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The Use of Force by Non-State Actors on the High Seas: Public and Private Responses

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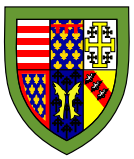

Queens' College Cambridge

This dissertation is submitted for the degree of Doctor of Philosophy

Declaration

This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the preface and specified in the text. It is not substantially the same as any work that has already been submitted before for any degree or other qualification except as declared in the preface and specified in the text. It does not exceed the prescribed word limit for the Faculty of Law Degree Committee.

Simon John Allison
August, 2020

Abstract

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Simon John Allison

The embarkation of private armed guards on commercial ships in Somalia has provided a unique opportunity to test the bounds of international law. The phenomenon was new. Until that point shipowners had been reticent to carry weapons or engage the services of those carrying weapons. The legal and practical risks of such carriage or engagement outweighed the potential benefits they offered to defend vessels. Somalia, however, was genuinely peculiar. While shipowners had contended with piracy before, for example in the Straits of Malacca, Somalia represented a potent combination of a failed State with a large, difficult-to-patrol and strategically vulnerable coastline. Shipowners began to engage the services of private maritime security companies (PMSCs) and their privately contracted armed security personnel (PCASP) to safeguard the passage of vessels through the Gulf of Aden, adjacent to Somalia, which is also the second busiest shipping lane in the world. By 2011 it was estimated that up to 50% of vessels sailing through the Gulf of Aden were using the services of armed guards. This new phenomenon gave rise to particular concerns under public international law regarding the law of the sea (and the safety of life at sea in particular) and international human rights protection. These concerns reverberated into private domestic legal concerns as shipowners, marine underwriters and indemnifiers became alarmed at the potential vulnerability of their commercial arrangements on the grounds of illegality and public policy, in addition to their potential liability stemming from the use of force.

While international law did have some norms relevant to the embarkation of armed guards, targeted regulation was lacking. Applicable rules had to be distilled from a variety of legal worlds: international and domestic, public and private. Member States of the International Maritime Organization (IMO) were slow to respond to this phenomenon. Many States

were reticent to cooperate on regulatory initiatives out of fear that such initiatives would be seen to condone the use of guards. Despite this, shipowners and PMSCs did not stop embarking armed guards due to the lack of regulation. Rather, some PMSCs took advantage of the lack of regulation to cut corners and contract on terms that were arguably a *prima facie* violation of the law of the sea (in particular the role of the shipmaster). The use of armed guards off the Somali coast has tested the ability of the law of the sea framework enshrined in the United Nations Convention on the Law of the Sea (UNCLOS) to respond to the use of force at sea. A lack of targeted governmental regulation motivated the shipping and insurance industries to develop regulatory initiatives including: the ISO 28007-1:2015 Guidelines for PMSCs Providing PCASP on Board Ships (ISO 28007:2015), the GUARDCON Contract for the Employment of Security Guards on Vessels and the 100 Series Rules as to the Use of Force (100 Series RUF). These instruments incorporate international norms concerning the law of the sea and human rights law into commercial shipping and insurance arrangements.

This dissertation examines both the public international law framework and the role of private ordering in this context. The following research questions are addressed:

1. Who is responsible for the acts of PCASP at sea and why?
2. How can private ordering contribute to the monitoring and enforcement of PCASP at sea?

This dissertation argues that, despite public international law having the substantive norms necessary to address the embarkation of armed guards at sea, it is undermined by the prominent and problematic doctrine of flag State jurisdiction over vessels. The result has been gaps in the enforcement of international law giving rise to a practical impunity being enjoyed by armed guards in terms of their conduct. The industry initiatives have a unique role to play alongside public international law in helping to close these enforcement gaps. Despite this, the potential of these industry initiatives is weakened by the difficultly of measuring their effectiveness given the lack of transparency over how they are enforced in practice. Their potential is further undermined by a lack of dispute resolution options to effectively redress harm caused by armed guards. While industry contributions to regulation have great promise, they would be strengthened through stronger reporting requirements and the adoption of current proposals to allow arbitration of human rights violations committed at sea.

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Contents

Glossary

100 Series RUF 100 Series Rules as to the Use of Force.

ACHPR African Charter on Human and Peoples' Rights.

ACHR American Convention on Human Rights.

ANSI American National Standards Institute.

ASIS ASIS International.

BHR Business and Human Rights.

BIMCO Baltic and International Maritime Council.

BIMCO Guidance BIMCO Guidance on Rules for the Use of Force by PCASP.

BMP Best Management Practices.

BUNKER Convention International Convention on Civil Liability for Bunker Oil Pollution Damage.

CGPCS Contact Group on Piracy off the Coast of Somalia.

