to make sure that they contract only suitable and reliable security companies or otherwise put their crews, vessels and cargo at risk and face possible damage claims.[62]

With the new legislation, Germany chose a middle path. The Bundestag voted to amend the GewO and the WaffG. However, it departed significantly from the traditional German way of regulating businesses. Even the competent authorities, the Federal Ministry for Economic Affairs and Energy and the Federal Ministry of Transport and Digital Infrastructure acknowledged that the new § 31 GewO, which was introduced in 2013,[63] established factually and, legally speaking, a totally new procedure for a trade license.[64]

Pursuant to the new system, maritime security providers need to obtain a license issued by the Federal Office for Economic Affairs and Export Control (BAFA) in consultation with the Federal Police.[65] The key difference between the new licensing system and other systems of trade licenses in German law is the corporate approach. In the past, the GewO always focussed on the person, that is, the company owner and his or her employees, with a view to ascertaining their reliability. § 31 GewO established a government approval system that focusses on the company itself. Instead of the company owner and the employees having to prove their reliability, the new regulatory system has the aim to ascertain whether the company has put the necessary organisational processes in place to safeguard that only reliable and suitable employees will undertake vessel protection services. To this end, the BAFA will, for example, not mandate a certain kind of training for new guards; it will simply look at the security and training concept, which the company has to document and make available during the licensing procedure, and evaluate whether based on this procedure it is sufficiently safeguarded that only reliable, apt and competent people are

61. The term 'cowboys' is often used as a synonym for unreliable, possibly trigger-happy, security guards not accustomed to the maritime environment; see e.g. Dutton, above n. 10, at 268; but the term also finds use in the academic discussion on private military and security companies; see K. Carmola, Private Security Contractors and New Wars (2010), at 13.
62. See Salomon and tho Pesch, above n. 25, at 762; M. Mudric, 'Armed Guards on Vessels: Insurance and Liability', 50 Comparative Maritime Law 217-68 (2011), available at: http://hrcak.srce.hr/file/114368.
63. Gesetz zur Einführung eines Zulassungsverfahrens für Bewachungsunternehmen auf Seeschiffen of 4 March 2013 (BGBl. I 362), last amended by the Law of 24 April 2013 (BGBl. I 930).
64. Erfahrungsbericht des Bundesministeriums für Wirtschaft und Energie im Benehmen mit dem Bundesministerium für Verkehr und digitale Infrastruktur und dem Bundesministerium des Innern, BT-Drs. 18/6443 of 16 October 2015, at 2.
65. § 31(1,2) GewO.

going to be deployed to trade vessels.[66] A slight departure from the corporate approach is made for the assessment of the management. The reliability, personal aptitude and competence of the management have to be evidenced during the licensing procedure.[67]
Aside from the GewO, the Weapons Act also has been amended to make a similar approach possible.

4.1 The Basic Requirements for Obtaining a License

The new § 31 GewO mandates that security companies planning to guard vessels sailing under German flag seawards of the German Exclusive Economic Zone against external threats[68] need a license issued by the BAFA in consultation with the Federal Police[69] regardless of where the security company is seated. Moreover, any German security company wishing to provide such services needs the same license regardless of the flags of the vessels on which they operate.[70] While § 34a GewO remains in force, § 31 GewO today applies as lex specialis to security companies offering protection to trade vessels in the sense described previously.[71]

4.1.1 The Requirements Pursuant to § 31 GewO for Maritime Security Companies

§ 31 GewO lists specific requirements regarding the internal organisation and procedures of the companies applying for the license, and it also seeks to ensure technical and personal reliability, personal aptitude and competence of the persons involved.[72] However – in line with the corporate approach – it is not the German authorities that scrutinise the personal reliability of the people involved, but the company itself, with the German authorities merely assessing, if the internal organisation of said company guarantees that their employees meet the requirements. As such, the license is to be refused, pursuant to § 31(2), sentence 3, no. 1 GewO, when the company seeking to be licensed does not fulfil the requirements concerning the operational organisation and internal procedures needed to ensure that the people involved in the provision of security services are reliable and demonstrate the necessary personal aptitude. Grounds for refusal pursuant to § 31(2), sentence 3, no. 2, GewO, are also given, if the management personnel does not demonstrate the necessary professional and personal competence and reliability or if the company fails to produce the required business liability insurance.[73] Other relevant requirements, which are much more detailed and intricate, are laid down in secondary legislation, namely, the Ordinance on the Licensing of Security Companies on Ocean-Going Sea Vessels (in the following: Licensing Ordinance[74]) and the Implementing Ordinance for the Ocean-Going Vessel Security Ordinance (in the following: Implementing Ordinance[75]).
Whereas § 31 GewO safeguards that every security company operating from Germany or on German-flagged vessels will need to be licensed pursuant to the new regime, an amendment to the German Ordinance on Shipboard Security Measures (See- Eigensicherungsverordnung[76]) establishes a duty of ship owners sailing under the German flag and wishing to deploy armed guards to only employ those with a license pursuant to § 31 GewO.[77] In order to safeguard that a sufficient number of such companies is available, the duty pursuant to the German Ordinance on Shipboard Security Measures entered into force about nine months after the licensing regime.[78] The ordinance obliges ship owners and operators to apply for an annex to the ship security plan mandatory pursuant to the International Ship and Port Facility Security (ISPS) Code. This annex needs to detail that armed security guards will be used, that those guards are licensed pursuant to § 31 GewO and that they will keep to the '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'[79] published by the International Maritime Organization (IMO).[80] By doing so, the ordinance factually makes adherence to this soft law instrument mandatory.
Employing guards without a license pursuant to § 31(1,2) GewO constitutes an administrative offence by the ship owner, which may result in a fine of up to 15,000 euros being imposed.[81] This procedure is administered by the Federal Maritime and Hydrographic Agency (Bundesamt für Seeschifffahrt und Hydrographie [BSH]). Such a violation will lead to the revocation of the approval of the annex to the ship security plan.[82]

66. König and Salomon (2014), above n. 29, at 242; Salomon and tho Pesch, above n. 25, at 763; H. Jessen, 'Der Einsatz privater bewaffneter Sicherheitsunternehmen auf Handelsschiffen unter deutscher Flagge', RdTW 125, at 130 et seq. (2013); Oehmke, above n. 25, at 447 et seq.
67. § 31(2), sentence 3, no. 2 GewO; see Oehmke, above n. 25, at 455.
68. § 31(1) GewO.
69. § 31(2) GewO.
70. Salomon and tho Pesch, above n. 25, at 763; *see also* VGH Kassel, Order of 21 July 2015 – 8 B 1916/14 – ECLI:DE:VGHHE:2015:0721.8B1916.14.0A, para. 2.
71. § 31(2), sentence 4, GewO; *see also* Oehmke, above n. 25, at 443.
72. § 31(2), sentence 3, no. 1, GewO.
73. Regarding the latter as a ground for refusal *see* § 31(2), sentence 3, no. 3, GewO.
74. Ordinance of 11 June 2013 (BGBl. I 1562).
75. Ordinance of 21 June 2013 (BGBl. I 1623).
76. Ordinance of 19 September 2005 (BGBl. I 2787), last amended by Art. 3 of the Ordinance of 1 March 2016 (BGBl. I 329).
77. *See* § 7(2a), sentence 1, no. 2(b), and sentence 3, German Ordinance on Shipboard Security Measures.
78. Salomon and tho Pesch, above n. 25, at 761.
79. MSC.1/Circ.1405/Rev. 2, 25 May 2012, as published by the Federal Ministry of Transport, Building and Urban Development, as it then was, in Verkehrsblatt 2013, at 640.
80. § 7(2a), sentence 1, no. 2(a) and (b), German Ordinance on Shipboard Security Measures.
81. Allgemeine Verwaltungsvorschrift für die Erteilung von Buß – und Verwarnungsgeldern für Zuwiderhandlungen gegen strom – und schifffahrtspolizeiliche Vorschriften des Bundes auf Binnen – und Seeschifffahrtsstraßen sowie in der ausschließlichen Wirtschaftszone und auf der Hohen See (Buß – und Verwarnungsgeldkatalog Binnen – und Seeschifffahrtsstraßen – BVKatBin-See), 2015, para. 37.103200 (at 333).
82. § 7(4) German Ordinance on Shipboard Security Measures.

4.1.2 *Ordinance on the Licensing of Security Companies on Ocean-Going Sea Vessels*

The basic norm, § 4(1) Licensing Ordinance, regulates that in order to apply for a license, a company has to set up and document a proper operational framework that ensures compliance with legal requirements and maintain this framework during the term of the license. The company furthermore has to define, document and regularly update appropriate procedures for planning and conducting operations at sea, such as the composition and qualification of the security personnel, procedural rules on the use of force and weapons and the monitoring of the security operatives on board.[83] In addition, the company has to regulate the duties of its security operatives through a general standing order, operations-specific standing orders and shift scheduling[84] and ensure that the security operatives are equipped with appropriate, serviceable equipment for carrying out their security function.[85] Concerning the employees actually exercising security functions, the company has to ensure that guards are reliable,[86] are at least 18 years old,[87] have the necessary personal aptitude[88] and possess the necessary competence.[89] The company also has to name a so-called designated executive, who acts as a link between the company and the German authorities.[90] Regarding this executive, the company has to submit records showing that he or she, as the person who is responsible to ensure compliance with the regulation,[91] also fulfils these requirements.[92] The company wishing to be licensed also has to produce proof of having a liability insurance policy that fulfils the requirements pursuant to § 12 of the Licensing Ordinance and submit a company profile containing a description of the market position of the security company in the field of maritime security.[93]

4.1.3 *Implementing Ordinance for the Ocean-Going Vessel Security Ordinance*

The Implementing Ordinance first regulates the appointment procedure of the designated executive[94] and the organisational structure of the company in question.[95] In doing so, it establishes relatively detailed standards. First, the company has to establish areas of responsibility of the specific guards on board a vessel and of other employees.[96] It also has to explain how the company will deal with cases of absence.[97] The Implementing Ordinance also mandates that the security team of a vessel has to be sufficiently staffed, requiring a minimum of four operatives, but opening the possibility to require more team members whenever the risk assessment shows a necessity for a higher headcount.[98] The company also has to show that it has documented criteria to determine staffing requirements, including role distribution within the security team. It lays out that each vessel protection team must consist of a) a team leader, b) a deputy team leader, c) guards and d) a trained paramedic; however, b), c), and d) may be performed by the same person, as long as the team does not fall short of the minimum number of team members.[99]

While the Licensing Ordinance regulates the material requirements, which the members of a security team have to fulfil, the Implementing Ordinance sets standards for the personnel selection and review process, which the company has to follow to ensure that the material requirements are continuously fulfilled.[100] It also lays down some rules for the training of a company's employees,[101] for example, a minimum of four weapons training sessions a year, which may not be more than six months apart.[102] How these trainings are conducted is again up to the company.[103] Furthermore, companies have to introduce internal control,[104] documentation[105] and communication processes, for example, to safeguard the immediate report of imminent or observed misconduct to the designated executive.[106]

The Implementing Ordinance also regulates the duty of the company to have deployment procedures in place, which include a consideration of the IMO's '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', and observance of the 'Best Management Practices for Protection against Somalia Based Piracy' (BMP).[107] The deployment procedures also have to safeguard the strict avoidance of physical force and the use of weapons. Exceptions may only be made when

83. § 5(1) Licensing Ordinance.
84. § 5(2) Licensing Ordinance.
85. § 6(1), sentence 1, Licensing Ordinance.
86. § 8 Licensing Ordinance.
87. § 7, no. 2, Licensing Ordinance.
88. § 9 Licensing Ordinance.
89. § 10 Licensing Ordinance.
90. The BAFA on its webpage mentions the designated executive as a 'role model for the security personnel', who must 'possess the same level of knowledge'; *see* the FAQ section on the BAFA webpage, 'Does the executive has to possess the full level of knowledge pursuant to section 10 Ordinance on the Licensing of Security Companies on Ocean-Going Sea Vessels already at the time when the application is filed or is it possible to submit the evidence later, probably after licensing?', available at: http://www.bafa.de/EN/Foreign_Trade/Maritime_Security/maritime_security_node.html.
91. § 4(1), sentence 2, no. 1, Licensing Ordinance.
92. § 11(2-4) Licensing Ordinance.
93. § 2(2) Licensing Ordinance.
94. § 1 Implementing Ordinance.
95. § 2 Implementing Ordinance.
96. The necessity to make available a sufficient number of employees around the clock on land to maintain operations is regulated in § 1(1), no. 3, of the Implementing Ordinance. For the requirement to legal advice around the clock *see* § 8 of Implementing Ordinance.
97. § 2(1), no. 1, Implementing Ordinance.
98. § 2(1), no. 2, Implementing Ordinance.
99. § 2(1), no. 2, Implementing Ordinance.
100. § 4 and 5 Implementing Ordinance.
101. § 6 and 7 Implementing Ordinance.
102. § 7(2) Implementing Ordinance.
103. *See* the answer to the question, 'How and to what extent should the legal knowledge training be organized?', in the FAQ section on the BAFA webpage, available at: http://www.bafa.de/EN/Foreign_Trade/Maritime_Security/maritime_security_node.html.
104. § 9 Implementing Ordinance.
105. § 10 Implementing Ordinance.
106. § 11 Implementing Ordinance as a whole, but especially § 11(1), no. 2, Implementing Ordinance.
107. § 12(2) Implementing Ordinance.

they are in accordance with the German legislation, particularly the rules on self-defence with special consideration given to appropriateness, necessity and proportionality of the defensive action.[108] The Ordinance specifies:

> If an attack is in progress and other milder defensive measures are unsuccessful or if their use is unpromising, the team leader gives the instruction – after the captain has expressly ordered it – to occupy the defensive positions and make preparations to fire. With consideration given to the general circumstances in individual cases, the following basic escalation levels are provided for:
> 1. warning shots into the air,
> 2. warning shots into the water in the vicinity of the attackers,
> 3. targeted shots at objects, particularly at the boat motor or hull,
> 4. as a last resort, if all milder defensive measures are ineffective, it is possible to use firearms directly against the attackers.[109]

It is noteworthy that master of a vessel (here: the captain) remains the final decision-maker. This was uncontroversial during the legislative process, since it is mandated by international and German law and its importance was universally supported.[110] While the Implementing Ordinance thus gives directions on how to exercise the right to self-defence, the legal rules regulating the use of force, however, remain unchanged compared to the law before 2013. The new § 31(2), sentence 4, GewO refers to § 34a(5) GewO and thus clarifies that security guards working for BAFA-licensed companies are – just as bouncers in nightclubs – regularly limited to the right to self-defence.[111] This has proven to be sufficient in practice, as the criminal law notion of self-defence is quite permissive in German law.[112] However, it has drawn criticism because such cases of professional or institutionalised self-defence are quite different from the cases the law originally meant to regulate by granting a right to self-defence.[113] In addition, it has been a topic of minor debate in German law whether there is a potential right of private guards to arrest (suspected) pirates.[114]

The Implementing Ordinance also goes into the nitty-gritty details, regulating the minimum equipment a security team has to bring on board a vessel, including night vision device, range finder, binoculars, long firearms, short firearms (especially for confrontations with an attacker after the ship was boarded[115]), sufficient ammunition, ballistic helmets, camera, ballistic vests, radio equipment with microphone headset, satellite telephone, medical equipment as well as automatic life vests.[116] Fines have been imposed for the failure to comply with these requirements. A case in point was a vessel protection team that was not equipped with short firearms.[117]

Violations of the obligations outlined in the foregoing regularly are administrative offences penalised with a fine, which is administered by the BAFA.[118] However, as the main and most punitive sanction available to the BAFA a license may be revoked pursuant to the general rules of German administrative law when the terms of the license have been violated by the license-holder.[119]

4.2 Licensing Procedure

The licensing procedure has been designed to meet the requirements of the international maritime industry. The licensing procedure can be undergone electronically, and the German authorities provide the necessary information and documents in English and largely accept the necessary documentation in English.[120] In contrast to the old normative framework, there is no need for company employees or the company management to appear before the authorities in person. In order to accelerate the process, the BAFA has published a self-assessment checklist to allow companies a quick self-check, to determine whether they fulfil all requirements.[121] The costs associated with applying for such a license are significant. An early estimation approximated the costs of a German company entering the market in the first year at around 1.1 million euros as initial cost

108. § 12(4), sentence 2, Implementing Ordinance.
109. § 12(4), sentences 4 and 5, Implementing Ordinance.
110. *See e.g.* Salomon and tho Pesch, above n. 25, at 766; R.E. Heller and H. Soschinka, 'Seepiraterie-Bekämpfung durch private Bewachungsunternehmen', *NVwZ* 476, at 479 (2013); Oehmke, above n. 25, at 201 et seq. with further references.
111. § 34a(5) GewO refers to more legal bases and in fact more legal bases apply, *e.g.* the 'Hausrecht', allowing an owner of premises to exclude some people from using it and to expel them, as well as the 'rights' pursuant to § 34 German Penal Code and §§ 227-9, 904 German Civil Code. However, in maritime security cases, the right to self-defence and defence of others pursuant to § 32 German Penal Code regularly is the only decisive legal basis for armed defence.
112. *See* for a maritime security-based study on this König and Salomon (2011), above n. 21, at 327 et seq.; Oehmke, above n. 25, at 484 et seq.
113. For a discussion, *see* Oehmke, above n. 25, at 394 et seq.; S. Kommer, 'Private Gefahrenabwehr auf Hoher See', *DÖV* 236, at 245 (2016); for a general discussion of the *ratio legis* of the right to self-defence in German law, *see* U. Kindhäuser, in U. Kindhäuser, U. Neumann & H.U. Paeffgen (eds.), *Strafgesetzbuch* (2017) § 32, para. 7 et seq.
114. *See e.g.* Kommer, above n. 113, at 244, who regrettably misreads the study of König and Salomon (2011), above n. 21, as being of the opinion that armed guards have a right to arrest pirates pursuant to German law. The study merely argued – in the segment focussing on international law – that such an act would not in and of itself be an act of piracy pursuant to the UNCLOS definition, which mirrors the opinion of the ILC, *see* ILC, UN Doc. A/3159 (1956), at 283.
115. Erfahrungsbericht des Bundesamtes für Wirtschaft und Ausfuhrkontrolle im Einvernehmen mit dem Bundesamt für Seeschifffahrt und Hydrographie und der Bundespolizei, BT-Drs. 18/5456 of 1 July 2015, at 24.
116. § 14(2) Implementing Ordinance.
117. *See* BT-Drs. 18/5456 of 1 July 2015, above n. 115, at 24.
118. § 144(5) GewO; examples of such misconduct are the intentional or negligent violation of the duty to obtain a license, which may result in fines up to 50,000 euros (§ 144(1) no. 2 and (4), GewO) and violations of the Licensing Ordinance, which may be penalized with fines up to 5,000 euros (§ 144(2) no. 1, GewO and § 16 Licensing Ordinance).
119. § 49 VwVfG.
120. BT-Drs. 18/5456 of 1 July 2015, above n. 115, at 9.
121. The checklist is available in the English language at http://www.bafa.de/SharedDocs/Downloads/EN/Foreign_Trade/ssb_self_assessment_checklist.html.