COLREGS International Regulations for Preventing Collisions at Sea.

CSR corporate social responsibility.

DWT deadweight tonnage.

ECHR European Convention on Human Rights and Fundamental Rights.

ECtHR European Court of Human Rights.

EEZ exclusive economic zone.

EU European Union.

FAL Facilitation Committee.

Firearms Protocol Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition.

GAIRS generally accepted international regulations, procedures and practices.

GRT gross registered tonnage.

GUARDCON GUARDCON.

Hague Rules Hague Rules on Business and Human Rights Arbitration.

HRA high-risk area.

HRAS Human Rights at Sea.

HRC Human Rights Council.

IACS International Association of Classification Societies.

ICCPR International Covenant on Civil and Political Rights.

ICJ International Court of Justice.

ICoC International Code of Conduct.

ICoCA International Code of Conduct Association.

ICS International Chamber of Shipping.

IGO inter-governmental organisation.

IHL International Humanitarian Law.

ILA International Law Association.

ILC International Law Commission.

IMCO Inter-Governmental Maritime Consultative Organization.

IMO International Maritime Organization.

INTERCARGO International Association of Dry Cargo Shipowners.

International Group International Group of P&I Clubs.

INTERTANKO International Association of Independent Tanker Owners.

IPTA International Parcel Tankers Association.

ISM Code International Safety Management Code.

ISO International Organization for Standardization.

ISO 28007:2015 ISO 28007-1:2015 Guidelines for PMSCs Providing PCASP on Board Ships.

ISO/PAS 28007:2012 ISO/PAS 28007:2012 Guidelines for PMSCs Providing PCASP on Board Ships.

ISPS Code International Ship and Port Facility Security Code.

ITLOS International Tribunal for the Law of the Sea.

ITRC Internationally Recognised Transport Corridor.

IUU illegal, unreported and unregulated.

LRQA Lloyd's Register Quality Assurance.

MARPOL International Convention for the Prevention of Pollution from Ships.

MLC Maritime Labour Convention.

Montreux Document Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict.

MSC Maritime Safety Committee.

NGO non-governmental organisation.

nm nautical miles.

NSI National Security Inspectorate.

OCSR ocean corporate social responsibility.

Optional Protocol Optional Protocol to the International Covenant on Civil and Political Rights.

P&I protection and indemnity.

PAS publicly available specification.

PCASP privately contracted armed security personnel.

PCIJ Permanent Court of International Justice.

PMSC private maritime security company.

PSCs Private Security Companies.

RUF rules as to the use of force outside armed conflict.

SAMI Security Association for the Maritime Industry.

SCEG Security in Complex Environments Group.

SLO social licence to operate.

SOLAS Safety of Life at Sea Convention.

SRFC Sub-Regional Fisheries Commission.

STCW International Convention on Standards of Training, Certification and Watchkeeping for Seafarers.

TFG Transitional Federal Government.

UDHR Universal Declaration of Human Rights.

UKAS United Kingdom Accreditation Service.

UN United Nations.

UN "Protect, Respect and Remedy" Framework Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.

UNCLOS the United Nations Convention on the Law of the Sea.

UNGPs United Nations Guiding Principles on Business and Human Rights.

UNHR Committee United Nations Human Rights Committee.

UNSC United Nations Security Council.

VCLT Vienna Convention on the Law of Treaties.

VPD vessel protection detachment.

WCO World Customs Organization.

The wave returns to the ocean. What the ocean does with the water after that is anyone's guess. But as a very wise not-robot once told me, true joy is in the mystery.

Eleanor Shellstrop, The Good Place

Chapter 1

Introduction

Maritime security is a relatively new concept.[1] Over the last two decades piracy off the coast of Somalia has helped to push maritime security to the forefront of the international agenda.[2] This dissertation considers the legal and practical role of maritime security-related private ordering within the flag State enforcement model as set out under the law of the sea. The dissertation evaluates how the flag state enforcement model has adapted to meet the challenge of privately contracted armed security personnel (PCASP) working for private maritime security companies (PMSCs). In addition, this dissertation offers a critique of private ordering in this context and offers recommendations as to the utilisation of private ordering in this area. This introductory chapter sets out the core research questions, aims and objectives, method and structure of the dissertation.

While piracy and armed robbery at sea have plagued shipping for centuries, the nature and frequency of pirate attacks emanating from the coast of Somalia pose a challenge for the traditional maritime security framework. Somalia is a troubled nation[3] in a very strategic location. The Somali coastline borders the Gulf of Aden, the gateway to the Suez Canal and the second-busiest shipping route in the world. The predominant business model is kidnap and ransom.[4] The aim is to take control of a vessel and its crew, and ransom them back to the owners. The evolution of what is effectively a piracy business

[1] See e.g. A Aarstad, 'Maritime Security and Transformations in Global Governance' (2017) 67 Crime Law Soc Change 313, 314; C Bueger, 'What is Maritime Security?' (2015) 53 Mar Pol 159.