and subsequently around 100,000 euros as annual cost. For companies in the market, but not working with an internal process manual, the costs for an application are estimated at 103,500 euros, while a company in the market already working with such a process manual will likely face significantly lower expenses. The annual training costs are estimated to be around 10,000 euros.[122]

If a company applies for a license, it does so by filling out the electronic application form on the BAFA webpage and attaching the necessary documents.[123] Due to the large volume of documents received in an application, the licensing process takes time. All in all, the procedure regularly takes 'some months' according to the BAFA.[124] While the process has in the past been slowed down by the failure of companies to submit necessary documents, another factor for a time delay is the fact that the subject matter is deemed as being vulnerable to corruption. Because of this, each application undergoes a primary examination and then a secondary audit by another government employee.[125] The necessary evaluation of the company's insurance to ascertain whether it fulfils the requirements of § 12 Licensing Ordinance was identified as being another source for time delay. To alleviate this factor, the insurer can submit a confirmation letter to the BAFA.[126]

In the authorisation process, the BAFA consults closely with the specialised maritime branch of the Federal Police based on an administrative arrangement which specifies that the Federal Police issue a recommendation in the licensing process and the BAFA considers it before deciding on granting the license.[127] A stronger role of the Federal Police, for example, as the authority competent to grant the licenses or at least as an authority with a veto power was rejected during the legislative process.[128]

The period of validity of a BAFA license is two years.[129] A previous draft of the new legislation proposed one year as a possible duration to guarantee a higher degree of control and regularity of inspection, but the longer period was deemed necessary to balance practical demands and meaningful oversight.[130] Recent demands from the maritime industry to extend the duration to three years were unsuccessful. This was mainly because BAFA acknowledges the need to keep the duration at two years, in order to ensure a regular and meaningful control over the companies, which is easier realised during the licensing process than by the state oversight mechanisms in place.[131]

4.3 Weapons Act

The Weapons Act has been amended in order to go along with the corporate approach of the new § 31 GewO.[132] Pursuant to the new regulatory framework, armed security companies operating on German-flagged vessels still need a weapon owner's license to possess the weapons needed to carry out their duties.[133] While the BAFA is competent to license security companies pursuant to § 31 GewO, the authorities of the Free and Hanseatic City of Hamburg are competent to issue the permit to the applying company that is necessary under the Weapons Act.[134] The authorities may exchange information with the BAFA, resulting in a much better information basis of the Hamburg authorities, since the BAFA regularly will have a much more detailed picture of the companies applying for a license.[135]

Pursuant to § 28a WaffG, the company has to apply for a permit, which, if granted, allows security operators and their personnel to acquire, possess and carry guns and ammunition on ocean-going vessels flying the German flag.[136] In practice, the company manager has to produce an identity card or passport and a police clearance certificate (if he or she is a foreign national[137]). With the application, the company also has to make available copies of identification documents, employment contracts and police clearance certificates (in case of foreign nationals) of the security guards, as well as their certificates of weapons expertise and documents showing that they have knowledge of German arms legislation and related laws and regulations. Furthermore, the executive staff also have to provide proof of weapons expertise and knowledge of German arms legislation and related laws and regulations. Last, the company has to produce evidence that weapons are kept safely at the company and a safekeeping policy for the storage of weapons on board trade vessels is in place.[138]

The reformed regulatory framework is parallel to the § 31 GewO. While in the past the permit could only be obtained by people having to appear before the competent authorities, providing evidence that they fulfil the legal requirements, the permit now is addressed to the company, encompasses the staff, and it is the company's

122. All estimates taken from the draft legislation, Entwurf eines Gesetzes zur Einführung eines Zulassungsverfahrens für Bewachungsunternehmen auf Seeschiffen, BT-Drs. 17/10960 of 10 October 2012, at 3.
123. The application page is accessible at https://fms.bafa.de/BafaFrame/bewachung.
124. BT-Drs. 18/5456 of 1 July 2015, above n. 115, at 10.
125. *Ibid*.
126. *Ibid*.
127. BT-Drs. 18/5456 of 1 July 2015, above n. 115, at 12.
128. Salomon and tho Pesch, above n. 25, at 763; Oehmke, above n. 25, at 446.
129. § 3 Licensing Ordinance.
130. *See* Salomon and tho Pesch, above n. 25, at 766; König and Salomon (2014), above n. 26, at 243.
131. *See* BT-Drs. 18/6443 of 16 October 2015, above n. 64, at 7-9; for a discussion of state oversight mechanisms under the regime, *see* Section 4.5 in this article.
132. Beschlussempfehlung und Bericht, BT-Drs. 17/11887 of 12 December 2012, at 21.
133. § 10(1) WaffG; *see also* Oehmke, above n. 25, at 457.
134. § 48(1), sentence 2, WaffG. In case of German security companies, the authorities of Hamburg consult with the local authorities at the seat of the company, § 28a(5) WaffG.
135. § 28a(3), sentences 3 and 4, WaffG.
136. § 28a(1), sentence 1, WaffG.
137. If a German national applies for a permit, the local authorities have the right to obtain such a certificate from the competent German authorities.
138. For these practical aspects of the authorisation process, *see* the BAFA webpage under 'Application Procedure' – 'License under the Weapons Act', available at: http://www.bafa.de/EN/Foreign_Trade/Maritime_Security/maritime_security_node.html.

duty to safeguard that the legal requirements are met.[139] Pursuant to § 28a(1) WaffG, the weapons permit 'shall be issued subject to conditions requiring the operator' to employ as security personnel only persons who meet the requirements given in § 4(1) nos. 1 through 3 (meaning the persons in question are older than eighteen, are reliable and have the personal aptitude for the task and have the necessary expertise with weapons). A further condition of the permit is that the company will inform the responsible authority within a period of time to be determined by that authority as to which persons have been assigned as armed guards.[140] Last, the company is obliged 'at the request of the responsible authority, to present evidence demonstrating that the persons assigned these tasks meet the requirements' mentioned above.[141] Concerning the only additional requirement, the necessity to use guns for the protection offered, this necessity is assumed by law for companies licensed pursuant to § 31 GewO.[142]

Not only the procedure but also the content of the traditional requirements for obtaining a weapons permit, reliability, aptitude, competence and necessity are modified to fit different settings. For example, the specialised knowledge necessary pursuant to § 7(2) WaffG 'shall be oriented on the special requirements for deployment on ships at sea' as far as permits under § 28a WaffG are concerned.[143]

The weapons permit has the same duration as the license pursuant to § 31 GewO[144] and includes the permit to bring the weapons on board a vessel pursuant to § 29 WaffG.[145]

The type of weapons that are permissible has remained unchanged under the new legislation.[146] Consequently, the use of war weapons in accordance with the Annex 2 to the War Weapons Control Act, especially automatic weapons, remains illegal.[147] This aspect was largely uncontroversial during the legislative proceeding in Germany and seems to be in contrast to the approach in other nations.[148]

4.4 Recognition of Other Licenses

To safeguard accordance with European Law, government licenses and other state-recognised certifications, which allow security functions on ocean-going vessels and are issued by another member state of the European Union or a contracting state to the Agreement on the European Economic Area, *shall* be accorded equal treatment with licenses issued pursuant to § 31(1) GewO.[149] Other state's licenses *may* be accorded equal treatment pursuant to § 15(2) Licensing Ordinance. The prerequisite for the recognition of any such license is, however, that the 'requirements for such foreign licenses or certifications are materially equivalent to the requirements' under the Licensing Ordinance.[150] A company carrying such other license needs to apply for equal treatment. If this request is granted – by way of an 'official notification'[151] from the BAFA – this permission has a term of two years.[152] § 15 of the Licensing Ordinance deems the notification, reporting and submission obligations of a company applicable in such a case,[153] which may mean that a company will have reporting obligations vis-à-vis two states.

4.5 State Oversight and Control

A critical aspect of any regulation is state oversight and enforcement. This is especially true for rules concerning maritime affairs, since the subject of legal obligations is regularly far from the national authorities' reach.[154] To achieve meaningful control and oversight, the new regulation first limits the license's duration to two years and thus mandates a regularly repeating licensing procedure.[155] Furthermore, it addresses the issue within the parameters of its corporate approach in that it acknowledges that there is a need for the authorities to obtain knowledge of any incidents in order to assess whether there was wrongdoing and, if necessary, sanction of misconduct.

To reach this goal, the regulatory framework introduces numerous reporting obligations:

4.5.1 Reporting Obligations of the Security Company

The security company is obliged to report every deployment of armed guards to the BAFA.[156] Furthermore, it needs to report on every incident which led to shots being fired,[157] any case of loss of weapons and/or ammunition[158] and changes in the internal organisation of the company.[159] § 14 of the Licensing Ordinance also regulates, however, that the person liable to provide information may refuse to answer questions, if this would subject the particular person or relatives to crimi-

139. Salomon and tho Pesch, above n. 25, at 764.
140. § 28a, sentence 3, no. 2, WaffG.
141. § 28a, sentence 3, no. 3, WaffG.
142. § 28a(1), sentence 2, WaffG; *see also* Oehmke, above n. 25, at 459.
143. § 28a(3), sentence 2, WaffG.
144. § 28a(1), sentence 1, WaffG.
145. *See* Salomon and tho Pesch, above n. 25, at 764; with further details in Oehmke, above n. 25, at 461.
146. *See* § 57 WaffG.
147. Oehmke, above n. 25, at 457-8 with further reference and a discussion on the possibility of the German Federal Criminal Police Office to issue exemptions pursuant to § 40(4) WaffG.
148. Salomon and tho Pesch, above n. 25, at 765; the legislation in Belgium seems to allow automatic weapons; *see* Jessen, above n. 66, at 132; however, it only does so on a case-by-case basis; *see* L. McMahon, 'Belgian Law Permitting Devastating Ammunition Reignites Row Over Appropriate Use of Force', *Lloyd's List*, 27 February 2013.
149. § 15(1) Licensing Ordinance.
150. § 15 Licensing Ordinance. § 15(1) applies to EU and EEA member states, while § 15(2) applies to all other states.
151. § 15(3), sentence 1, Licensing Ordinance.
152. § 15(3), sentence 2, Licensing Ordinance.
153. § 15(4), Licensing Ordinance.
154. The government acknowledged this in the draft legislation, BT-Drs. 17/10960 of 10 October 2012, above n. 118, at 12.
155. BT-Drs. 17/10960 of 10 October 2012, above n. 118, at 12.
156. § 14(1) Licensing Ordinance.
157. § 14(2) Licensing Ordinance; the norm includes an additional obligation to report this to the Federal Police.
158. § 14(4) Licensing Ordinance.
159. § 14(3) Licensing Ordinance.

nal proceedings or proceedings under the Administrative Offenses Act.[160]

Noncompliance with these duties is an administrative offence, which may result in a fine of up to 5,000 euros.[161]

4.5.2 Reporting Obligations of the Ship Owner or Ship Operator

The master of the vessel in question is also obliged to report incidents. Insofar, the obligations are administered by the Federal Maritime and Hydrographic Agency. As stated previously, ship owners using armed security guards are obliged to apply for an annex to the mandatory ship security plan. This annex is approved subject to the condition that the ship owner adheres to and will ensure that others adhere to the reporting and record-keeping obligations.[162] Concerning their reach and structure, these duties lean on the IMO's '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', which suggests that the 'master should maintain a log of every circumstance in which firearms are discharged, whether accidental or deliberate' to fully document such events in sufficient detail.[163] The report should include time and location of the incident, details of events leading up to the incident, written statements by all witnesses and those involved from the ship's crew and security team in the incident, the identity and details of personnel involved in the incident, details of the incident, injuries and/or material damage sustained during the incident, and identify lessons learned from the incident and, where applicable, recommended procedures to prevent a recurrence of the incident.[164]

Thus, in the process of obtaining approval for the ship security plan, the ship owner or operator has to declare that the reporting modalities pursuant to the IMO Guidelines will be adhered to, that is, that they will oblige the master to report to them any such incidents. According to the German Ordinance on Shipboard Security Measures, the company security officer of the ship owner or operator will then have reporting obligations towards the state authorities. First, the company has to report the use of private armed guards 24 hours before entry into a risk area.[165] The company furthermore has to keep the records of reports from the masters for a period of two years starting at the end of the calendar year.[166] It also has to hand them over to the BAFA, the BSH and the Federal Police in case of an incident where shots were fired or otherwise hand them over after being asked to do so by these authorities.[167] Noncompliance with those obligations again is an administrative offence punishable with fines up to 5,000 euros.[168]

4.5.3 Assessment

Those parallel reporting obligations are meant to offer two different perspectives of an incident and enable the authorities to ascertain the veracity and comprehensiveness of reports.[169] The authorities themselves characterise these instruments as having an outstanding importance to improve the otherwise lacking mechanisms of control and state oversight.[170]

This assessment is likely exaggerated. State oversight remains a very problematic topic. While the German regulation does attempt to safeguard that the German authorities will be made aware of incidents, it is all too easy to imagine circumstances in which the interests of the security team, the master of the vessel and the shipping company converge in the sense that they have a shared interest to keep German authorities ignorant. A case in point is the *Enrica Lexie*. This case featured Italian soldiers trying to defend the vessel they were stationed on with armed force, resulting in the death of two fishermen under unclear circumstances. While the case now centres on questions of state immunity,[171] with the Indian authorities trying to prosecute the Italian soldiers, the case does offer a good example for private armed guards as well. Fishermen often follow large vessels, because they attract fish to the water surface. Private guards' wrongly assessing such a situation may treat them as a threat. If armed force were used in such a case, the reporting obligations of the German regulatory framework would be put to a hard test.

Depending on his or her involvement in an incident, the master of the vessel, being the person ultimately in charge, may have a significant interest not to report the case. After all, any step of publicising it could lead to local authorities of coastal or port states obtaining knowledge as well, putting the master at risk of criminal prosecution. The same applies for the armed guards.

160. § 14(3a) Licensing Ordinance; *see* Salomon and tho Pesch, above n. 22, at 766.
161. § 144(2), no. 1, GewO and § 16 Licensing Ordinance.
162. § 7(2a), sentence 2, German Ordinance on Shipboard Security Measures (See- Eigensicherungsverordnung).
163. IMO, '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', para. 5.16.
164. IMO, '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', para. 5.17.
165. § 7(2a), sentence 2, no. 1, German Ordinance on Shipboard Security Measures.
166. § 7(2a), sentence 2, no. 2, German Ordinance on Shipboard Security Measures.
167. § 7(2a), sentence 2, no. 3, German Ordinance on Shipboard Security Measures.
168. § 12(1), no. 6, German Ordinance on Shipboard Security Measures; Allgemeine Verwaltungsvorschrift für die Erteilung von Buß – und Verwarnungsgeldern für Zuwiderhandlungen gegen strom – und schifffahrtspolizeiliche Vorschriften des Bundes auf Binnen – und Seeschifffahrtsstraßen sowie in der ausschließlichen Wirtschaftszone und auf der Hohen See (Buß – und Verwarnungsgeldkatalog Binnen – und Seeschifffahrtsstraßen – BVKatBin-See), 2015, paras. 37.104100-37.104320 (at 334); Oehmke (above n. 25, at 469) sees a maximum fine of up to 50,000 euros on the basis of § 15(1), no. 2 *Seeaufgabengesetz* (Federal Maritime Responsibilities Act), she, however, neglects the above-mentioned administrative regulation limiting administrative fines in these cases.
169. BT-Drs. 18/5456 of 1 July 2015, above n. 111, at 12.
170. BT-Drs. 18/5456 of 1 July 2015, above n. 115, at 12.
171. *See e.g.* Jessen, above n. 66, at 128 et seq.

They may even rely on their right not to report pursuant to § 14(3a) Licensing Ordinance and the *nemo tenetur* maxim, that is, the right against self-incrimination. It has also been alluded to the fact that colleagues, that is, other team members of a vessel protection team, who may or may not have been involved in misconduct, may have a tendency to be loyal to their colleagues and as such may not alert the authorities or the company.[172]
The same calculation would apply if the reports actually reach a shipping or security company, especially since a shipping company will regularly want to avoid lengthy police operations on their vessel which may expose them to significant damage claims of their customers,[173] and a security company will certainly not want to risk publicising an incident. Furthermore, a violation of a reporting obligation is punishable only by a fine of up to 5,000 euros, which will regularly mean violating the reporting obligation and taking the risk of having to pay a fine will be more attractive than risking that an incident is publicised.[174] Of course, a security company risks their license with an intentional violation of a reporting obligation; however, the withdrawal of the license presupposes that the state authorities obtain knowledge of an incident, which will rarely be the case.[175] As such, it is conceivable that the German authorities would never receive the information of an *Enrica Lexie*-like scenario, at least, if the crew and the security team remain physically unscathed. Most likely, they would simply receive a report of ammunition having been lost.
While it is acknowledged that such a scenario is never completely avoidable in a maritime setting, it has been submitted during the legislative process that more can be done to enable state authorities to investigate critical incidents. This remains the case. Mandating the armed guards to wear body or helmet cameras was one suggestion.[176] While armed guards after a critical incident could report their cameras as lost, a report of lost ammunition and lost body cameras would raise louder alarms and would be a reason to possibly initiate criminal investigations. Another suggestion was to enable the crew of a vessel to anonymously report such incidents to the flag state authorities.[177] Such reporting mechanisms would not need to be invented but could follow the anonymous reporting mechanism already put into place by the Maritime Labour Convention and would simply need to transfer the 'protection of whistle-blowers' idea of the ISO/PAS 28007:2012 standards in no. 5.9 f to the crew of a vessel.[178] These suggestions would not make state oversight perfect, but they would surely raise the probability that an incident is reported to the state authorities. However, they were not implemented to this date. Thus, until today, the only possibility to obtain knowledge of an incident and thus be able to investigate is to hope that the companies involved and the private guards as well as the masters of the vessels will adhere to their reporting obligations.
Apart from reporting and record-keeping obligations, BAFA continues to have the rights pursuant to § 29 GewO, namely, to mandate the company to disclose information on certain aspects. Theoretically, the BAFA also has the right to enter the premises of businesses during business hours to inspect the business records.[179] The right to enter the premises is limited, at least vis-à-vis foreign companies, since the BAFA cannot exercise its rights under national law in another sovereign country without its permission. The right to request information, however, is still a viable option. Denying such a right without a sufficient legal reason is – again – only seen as an administrative offence, this time pursuant to § 146(2) no. 4 GewO and thus punishable with a fine of up to 2,500 euros. However, if a security company denies a request for information, the BAFA would likely have sufficient grounds to revoke the license of a company.[180]

5 Concluding Remarks

Overall, the new regulation deserves praise in that it intends to raise the quality standards of such a global, dynamic and risk-prone industry. The positive aspects include the close connection to the internationally accepted standards of the IMO, ISO as well as the BMP, which limit the likelihood that the German standards contribute to a fragmented landscape of different national standards. The detailed regulatory framework in the ordinances ensures the clarity of standards. The minimum personnel requirement of four security guards significantly contributes to higher standards, as the tendency to cut costs by reducing the number of guards – especially vital today, since the number of attacks have dropped – is counteracted. However, state oversight and government control remain a significant problem since high material standards only have value when compliance is safeguarded.

172. Oehmke, above n. 25, at 468-9.
173. Oehmke, above n. 25, at 470.
174. *See* Salomon and tho Pesch, above n. 25, at 767; Oehmke, above n. 25, at 469.
175. *See* Salomon and tho Pesch, above n. 25, at 767; Oehmke, above n. 25, at 469.
176. T.R. Salomon and S. tho Pesch, 'Zertifizierung bewaffneter Sicherheitskräfte auf deutschen Handelsschiffen und Staatshaftung', *NordÖR* 65, at 70 (2012); Salomon and tho Pesch, above n. 25, at 767.
177. Salomon and tho Pesch, above n. 176, at 70; T.R. Salomon and S. tho Pesch, 'License to kill? – Staatshaftung und die Zertifizierung von maritimen Sicherheitsdienstleistern', *ZRP* 1, at 4 (2012).
178. Salomon and tho Pesch, above n. 25, at 767; in the same direction, Oehmke, above n. 25, at 471.
179. § 29 GewO.
180. *See e.g.* Meßerschmidt, in Pielow (ed.), *Beck-OK GewO*, § 29, para. 27, with reference to a judgment of the Federal Administrative Court, 28 July 1978, 1 C 43/75, which did not feature a case of a denial of an information request, but a restaurant owner denying cooperation with the police to combat the trade of controlled substances in his business. He was held to be unreliable pursuant to the GewO, because of his denial to cooperate. A case of a denied information request may also call into question the reliability of the management personnel of a maritime security company.

It is hard to say how the German license scheme would have fared, had the pirate attacks remained at the high rate of 2010-2011. Today, German ship owners still to a large extent sail the high-risk areas under foreign flags. Although this has been the case all along, it still is noteworthy that the regulatory overhaul did not result in a reorientation of the ship owners towards the German flag. The number of security companies that are current BAFA license holders is at eight,[181] four of which are German companies of which most are not exactly household names in the field of maritime security providers. In January 2014, seven companies were listed as carrying licenses.[182] Currently, many of the German companies that saw a chance of getting into the market in 2011-2012 seem to have given up on offering vessel protection services, since bigger foreign companies seemingly had too much of a head start in the sector to allow smaller German companies to secure a large-enough market share.

There were a number of reasons why maritime security companies did not apply for a BAFA license more frequently – and they are not necessarily found in the reformed GewO and the WaffG. Practitioners reported early on that while obtaining a license was a complex procedure, obtaining an export license was much more cumbersome and time-consuming. It was not the prime focus of the ministries involved in conceptualising the new regulatory framework that transporting weapons out of Germany for use on ocean-going vessels in international waters is a (temporary) export in the legal sense. Thus, it is subject to additional licensing pursuant to § 8 of the Foreign Trade and Payments Regulation and, if applicable, under Article 4(1) of Regulation (EU) Number 258/2012.[183] Long waiting periods for security companies were the consequence of this and while foreign companies could build their businesses and operate on non-German-flagged vessels, German security companies were prohibited from working in the field, which resulted in an even greater head start of foreign companies. The BAFA now offers a collective license procedure for repeated temporary exports for companies licensed pursuant to § 31 GewO, which alleviates some of the delay but results in yet other demands on the internal organisation of the company.[184] These birth defects of the reformed regulatory framework not only hindered German companies but also likely affected how the BAFA license regime was seen in the industry.

Although the presence of only a few companies on the BAFA-list of licensed companies speaks for a very insignificant impact of the German regulations on the industry at large, the regulation seems to have had an impact, nevertheless. In a market where the projection of reliability may mean a significant edge over competitors, it was predicted early on that even though the BAFA license may not be used much in practice, big companies may opt to obtain it as a seal of approval to signal high-quality standards.[185] This came to pass as evidenced by early reactions of security companies hailing the new regulation as an important step to quality assurance in the market.[186] Up until today, large international maritime security providers are licensed by the BAFA, meaning they changed their internal business organisation to comply with the German regulation, a factor that may also determine their conduct, if they protect vessels under foreign flags.

Contributions focussing on maritime security providers always end on a similar note. There are many reasons why one may justifiably be uncomfortable with the practice of maritime armed guards acting far away from state oversight in a line of business that will regularly mean that the lives of (presumed) attackers are taken or grievous bodily harm is caused. However, they have proven to be an effective component of the necessary defence of trade vessels against pirate attacks. Because of that, this business model will likely be here to stay. Accordingly, regulating this industry to meet the justified criticism, to counteract possible misconduct and to put state authorities in the know must remain a top priority. However, a more global approach to the topic would be necessary to hinder the possibility of the ship owners to opt out of national legislation by changing their vessels' flags. This is hardly going to come easy since popular flag states will likely be reluctant to introduce restrictive legislation.

181. The companies are published at http://www.bafa.de/EN/Foreign_Trade/Maritime_Security/maritime_security_node.html (last visited 11 May 2018).
182. König and Salomon (2014), above n. 26, at 243.
183. *See* the BAFA webpage under 'Application Procedure' – 'License under Export Control Law', available at: http://www.bafa.de/EN/Foreign_Trade/Maritime_Security/maritime_security_node.html; for an extensive analysis of the export control regime, *see* Oehmke, above n. 25, at 473 et seq.
184. According to the BAFA, the collective license procedure 'permit exports and transfers of goods subject to licensing to different countries and different consignees. The application for such a collective licence procedure licence requires in particular a well-functioning internal export control system (ICP).… In fact, private security services have to install their own ICP in order to manage and comply with the collective licence procedure licences granted.' Available at: http://www.bafa.de/EN/Foreign_Trade/Maritime_Security/maritime_security_node.html.
185. Salomon and tho Pesch, above n. 25, at 769.
186. 'USA: AdvanFort Praises New Accreditation Criteria for Private Maritime Security Companies', *World Maritime News*, 9 September 2013, available at: http://bit.ly/2CezQSP.

Armed On-board Protection of Italian Ships: From an Apparent Hybrid Model to a Regulated Rise of Private Contractors

Giorgia Bevilacqua*

Abstract

The sharp increase of piracy attacks in the last two decades was followed by a parallel increase of demand in the maritime security sector. A plenty of flag States around the world have started to authorize the deployment of armed security guards, either military or private, aboard commercial ships. In 2011, Italy also introduced the possibility of embarking armed security services to protect Italian flagged ships sailing in dangerous international waters. Like the other flag States' legal systems, the newly adopted Italian legislation aims to preserve the domestic shipping industry which was particularly disrupted by modern-day pirates. On the other hand, the doubling of approaches of the Italian legal and regulatory framework, initially privileging military personnel and then opting for the private solution, took the author to investigate the main relevant features of the Italian model of regulation and to analyze the recent developments of the domestic legal practice on counterpiracy armed security services, focusing on the role that customary and treaty obligations of international law played for the realization at national level of on-board armed protection of Italian ships. The use of lethal force at sea and the relationship between the shipmaster and the security guards will receive specific attention in this article.

Keywords: maritime security services, Italian hybrid system, Military and Private Personnel, Use of force, relation with the shipmaster

1 Introduction

The significant impact of piracy[1] and armed robbery at sea[2] on global shipping brought the international community to promote a range of different measures to tackle them. In response to several resolutions by the United Nation Security Council (UNSC)[3] since 2008, states – unilaterally and through international organisations – focused most of their efforts on the militarisation of pirate-ridden waters.[4] As is well-known, however, such measures are extremely expensive, and the vast areas in which pirates operate have created a sort of security gap that prevents navies from defending every commercial ship which sails in dangerous waters. Furthermore, while for hijackings off the coast of Somalia, the UNSC has authorised and repeatedly renewed its authorisation to use 'all necessary means to repress acts of piracy and armed robbery',[5] analogous instruments under Chapter VII of the UN Charter in order to counter these criminal phenomena in other regions of the world have not been approved so far.

The limits of international naval patrols led shipowners to rely on alternative security options in defending their vessels and seafarers against violence at sea. As a matter of fact, the sharp increase of pirate attacks was quickly followed by a parallel increase of demand for security. While floating armories full of arms for hire against criminality at sea became more and more common, shipowners could soon rely on a variety of models of contracted maritime security services.[6]

In parallel, aware of growing developments in the security sector, a plenty of flag states around the world started to authorise the deployment of armed guards, either

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1. On the definition of maritime piracy, *see* Arts. 14-22 of the High Seas Convention, done at Geneva on 29 April 1958, entered into force on 30 September 1962 (UN, Treaty Series, Vol. 450) and Arts. 100-110 of the United Nations Convention on the Law of (UNCLOS) done on 10 December 1982, entered into force on 16 November 1994 (UN, Treaty Series, Vol. 1833).
2. For the definition of armed robbery at sea, *see* Art. 2.2 of the *Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships*, approved by the Committee on Maritime Security on 20 December 2000, MSC/Circ. 984 (subsequently adopted by the IMO Assembly on 29 November 2001, with Resolution A.922(22).
3. For instance, *see* UNSC Resolution 1846 (2008) on Somalia, adopted at its 6026th meeting, on 2 December 2008, UN Doc. S/RES/1846 (2008), para. 9.
4. The most prominent coalitions of forces which have operated against piracy are the NATO Operation Ocean Shield, the European Union Naval Force – Operation Atalanta, Combined Task Force 151 and Malacca Strait Patrols. National counter-piracy missions were also active, such as China, India, Japan, Malaysia, Russia, Saudi Arabia, South Korea, Yemen. More recently, 'TSARE Teku', the Nugeruan antipiracy operation was launched to patrol the Gulf of Guinea.
5. For the first authorisation to enter and intervene in Somali waters, *see*: UN Security Council, Resolution 1816 (2008) on Somalia, adopted on 2 June 2008, UN Doc. S/RES/1816 (2008). With the subsequent Resolution 1851 (2008), the authorisation was further extended to certain parts of the Somali coasts. Regarding the temporary extension of the authorisation, *see*, ultimately, Resolution 2316 (2016), adopted on 9 November 2016, UN Doc. S/RES/2316 (2016) (2016).
6. *See* 'Oceans Beyond Piracy, Defining Contracted Maritime Security', 16 December 2016. Available at: http://oceansbeyondpiracy.org/sites/default/files/attachments/DefiningContractedSecurityIssuePaper092116.pdf (last visited 3 January 2019).

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military or private, aboard civilian ships. The first relevant step was undertaken by four of the world's largest ship registries – Panama, the Bahamas, Liberia, and the Marshall Islands – when they presented the 'New York Declaration' during the Contact Group plenary session in May 2009. Shortly afterwards, other states around the world, including the United States of America, Japan, Cyprus and Singapore also signed this declaration and promulgated guidelines and recommendations providing new measures to ensure secure navigation in international waters.[7] Regarding European states, the majority of them, such as Denmark,[8] Germany,[9] Greece, the United Kingdom (UK) and the Scandinavian countries allowed for the boarding of private security guards. Few other states, such as the Netherlands[10] and France are on the way to introducing or have already introduced vessel protection systems based on the boarding of military personnel only.

In 2011, Italy also introduced the possibility of embarking armed security services to protect civilian ships sailing in dangerous waters. Like the other flag states' legal systems, the newly adopted Italian legislation aims to preserve the domestic shipping industry which was particularly disrupted by modern pirates. Of note, Italy is one of those states which has well-defined economic interests that need protection from piracy and armed robbery. Italy has a long-standing maritime tradition and most of its foreign trade, both for import and export, is based on transport by sea. The International Chamber of Shipping places Italy at the fifth place in Europe – after Malta, Greece, Cyprus, and the UK – and includes it among the world's major shipping flags.[11]

Since the resurgence of piracy, its traditional national fleet has been heavily threatened by piracy attacks. As reported to the International Maritime Bureau (IMB), approximately thirty-four Italian vessels were hijacked by pirates when such criminal phenomenon reached its peak between 2008 and 2012.[12] With specific respect to 2011 – when the new Italian antipiracy legislation was adopted – well eight Italian ships were hijacked.[13] Some of these criminal episodes had a particularly strong impact on Italian shipping companies, in terms of both economic and human costs. On the one hand, piracy has determined a sharp increase of costs due to rerouting, fuel and insurance premiums and, additionally, when the vessel was effectively seized by pirates, they have prevented the shipowner from making use of the vessel for commercial purposes during the period of the seizure. On the other hand, crew members embarked on seized vessels belonging to Italian shipping companies have been held at the hands of violent pirates for days, weeks and sometimes also months.

At the same time, the well-known incident regarding two Italian military members of a vessel protection detachment (VPD), on board the Italian oil tanker *Enrica Lexie*, accused of killing two Indian seamen off the coast of Kerala (India) have drawn the attention of the public to the challenges related to the use of military services on board private ships;[14] an event that posed a number of serious legal and practical issues that underline the importance to stipulate accurate rules to govern the use of force at sea and which in practice lead Italy to move towards private security services.

In light of this complex and still evolving background, the purpose of this article is to illustrate and analyse the main characteristics of the Italian model of regulation and investigate the role that customary and treaty obligations of international law played for the implementation at national level of on board armed security services. For this purpose, we will initially explore the legal and institutional context in which the new Italian model of regulation was conceived, having a look at the different initiatives considered to protect the freedom of navigation of the national fleet in pirate-prone hot spots (Section 2). Even though an Italian model of regulation on armed security services was adopted in 2011, this model was soon amended and integrated with a number of subsequent acts. We will therefore illustrate and analyse the main relevant aspects of this articulated framework, highlighting the doubling of approaches of the Italian decision-makers, initially in favour of the military option and only four years later in favour of the private one (Section 3). Against the Italian final preference for private guards, what assumes key relevance is an assessment of the regulatory framework, establishing whether and under what conditions security personnel may be armed and used on board Italian vessels and which relationship may be established between the security personnel and the shipmaster (Section 4). Finally, we will conclude by outlining the strong and weak points of the new legal practice, envisioning a pos-

7. For a comparison of some flag state approaches on armed security services, *see* E. Cusumano and S. Ruzza, 'Security Privatization at Sea: Piracy and the Commercialisation of Vessel Protection', *International Relations* 1 (2017); Y.M. Dutton, 'Gunslingers on the High Seas: A Call for Regulation', *Duke Journal of Comparative & International Law* 105 (2014); J. Kraska, 'International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy', in D. Guilfoyle (ed.), *Modern High Seas Piracy* (2013) 219.
8. On the Danish model of regulation, on this special issue of the *Erasmus Law Review, see* C. Frier.
9. On the German model of regulation, on this special issue of the *Erasmus Law Review, see* T. R. Salomon.
10. On the Dutch model of regulation, on this special issue of the *Erasmus Law Review, see* P. Mecies and S. Eckhardt.
11. The statistics of the International Chamber of Shipping are available at: www.ics-shipping.org/shipping-facts/shipping-and-world-trade/the-world's-major-shipping-flags (last visited 3 January 2019). Similarly, the International Maritime Organisation (IMO) includes Italy in the list of top twenty leading merchant fleets. *See* IMO Maritime Knowledge Centre, International Shipping Facts and Figures – Information Resources on Trade, Safety, Security, Environment, 6 March 2012.
12. *See* the IMB Report on acts of piracy and armed robbery against ships for the period 1 January – 31 December 2012, January 2013.
13. *Ibid.*
14. On the *Enrica Lexie's case, see* D. Guilfoyle, 'Shooting Fisherman Mistaken for Pirates: Jurisprudence, Immunity and State Responsibility', *European Journal of International Law: Talk!,* 2 March 2012, available at: www.ejiltalk.org (last visited 3 January 2019); Kraska, above n. 7; N. Ronzitti, 'The Enrica Lexie Incident: Law of the Sea and Immunity of State Officials Issues', 22 *The Italian Yearbook of International Law* 3 (2012).

sible way forward to fill the existing maritime security gap (Section 5).

2 Development towards the Italian Model

To protect the national shipping industry, Italian authorities have soon decided to undertake different counter-piracy initiatives.

First of all, the Italian Navy has intensively contributed to the militarisation of the waters off the coast of Somalia, participating to several multinational antipiracy operations, such as the NATO 'Operation Ocean Shield'[15] and the European Union (EU) 'Operation Atalanta'.[16] On 11 October 2011, for example, the crew (including six Italian members) which retreated into the citadel of the Italian bulk carrier *Montecristo* was freed, thanks to the prompt intervention of a NATO naval team.[17]

Secondly, rather than contributing to the attractive and quite common practice of the catch and release,[18] Italy has occasionally prosecuted suspected pirates captured at sea by naval forces. On this basis, the alleged criminals were transferred before Italian courts and prosecuted pursuant to both the international customary principle of universal jurisdiction[19] and the applicable national legal system. The latter includes the provisions set forth in the Italian Navigation Code (*codice della navigazione*)[20] and a more recent Law-Decree, offering a special legal framework for the apprehension and detention of suspected pirates when the Italian state or Italian citizens or Italian goods are or risk being damaged.[21] For the first time since the upsurge of contemporary piracy,[22] the Italian Supreme Court of Cassation has recently condemned Somali citizens to eight years of imprisonment with the accusation of maritime piracy and other related illicit acts.[23]

Notwithstanding the Italian efforts in terms of enforcement jurisdiction at sea and adjudicative criminal jurisdiction before national courts, Italian interests were not always sufficiently protected. In many other cases, Italian vessels were boarded, seized and finally released only after long periods of time and large ransoms were paid. For instance, the Italian flag oil tanker *MV Savina Caylin*, which was hijacked off the coast of Somalia by five pirates in skiffs armed with automatic weapons on 8 February 2011, was released only after more than ten months of cruel detention of the crew members and after than 10 million USD were paid.[24] Among the several Italian ships seized by pirates in the same year, it is believed that the bulk carrier *Rosalia D'Amato* and the chemical tanker Enrico Ievoli as well were freed only after a ransom was paid either by the flag state or by the shipping company.[25]

Further to these and other incidents which underlined the existence of a real security gap for the Italian fleet navigating off the Horn of Africa region, private shipowners have strongly been advocating – mainly through the principal Italian association of ship owners' representatives (*Confitarma*) – the adoption of additional instruments to protect their vessels and seafarers. The attention of the shipping industry was especially drawn to armed security services; they seemed to be particularly successful in acting as an actual deterrent and consequently useful in reducing the risk to the lives and well-being of those on board targeted ships. Specifically, this debate was focused on how best to manage armed secur-