[2] J Kraska, 'Freakonomics of Maritime Piracy' (2010) 16(2) The Brown J World Aff 109; V Sakhuja, 'Contemporary Piracy, Terrorism and Disorder at Sea: Challenges for Sea-Lane Security in the Indian Ocean' (2002) 127 Marit Stud 1; D Guilfoyle, 'Prosecuting Somali Pirates: A Critical Evaluation of the Options' (2012) 10(4) J Int Crim Justice 767.

[3] K Ali, 'Anti-Piracy Responses in the Gulf of Guinea: Addressing the Legal Deficit' in C Esposito and others (eds), *Ocean Law and Policy* (Brill 2016) 209.

[4] 'In East Africa, the use of sophisticated weapons to hijack ships and hold the crew hostage has been the prevalent mode of operation ... Operating off the coast of Somalia, in the Gulf of Aden and in the Horn of Africa, piracy attacks often involve the launching of small skiffs from larger 'mother ships', which are usually vessels they previously hijacked': M Kao, 'Against a Uniform Definition of Maritime Piracy' (2016) 3 Mar Safe Law Journal 1, 3.

model has meant that the level of sophistication involved in attempted pirate attacks is much higher than has been seen before.[5]

Not all captured vessels result in obtaining a desired ransom. Pirates have targeted family vessels and yet demanded ransoms beyond the means of the families involved. Shipowners may not pay ransoms for other reasons, including where the ransom outweighs the value to them of getting a vessel and its crew released. In these circumstances the 'forfeited' vessels may go on to be used as mother-ships to assist in future piracy ventures.[6]

As an old doctrine of a long-established body of the law of the sea, it is surprising in many ways that piracy should prove to have been such a challenging area of international law in the last few decades. Piracy has joined port security and seaborne terrorism as the subjects of a relatively new area known as 'maritime security'.[7]

It is no coincidence that the words 'pirate' and 'privateer' are so similar. They are both derived from the same historical practice of State-sponsored acts of violence against vessels for private ends. This historical definition and the use of the two different words may be, perhaps overly-simplistically, viewed as one State's privateer being another State's pirate.[8] This historical conception of piracy includes those sailing under letters of marque which:

> gave them license to attack the enemies of the state, privateers worked for two causes at the same time—their own enrichment and the military aims of their sponsors. During the brief war of 1812, the United States issued more than five hundred letters of marque to privateers, who captured or sank more than seventeen hundred British ships . . . It was a time when "national and individual interests could be pursued in tandem, and a fortune could be won while ostensibly serving the state.[9]

The global community has spent billions of dollars supporting naval patrols within the area.[10] These naval escorts have resulted in the establishment of the Internationally Recognised Transport Corridor (ITRC) through the Gulf of Aden. An unintended consequence of the successful use of naval escorts to create a safe transit corridor has been the 'balloon effect'.[11] Somali pirates have adapted to cover an even greater area outside the ITRC,

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5 Y Dutton, 'Gunslingers on the High Seas: A Call for Regulation' (2013) 24 Duke J Comp & Int'l L 107, 113 fn 31.

6 Kao (n 4) 3.

7 'In the IMO concept, "maritime safety" refers to preventing or minimizing the occurrence of accidents at sea that may be caused by substandard ships, unqualified crew or operator error, whereas "maritime security" is related to protection against unlawful, and deliberate acts': B Patel, 'Eight Dimensions of Maritime Security Law and Practice Among Member States of the Indian Ocean Rim Association' in C Esposito and others (eds), *Ocean Law and Policy* (Brill 2016) 251; citing N Klein, J Mossop, and D Rothwell, 'Australia, New Zealand and Maritime Security,' in N Klein, J Mossop, and D Rothwell (eds), *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand* (Routledge 2010) 8.

8 'The ancient, and until relatively recently the most common, approach to pirates was to view oceangoing robbers as enemy combatants engaged in military attacks against the state and its constituents': R Haywood and R Spivak, *Maritime Piracy* (Routledge 2012) 8.