15. Following the previous NATO's 'Operations Allied Provider' and 'Allied Protector', 'Operation Ocean Shield' began on 17 August 2009 and ended on 15 December 2016. It adopted a comprehensive approach to counter-piracy efforts and focused on operations at sea but also assisted regional states, at their request, to develop counter-piracy operations and capacity. Further information on 'Operation Ocean Shield' are available at: https://www.mc.nato.int/missions/operation-ocean-shield.aspx (last visited 3 January 2019).
16. EUNAVFOR Operation Atalanta was the first European counter-piracy naval mission launched on 8 December 2008 in support of UNSC Resolutions 1814, 1816, 1838, and 1846. Its mandate was reputedly extended. The last extension concerned the period from January to December 2017. *See* Council Decision (CFSP) 2016/2082 of 28 November 2016 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, in *Official Journal of the European Union L 321/53*, 29 November 2016. Further information on EUNAVFOR Atalanta are available at: http://eunavfor.eu (last visited 3 January 2019).
17. *See* the IMB Report on acts of piracy and armed robbery against ships for the period 1 January – 31 December 2011, January 2012. Available at: www.rk-marine-kiel.de/files/piraterie/imb/imb_piracy_report_2010.pdf (last visited 3 January 2019).
18. On *catch and release, see* The Report of the of the Secretary-General pursuant to Security Council resolution 1950 (2010), adopted on 25 October 2011, UN Doc. S/2011/662.
19. On the principle of universal jurisdiction, *see* Arts. 19 of the High Seas Convention and Art. 105 of the UNCLOS. For doctrine, M.H. Nordquist, S. Nandan & S. Rosenne (eds.), 3 *United Nations Convention on the Law of the Sea 1982: A Commentary*, (1995), at 212; K.C. Randall, *Universal Jurisdiction Under International Law*, 66 *Tex. L. Rev.* 785, 840 (1988).
20. *See* Arts. 1135 and 1136 of the Italian Navigation Code.
21. *See* Decree Law No. 209 of 30 December 2008, converted with amendments in Law No. 12 of 24 February 2009, concerning Extension of Time of Interventions for Development Cooperation, Support of Peace and Stabilization Processes, and Participation of Armed and Police Forces in International Missions. For doctrine on domestic antipiracy systems, *see* M. Bo, 'Piracy at the Intersection between International and National: Regional Enforcement of a Transnational Crime', in H. van den Will and C. Paulussen (eds.), *Legal Responses to Transnationa and International Crimes – Toeards an Integrative Approach*, (2017) 71, at 83.
22. A previous case was closed through a plea bargain between the public prosecutor and all defendants, arrived up to a first instance judgment, when on 4 December 2012 the Tribunal of Rome sentenced eleven Somali citizens to three and half years of imprisonment for the attempted hijacking of the Italian tanker *Valdarno*. This judgment was not published, but some comments are reported in the Maritime Security Review. Available at: www.marsecreview.com (last visited 3 January 2019).
23. Court of Cassation (Section II, pemal), 20 June 2013, No. 26825, which confirms the first and second instance decisions (*see* Juvenile Tribunal of Rome, 16 June 2012 and the Court of Appeal, Juvenile Section, 6 October 2012).
24. Somalia Report. 2011, *MV Savina Caylyn* Released by Somali Pirates, 21 December. Available at: http://piracyreport.com/index.php/post/2240/MV_Savina_Caylyn_Released_by_Somali_Pirates (last visited 3 January 2019).
25. IMB Annual report for 2011, above n. 17.

ity services on board private commercial ships transiting through high risk piracy zones.

The first option considered by Italian authorities is the military one. In February 2011, the chief of the Italian Navy (*Capo di Stato Maggiore*) received a mandate from the Ministry of Defense to set up an *ad hoc* technical panel entitled to analyse all operative and legal challenges related to the possible deployment of VPDs on Italian civilian vessels. This panel – including a delegation of the Ministry of Defense and other concerned ministries as well as representatives of Confitarma and other private stakeholders – elaborated an articulated normative proposal on the use of uniformed personnel. Subsequently both options – the private and the military one – were further examined by the Defense Commission of the Senate (*IV Commissione permanente*) which carried out a survey of the main self-protection measures adopted by other European member states[26] and interviewed the chief of the Italian Navy on the topic.[27]

From this lively debate emerged a clear preference for the military option. Uniformed personnel were considered highly qualified, well trained and equipped. Differently from private personnel, they could also rely on weapons of war and very modern technologies. Furthermore, military teams can act under the direct control of national public authorities and in cooperation with the above-mentioned naval units operating in high risk areas. From a strictly legal perspective, the public security model could be enforced in a safer and faster manner since it was already based on existing procedures and rules of engagement. An additional argument in favour of the state representatives' option is mentioned by the chief of the Italian Navy: military personnel is in line with the EU military approach. Namely, the first EU antipiracy naval 'Operation 'Atalanta' aims, among other things, to 'provide protection to vessels chartered by the World Food Programme, including by means of the presence on board those vessels of armed units'.[28]

Meanwhile, while the debate was pending among the different categories of stakeholders, the Italian legal system was completely lacking an adequate security model of regulation. In the absence of a formal decision authorising the use of armed guards aboard national private vessels, Italian shipowners had started to rely on flags of convenience, that is, on the flag of those states that already had a more convenient framework in force that allowed for the deployment of armed security personnel on board.[29] For instance, a flag of convenience was particularly useful in avoiding the risk of falling prey to pirates off the coast of the Seychelles on 26 April 2009, when pirates attacked the cruise ship MSC Melody, belonging to an Italian company but sailing under a Panama flag, and were repelled thanks to an Israeli security team placed on board.[30]

3 Key Aspects of the Regulation

The pressure of Italian shipowners and the aggressive competition of the more secure foreign flag vessels led to an acceleration of the legislative process. Since 6 August 2011, the Law-Decree No. 107/2011, as amended by Law 2 August 2011 No. 130, was turned into law and definitely enforced.[31]

On paper, Law 130 has a very wide scope. On the one hand, it extends the participation of the Italian armed and police forces to some international missions and to deployment cooperation, peace support and stabilisation processes until 31 December 2011, while on the other hand, it comprises several provisions on the implementation of UNSC Resolutions on Libya and on international efforts to fight maritime piracy.[32]

As far as counter-piracy armed services are concerned, the relevant provisions are all stipulated in Article 5, which introduced an hybrid model of regulation authorising private shipowners to embark VPDs (*nuclei militari di protezione*) or, alternatively, private security guards (*guardie particolari giurate*) on board Italian ships navigating across dangerous international waters.[33] The rationale of Article 5 – titled 'Further Counterpiracy Measures' – is to provide Italian merchant vessels with

26. *See* Fourth Permanent Commission – Defense, Resolution on the possible deployment of VPDs on board Italian civil vessels transiting international waters under risk of maritime piracy, 22 June 2011, p. 7. A draft of regulation was prepared on 3 March 2010 and presented to the Italian Parliament with the aim to allow private security services (Senate of the Italian Republic, Draft regulation presented on the initiative of Amato e Catoni, No. 2050. Adde drafts No. 2092, submitted by Senatore Enrico Musso and others No. C 3321).
27. The interview of the chief of the Italian Navy held on 15 June 2011 is available at: www.senato.it/documenti/repository/commissioni/comm04/documenti_acquisiti/Intervento%20amm.%20sq.%20Branciforte.pdf (last visited 3 January 2019).
28. *See* Council Decision 2012/174/CFSP of 23 March 2012 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, Official Journal of the European Union L 89/69, 27 March 2012.
29. On the issues related to the use of flags of convenience, *see* L. Schiano di Pepe, 'La questione della nazionalità delle navi dinanzi al tribunale internazionale per il diritto del mare', *Rivista di diritto internazionale* 329 (2002).
30. Information available at: http://news.bbc.co.uk/2/hi/africa/8019084.stm (last visited 3 January 2019).
31. Law No. 130 of 2 August 2011 (Italian Official Journal No. 181 of 5 August 2011). Enactment as a Law, with amendments, of Decree Law No. 107 of 12 July 2011, concerning the extension of the intervention of development cooperation, support of peace and stabilisation processes, international missions of the Armed and Police Forces, as well as the implementation of UNSC Resolutions 1970 (2011) and 1973 (2011). Urgent measures against piracy.
32. *See* G. Rubagotti, 'Use of Force and Peace keeping', 21 *The Italian Yearbook of International Law* 428 (2011).
33. For a thorough analysis of the Italian legislation introducing the possibility to embark armed services on board, *see* G. Bevilacqua, 'Counter Piracy Armed Services, the Italian System and the Search for Clarity on the Use of Force at Sea, 22 *The Italian Yearbook of International Law* 39 (2012); E. Cusumano, S. Ruzza, 'Contractors as a Second Best Option: The Italian Hybrid Approach to Maritime Securit', *Ocean Development & International Law* 111 (2015); N. Ronzitti, 'Un passo avanti per la tutela delle navi italiane ma troppa cautela nella legge di conversione', *Guida al diritto* 54 (2011); M. Tondini, 'Impiego di NMP e guardie giurate in funzione antipirateria', *Rivista marittima* 32 (2013).

more freedom of navigation while crossing pirate-ridden waters. In this sense, this provision gives execution in the Italian legal system to the customary principle of international law codified in Article 87 of the UN Convention on the Law of the Sea (UNCLOS) which stipulates that the high seas shall be open to ships of all states, whether coastal or landlocked. Of the freedoms pertaining to the high seas, the main one is the freedom of navigation.[34] It is clear that pirates, when boarding and hijacking private ships, are preventing the concrete realisation of the freedom of navigation on the high seas. Allegedly, by means of maritime security services, the Italian legislator attempts to increase the freedom of navigation of Italian flag vessels.

In brief, the adoption of Article 5 of Law 130 represents a first important step forward in the management of Italian maritime security services. In the modern era of piracy, it is the first time that private ships flying Italian flags are allowed under Italian law to embark security personnel for defense purposes. At the same time, the Italian hybrid on board protection model is destined to become a single component of a broader and dynamic legal and regulatory framework. In the following subsections, we will first analyse the general content of the main relevant provisions stipulated in Article 5 of Law 130 (Section 3.1) and will then verify how these provisions were subsequently amended and integrated by further implementing regulations, governing some specific aspects on the deployment of maritime security services (Section 3.2).

3.1 Article 5 of Law 130

Originally, the Italian on board protection model comprised of two main groups of provisions: the first group addressed to VPDs (Art. 5, paras. 1-3), which was abrogated in 2015,[35] and the other group addressed to private guards (Art. 5, paras. 4, 5, 5-*bis* and 5-*ter*) which is still in force and applicable.

Regarding VPDs, this category of contracted security service is quite unique in the maritime security field. In practice, the deployment of VPDs introduced military personnel, equipment, and activities, including military-specific command and control hierarchies, into the shipping sector, aboard private vessels.[36] More recently, the Code of conduct adopted by the Italian Ministry of Interior for Non-governmental Search and Rescue Organizations (NGOs) appears like an attempt to replicate this figure in a different context. In short, the Italian Code of conduct requires, among other things, to deploy Italian police officers on board NGOs' rescuing vessels with the specific aim to counter migrant smuggling and/or human trafficking in the Mediterranean Sea. Despite antipiracy VPDs, the newly proposed Italian police officers should be embarked on NGOs' vessels also when they sail a foreign flag. But Italy, like any other coastal state, is normally not entitled to exercise any enforcement power over ships flying other countries' flags when they navigate on the high seas. Therefore, this and other requirements of this Code of conduct, faced several criticisms from NGOs – namely, some of them have refused to sign it – but also from the international legal and political doctrine,[37] which especially highlights the risk that Italian officers operating on NGO's ships in dangerous international waters offshore from Libya might be exposed to retaliation by smugglers and militias.

Regarding the specific functioning of all antipiracy VPDs, their operations were directly coordinated by the chief of the Italian Navy, to which all requests of protection had to be addressed.[38] Each military team had to consist of a leader and additional members of the Italian Navy or other national military forces. For instance, the six military officers embarked on the Italian tanker Enrica Lexie during the incident mentioned earlier off the coast of Kerala were members of the regiment 'San Marco', which is an infantry military unit belonging to the Italian Navy. Despite the presence on board of VPDs, the vessel itself remained a private vessel as it did not belong to the armed forces of the state and lacked the markings identifying it as being on government service.[39]

Before Italian provisions governing VPDs services were abrogated in 2015,[40] if the military team was available, it was embarked in the identified port at the agreed time. On the contrary, if the military team was not available, shipowners could also rely on privately contracted armed security personnel.

Military and private services were subject to certain common general rules stipulated in the Italian on board protection model. For example, both could be embarked only on board vessels flying the Italian flag. As a consequence, Italian vessels flying foreign flags do not fall within the scope of Article 5. Furthermore, the ship embarking with military or private teams should navigate in specific unsecure zones of the high seas, identified as the 'High Risk Area'. Yet, in both circumstances, the heavy costs of military or private guards should be

34. *See* Art. 87(1)(a) UNCLOS.
35. Decree-Law No. 7 of 18 February 2015 on urgent measures to counter national and international terrorism, as converted, with amendments, by Law No. 43 of 17 April 2015.
36. An Italian version of the Italian Code of conduct for NGOs engaged in Search and Rescue operations in the Mediterranean sea is available Interior at: www.interno.gov.it/sites/default/files/codice_condotta_ong.pdf (last visited 12 June 2018).
37. On the legality of the Italian Code of conduct for NGOs, *see* E. Cusumano, 'Traightjacketing Migrant Rescuers? The Code of Conduct on Maritime NGOs', *Mditerranean Politics* (2017). Available at: https://www.tandfonline.com/doi/full/10.1080/13629395.2017.1381400 (last visited 3 January 2019); M. Fink and K. Gombeer, 'Non-Governmental Organisations and Search and Rescue at Sea', *Maritime Safety and Security Law Journal* (2018), available at: www.marsafelawjournal.org/wp-content/uploads/2018/06/MarSafeLaw-Journal_Issue-4_Gombeer-and-Fink.pdf; V. Moreno-Lax (last visited 3 January 2019), 'Nonsensical', 'Dishonest', *Illegal: the 'Code of Conduct'*, interview of 24 July 2017, available at: https://sea-watch.org/en/nonsensical-dishonest-illegal-the-code-of-conduct (last visited 3 January 2019); M. Ramacciotti, 'Sulla utilità di un codice di condotta per le organizzazioni non governative impegnate in attività di search and rescue (SAR)', *Rivista di diritto internazionale* 213 (2018).
38. *See* Law 130, Art. 5, para. 1.
39. *See* Art. 8 of the High Seas Convention and Art. 29 of the UNCLOS.
40. *See supra* note 35.

borne by shipowners. According to Article 5, paragraph 6-*ter* their deployment could not lead to any additional burdens on the state.[41] Last but not least, both military and private teams can act only to *protect* the ship from possible piracy attacks. Namely, when aboard private ships, neither military nor private personnel can hunt suspected pirates. This prohibition is made descending from international customary and treaty law, as codified by both Article 21 of the High Seas Convention and Article 107 of the UNCLOS, which entrust the function of policing the seas only to warships and other vessels clearly marked and identifiable as government units. In other words, according to these provisions, only military and governmental ships have the power to seize a pirate ship, arrest the persons and seize the property on board.[42]

Notwithstanding these general common aspects, uniformed and private security guards are subject to different specific rules. First of all, pursuant to the Italian on-board protection model, while VPDs are subject to the already existing rules of engagement issued by the Ministry of Defense, private security guards shall operate on board according to the national legislation regulating the use of private security services on Italian territory.[43] In Italy, the general provisions applicable to private security personnel and companies are stipulated in the Italian Code of Public Security, which is explicitly recalled in the Italian on-board protection model.[44] According to this Code, public and private entities can rely on private guards for the surveillance and custody of movable and immovable properties. To operate in the Italian territory, private guards shall comply with certain subjective requirements (*e.g.* have a clean criminal record and have attended specific trainings) and obtain a specific authorisation from the Interior Ministry officials (*Prefetti*). In addition, under this Code, for the carrying of weapons a specific license of the Ministry of Interior is also needed.[45] Finally, bearing in mind that private ships having security personnel on board cannot policy the seas, the protection that can be ensured by private guards is actually limited. In accordance with the Italian Code of Public Security and the Criminal Code, private guards can act only in defense of goods and property within the frame of the legitimate defense, provided for in Article 52 of the Criminal Code. Differently, VPDs can use the lethal force for the purpose of protecting vessels and crews in accordance with the Peacetime Military Criminal Code.[46]

3.2 The Implementing Regulations of the Italian On-board Protection Model

To make Article 5's provisions concretely enforceable, Italian decision-makers had to issue further implementing regulations. Some of them were rapidly adopted. In this sense, on 1 September 2011, the Italian Ministry of Defense adopted Decree No. 55447,[47] in order to identify specific areas in international waters at risk of piracy in line with the International Maritime Organisation (IMO) periodical reports concerning the so-called High Risk Area.[48] Likewise, on 11 October 2011, the Ministry of Defense and Confitarma entered into a memorandum of understanding (*protocollo di intesa*) specifying the modalities used to protect national vessels.[49]

Other implementing regulations including rules on the deployment of private guards, instead, have needed much longer before being introduced and definitely enforced. In particular, in order to be embarked on board merchant ships at risk of piracy, Italian private guards must observe the rules listed in an *ad hoc* decree issued by the Ministry of Interior, specifically aimed to clarify the relationship between the private guards and the shipmaster on the one hand, and to regulate the use, the type, the quantity, and the storage of weapons on the other hand.[50] And, although such Ministerial Decree was to have been adopted within sixty days from the entry into force of Law 130,[51] the deployment of private contractors was not possible before October 2013 because of an incomplete regulatory framework.[52]

As a matter of fact, the implementing Decree was definitely drafted in December 2012 and entered into force only in March 2013 (hereinafter the Implementing Ministerial Decree).[53] And, even though this Decree is expressly aimed to define the implementing modalities

41. *See* Law 130, Art. 5, paras. 4, 5, 5-*bis* and 5-*ter*.
42. Customary international law – as codified by both Art. 21 of the High Seas Convention and Art. 107 of the UNCLOS, entrusts the function of policing the seas only to warships and other vessels clearly marked and identifiable as government units.
43. *See* Arts. 133, 134 and 138 of the Italian Code of Public Security (*Testo unico delle leggi di pubblica sicurezza*), included in the Royal-Decree of 18 June 1931, No. 773, and following amendments, and Art. 249 and ff. of the related implementing Regulation, included in the Royal-Decree of 6 May 1940, No. 635, and following amendments. These rules are expressly recalled in Law 130, at Art. 5, para. 4.
44. *See* Italian Code of Public Security.
45. *Ibid*.
46. In this respect, *see* N. Ronzitti, 'La difesa contro i pirati e l'imbarco di personale militare armato sui mercantili: il caso della "Enrica Lexie" e la controversia Italia-India', *Rivista di diritto internazionale* 1073 (2013).
47. *See* Decree of the Ministry of Defense No. 55447, of 1st September 2011 (Italian Official Journal No. 212, of 12 September 2011). Identification of the international area at risk of maritime piracy where VPDs can be embarked. On 24 September 2015, the Ministry of Defense adopted a new implementing Decree in line with the newly introduced IMO Circular including the revision to coordinates of the High Risk Area, (Italian Official Journal No. 232 of 6 October 2015.
48. The current High Risk Area is defined by the IMO Circular No. 3606 of 2 December 2015. Available at: www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Guidance/Documents/Circular%20Letter%20No.3606.pdf (last visited 3 January 2019).
49. Memorandum of understanding (*protocollo di intesa*) between the Ministry of Defense and Confitarma adopted on 11 October 2011 aimed to agree the modalities to protect national vessels.
50. *See* Law 130, Art. 5, para. 5-*ter*.
51. *Ibid*.
52. Meanwhile, however, pursuant to a Law-Decree of 29 December 2011, the Italian Government has authorised their deployment for a temporary period, notwithstanding the absence of rules on the use of force and weapons by private guards, provided that they have taken part in international missions of the Italian Armed Forces for at least 6 months. *See* Law-Decree 29 December 2011, No. 215, as by Law 24 February 2012, No. 13 (GU 27 February 2012).
53. *See* Ministerial Decree.

stipulated in the Italian on-board protection model,[54] its adoption may not be considered the final step of the legislative process. In light of persisting uncertainties about the procedure required for the authorisation of private guards aboard, it was necessary the adoption of yet another implementing act, that is, a memorandum signed by the chief of the Italian police. This memorandum contains all the provisions ensuring a consistent interpretation of counter-piracy regulations by the Interior Ministry officials responsible for authorising the activities of domestic private security companies. Finally, the use of private guards became legally possible only after the memorandum was released in October 2013, and thus, more than two years later from the Law 130 entering into force.

The prima facie specificity of the Italian legal and regulatory system on counter-piracy armed security services is to allow the use of both military and private teams. Our analysis, however, shows that for improving the freedom of navigation of Italian flagships in pirate-prone hot spots, national authorities have first opted for VPDs and have only afterwards turned to private guards. Indeed, the (apparent) hybrid approach introduced between 2011 and 2015 could apply only on paper for a long time. As seen earlier, the implanting regulations necessary to deploy private security contractors were definitely adopted only in October 2013. In addition, the deployment of private guards remained only a second-best option. Notwithstanding the adoption of the implementing acts, private personnel could be embarked only if VPDs were not available and, as we will see in detail in the subsequent section (Section 4), only if certain essential requirements – regarding the vessel and the security team itself – were met.

On the other hand, VPDs' provisions set forth in the Italian on-board protection model had an intense but rather short history. A number of changes in the international and national sphere – such as the decrease of piracy in the Horn of Africa region, the problematic implications of the ongoing dispute between India and Italy on the Enrica Lexie's incident, as well as the shifting priorities of the Italian military forces – led Italian authorities to abandon the NATO Operation 'Ocean Shield' and amend Article 5 of Law 130 with the abrogation of the group of provisions governing VPDs.[55] As a result, as of 2015, the only available option for armed protection on Italian vessels crossing the High Risk Area consists in using private contractors.

54. *See* Ministerial Decree, Art. 1.
55. *See* Decree-Law No. 7 of 18 February 2015 on urgent measures to counter national and international terrorism, as converted, with amendments, by Law No. 43 of 17 April 2015.

4 Use of Force and the Relation between the Master and the Guards/Team Leader

Several important aspects establishing rules on the use of force and governing the relation between the shipmaster and private guards were fully clarified or newly introduced only at the end of 2013 by means of the aforementioned body of implementing regulations descending from Article 5 of Law 130. In effect, the adoption of these implementing regulations represents a significant outcome, especially in terms of legal certainty for maritime operators. The absence in Italy, up to the end of 2013, of an accurate regulatory framework gave rise to a problematic security gap. Rather than only a theoretical matter, this absence has de facto prevented the use of private personnel on Italian flagships for about three years. Whereas other flag states[56] had already enacted specific legislations which set forth provisions on the use of force and the relation between the master and the guards, Italian maritime operators could eventually rely on recommendations and guidelines developed by international shipping associations.[57] Of such soft-law measures, the IMB's Best Management Practices (BMP) for Protection against Somalia Based Piracy[58] developed by industry bodies, along with national navies, played a role of the outmost relevance in informing Italian shipowners on useful tools to improve the safety and security of their merchant vessels against acts of piracy. And indeed, even if not mandatory, the importance of complying with the BMPs has been later recalled in the Italian implementing regulations. On the other hand, in light of their legal nature the BMPs were certainly not able to give implementation to Law 130 and to enable maritime operators to embark private guards on Italian ships navigating in dangerous international seas.

In order to analyse the articulated Italian regulatory framework, we will first deal with these provisions governing the use of private force, focusing on a number of supplementary requirements about whether and under what conditions contractors can be armed, with what kind of weapons they can be armed, and when and how such weapons may be lawfully embarked and eventually used (Section 4.1), and secondly, we will pass on the relation between the shipmaster and the guards, pointing out the differences on the relation with the military team (Section 4.2).

56. *See, e.g.* Panama, the United States, Spain and the UK.
57. *See, for instance*, BIMCO; the largest international shipping association, has detailed standard contract for the employment of security guards on vessels (GUARDCON). *See also* Industry Guidelines for the Use of Private Security Contractors May 2011.
58. Available at: http://eunavfor.eu/wp-content/uploads/2013/01/bmp4-low-res_sept_5_20111.pdf (last visited 3 January 2019).

4.1 The Use of Private Force

The Implementing Ministerial Decree clarifies that private contractors in Italy can be either directly hired by the shipowner concerned or employed by a private military and security company (PMSC).[59] Beginning from this distinction, the Decree clarifies that a team of private contractors shall include at least four members. They shall have a special license for carrying long guns for personal defense; they shall have work experience in Italian armed forces, also as volunteers; or they shall have attended a course organised by the Ministries of Interior, Defense, and Transports.[60] Personnel who served in the armed forces and have participated for at least six months in international operations, however, can be exempted from the obligation to attend and pass any course until the possibility for additional compulsory training will be provided.[61] In addition, the Implementing Ministerial Decree stipulates that shipowners can also employ foreign contractors. In order to operate as maritime security providers on Italian flag vessels, foreign guards have to be established in another EU member state and receive a specific authorisation from the Italian Ministry of Interior.[62]

A set of detailed provisions is also addressed to PMSC. Each PMSC shall adopt a protocol on how to respond to possible security threats.[63] Each protocol shall contain several subsequent phases and comply with the specific rules for the use of force suggested by the international shipping industry.[64] In practice, when a security threat is identified, the team leader has to preventively notify the shipmaster that he intends to initiate the procedures deemed appropriate to deter the pirate attack. Upon the shipmaster's authorisation, the team leader can then adopt non-lethal measures, such as evading maneuvers and warnings that include the use of spotlights, eye-safe lasers, water cannons, and glare rockets. Firearms can also be displayed but not immediately used. Only if these measures are not sufficient to deter the attack, can warning shots be discharged from firearms. The resort to lethal force can only occur upon the specific shipmaster's authorisation.

When the security of vessels and crews is made depending on private personnel, specific provisions are also addressed to the embarkation, transportation, storage, use and disembarkation of firearms.[65] In addition to the aforementioned authorisations and licenses regarding the use of arms by contractors, the Implementing Ministerial Decree stipulates that the shipowner shall obtain a specific authorisation to carry firearms on board.[66] The firearms which shall be exclusively used for the deployment of security services that can be embarked either on the Italian territory or on the territory of foreign states which border a High Risk Area.[67] During the navigation, firearms have to be stored and locked into a specific safe, for which the shipmaster holds the key. Should the vessel be attacked by pirates in international waters, the key shall be given to the ship security officer, who will then, in turn, hand the weapons to the private guards. When firearms are no longer needed, they shall be stored again in the safe, and the key shall be returned to the shipmaster. Moreover, only one firearm per private security guard and no more than two spare ones can be stored on board. The possibility to employ automatic firearms, normally forbidden under Italian law for non-members of public security forces, can be decided on a case-by-case basis by the Ministry of Interior. The Commander in Chief of the Italian Navy Fleet and the Italian Foreign Ministry office shall be provided in advance with accurate information about the number and description of firearms, together with the number and nationality of contractors and the route of the vessel.[68]

Making clear when and under what conditions the transit of foreign merchant vessels with antipiracy armed guards on board can occur, the Italian Ministerial Decree seeks to prevent or at least limit any potential prejudice to costal states which may be concerned by the passage of foreign armed vessels. As far as the perspective of the international law of the sea is considered, when armed merchant vessels pass through territorial waters, the flag state must duly take into account additional rules. Article 19 UNCLOS provides that foreign flagged vessels may pass through territorial waters *so long as [their passage] is not prejudicial to the peace, good order or security of the coastal state*.[69] Hence, according to this provision, it is plausible that coastal states do not retain innocent the passage of foreign *armed* ships. Arms, indeed, may easily represent a great risk in terms of potential liability.[70] However, as seen earlier, the embarkation, transportation, storage, use and disembarkation of firearms are now subject to a certain number of strict Italian regulations. Besides that, according to such regulations when Italian vessels sail through waters

59. *See* the Implementing Ministerial Decree, Art. 3.
60. *See* the Implementing Ministerial Decree, Art. 3. These requirements supplement the general conditions applicable to all Italian private security guards stipulated in Art. 256-*bis* mad Art. 257-*bis* of the above recalled Royal Decree on private security.
61. *See* Decree of the Italian Ministry of Interior, 2013.
62. *See* E. Cusumano and S. Ruzza, 'The Political Cost-Effectiveness of Private Vessel Protection: The Italian Case', *Italian Journal of International Affairs*, (2018). Available at: https://www.tandfonline.com/doi/abs/10.1080/03932729.2018.1450110 (last visited 3 January 2019).
63. *See* Implementing Ministerial Decree.
64. *See* Patel (Chairperson of the United Nations Working Group on the use of mercenaries), 'New Forces Need New Rules', in Opinion piece by UN Working Group on the use of mercenaries, 25 September 2012; UN News Center, *Somalia: UN experts on use of mercenaries urge greater oversight for private security contractors,* 16 December 2012.
65. *See* Implementing Ministerial Decree, Art. 6.
66. *See* Implementing Ministerial Decree, Art. 6, para. 1.
67. *Ibid*.
68. *See* Implementing Ministerial Decree.
69. *See* Art. 14 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and Art. 19 UNCLOS. For doctrine, *see* G. Cataldi, *Il passaggio delle navi straniere nel mare territoriale* (1990), at 97.
70. *See* MSC.1/Circ.1405/Rev.2, 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. Available at: www.imo.org/en/OurWork/Security/SecDocs/Documents/Piracy/MSC.1-Circ.1405-Rev2.pdf (last visited 3 January 2019). The IMO's Maritime Security Committee is the highest technical body of the IMO consisting of all Member States.

belonging to coastal states near the High Risk Area, firearms shall be duly locked and their use shall be expressly forbidden. The same aim is probably behind the implementing provisions which impose a progressive use of force, but only and specifically within dangerous international waters. All these specific prescriptions seem to respect or at least consider the principle on the innocent passage and the principle of the territorial sovereignty of the coastal state provided by the international law of the sea.

The importance to have in force domestic provisions governing the use of private force against piracy suspects respond to another primary need: to find an adequate balance between the use of lethal force and the fundamental right to life prescribed by international human rights law. Namely, the fundamental right to life is not an absolute right, but its application is extremely wide. States are prohibited at all times from *arbitrarily* depriving any person of his or her life and, accordingly, it cannot be abrogated *arbitrarily* when, for instance, suspected pirates are captured.[71] Besides that, the prohibition concerns the taking of life by police, soldiers and any other agents exercising police powers and, thus, also in the case of private security personnel.[72]

Italian implementing provisions requiring the respect of specific conditions and progressive phases on the use of arms on board consider that according to human rights law, in order to be lawful, the use of force must respect the two core law enforcement principles, which are "proportionality" and 'necessity'.[73] In particular, according to the first criterion, there must be proportionality between the measure of force used on the one hand and the *purpose* and *interest* pursued on the other hand. According to the second criterion, the use of force must be avoided, as far as possible, and, where force is inevitable, it must not go beyond what is reasonable and necessary in the circumstances.[74]

With specific respect to case of the use of force at sea against alleged pirates, in several resolutions the UNSC affirms that human rights law is applicable also during counter-piracy operations.[75] Likewise, in May 2012, the IMO's Maritime Security Committee issued a new interim guidance for privately contracted armed security personnel, where it is stated, inter alia, that it should ensure that armed personnel understand that:

> […] all reasonable steps should be taken to avoid the use of force and, if force is used, that force should be used as part of a graduated response plan, in particular including the strict implementation of the latest version of BMP;
> […] the use of force should not exceed what is strictly necessary and reasonable in the circumstances and that care should be taken to minimize damage and injury and to respect and preserve human life; […][76].

On these grounds, we would argue that the adoption of detailed implementing rules governing the gradual use of force reveals, at least on paper, the intention of Italian authorities to enact a system capable to *respect* pirates' human rights and *protect* them from potential interference by others, including private security personnel.

4.2 The Relation between the Master and the Guards

With respect to the relation between the shipmaster and the security personnel, as with any other private personnel on board, security guards are subject to the authority of the shipmaster, who maintains exclusive control over the vessel.[77] In particular, according to the Implementing Ministerial Decree, shipmaster and team leader have different tasks and competences. While the shipmaster is the representative of the shipowner on board and has the power to authorise the arming and deployment of the private guards, he cannot really influence the tactical choices of the contractors, who are led and supervised by their team leader.[78] And as far as the duties of contractors are concerned, they include surveillance, identifying threats, assisting the shipmaster in implementing the appropriate protective measures, preparing the crew for the pirate attack in compliance with the shipping industry's BMPs, and protecting the ship itself. The

71. For a commentary on the application of the right to life, *see* D.J. Harris, M.O'Boyle & C. Warbrick, *Law of the European Convention on Human Rights*, (2009), at 56; S. Piedimonte Bodini, 'Fighting Maritime Piracy under the European Convention on Human Rights', *European journal of international law* 5 (2011); J. Callewaerth, 'Is there a Margin of Appreciation in the Application of Arts. 2, 3, and 4 of the Convention?', *Human Rights Law Journal* 6 (1998); D. Guilfoyle, Counter-Piracy Law Enforcement and Human Rights', 59 *International and Comparative Law Quarterly* 151 (2010).
72. *See*, among others, ECtHR, *Avsar v. Turky*, application No, 25657/94, Judgment of 10 July 2001, definitive on 27 March 2002, para. 37 in *Reports of Judgments an Decisions*, 2001-VII.
73. *See* Art. 8-*bis*, para. 9, of the 1988 Convention for the suppression of unlawful acts of violence against the safety of maritime navigation (SUA Convention), as amended by the 2005 SUA Protocol; The 1979 Code of Conduct for Law Enforcement Officials, adopted by General Assembly Resolution 34/169 of 17 December 1979; The 1995 UN Fish Stocks Agreement for the Implementation of Provisions of the UNCLOS, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stock, opened to signature in New York on 4 December 1995, 34 ILM (1995) 1547.
74. *See* S.S: 'I'm Alone', *Canada v. United States,* Reports of International Arbitration Awards, Vol. 3, p. 1615 and ITLOS, M/V 'Saiga' (No. 2) Case, *Saint Vincent and the Grenadines v. Guinea,* Judgment of 1 July 1999. *See* D. Guilfoyle, *Shipping Interdiction and the Law of the Sea*, Cambridge University Press (2009), at 268.
75. *See*, among others, Security Council Resolution 1851, para. 6, *supra* note 5.
76. *See* IMO, 'Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area', MSC.1/Circ.1443, 25 May 2012, §5.15. It is also argued that companies themselves have a duty to respect fundamental human rights, such as the right to life and the right to freedom from torture. Under the 2008 UN Framework for Business and Human Rights, developed by the UN Special Representative on Business and Human Rights and endorsed by the Human Rights Council in Resolution 8/7 of 18 June 2008 (§1), there is a corporate responsibility to respect human rights. *See also* 'Report of the independent international commission of inquiry on the Syrian Arab Republic', UN doc. A/HRC/19/69, 22 February 2012, §106.
77. *See* Implementing Ministerial Decree, Art. 9 which with respect to the relation between the shipmaster and private guards expressly recalls Arts. 8, 186, 187, 295, 297 and 302 of the Italian Navigation Code.
78. *See* Implementing Ministerial Decree, Art. 9.

team leader in particular, is responsible for offering advices to the shipmaster on security matters, conducting security inspections, supervising the activities of the other contractors, and drafting a daily report of their activities. The master, on the other hand, retains the power to order a ceasefire.[79]

Relatively different was the relationship between the shipmaster and the military team leader. Namely, the military team was subject to the authority of the shipmaster, exception made in the event of pirate attacks. In these cases, VPDs were subject to the sole authority and responsibility of the military team leader, who assumed the role of Judicial Police Officer and guided all military team members in accordance with the rules of engagement issued by the Italian Ministry of Defense. The use of lethal force was allowed on the basis of the need to protect the commercial vessel at risk of piracy and felt within the exclusive responsibility of the military team leader.[80]

In light of the differences existing with the military team and provided that private personnel is for the first time allowed on board Italian merchant ships, the adoption of implementing provisions including details on the relation between the shipmaster and the contractors was certainly essential to bring clarity among maritime operators.

5 Concluding Remarks

The adoption of a national legal and regulatory system represents an important step forward in the management of the maritime security field. In response to criminality at sea, shipping companies around the world had progressively started to rely on several categories of security services in order to defend ships and crews against piracy attacks. This tendency led to a proliferation of weapons at sea and various types of armed security teams operating aboard private commercial vessels. In the absence of a domestic model of regulation, also Italian shipping companies had started to rely on armed services offered by foreign security companies through the expedient of sailing flags of convenience. Likewise, other European member states, Italian decision-makers understood the need and the relevance of filling the security gap left by international law and regulating the emerging phenomenon.

And whether one likes the idea or not, armed security services on board civilian vessels appear to become an increasingly common feature of counter-piracy tools. Considering that there is not enough naval capacity to secure all pirate-prone hotspots around the world, on a short-term basis the deployment of on-board security services is probably the only way forward to provide ships with sufficient protection and actual freedom of navigation in dangerous international waters. From the data reported in the most recent annual report of the IMB,[81] it emerges that in the period between 2015 and 2016, Italian flagged vessels were never successfully attacked by pirates. Together with such concrete outcomes, the fact that for the protection of their properties, public and private entities ashore may rely also on private personnel since the adoption in 1931 of the Italian Code of Public Security, encourages the idea that national authorities will not turn back for the maritime security field to either a hybrid or a public model of regulation. Moreover, the private security trend is fully consistent with the parallel growing expansion of maritime private security services at international and European level as well as with the general widespread use of security contractors for public security services ashore.