9 Haywood and Spivak (n 8) 8–9; citing A Konstam, *Piracy: The Complete History* (Osprey Publishing 2008) 38.

10 Dutton, 'Gunslingers on the High Seas: A Call for Regulation' (n 5) 108.

11 D Guilfoyle (ed), *Modern Piracy: Legal Challengers and Responses* (Elgar 2013) 40.

extending well into the Indian Ocean.[12] Using previously-seized vessels, known as mother ships, the pirates have established a sea base for their operations from which they can launch attacks using smaller fishing skiffs. This expanded area has become known as the high-risk area (HRA).[13] The HRA covers millions of square nautical miles of ocean space in the Indian Ocean. Even with the best coordinated naval efforts it has become clear that Western navies cannot effectively patrol this widened area. The 'huge operations area' meant that military patrols were rarely on hand to prevent pirate attacks, resulting in a 'security gap'.[14] The global naval presence in the region has been described as akin to 'a police car patrolling an area the size of France'.[15] This security gap has meant the risks of piracy have become too high for many shipowners.[16]

For shipowners, the rise in successful attacks and the seeming inability of authorities to prevent them has meant turning to the embarkation of PCASP.[17] To repeat an often-quoted point, no vessel with armed guards has been successfully taken by pirates.[18] Statistics on the use of PCASP vary widely. In a briefing paper dated August 2012, the Geneva Academy of International Humanitarian Law and Human Rights estimated that at least one quarter of vessels transiting the Gulf of Aden employ private maritime security and that the percentage was believed to be rising.[19] Other sources have estimated PCASP usage as high as 50%.[20]

The use of force by non-State actors such as PCASP off the Somalian coastline has proven to be a uniquely challenging subject for international law.[21] A number of legal and practical problems may arise. These include the excessive use of force causing death or injury

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12 A Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies' (2013) 62 Int Comp Law Q 667, 668.

13 Best Management Practices for Protection Against Somalia Based Piracy (BMP 4), IMO MSC (14 September 2011) IMO Doc MSC.1/Circ.1339 Annex 2.

14 Geneva Academy of International Humanitarian Law and Human Rights, Counterpiracy Under International Law (August 2012) 17; Dutton, 'Gunslingers on the High Seas: A Call for Regulation' (n 5) 108; S Casey-Maslen and A Priddy, 'Counter-Piracy Operations by Private Maritime Security Contractors Key Legal Issues and Challenges' (2012) 10 J of Int'l Criminal Justice 839, 839–40.

15 J Brown, Pirates and Privateers: Managing the Indian Ocean's Private Security Boom (1 September 2012) 45; C Eagar, 'To Catch a Pirate: The British Ex-Servicemen Battling to Protect International Shipping from the Clutches of Somali Pirates' *The Daily Mail* (20 December 2011).

16 W Molenaar, B van Ginkel, and F van der Putten, *State Or Private Protection Against Maritime Piracy?: A Dutch Perspective* (2013) 34.

17 See E Williams, 'Private Armed Guards in the Fight against Piracy' in E Papastavridis and K Trapp (eds), *La Criminalite En Mer* (Martinus Nijhoff 2014); JC Coito, 'Pirates vs. Private Security: Commercial Shipping, the Montreux Document, and the Battle for the Gulf of Aden Comment' (2013) 101 Calif Law Rev 173; M Mineau, 'Pirates, Blackwater and Maritime Security: The Rise of Private Navies in Response to Modern Piracy' (2010) 9 JIBL 63; C Symmons, 'Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea' (2012) 51 MLLWR 21.

18 Casey-Maslen and Priddy (n 14) 840.

19 Counterpiracy Under International Law (n 14) 17.

20 Pirates and Privateers: Managing the Indian Ocean's Private Security Boom (n 15) 45.

21 H Tuerk, 'The Resurgence of Piracy: A Phenomenon of Modern Times' (2009) 17 U Miami Int'l & Comp L Rev 1; P Koutrakos and A Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (OUP 2014).

(for example the Avocet incident,[22] where helmet-camera footage uploaded to YouTube appears to show PCASP using deadly force against pirates without using warning-shots in accordance with a graduated response plan). Other potential fears include the use of force causing damage to the ship and cargo (and to other vessels), pollution incidents arising from damage to a ship or cargo, unlawful usurpation of a masters' authority, negligence resulting in the vessel being taken by pirates, the use of unlicensed weaponry or 'weapons of war', the use of force resulting in an obligation to rescue those in danger and failure to report following the use of force.[23] The potential for human rights violations is significant.[24]

1.1 Research Questions

A lack of targeted governmental regulation[25] has motivated the shipping and insurance industries to develop several regulatory instruments, including ISO 28007-1:2015 Guidelines for PMSCs Providing PCASP on Board Ships (ISO 28007:2015)[26] an accreditation standard for PCASP at sea (and the companies they work for), the GUARDCON Contract for the Employment of Security Guards on Vessels[27] a standard form contract for the engagement of PCASP at sea and the 100 Series Rules as to the Use of Force (100 Series RUF).[28]

These initiatives were a central part of the assumption of responsibility for the regulation of PCASP by the shipping and insurance industries. They were expressly directed at remedying the legal and practical problems that had become evident in the absence of a specialised State-supported regulatory regime. ISO 28007:2015, GUARDCON and 100 Series RUF acted to incorporate the publicly derived substantive rules into commercial

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22 O Eruaga, 'Private Maritime Security Companies Within the International Legal Framework for Maritime Security' in P Mukherjee, M Mejia, and J Xu (eds) (Springer 2020) 196; D Caron and N Oral (eds), *Navigating Straits* (Brill — Nijhoff 2014) 292; Y Dutton, *Fighting Maritime Piracy with Private Armed Guards* (, Oxford Research Group 2016).

23 See Dutton, 'Gunslingers on the High Seas: A Call for Regulation' (n 5).

24 Petrig (n 12); A Mehra, 'Bridging Accountability Gaps - The Proliferation of Private Military and Security Companies and Ensuring Accountability for Human Rights Violations' (2009) 22 Pac McGeorge Global Bus & Dev LJ 323; E Corthay, 'Legal Bases for Forcible Maritime Interdiction Operations against Terrorist Threat on the High Seas' (2017) 31(2) Austl & NZ Mar LJ 53.

25 S MacLeod, 'Private Security Companies and Shared Responsibility: The Turn to Multistakeholder Standard-Setting and Monitoring through Self-Regulation-'Plus'' (2015) 62(1) NILR 119; S Hurst, 'Trade in Force: the Need for Effective Regulation of Private Military and Security Companies Note' (2010) 84 South Calif Law Rev 447; C Spearin, 'Against the Current? Somali Pirates, Private Security, and American Responsibilization' (2010) 31(3) Contemp Secur Policy 553; H Elms and RA Phillips, 'Private Security Companies and Institutional Legitimacy: Corporate and Stakeholder Responsibility' (2009) 19(3) Bus Ethics Q 403.

26 ISO, Ships and Marine Technology: Guidelines for Private Maritime Security Companies (PMSCs) Providing Privately Contracted Armed Security Personnel (PCASP) on Board Ships (and Pro Forma Contract) (ISO 28007-1:2015) (2015) (ISO 28007-1:2015).

27 BIMCO, GUARDCON: A Standard Contract for the Employment of Security Guards on Ships, IMO MSC (2012) IMO Doc MSC 90/INF.5.

28 Human Rights at Sea, The 100 Series Rules for the Use of Force, IMO MSC (2013) IMO Doc MSC 92/INF.14.

shipping and insurance arrangements.

Piracy and counterpiracy activities off the Somali coast have tested the ability of the law of the sea framework enshrined in the United Nations Convention on the Law of the Sea (UNCLOS) to respond. The embarkation of PCASP by merchant vessels is a relatively recent phenomenon. Their widespread and continued use has generated serious legal and practical issues that have not been adequately addressed by policy-makers. In particular, flag State jurisdiction and the prevalence of open registries. In the absence of an agreement between States on a special treaty-based regime for the regulation of these non-State actors, the traditional interstate law of the sea approach to private maritime security governance has proved inadequate.

This dissertation examines the following research questions:

1. Who is responsible for the acts of PCASP at sea and why?
2. How does private ordering contribute to the monitoring and enforcement of PCASP at sea?

1.2 Aims and Objectives

The use of PCASP and in particular the use of firearms has become a significant issue on the global stage. A 'major area of contention is the lack of uniformity or settled law, resulting in a multiplicity of regimes, practices and divergent opinions'.[29] States were slow to address the legality of PCASP on their flagged vessels, or on foreign-flagged vessels navigating their waters or visiting their ports. The resulting 'complex web of legal requirements has led to surprising situations and violations of established rules' such as weapon dumping and floating armouries.[30] There are significant levels of both fragmentation and lack of clarity relating to the applicable rules. Calls for greater regulation have also come from the shipping industry. It may seem counter-intuitive for commercially orientated non-State actors to favour increased regulation. However, it is imperative that the shipping industry can 'distinguish between the good and the bad, and the companies want to put blue water between themselves and those they would regard as the cowboy element'.[31]

As there is no comprehensive legal framework regarding the use of PCASP as part of shipping operations and the carriage of firearms aboard commercial ships, it is imperative to establish the legal basis upon which armed guards are currently deployed on vessels.[32]

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29 Williams (n 17) 339.

30 Geneva Small Arms Survey, 'Escalation at Sea: Somali Piracy and Private Security Companies' in *Small Arms Survey 2012* (CUP 2012) 210.