On a long-term basis, however, the Italian model of regulation and, more generally, national regimes governing the use of armed security services at sea will not be sufficient. Under the Italian legal and regulatory system, armed services can gradually use the force on the high seas only. The above recalled respect both of the coastal states sovereignty and principle of innocent passage implies the permanence of a security gap in the territorial waters of several coastal states prone to pirates. Off the Gulf of Guinea, for instance, where commercial ships are attacked especially in territorial waters, the total number of kidnapped crews in 2016 was the highest in ten years.[82]

In light of this persistent security gap and the parallel growth of profitability of the private counter-piracy market, our main idea is to foster the stipulation of bi-or-multilateral treaties which may directly address the subject of on-board armed protection of vessels. Following the precedent of the bilateral agreements regarding the transfer of piracy suspects captured by naval units operating in the waters off the Horn of Africa,[83] state parties of the proposed instrument might be all these states which are concerned by maritime piracy and armed robbery at sea. In other words, memoranda of understanding might be stipulated between, on the one hand flag states interested in improving their freedom of navigation also when passing across dangerous territorial waters, and on the other hand, costal states in the regions infested by pirates and interested in disrupting the phenomenon. Well aware of the significant rise in the number of companies offering armed security services and of the lack of harmonisation, the IMO issued, and then revised, interim guidelines which are

79. *Ibid.*
80. *See* Law 130, Art. 5, para. 2.
81. *See* the IMB Report on acts of piracy and armed robbery against ships for the period 1 January – 31 December 2016, January 2017, available at: http://lignesdedefense.blogs.ouest-france.fr/files/2016-Annual-IMB-Piracy-Report.pdf (last visited 3 January 2019).
82. *Ibid.*
83. Among others, *see* Exchange of Letters between the EU and Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the EUNAVFOR, and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer, OJEU L79/52 (2009); Exchange of Letters between the EU and Seychelles, OJEU L 315/37, (2009); Agreement between the EU and Mauritius, OJEU L 254/3 (2011).

addressed to all actors in the maritime security field and aim at regulating when, where and how armed force may be used in countering piracy.[84] Similar non-binding measures were also undertaken by governments with the Monteux Document[85] and by the international shipping industries with the GUARDCONs and the BMPs. Such measures may be interpreted as a desire to regulate the field. At international level, however, what is still really urgently needed is a binding instrument which is capable to coordinate the different initiatives already undertaken by flag states at the national level in the absence of an explicit discipline on security services.

84. *See* MSC.1/Circ.1443 on Interim Guidance to private maritime security companies providing contracted armed security personnel on board ships in the High Risk Area; MSC.1/Circ.1408 on Interim recommendations for port and coastal States regarding the use of privately contracted armed security personnel on board ships in the High Risk Area; MSC.1/Circ.1406/Rev.1 on Revised interim recommendations for flag States regarding the use of privately contracted armed security personnel on board ships in the High Risk Area; MSC.1/Circ.1405/Rev.2 on 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; and a joint MSC and Facilitation Committee circular, Questionnaire on information on port and coastal State requirements related to privately contracted armed security personnel on board ships, which is aimed at gathering information on current requirements.
85. The Monteux Document is the result of an international process launched by the Government of Switzerland and the International Committee of the Red Cross. It was finalised by consensus on 17 September 2008 by seventeen states: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Ireland, Ukraine and the United States of America.

Armed On-board Protection of Dutch Vessels: Not Allowed Yet But Probably Forthcoming

Paul Mevis & Sari Eckhardt*

Abstract

This article provides an overview of the developments about the armed on-board protection of Dutch vessels under Dutch law. The Dutch position has changed over the years. In 2011, the starting point was that *private* security companies (PSCs) are not to be allowed. It was expected that adequate protection of Dutch vessels could be provided by vessel protection detachments (VPDs). Although not considered as an absolute statutory bar, the state monopoly on force was considered the main argument against PSCs. After optimising the use of VPDs and given the development in other countries, the approach changed into a 'VPS, unless …'-approach. Under the new Protection of Merchant Shipping Act that is expected to come into force in the second half of 2019, PSCs can be employed only if no VPS is available. This article gives an overview of the argumentation in this change of view over the years. It also explores the headlines, criteria and procedures of the new law and some other topics, including the position of the master under the upcoming law. In line with the other country reports, it enables the comparative study in the last article of this special issue.

Keywords: vessel protection, private armed guards, state monopoly on force, masters position, state control

1 Introduction

The scope and nature of the threat of piracy to the large fleet of Dutch merchant vessels has been the topic of political debate since 2011 between the Netherlands government and Parliament.[1] The main question in the discussion was whether to allow armed *private* security companies (PSCs) on board Dutch merchant vessels, and if yes, under what conditions and restrictions. Deploying armed PSCs on board Dutch sea vessels has always been, and on the date of finalisation of this article in March 2019 it still is, prohibited by law. This is so, despite the threat of piracy in its peak years, 2010 and 2011, and despite the fact that companies around the world provide armed security services for seagoing vessels. Theoretically, an attack against a Dutch vessel, with a lot of media attention, could have affected the discussion, but there has been no such attack. Nevertheless, there has been a constant discussion in the Netherlands about whether PSCs should be permitted. Supported by vessel owners and other organisations, and the argument that the Dutch merchant fleet will become less competitive, the calls for allowing PSCs on board Dutch vessels have become stronger over the years. An important rationale underlying this gradual change of mind is that there is an increasing number of flag states in Europe that by law allow on-board PSCs. In the Netherlands, an amendment of law is required to allow armed PSCs on board Dutch vessels. Such amendment is expected to be enacted in the near future because a bill on this subject has (already) passed the Netherlands Parliament (in March 2019), but the bill has not come into force yet. The strong debate in the two Houses of Parliament[2] focused on issues of legal substance and validity of the proposed provisions and centred on this question of law: does the bill provide enough and adequate provisions for the Dutch government to allow PSCs? Even when the bill will be enacted as an Act of Parliament, many of its provisions will require further regulation by regulations thereunder[3] before the first armed PSC will be allowed to board a Dutch vessel. In addition, as long as there is no imminent threat of piracy, there is no need for a rapid enactment.[4] And even if the amendment enters into force, it will allow deploying PSCs under very strict conditions. Until such time, the

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1. G. Scott-Smith and M. Janssen, 'Holding on to the Monopoly on Violence? The Use of Armed Force, the Dutch Approach to PMSCs, and the Anti-Piracy Case', *St. Anthony's International Review*, at 54-70 (2014) provide for an overview of discussions up to 2013.
2. The Dutch Parliament, the States-General, is bicameral consisting of the House of Representatives and the Senate. A bill has to pass both chambers. A majority in each of the two chambers may accept a bill. Only the House of Representatives can initiate or amend a bill.
3. The Act of Parliament may provide (and the accepted bill does provide as we will see) that matters be further regulated by Order in Council, which is legislation of a lower order than an Act of Parliament. An Order in Council is issued by Royal Decree. Parliament may require to be informed before the Order is promulgated, as it did for almost all of the Orders prescribed by the legislative proposal.
4. International Chamber of Commerce (ICC) and International Maritime Bureau (IMB), *Piracy and Armed Robbery against Ships, Report for the Period 1 January-31 December 2017* (London, 2018), available at: https://www.icc-ccs.org/piracy-reporting-centre/request-piracy-report.

Netherlands will continue to rely exclusively on its armed forces to protect ocean-going vessels – vessel protection detachments (VPDs). The amendment will change the exclusive nature of VPD protection, but its approach will remain 'VPD, unless …'.

This article will discuss the arguments raised in the political debate in the Netherlands on deploying PSCs on board Dutch vessels. Given the absence of practical experience with PSCs on board of Dutch vessels, we will describe the contents of the legislative proposal in the bill as accepted by Parliament. This article will then highlight the rationales underlying the 'VPD, unless …' approach. We will also discuss how the legislator plans for the system to work when PSCs take firearms on board and, in the worst case, are required to shoot hijackers of their vessels.

2 Statutory Background – An Overview of Arguments

2.1 For the Time Being Current Situation

The traditional and for the time being current regulatory framework in the Netherlands has three particular features. First, current law *does* allow for the master of a vessel to have two handguns on board but prohibits possession of more or heavier firearms. This option obviously falls short to meet the threat of modern piracy. Second, the possession or use of these weapons on board may constitute a criminal offense, such as a violation of the gun control laws (possession of guns on board) or, if firearms are used, (attempted) murder or aggravated assault under the Dutch Criminal Code. The government has stated that masters and vessel owners will be prosecuted if they violate these laws. There has not yet been any criminal prosecution, although there have been rumours that some Dutch vessels in fact have private security guards on board. In extreme cases, such violations of Dutch criminal law may cause the government to deregister the Dutch vessel involved. Third, if the master and crew, however, use force against pirates attacking their vessel, they may argue self-defence or necessity when prosecuted. In its judgment of 23 October 1984 the Supreme Court held that the mere fact that prohibited weapons were used in self-defence does not in itself imply that the defendant is barred from arguing self-defence. The mere fact that a master chooses to navigate a piracy-prone area is arguably not enough to deny him the defence of self-defence or necessity for being at fault. On the other hand, as long as there is no imminent threat or attack, there is no need for self-defence. Therefore, self-defence cannot serve as a justification for possessing firearms on board Dutch vessels because of fear or the possibility of a pirate attack, where such possession is a violation of gun control laws. In addition, as we will see in the following, this justification is not used in the upcoming legislation.

2.2 The 2011 Advisory Committee on Armed Private Security against Piracy and the Government's Response: 'VPDs Only (for Now)'

Against the backdrop of the piracy threat, the Dutch government was forced to take a stand in 2011 as to whether it would allow armed private security guards on board Dutch vessels. The government decided to submit the question to the Advisory Committee on Armed Private Security against Piracy ('Advisory Committee').[5] The Advisory Committee issued its recommendations in August 2011.[6] Although it didn't expressly rule out any possibility of deploying armed private security on board Dutch vessels, it did so preliminarily, thus leaving room for future developments. The government subsequently endorsed this position and so did a majority of Parliament. The Advisory Committee and the government based their assessment on the following arguments.

2.2.1 State Monopoly on Force

First, both the Advisory Committee and the government gave much importance to the principle of the state's monopoly on violence, which is a fundamental principle under Dutch public and private law holding that the legitimate use of force by the state cannot be exercised by private entities. There are several reasons for their emphasis on this principle, which echoes deep religious beliefs and philosophies of Dutch politics and society. However, the government's 2011 decision to hold off PSCs also implies – consistent with the Advisory Committee's reasoning – that the government believes the state monopoly on force is not an *absolute* statutory bar to accepting the use of armed private security on board Dutch vessels. It is not a bar in other countries either.

2.2.2 Importance of Criminal Prosecution of Pirates

Second, in its decision to hold off the Dutch government also analysed the rest of its efforts to combating piracy. State action by Dutch armed forces on board Dutch merchant vessels could also promote the international rule of law. The Dutch Constitution requires the government to do so.[7] For that reason, it is important to seek criminal prosecution of piracy as the crime of hijacking individual vessels[8] as well as a form of international organised crime. Serious efforts need to be made to locate and prosecute the upper echelons of pirate groups as criminal organisations: the clients, financiers and intermediaries. Criminal prosecution means arrest-

5. The author was a member of that Committee.
6. The Dutch report contains a summary in English, available at: https://www.rijksoverheid.nl/documenten/rapporten/2011/09/01/rapport-commissie-de-wijkerslooth-geweldsmonopolie-en-piraterij. There was an earlier advice of the Advisory Council on International Affairs to allow PSCs: https://aiv-advies.nl/download/045f9ea5-c9f0-4bb6-a3c0-bc190e56dbaa.pdf.
7. Section 90 of the Dutch Constitution provides: 'The Government shall promote the development of the international legal order.'
8. Punishable under Section 381 of the Dutch Criminal Code and applicable on the basis of universal jurisdiction (Section 4 of the Dutch Criminal Code).

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ing and bringing charges against hijackers, preferably in the region but, if necessary, also in the Netherlands. This is an important (international) obligation which VPDs deployed on board Dutch vessels are better able to organise than PSCs who merely want to save the vessel. Courts in the Netherlands and elsewhere in Europe have gained some experience with this type of prosecution.[9] The more the Netherlands, together with other countries, can and actually does contribute to combating piracy under international criminal law, the more reason it has to not deploy PSCs as an immediate and unavoidable necessity due to the situation on certain navigation routes. State action against pirates in general is important in this discussion. In this regard, the Netherlands appears to do or wants to do more than many other countries.

2.2.3 Importance of Other Means of Protection

Third, in 2011, the government relied on methods other than PSCs to protect Dutch vessels, one particular method being the consistent and proper implementation of Best Management Practices. These include safety measures on board, convoy shipping and joining group transits through the International Recommended Transit Corridor, as well as shipping under the protection of patrolling navy vessels in dangerous seas within the framework of the EU Atlanta mission and the NATO Ocean Shield mission. This argument is supported by the view that the Dutch state is not required to guarantee protection for every risk that every Dutch vessel may encounter on routes anywhere in the world. There is no duty to permit a PSC for each journey with a possible risk for a piracy attack.

2.2.4 Navy Deployment to Be Optimised First

The last argument of the Advisory Committee and the Dutch government's decision not to allow armed private security guards on board Dutch vessels in 2011 was that the use of armed private security guards was not necessary. They argued that military VPDs by the Royal Netherlands Navy could provide sufficient and adequate security for individual vessels. One specific rationale was the lack of practical experience in 2011 with deploying VPD for security purposes. At that time, there still was no clarity as to the scope of protection and the number of military VPDs. Before the decision to allow PSCs could be made, VPD deployment had to be optimised first. Since 2011, VPD protection has been optimised and made more flexible and less expensive over the years. As we will see, the answer to the question whether peak flexibility has been reached in 2018 has in recent years been an important factor in the changing approach towards PSCs.

2.3 The 2017 Bill for the Protection of Merchant Shipping Act

The government and Parliament initially argued that the use of PSC could not be ruled out but could only be considered when 'an adequate level of protection cannot be offered and the international position of the Netherlands is negatively affected'. This allowed them to reconsider some matters while allowing PSCs on board Dutch vessels. On 26 April 2013, the government[10] issued a new statement to Parliament about deploying VPDs.[11] The government expressed its intention to draft legislation allowing the use of PSCs. The government had a variety of reasons for its new position.

The government continued to emphasise adequate protection of the merchant fleet by deploying VPDs. However, one of the most important arguments to allow PSCs was that, in spite of the downward trend in deployment of VPDs, the state cannot always meet the vessel owners' requirements. The government's letter stated that VPDs cannot meet the requirements of the vessel owners in all cases in terms of flexibility in application periods, scope, relative costs or geographical range. Problems arise particularly in transports that are part of the spot market. These are transports for which the destination port only becomes known at a later stage. Furthermore, the Ministry of Defense was not prepared to deviate from the minimum standard size of a VPD of eleven people. Deviation was possible but required a drastic (more expensive) change of the deployment concept. As such, the Ministry of Defense could not transport a VPD if the vessel was not suitable to take on a team of eleven people. Thus, the government's opinion in 2013 was that although VPD deployment had been optimised, their deployment still could not provide security in all cases. The use of VPDs had therefore reached its limit, not because of a lack of defence personnel but because of the size of VPDs, because the time required to organise VPDs differed and was at times very short, and because of pricing (the vessel owner's private contribution could not be reduced further).

There is yet another argument, however. As the government rightly reported in their letter to Parliament, especially in the years after 2011, many countries, including many European countries, have passed legislation to permit the use of PSCs. This fact has contributed to the shift in political opinion. This change is based on the fear that the exceptional prohibition of the Netherlands will affect its merchant fleet's competitive position. Such potential negative effect on the competitiveness of the merchant fleet is a sensitive matter for those Dutch politicians and members of society who consider the country's military and trade history to be heroic. There was a fear that Dutch ship owners would reflag to a country that allows PSCs or that makes enough VPDs

9. Several cases have been brought before Dutch criminal courts, challenging several aspects of substantive and procedural criminal law, but leading to convictions under national law.

10. On 5 December 2012, the government was comprised of liberals and socialists. The previous government was made up of liberals and Christian democrats. The Minister of Defense was a Christian democrat. Traditionally, Christian democrats are fierce proponents of the state monopoly on force.

11. *Parliamentary Papers II*, 2012/13, 32 706, 44.

available. From a legal point of view, it is clear from developments in some other countries that these countries considered that there is a legal basis to allow PSCs. Yet they also considered that it is possible on a PSC certification framework to provide for proper and effective rules to control the use of force by PSCs on board. On these arguments the original, strong argument of the state's monopoly of force started to be less articulated in favour of a more economic approach. It is important to note, however, that the other countries' decision to allow PSCs is based on reasons considered less important in the Netherlands. For instance, in some countries (*e.g.* Norway, Denmark) there is a major difference between the size of the merchant fleet and the size of their navy. In addition, countries have vastly different legal and cultural opinions about the state's sole right to use force (as seems to be the case in the Anglo-Saxon legal culture). In Germany's case, the limited deployment of its navy is based on its history.

All these arguments taken together led the government to conclude in 2013 that PSCs should be allowed in addition to VPDs and that legislation had to be passed to make this possible. However, it is relevant to note that the government's change of position is not – as the Ministers want to make it appear in their above-mentioned letter of 26 April 2013 – fully consistent with the reasoning and conclusions of the 2011 Advisory Committee's report or the previous government's original position which was based on that report. The government made a new and different political decision. This decision was more than ever before based on the need to facilitate shipping and the belief that the state has a duty of care to protect the economic interests of the industry and the safety of people sailing on Dutch vessels. This indicates the new – politically different – government had less reservations about abandoning the state monopoly on violence to allow vessel owners to use PSCs. This belief was a new element in the debate and was based on notions of international (labour) law, such as Article 94 of the UNCLOS, Article V of the Maritime Labour Convention and Article 2 of the European Convention on Human Rights (ECHR; right to life), in combination with the doctrine of 'positive treaty obligations'. Because the optimised deployment of VPDs and measures by the vessel owners themselves could no longer provide adequate security in all categories of transport, the government considered it necessary to fulfil its duty of care by creating the appropriate conditions for the use of PSCs. Note that international law does not strictly require the state to allow PSCs. The previous government also considered the possibility of not sailing at all, or only at the vessel owner's risk, instead of allowing the use of a PSC on board. The state's duty of care was in that approach not absolute. In addition, the new government became more concerned about economic ramifications if the Netherlands were to prohibit PCSs while other countries did not.

Although there is little to be said against the new political position, the underlying arguments are not very convincing as compared to those raised in the past. In addition, it is based on the mere *expectation* of adequate legislation and implementation practices to facilitate the use of PSCs. The fact that the government's arguments are not convincing is also apparent from Parliament's reaction to the government's new position. In 2013, a majority in the House of Representatives disagreed it was necessary to allow PSCs on board Dutch vessels in addition to VPDs and to pass legislation to do so. Parliament's position was based on the same questions that were raised in the government's debate: is the use of PSCs on vessels necessary, given all the other options for protection? Can the use of VPDs still be further expanded, for example, by stationing marine forces in the Gulf of Aden or by cooperating with other EU countries? Can the size of a VPD be reduced to less than eleven people, given the fact PSCs as well as other countries' military VPDs work with teams of four to six people? And what are the consequences of differences in size? Is piracy moving from the East Coast of Africa to the West Coast where states do not permit PSCs (and perhaps not even VPDs) on board vessels in their territorial waters? This question was particularly important: can legislation be passed which adequately regulates and provides safeguards for the use of weapons by PSCs on board? Can the master's duties in this regard be adequately regulated? Parliament's response was not entirely negative. However, the questions raised did not convince the majority there was a need to legalise the use of PSCs, even if only complementary to VPD protection. Parliament insisted on further investigation while calling for restraint before making irreversible decisions to allow PSCs on board Dutch vessels.