31 House of Commons Foreign Affairs Committee, *Piracy o the Coast of Somalia* (HC 2011, 1318) [Ev]11 (Oral Evidence Stephen Askins given 22 June 2011, [Q66].

32 Williams (n 17) 341.

This dissertation examines how the enforcement of public international law concerning the use of PCASP at sea is undermined by the doctrine of flag State exclusivity. The resulting enforcement gaps have given rise to a practical impunity being enjoyed by armed guards in terms of their conduct.

This dissertation aims to examine the role of shipowners and the marine insurance industry in formulating and enforcing rules and standards that address broader public policy concerns relating to the use of force by PCASP. It is argued that industry regulatory initiatives can complement State regulatory efforts and aid in closing these enforcement gaps. Despite this, the potential of these industry initiatives is weakened by a lack of reporting and transparency, making evaluation of their effectiveness difficult in practice. The potential of the industry regulatory initiatives is further undermined by the lack of accessible avenues for aggrieved third-parties seeking remedies for harm caused by PCASP in violation of industry norms. It is argued that the promise and potential of industry regulatory initiatives would be strengthened through stronger reporting requirements and the adoption of current proposals concerning Business and Human Rights Arbitration[33] and Human Rights at Sea Arbitration.[34]

The ultimate goal of this dissertation and any subsequent publication is to assess how transnational rulemaking, aided by the practice of the maritime and insurance industries, can assist flag States in meeting their obligations through the promotion of uniform and effective ocean governance.

1.3 Methodology and Approach

This dissertation consists of a desk-based qualitative empirical study of primary and secondary sources. It includes a wide range of secondary material including manuscripts, edited book chapters and journal articles. This dissertation examines the interactions of several areas of law as they relate to the embarkation and use of force by PCASP. These areas of law include aspects of public international law such as the international law of the sea, the use of force and human rights, State responsibility, international environmental law, the settlement of international disputes, the role of national legal systems, and the

[33] Center for International Legal Cooperation, The Hague Rules on Business and Human Rights Arbitration (December 2019); B John, 'The Hague Rules on Business and Human Right Arbitration' (21 April 2020) ⟨https://globalarbitrationnews.com/the-hague-rules-on-business-and-human-rights-arbitration/⟩ accessed 2 May 2020; D Desierto, 'Why Arbitrate Business and Human Rights Disputes? Public Consultation Period Open for the Draft Hague Rules on Business and Human Rights Arbitration' (*EJIL*, 12 July 2019) ⟨https://www.ejiltalk.org/public-consultation-period-until-august-25-for-the-draft-hague-rules-on-business-and-human-rights-arbitration/⟩ accessed 3 May 2020.

[34] Human Rights at Sea (Arbitration as a Means of Effective Remedy for Human Rights Abuses at Sea, 9 July 2020, Webinar); This was followed by a webinar on the 9th July 2020. See Human Rights at Sea, *Arbitration as a Means of E ective Remedy for Human Rights Abuses at Sea* (2020).

sources, history and theory of international law.

A number of private and public doctrines of domestic law are also analysed. They include criminal law, firearms legislation (including export controls), ship registration laws and insurance law. In terms of the norm transmission capacity of private law, this dissertation touches on aspects of conflict of laws and commercial arbitration, maritime law, marine insurance law and commercial supply chain arrangements. Several transnational private regulatory forms are also examined including supply chain contracts, standardisation, accreditation and certification, membership organisations including industry trade bodies, mutual insurance organisations, and codes of conduct.

Analysis of norm evolution and transmission also includes a consideration of various organisations including Inter-governmental organisations (IGOs) such as the International Maritime Organization (IMO) and its groups, the United Nations (UN), and the Human Rights Council. Also, Non-governmental organisations (NGOs) such as the International Organization for Standardization (ISO), the Baltic and International Maritime Council (BIMCO), shipping groups, insurance groups, the human rights at sea charity, and State entities such as flag, port and coastal States, corporate home states, and corporatised shipping registries.

While much writing on non-State rulemaking is sociological or socio-legal in nature, this dissertation adopts a predominantly black-letter legal doctrinal analytical approach in evaluating both State and non-State normative processes. It may seem premature to apply legal doctrinal analysis to non-State normative regimes before concluding that they are indeed law. The distinction between law and non-law remains important. However, there is a difference between legal method and the question of characterisation as law (or of a particular body of law). Legal method is a useful toolbox that aids analysis of all forms of rulemaking, legal and otherwise.[35]

A conscious decision was made to exclude analysis of piracy and counterpiracy and armed robbery in the Gulf of Guinea off Nigeria. West African piracy differs from Somali piracy for a number of reasons. First, unlike the Gulf of Aden, vessels are targeted for their cargo (very often crude oil), rather than a ransom. Second, the use of private armed guards is prohibited by Nigeria and vessels wishing to have armed protection are instead required to employ Nigerian armed forces personnel. Third, the Nigerian government has a greater capacity to police the waters off the country's coast. Finally, and most pertinently, there is a shared belief amongst industry and IMO members that attacks on vessels off Nigeria have been in part facilitated by elements of governmental authority.[36]

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[35] See, generally, P Chynoweth, 'Legal Research' in A Knight and L Ruddock (eds), *Advanced Research Methods in the Built Environment* (Wiley-Blackwell 2008).