In December 2015, the Dutch government published another statement to Parliament. The government argued that it continued to prefer public security guards but did not entirely rule out private security guards.[12] It continued to adhere to the principle that VPDs could be deployed; however, it specifically addressed two exceptions. The first exception is the situation that there is simply no VPD available. Four other exceptions were described in the government's opinion as follows:

1. Transportation requiring to navigate 100 NM or more to reach the entry and exit point of a VPD in comparison to an entry and exit point of a team of private security guards.
2. Transportation accompanied by VPDs costs the vessel owner 20 per cent or more than deploying private security guards.
3. Transportation by a vessel that cannot accommodate an additional VPD during the period the VPD is on board.
4. Transportation for use in the spot market where the planned route and potential detours render VPD deployment too complicated or impossible.

In these cases, the government's new approach was that private security services holding a Netherlands maritime security license should be allowed on board merchant

12. *Ibid.*, 74.

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vessels, subject to strict conditions. It is clearly a 'VPD, unless …' opinion.

Along this line, two members of the House of Representatives submitted a bill for the Dutch[13] Protection of Merchant Shipping Act. Their final draft was published in February 2017.[14] It is this bill that, finally, is accepted by Parliament in March 2019. The bill seeks to elaborate on the above-mentioned 'not for now' PSC approach of the 2011 Advisory Committee, given that experience since 2011 has shown the limits of depending solely on VPDs to protect Dutch vessels in situations that call for protection. And given the development that more and more countries have accepted PSCs. The bill aims to provide adequate security for transports which cannot be secured by VPD (for lack of space, time or costs) and to protect the Dutch merchant fleet's commercial interests. The bill does so by ensuring that transport prices match the prices foreign vessel owners pay to protect their transports. Under this bill, Dutch law will in the near future permit on-board possession and, if necessary, use of weapons. The bill sets forth the legal safeguards deemed necessary for such deployment. The bill's contents and key considerations and issues merit discussion because it is an indication of the contours of future law on PSCs in the Netherlands. This will allow us to judge whether it has the requisite fundamental features. Let us therefore turn to the bill in more detail.

3 Key Aspects of the Law

3.1 Background

The bill's drafters mainly follow the government's opinion that there are, or better, have become sufficient arguments in favour of allowing PSCs.[15] Their reason for drafting the bill is the rising number of piracy attacks and their significant impact on the economy. The maritime industry plays an important role in the economy and employment of the Netherlands. Again, much weight is given to the fact that all European countries with a strong maritime presence have promulgated legislation for deploying private maritime security on board merchant vessels. This affects the competitiveness of the Netherlands merchant shipping industry because Dutch vessel owners pay more than foreign vessel owners to protect their vessels. As a result, they miss out on business opportunities, because they cannot meet the security requirements. The drafters argue this encourages vessels to deregister from Dutch registers and to fly a different flag. This causes the merchant shipping industry and related services (*e.g.* financing, accounting, repair and maintenance companies, and maritime lawyers) to leave the Netherlands' jurisdiction, making it less attractive to register a vessel under Netherlands law. The drafters argue the playing field could be levelled again by allowing private security services on board Dutch merchant vessels, subject to conditions. This economic argument seems to reflect the shift in the political opinion from embracing the public law concept of state monopoly on violence to advocating the necessity to protect vital economic interests. The approach, consistent with the government's position, is that PSCs should only be allowed if the government cannot provide VPD protection. PSC protection is only allowed where it has been previously decided that VPD protection is not available; PSC protection is only permitted as a substitute to VPD protection. So: 'VPD, unless …'

3.2 'VPD, Unless …'

It is generally accepted that vessel owners travelling through high-risk areas are expected to use Best Management Practices (BMPs) consisting of procedures with several levels of measurements to prevent pirates from attacking vessels and boarding the vessel. The use of all possible BMPs is seen as *condition sine qua non* for further protection by VPD or PSC, as the case may be.

In the 'VPD, unless …' approach, the use of PSCs is given a subordinate role. Under the bill, this means that when a VPD or another form of government protection is available, the vessel owner must accept that form. The vessel owner will be eligible to receive private security services, only if the transport meets the protection criteria and no VPDs are available. The bill's explanatory memorandum distinguishes four specific situations that we already mentioned earlier.

1. Even though VPDs are deployed in more cases, they cannot always be deployed, especially on the spot market as we saw earlier. The main impediment is the difficulty of organising VPD protection on short notice.
2. The vessel in question has no adequate facilities to host a VPD of eleven persons.
3. Economic factors of VPD protection would cause unwarranted changes in the planned navigation route by 'more sea miles than a certain amount to be further stipulated by the Ministry'.[16]
4. The costs of engaging VPD protection are disproportionately higher than PSC protection; the percentage to be stipulated by the Ministry.[17]

In these situations, the drafters saw a discrepancy between the government's duty to organise protection (duty of care) and the impossibility of organising such

13. To expedite the process, the bill only relates to the European part of the Kingdom of the Netherlands. One complication is that ships within the whole Kingdom of the Netherlands fly the Dutch flag, but the Netherlands and Curacao use different ship registers. Applying Dutch legislation to Curacao would require a legislative proposal to go through different legislative processes and to be passed by separate parliaments within the Kingdom of the Netherlands. The idea is that Curacao will make separate but substantially the same provisions as the Dutch law. By a special provision, the upcoming Dutch bill can eventually be replaced by a law, applicable to the Kingdom of the Netherlands as a whole (*Rijkswet*), but that is not a target as such (*Parliamentary Papers I*, 2018/19, D, 6).
14. *Parliamentary Papers II* 2016/17, 34 558, 5.
15. *Ibid.*, 6.
16. The distance of 100 NM mentioned above in the government's 2013 memorandum serves as an indication.
17. The 20 per cent figure mentioned above in the government's 2013 memorandum serves as an indication.

protection through VPDs. In order to correct the discrepancy, the drafters proposed to allow deploying armed private security guards only in these situations.
Under this principle of 'VPD, unless …', it first has to be determined whether VPD protection is at all feasible. The vessel owner must obtain specific permission *for each transport* to deploy private security guards. The vessel owner has no discretion in choosing between VPD or PSC or in deciding whether based on the above criteria his situation allows him to do without a VPD. Under the bill, this judgment is reserved to the Dutch Coast Guard acting on behalf of the Minister of Justice and Security. Using a PSC without this previous permission is, as we will see in the following, a separate criminal act.
Furthermore, the use of PSCs will only be allowed in dangerous areas. The Ministry will designate these areas based on the high-risk areas set forth in the ILO's BMP document. It also designates so-called Voluntary Reporting Areas (VRAs).
The deployment of private securers is only allowed by private services holding a license issued by the Minister of Justice and Security (issued by the Environmental and Transportation Inspection). Only ISO 28007-1:2015-certified organisations are eligible for licenses. (Licenses of other EU countries will be accepted as well as those from other countries that meet certain criteria.) The license may contain further regulations, such as the requirement of video surveillance and recording of all activities of the PSC through body cameras or the requirement that the PSC be sufficiently insured. A license can be suspended or withdrawn by the Minister.

4 The Use of Force and the Relation between the Master and the Guards/Team Leader

The upcoming bill for the Protection of Merchant Shipping Act addresses the use of force because this is a matter of domestic law (including criminal law).

4.1 General Legal Background

Despite the political shift from favouring the protection of vital interests of Dutch economy over the state monopoly on the use of force, the bill shows Dutch politics is still reluctant towards armed PSCs. That is the bill's legal background. For a proper understanding, we highlight two important aspects.
The first aspect is that even if the state of the Netherlands were to accept PSCs, the state will remain responsible for any use of force on Dutch vessels, based on for example, the ECHR. Indeed, anyone on board a vessel sailing under Dutch flag and everything that happens on board fall under the Netherlands' jurisdiction, to use the term of Article 1 of the ECHR. When it comes to using violence against pirates on board, the Netherlands – as an ECHR member state – will be responsible for proper treatment of those pirates harmed by its use of force or arrested as perpetrators. As such, these people have a right to adequate medical care, to have any potential human rights violations investigated and compensated, especially their right to protection of their life under Article 2 of the ECHR. They also have due process rights as suspects, including the right to be promptly taken before a court or other authority, even if they are arrested on the high seas, as required under Article 5(3) of the ECHR. It should be noted that the ECHR recognises that it may take some time to take an arrestee from the high seas to court. It is settled case law in the Netherlands that all these duties are best discharged by maintaining the monopoly on force and only allowing the state's armed forces (VPDs) on board Dutch vessels. This will ensure the use of force and its ex post justifications are clearly and adequately regulated and properly governed by the rule of law. This was and still is a strong argument in Dutch politics against the use of PSCs.
The second aspect concerns the right to self-defence as a legal defence and is in some way related to the first. Although the bill for the Protection of Merchant Shipping Act clearly seeks to allow Dutch vessels to protect themselves against piracy, self-defence is not the underlying normative principle of the bill. First of all, as stated earlier, possession of firearms on board Dutch vessels is a per se violation of law as well as the criminal provisions of the gun control laws. Under Dutch criminal law, self-defence is only allowed when there is an imminent attack or threat thereof. The bill regulates onboard possession of firearms (while further regulating proper storage etc.) separately from their eventual use. The bill thus seeks to enhance the vessel owners' protection of their vessels. However, self-defence is not the underlying legal principle on which the bill's legal framework is based. Instead, it is based on the recognition that we need a system to control possession and – if necessary – the use of (fire)arms, given that there is a need for protection in dangerous waters. The bill seeks to regulate possession and use of firearms on board of Dutch vessels *within* the legal framework. Dutch law recognises self-defence as an *exception* in very specific situations where an imminent threat makes it impossible to abide by the law.

4.2 Specific Provisions

According to the bill, armed private security forces may use force when performing their maritime security services. The bill calls for further, delegated regulation to indicate which weapons and other means of force are allowed and how they have to be stored on board. If there is a threat of piracy, the security forces may carry, set up and threaten with their designated means of defence. If the threat continues and there is no other peaceful way to neutralise the threat, they can use the appropriate level of force as necessary. However, they

must issue a warning before using force. They may not use force simply to kill, although the provision in question does not prohibit fatal shootings if absolutely necessary. Here again, the justification is that use of force is consistent with *this* particular statute, not that the PSC acted as required under the specific self-defence provision of the Dutch Criminal Code.

The maritime security guards are allowed but not required to arrest pirates when they observe them committing a crime (according to a general provision in the Dutch Code of Criminal Procedure) and to use handcuffs (according to the bill). Arrestees must be brought before the vessel's master, who now acting as a law enforcement officer, has to proceed as prescribed in the special provisions in the Code of Criminal Procedure applying to the master. This aspect of Section 10 of the bill reflects the Dutch approach following the Advisory Committee's 2011 report not only to prevent piracy but also to arrest and prosecute pirates, if necessary in the Netherlands. It also shows the Netherlands accepts a certain level of responsibility for pirates on board Dutch vessels.

The following provisions are relevant in relation to state oversight and control. Civil servants designated by Ministerial Order must ensure compliance with the Act. The Environmental and Transportation Inspection is charged with overseeing the maritime security companies holding maritime security licenses. It must perform its oversight duty under the auspices of the Minister of Justice and Security. Because the security services will also take place outside the territory of the Netherlands, the oversight duties must be performed on board vessels docked in the harbours of other countries. In case of any irregularity, further investigation may follow and depending on the outcome measures may be taken, such as fines or revocation or suspension of licenses.

The Economic Crimes Act (in Dutch: 'Wet op de economische delicten') will criminalise violations of the prohibition to offer or perform armed maritime security activities without a license granted by the Minister, or to perform, permit or enable armed maritime security activities on board a vessel without the Minister's permission. Dutch criminal law allows for prosecution of legal entities, such as PSC companies. Furthermore, the master's failure to report any use of force and use of handcuffs to the public prosecutor will be criminalised as well. The penalty for violating these rules is imprisonment for six months or a fine of the fourth category (ranging from €8,201 to €20,500).

Upon completion of each transport accompanied by private maritime security guards, the master and the head of PSC each must draft a separate report in the Dutch or English language as provided in the rules which will be promulgated by further regulation (Order in Council). The reports must state whether and what force or handcuffs were used. Once the threat of piracy subsides, the master must promptly report any use of force and any use of handcuffs by the private maritime security guards to the public prosecutor.

In this respect, the bill has been amended significantly on a certain point by the House of Representatives during the debate in Parliament in an effort to obtain a parliamentary majority in favour of the bill. The relevant part, Section 11 (paras. 1 and 2) of the bill states:

1. In discharging their maritime security tasks private maritime security guards shall use cameras and microphones.
2. Audiovisual recordings must be made from the moment there is a threat of piracy until such time the threat has subsided or is deflected. The recordings will be saved in files.[18]

The team leader has to hand over all video and audio recordings to the master who, in turn, has to transfer them to the public prosecutor as part of his duty to report any threat or use of force or handcuffs. The public prosecutor will then decide whether the use comported with the existing laws, particularly whether there has been any violation of any criminal laws. If he has a reasonable suspicion there has been such violation, he may conduct further criminal investigation or bring criminal charges. Prosecution may result in acquittal if the court finds that the use of force comported with the provisions of the bill. If the court so finds then, again, such acquittal will not depend on the Criminal Code's self-defence provision. However, if the team leader, master or PSC member failed to follow the rules of the bill, they may invoke that provision to raise self-defence as a defence. This is mainly a theoretical position because the law imposes a higher duty of care on the team leader.

To summarise, the use of force is governed by criminal law with its top law enforcement officer – the prosecutor. Once the bill becomes law, time will tell how this system will work in practice. What is clear is that strict regulation of the use of force in the cases where the bill allows for the use of firearms is a reflection of a sensible form of government control. It is an elaboration of the state monopoly on force as well as a key feature of the Dutch approach.

4.3 Master's Role

Unsurprisingly, the master's position and responsibilities were a sensitive topic in the discussion which was subject to much debate. In particular, the Dutch organisation of masters was not as keen as vessel owners to accept PSCs on board. On the one hand, the government argued vessel masters could not be held responsible for everything that happens on board if PSCs are engaged. On the other hand, it is clear that under international maritime law the master has a broad level of responsibility. From a Dutch perspective, it is common to vest military team leaders of a VPD with responsibility because they are military commanders under Dutch law. In case of PSCs, there is the risk of 'cowboys at sea' and of a certain legal uncertainty about the master's role. The bill uses a dual approach when it states that

18. *Parliamentary Papers I*, 2017/18, 34 558, A.

the maritime security guards are not allowed to use violence until their team leader orders them to do so, unless such orders cannot reasonably be awaited. The team leader may only order use of force after consulting the master who must agree that passive and active anti-piracy measures have failed to mitigate the risk of piracy, unless they cannot reasonably engage in such consultation or they cannot reasonably wait for its outcome. Consequently, the bill expects the team leader and the master to confer to a certain degree, but the extent to which they have to confer in the light of the responsibilities at stake is not completely clear. After reading this, one might appreciate that a master will not feel entirely comfortable and clear about his position and responsibilities in this respect. The parliamentary debate provides more insight, stating:

> The vessel owner and the master are responsible for complying with the ILO's Best Management Practices ('BMPs'). Whenever a master engages the assistance of armed private security guards, he will be responsible for ensuring both before and during the journey that any such active and passive protection measures as could reasonably be adopted are in fact adopted. These would include changing course, increasing speed, using laser beams, water cannons, barbwire, and so forth. The master is at all times responsible for navigating and operating the vessel. The team leader and the maritime security company will be in charge of using force. The team leader, not the master, will instruct them to do so.[19]

And:

> And lastly, the master's role. The private security guards are personally responsible for their operations. The master is not the one directing the team's operations in threatening situations – that is the duty of the team leader. However, the master will continue to have overriding authority, as set forth in the United Nations Convention on the Law of the Sea. The master may use that authority, for instance, in the exceptional situation where he believes the team is using disproportionate force.[20]

Let us analyse this from the perspective of criminal liability. For instance, if a PSC member shoots a pirate on board a Dutch vessel, then arguably that member will be liable. If he had not yet received any orders to use firearms or any warnings and so on, then it may be safe to conclude that he operated *outside* the scope of this team's duties. Again, he may raise the defence of self-defence. Ordinarily, the team leader who ordered the use of force will be the first to be held liable. Under Dutch Criminal Procedure Law, the shooting and killing has to be reported to the prosecutor (accompanied by video and audio footage). As such, the prosecutor has discretion to decide who will be the (prime) target of any criminal investigation or prosecution. The bill seems to make the team leader the main target of the criminal investigation, although it is clear that the master in the end, bears full responsibility, not only under criminal law but under civil law too for that matter.[21] If the master forbids the team leader to take any action, the latter has to accept this decision of the former.[22] The master will only be held criminally liable if it is clear that the PSC or its team leader made disproportionate use of firearms and force, such that the master had a duty to intervene with his overriding authority under international maritime law, in the absence of which he will be held liable.[23] This will only happen under exceptional circumstances and therefore in rare cases only (one must hope). This might be different, though, if the circumstances under which the PSC had to work on board, for which the master is responsible, were generally so bad and poor that they may have contributed to the improper use of force. Poor overall conditions on board the vessel where the PSC is deployed may even reach a level where the vessel owner is so reckless that he might be held criminally liable for the results of the use of force too.

5 Conclusion

The bill for the Protection of Merchant Shipping Act has, surprisingly, not that much been discussed by Dutch legal commentators. As far as it is discussed recently,[24] the approach is accepted, although there is discussion about the state responsibility under international law.[25] The bill has passed the two Houses of Parliament by March 2019 and is expected to come into force somewhere in the future. In the intense discussion in Parliament the debate centred on three substantive issues.

The first point of debate is the substantive difference between a VPD and a PSC. The Dutch Ministry of Defense argues eleven people should be the minimum number for an effective VPD. The average size of PSCs is four persons. It was tried to explain this significant difference by stating that VPDs have their own basic medical care and operate differently. They operate from several points on the vessel and not, as PSCs, from one central position, which is often the bridge. In addition, VPDs carry out all the security tasks themselves, where-

19. *Parliamentary Reports II*, 2017/18, 34 558, 57-32, 16.
20. *Ibid.*, 24 and *Parliamentary Reports I*, 2018/19, 34 558, C, 3.
21. *Parliamentary Reports I*, 2018/19, 34 558, C, 5.
22. *Ibid.*, F, 2.
23. This means that the above quote from the parliamentary debate ('The master *may* use that authority, for instance, in the exception situation where he believes the team is using disproportionate force') must be read as stating that the master *should* use his authority under these conditions.
24. C. Ryngaert, De nieuwe wet ter bescherming van koopvaardij, *Ars Aequi* 2018/787.
25. *Ibid.*, and L. Roorda, C. Ryngaert & B. Straeten, 'Private beveiliging in strijd tegen de piraterij: een onderzoek naar de aansprakelijkheid van private beveiligers en de Staat', in I. Giesen, J. Emaus & L. Enneking (eds.), *Verantwoordelijkheid, aansprakelijkheid en privatisering van publieke taken* (Den Haag, Boom, 2014), 165-188.