[36] Piracy in the Gulf of Guinea 'has been characterised by greater incidents of violence, with the highest number killings compared to other regions ... There is evidence that the tanker oil thefts are being facilit-

1.4 Structure

Part I examines high seas freedoms and the development of the flag State jurisdiction those freedoms necessitated. The part considers the flag State enforcement model and its role as the primary mechanism for the monitoring and enforcement of international norms at sea. Part I will establish the international law framework against which PCASP operate by considering the relevance of flag State exclusivity, obligations and responsibility. Chapter 2 will examine the development of freedom of the high seas and consider the consequences of flag State exclusivity for the regulation and policing of PCASP at sea. The analysis will discuss freedom of the seas, ship registration and issues of port and coastal State jurisdiction. As the chapter argues, while some important inroads into the operation of flag state exclusivity have been made, flag States remain the most important players in the policing of conduct on vessels, particularly on the high seas and within other States' exclusive economic zones (EEZs). Flag State jurisdiction is the cornerstone of the public international law-based enforcement regime. As a result it is important to turn to duties imposed upon flag States.

Chapter 3 examines the capacity of international law to regulate the use of armed guards on ships. The chapter analyses the obligations of flag States in particular and relevant norms of the law of the sea and international human rights law. A core focus of Chapter 3 is Article 94 of UNCLOS and its central role in giving rise to flag State duties as part of measures that must be taken to ensure States effectively exercise jurisdiction and control over administrative, technical and social matters concerning ships flying their flag.[37] Chapter 3 considers how flag State duties are extrapolated from the text of Article 94 including through the ongoing development of the doctrine of due diligence. As the chapter notes, Article 94 gives rise to a number of State obligations including those related to ensuring that the role of the shipmaster is not undermined by the use of ship-based security. Further, the jurisdiction afforded to flag States brings into play requirements relating to the protection of the right to life, including the need for flag States to monitor and investigate human rights violations occurring in relation to their flagged vessels.

Chapter 4 considers State responsibility for PCASP in light of the flag State jurisdiction model and identify the arising legal and practical gaps in the enforcement of international norms. The chapter will consider how State responsibility may arise from the failure of flag States to exercise due diligence over vessels carrying PCASP. The chapter will ask whether the State-centred enforcement model alone is sufficient to remedy any violations

ated by corrupt officials, and the pirates often claim to be redistributing the wealth generated by the oil trade, which adds a political dimension to the attacks': Kao (n 4) 3–4.

[37] See UN Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 94.

of international law associated with the use of PCASP.

As Part I demonstrates, international law, while perhaps a little disjointed, does not lack the necessary norms to address the shipping safety and human rights issues arising from the embarkation of PCASP at sea. However, reliance on the flag State enforcement model to monitor and enforce compliance with those norms results in enforcement gaps and can give rise to practical impunity.

Part II examines the role of private ordering in the development, monitoring and enforcement of rules applicable to the use of PCASP. Chapter 5 examines maritime lawmaking and enforcement networks and the role they played in private ordering. These networks include shipowner associations, first and third-party insurers and indemnifiers, registries, classification societies and the IMO. The chapter then considers the development of private rulemaking in response to PCASP. It focuses on the emergence of three key instruments in particular, GUARDCON, the ISO 28007:2015 and the 100 Series RUF. The chapter considers how these developments occurred alongside the work of the IMO and Maritime Safety Committee (MSC). Chapter 5 involves an articulation of the stages of rule development witnessed in the move to create a regulatory framework for PCASP.

Chapter 6 concerns the transmission of norms in the context of private ordering. Looking at the industry consensus, the chapter considers how standardisation, standard form contracting and market exclusion operate together to influence the behaviour of non-State actors at sea. It considers how failure to comply with international norms concerning shipping safety and human rights protections can result in exclusion from marine insurance coverage, protection and indemnity (P&I) clubs, shipping organisations and cargo markets, and result in consequences under private domestic law. The chapter considers the significance of the role of States in directly and indirectly encouraging uptake of the industry consensus.