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as PSCs also engage the crew to be on the lookout, for example. However, this does not explain the significant difference completely. The question is whether PSCs will exercise enough care and restraint in using proportionate force or avoiding it whenever possible. This is an important argument of the Dutch 'VPD, unless …' model, an approach that assumes a certain compatibility and equality in the level of protection and guarantees between VPDs and PSCs.

The second point is also connected to this 'VPD, unless …' approach. One of the main categories in which a PSC might be allowed is – as mentioned earlier – the category of transports connected with the spot market. Here, insufficient flexibility of VPDs is the main reason for engaging PSCs. Against this background, the 'VPD, unless …' approach seems somewhat ironic because the merchant sector represents seventy-five per cent of the spot market.[26] In theory, if PSC might be used for all transports in this spot market, PSCs may become the rule rather than the exception.

The third issue is about the master's role and responsibilities. Notwithstanding a certain level of 'understanding' between the master and the team leader on the necessity of the use of force that the bill provides for and the explanation on this point in the parliamentary discussions, as quoted previously, it is still not completely clear who ultimately bears responsibility and what he is responsible for. Under the general approach of maritime law, there can be hardly any discussion about the overall authority and ultimate responsibility of the master. But is he (or should he be) responsible for PSC's use of force against pirates?

If the bill ultimately passes, it will still take some time before the first PSC boards a Dutch vessel. Further regulations have to be made and have to be approved, and several entities have to discharge their duties under the Act. And even then the Netherlands' stance on private armed guards on board Dutch vessels will still be ambivalent. It has emphasised the importance of the state monopoly on force. However, private entities cannot use the legitimate force used by the state. Although this principle is not insurmountable, it calls for restraint. The monopoly on force as a theoretical argument has been supported by the Dutch Royal Marine's practical experience in offering significant on-call assistance to vessel owners to protect their vessels. And although the political stance has changed over the years – giving more weight to protecting vital economic interests – the approach is still a public law-oriented system of strict ex ante and ex post control. Under the 'VPD, unless …' approach, PSCs are only accepted under a 'condition of subsidiarity', to use EU terminology. It is not for the vessel owner to decide whether he can use a PSC. He needs permission per transport and must accept a VPD, if available. Even when the Netherlands have passed its PSC legislation, its approach will still make its position unique as compared to the legislative frameworks of other countries. Last, from a legal point of view the 'proof of the pudding is in the eating.' Will the Dutch law provide adequate control of the use of private armed guards in general and in each case when force is used, so as to comply with both the fundamental principles of public law of the Netherlands and international law, including human rights? But we may not get to the pudding. Given the diminishing threat of piracy, the debate – and the Act – may wither, 'die in silence'. As a Dutch newspaper stated previously after the bill was accepted in (one of the Houses of) Parliament, 'The anti-piracy law is here but where are the pirates?'

26. *Parliamentary Papers II* 2016/17, 34 558, 3, 6.

National Models for Regulating On-board Protection of Vessels: Some Cross-cutting Issues

Birgit Feldtmann, Christian Frier & Paul Mevis*

1 Introduction

The topic of this special issue is flag states' legal approaches to on-board protection of merchant vessels by Privately Contracted Armed Security Personnel (PCASPs) or Vessel Protection Detachment (VPDs), a development which was especially triggered by Somali-based piracy. The idea of armed on-board protection is basically to merge targets (*ships and seafarers*) and their defenders (*guards*) into a single defensive unit and thereby minimise the risk of successful hijackings. This approach, which has to be considered on the national level in accordance with the flag state principle, is part of the wider approach that the international community has taken, and which has contributed to a huge reduction in attacks and hijackings for the benefit of crews, ships and cargoes.

On-board protection is a phenomenon that provokes a number of legal challenges and uncertainties, which from a regulatory perspective have to be addressed on the national level and in the wider context of the international law of the sea. The four country reports in this special issue illustrate the diverse approaches and the underlying policy concerns which can come into play when flag states develop their own approach and regulatory model. The in-depth analyses in the country reports provide a picture of the issues at stake from a national perspective.

In the light of the informative and comprehensive country reports, one could be tempted to engage in a classic comparison of the contributions. However, that is not the approach we have chosen. Instead, we will leave any comparison of the national regulatory models to the reader. Our approach is to focus on a number of cross-cutting issues that illustrate the legal considerations and dilemmas at hand and provide opportunities to reflect and discuss overall questions associated with the use of on-board protection. Those cross-cutting issues are interrelated and overlapping; it is our belief that they lead us to questions of universal interest. Of course, we take into account the fact that the country reports encompassed in this special issue represent a small but at the same time diverse sample from the total number of flag states that allow armed guards.

2 Cross-cutting the Legal Framework

Having to find their own way, it is not surprising that Denmark, Germany, Italy and the Netherlands started to debate and draft their specific legal approach within the sphere of their own legal system and on the basis of their respective legal system's underlying ideas and approaches. In all four countries, the development of the regulatory models was, more or less, connected with fundamental discussions about the interests at stake and national opinions on the rule of law. From a starting point, we can see the difference between countries with no regulation that allow PCASPs (Italy, the Netherlands and Denmark) and Germany where the discussion started because the actual general legislation seemed to allow 'too much' and therefore it was felt there was a need to regulate the use of PCASPs far more restrictively in a *lex specials*. We also see, more importantly, the significant difference between the two countries (Italy and the Netherlands) which were convinced that a state-based approach (VPDs only) is preferable or at least were convinced this was the correct starting point of national regulation. The somewhat 'idealistic' state-based approach rather than 'privatisation approach' by the Netherlands and Italy was in due course modified, triggered by the fear of losing ground: the increase in the number of flag states allowing PCASPs and the subsequent threat of reflagging and reduction of the national fleet seemed to be the elephant in the room pushing for a level-playing field.

One interesting observation in the context of the different national legal frameworks is the diverse role of the 'state monopoly on violence' argument: in the Netherlands, it still is considered to be the underlying ruling principle for the new 'VPD, unless' approach, while the German position seems to be that the use of private armed guards does not contradict the state's monopoly

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on the use of force, as PCASPs do not exercise any public powers. This illustrates that common principles of (public) law can have relatively different weights and interpretations in domestic legal discussions, when compared with similar discussions in other countries. We address the question of the use of force in further detail as follows.

The above-mentioned observations might make us ask which of the two different approaches is better. Two remarks are relevant in this regard: first, the fight against piracy is not only about protecting a certain vessel on its journey and thereby protecting the economic interest of a given ship owner. Basically, piracy is a form of violent international organised crime and a threat to human lives, the freedom of navigation and free trade as a common interest. It is, at least as far as Somalia is concerned, the result of the political, social and economic chaos in that country. If a state chooses to perceive the fight against piracy in the broader perspective of law enforcement, justice, regional capacity building and upholding law and order at sea, the choice for a VPD approach might be obvious. However, as illustrated in the international perspective in this special issue, the placement of state representatives on private vessels is not without legal challenges. It can also be argued that a PCASP approach does not necessarily mean that a state is neglecting the wider perspective. Both the German and the Danish answer appears to be that the approach can be two-fold – with a 'privatisation solution' on board commercial vessels and a state-based approach by participating in international counter-piracy operations at sea and in capacity building on shore at the same time. On that note, it can be concluded that the general tendency seems to be that at the current stage of developments today, states seem to be downsizing the law enforcement approach (*e.g.* by deploying fewer naval vessels to counter piracy) and with the focus now on the protection of economic interests.

The second observation concerns what could be described as the density or comprehensiveness of the legal framework: if we compare the two countries with a PCASP approach from the very beginning (Denmark and Germany), it is obvious that within this common approach there exist substantial differences in the approaches towards the governance and control of PCASPs (we will get back to this in due course). However, the essential observation is this that while Denmark to a large extent leaves further regulation to the private sector, Germany has chosen a (public) law approach with rather strict and detailed regulation. In other words, the question is not necessarily whether the option of public or private armed protection is preferable as such. The real factor seems to be the question of how and to what extent the issues at stake are regulated and enforced in practice. This means that the quality of a given approach depends on the broader goals and aims of the respective regulation in a certain country and the way this works out in reality.

3 Controlling Security Providers: The Cross-cutting Issue of Authorisation

A prerequisite for using armed on-board protection in the first place is the requirement that authorisation must be obtained. This functions as a guarantee for ensuring that only reputable security providers are contracted. A common feature in the four regulation models is that authorisations are issued by public authorities. Notwithstanding, three interesting points can be deduced from the country reports. First, the recipient of the authorisation and the level of detail which must be observed differs to a large extent. Generally, it is a requirement for supplying armed on-board protection that the security provider has obtained national authorisation beforehand. This is the situation under both German and Italian law and stipulated in the Dutch draft proposal. Also, the German authorisation scheme borrows very heavily from international standards as noted by *Salomon*. The density of the authorisation scheme cannot be accounted for in the Dutch proposal but coming from a VPD solution only, it is fair to assume that such an authorisation scheme will not be lax. Interestingly, as noted by *Frier*, the Danish authorisation scheme varies greatly from the other systems in the way that the addressee of the authorisation is in fact only the ship owner. Thus, security providers are not subject to individual administrative control or authorisation under Danish law.

Second, under some of the regulation models the authorisation must not be mixed up with the need for a separate licence to hire security providers for a certain transport (the Netherlands) or the allowance to use certain weapons such as automatic firearms (Italy). This leads to another crucial issue in connection with armed on-board protection, which does not seem to be fully addressed in all flag states: the issue of how to get weapons on board and the legal challenges connected to having weapons on board while passing through other coastal states' territorial waters. As *Feldtmann* briefly raises in the chapter on the international law, the provisions of the United Nations Convention for the Law of the Sea (UNCLOS) might be interpreted in different ways by different coastal states and the legal uncertainties have been a factor in the development of floating armouries, which again leads to a number of legal questions and uncertainties.

Third, the country reports illustrate clearly that the division of powers between administrative bodies and private actors varies greatly between the different flag states. While the German system is dominated by a tight, state-based authorisation process, the Danish system leaves most of the responsibilities to private actors (ship owners and security providers), and the state authorities have in fact a minor role in the process. This means that there are differences in the level of state control.

The foregoing means that security companies, while providing the same kind of services, have to operate in and deal with a complex mixture of diverse national approaches and regulations. Thus, having gained authorisation to operate under one system does not mean that the same service provider can provide the same service under another system without any further obstacles. This is interesting as the shipping industry deals in international trade and is very much used to harmonisation and standardisation.

4 Controlling Violence: The Cross-cutting Issue of the Use of Force

The international perspective and the four country reports clearly illustrate that one of the crucial topics in connection with both the employment of PCASPs and VPDs is the issue of the use of force. This raises the following question: what is the legal framework regarding the use of weapons to repel pirate attacks and as a last resort to take human lives?

The question of the use of force is essentially a question of 'controlling violence' and also a question of the distribution of powers between states and their citizens. From a legal perspective, the question of the use of force can be reflected upon from different points of departure with different connected legal considerations. One point of departure is the perspective of the international law of the sea, which, as shown by *Feldtmann*, does not explicitly deal with the use of force, neither in connection with state actors' use of force in a general law enforcement or in a specific counter-piracy setting, nor with a view to private actors exercising the individual right to self-defence. Nevertheless, the use of force exercised in self-defence is implicitly taken for granted in the legal regime established by the law of the sea, without giving any further guidance.

Another point of departure is the human rights perspective. Italy, Denmark, Germany and the Netherlands are all party to the European Convention on Human Rights (ECHR) and the scope of Article 2 of ECHR is central in any approach to the control of violence and threats to life. In a nutshell, the human rights perspective leads to at least two obligations. First, the state's use of lethal force against individuals must be limited to an absolute minimum and can only be used as a last resort. Second, the individual right to life is linked to the individual right to self-defence, meaning that the protection of innocent lives can, as a last resort, justify the taking of 'less innocent' lives. From a state-based perspective, as shown in the Dutch country report and briefly mentioned earlier, the issue of the use of force can on the national level be perceived as a crucial question of the state's monopoly on force. This perspective was also raised in Germany. What might be surprising is that it seems that the question of the state's monopoly on force has not been raised in all countries – in Denmark a similar discussion has basically been absent. One could argue that the question of the state's monopoly on force is not really challenged if the protection of vessels is exclusively seen from a self-protection perspective; the issue at stake is not the transfer of state powers to private actors, but an issue of the individual right to self-defence and nothing more. This seems to be the conclusion in Germany and the underlying assumption in Denmark.

The issue of the use of force by PCASPs and the specific boundaries for legitimate self-defence are a subject for regulation on the national level. The country reports indicate that a typical approach is to rely on the general principle of self-defence in criminal law and not to develop a specific legal framework for the use of force in this specific setting. German lawmakers have gone one step further by trying to operationalise the concept. Only the Netherlands have opted for the VPD approach and are not leaning on the general concept of self-defence in criminal law. As shown in the Danish country report, maritime stakeholders might turn to soft-law instruments for guidance on how to operationalise the right to self-defence in case of pirate attacks. In this context, the German approach is interesting: the outline of the German legal system shows that the issue of the use of force/self-defence is included in the process of authorisation. The aim seems here to be to ensure sufficient knowledge of the legal framework for self-defence and thereby ensuring some kind of control over the use of force on the vessel. It might also be worthwhile to mention that Italy and Germany require special licences for the use of particular weapons (especially semiautomatic weapons).

Another important issue in connection with the control of the use of force is reporting obligations (post-incident reports) and other oversight mechanisms. All regulatory models seem to struggle with the difficulty of securing the control of the use of force on a vessel far from all of the usual (land-based) systems of compliance. To bridge the gap, all countries have incorporated systems of reporting; reporting to maritime authorities or the Ministry of Justice, or even to the public prosecutors. Interestingly, there is a dualistic approach of double-reporting (master and team leader) in Germany and the Netherlands, whereas in Denmark only one report (issued by the ship owner and based on information provided by the master) is sufficient.

In the German system, the obligatory use of cameras was discussed but not made mandatory. The upcoming Dutch legislation, which is the result of intense discussions in the Dutch Parliament, requires that armed guards use cameras. Associated camera recordings will have to be annexed to reports about specific incidents in which weapons were used. Reading this provision from a criminal law perspective, one might add that, as we can read in the country reports, the Italian and German regulations provide for specific provisions to protect the persons involved against an obligation of self-incrimination (*nemo tenetur* principle), whereas the Dutch and the

Danish laws do not contain any provision in this respect. Under the law of the latter, guards and the master must turn to the general ECHR protection principles in this respect.

5 Chain of Command: The Cross-cutting Issue of Who Is in Charge

Another interesting observation in connection with the country reports is that there were quite similar discussions about the exact position of the master, his authority and responsibility if on-board protection is used. Remarkably, this is one of the few topics where the international law of the sea provides for a rather clear legal basis: the overall authority of the master on all matters connected to the vessels, its navigation and crew is articulated in a number of conventions, for example, in the International Convention for the Safety of Life at Sea (SOLAS), Regulation 34.1. However, the question remains what this legal position means in practice if we connect the master's authority with the specific topics of the use of force and the individual right to self-defence. First, those topics do not normally fall under the master's training and experience. Second, as pointed out by *Feldtmann*, in practice the relation and division of powers between the master, team leader and individual guard is rather complex. This point is illustrated by looking at the provisions in Italy, Germany and the Netherlands. According to the Dutch parliamentary debate, the responsibility and criminal liability of the master is limited to obvious cases in which he must use his authority to stop the obvious use of disproportionate violence as decided and ordered by the team leader (after consultation with the master). But in Germany and Italy, the same overall authority of the master, as codified in the International Law of the Sea, has resulted in a different interpretation. According to Italian law, the master has to order the use of violence, for example, the occupation of the defensive positions on board and the preparation to use firearms. Interestingly, this rather important question has not played a particular role in the Danish discussions. These different interpretations and rules concerning the master's position in connection with the use of force/self-defence lead to a situation where the masters must meet different requirements in different flag states. The question of responsibility of the master in connection with the use of force can have an implication for a possible criminal liability; however, it does not mean that the master is the first or only person to face investigations and prosecution in case of disproportionate use of force.

6 Concluding Remarks/ Schlussbemerkung/Ten slotte/konklusion/ conclusioni

In the introduction to this special issue it was predicted that the regulatory models on the national level in Denmark, Germany, Italy and the Netherlands might differ at a level that we have called the 'level of privatisation'. We stated earlier that we would return to this perspective in this final contribution. Given the informative and comprehensive country reports, the differentiation in the level of privatisation is obvious. However, recent developments have lessened these differences regarding the level of privatisation.

Perhaps this observation is more important: it is our conclusion that the differences in the level of privatisation are not necessarily the main points of relevance when it comes to evaluating the national approaches and provisions. More important is the answer to the question of to what extent national law provides for sufficiently detailed regulation and control mechanisms to address the complex and sensitive aspects of on-board protection in general and in the use of PCASPs in particular. How are the employment of PCASPs and their (potential) use of firearms and the related risks guided, regulated and controlled by the flag state at hand? One can argue that even if this leads to diverse approaches for security companies to navigate in, it could be an advantage if national legal systems deal with the issues at hand as long as they do their utmost to regulate and control the use of PCASPs and the subsequent use of force in their national law as specifically and effectively as possible. An alternative could be common European or international uniform rules which possibly would not rise over a basic level of guarantees and control. In reality, the different approaches and regulations under national law of a 'tight' approach with strong regulation and 'quality control' could result in an economic advantage: *Salomon* describes that the detailed German system of authorisation could function as a 'seal of approval' and 'quality guarantee' for companies that have met these high standards. On the other hand, a complicated and expensive authorisation process or state-based model might lead to threats of reflagging. However, if a flag state wants to brand itself as a 'quality' flag state, a responsible approach should be the preferable one.

Our final conclusion is that the issue of the use of firearms and associated risks calls for regulations that take more than the economic perspective into account. We believe that all four flag states that are described in this special issue understand this very well. However, they have chosen rather different approaches. None of them seem to have found the 'definitive' (optimal) solution to all associated problems and legal uncertainties, and perhaps the suspicion is that there is no solution which fits

all. There is also another aspect associated with this: at the end of the day, violence, however well-regulated and controlled, will never be the final, sole answer to any complex problem. To be frank: the use of armed on-board protection, be it PCASPs or VPDs, should be considered as management of a symptom rather than a long-term solution. It should be only *one of many* approaches towards modern piracy, which is a complex phenomenon and a problem the international community must solve by taking a comprehensive approach. As the former U.S. Secretary of State, Hillary Clinton, put it so clearly in connection with the Maersk Alabama incident in 2009 (as cited in our introduction): 'We may be dealing with a 17th-century crime, but we need to bring 21st century solutions to bear.' It seems that the international community, as shown by *Feldtmann*, has understood this and the three-pillar approach of the international community and the maritime stakeholders towards the Somali problem of piracy has been somewhat successful. It is important to keep the momentum going and to continue to deal with the problem of piracy by multiple, supplementary approaches, guided by human rights and the fundamental principles of the rule of law.

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