Chapter 7 examines the literature on transnational private regulation and several critical perspectives concerning private ordering. These include the nature of technocracy and the limits of democratic participation, regulatory capture and regulatory competition. The chapter argues that these weaknesses should be weighed against the legal and practical issues of pure State-based ordering of non-State actors at sea. There is a danger in focusing too much on regulatory competition and notions of 'races to the bottom' in standards. Fundamentally, State and non-State ordering are better viewed as complements, than as competitors. Both State and non-State ordering are informed by each other and leverage each other for their efficacy. The chapter also examines the hardening of norms within the law of the sea context. As the chapter argues, instruments such as ISO 28007:2015 play an important gap filling role within UNCLOS and may assist flag States in discharging their obligations.

Chapter 8 concludes the dissertation by evaluating how transnational rulemaking, aided by the practice of the maritime and insurance industries, can assist flag States in meeting their obligations through the promotion of uniform and effective ocean governance. As the chapter argues, the combination of public and private ordering operate to ameliorate the practical impunity that results from the weaknesses in the flag State enforcement model.

As Part II argues, the industry consensus demonstrates the potential to help close enforcement gaps in terms of the use of PCASP at sea. Despite this, it remains necessary to identify and address remaining gaps such as the monitoring and enforcement of reporting obligations and data collection. The lack of transparency in the monitoring and enforcement of private ordering, as well as the difficulty in ensuring human rights violations are remedied, remain problematic. These weaknesses need to be addressed to give better effect to the promise contained in the industry consensus. The dissertation submits that this is possible with better mechanisms for remedying harm, as well as greater transparency and reporting in terms of monitoring and enforcement of rules.

Part I

Who is responsible for the acts of PCASP at sea and why?

Chapter 2

Exclusive Flag State Jurisdiction

It is important to consider the primacy of flag State exclusivity to better understand the legal and practical issues involved in the enforcement of the law of the sea and human rights doctrines. This chapter examines the development of rules concerning high seas freedoms and ship registration. It considers the law concerning flag State freedoms under the United Nations Convention on the Law of the Sea (UNCLOS) and international case law and the resulting consequences for ship registration. This analysis includes a consideration of port and coastal State rights and some recent inroads that have been made. As this chapter establishes, flag States remain the predominant players in the enforcement of international norms on the high seas and within States' coastal waters. As a result, frameworks seeking to ensure the lawful use of privately contracted armed security personnel (PCASP) at sea, as well as analysis of those frameworks, need to be conscious of the nuances and limitations that result from flag State primacy.

2.1 High Seas Freedoms

The most important State player in the regulation of commercial shipping is the flag State. Also known as a vessel's registry, the flag State provides ships with their nationality.[1] The law of the flag State remains the internationally recognised 'starting point in maritime choice of law'.[2] The 'cardinal importance' given to the law of the flag State has been described as 'perhaps the most venerable and universal rule of maritime law'.[3] The overriding authority of the flag State acts as an important compromise between competing

[1] For background on ships as legal fictions see S Miller, 'The Reasons for Some Legal Fictions' (2010) 8 Michigan Law Review 623, 635–6.

[2] E Powell, 'Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience' (2013) 9 Ann Surv Int & Comp L 263, 280.

[3] *Lauritzen v Larsen* (1953) 345 US 571 (Supreme Court US) 584.

State interests. It is designed to respond to the limitations on regulating maritime activity.[4] It does this by 'assigning regulatory, criminal, and civil jurisdiction' to a vessel's flag State.[5] In this regard, flag State authority is regarded by some as the 'foundation of the maintenance of order on the high seas'.[6]

The starting point for flag State jurisdiction is the 1609 publication of *Mare Liberum* written by Dutch lobbyist Hugo Grotius.[7] Central to Grotius' thesis was that the oceans were free from claims of sovereignty by any nation. Grotius' conception of freedom of navigation developed to become the cornerstone of the law of the sea. Its restriction on sovereign power over the high seas meant the law of a ship's flag State (or State of registration) came to be used by various authorities 'as the sole and definitive indicator of the applicable maritime law'.[8] However, the principle of freedom of navigation became subject to challenge, particularly during the 20th century as nations with vast coastlines sought sovereignty over neighbouring oil, gas and fish stocks. Major maritime nations such as the United Kingdom sought to keep legal recognition of a narrow territorial sea (along the lines of the three nautical mile 'cannon shot rule'). Other coastal and developing nations were in favour of the recognition of larger maritime zones, such as exclusive fishing zones, extending hundreds of nautical miles from the baseline.[9]

Freedom of the high seas was enshrined in early attempts to codify the law of the sea. For example in the 1956 International Law Commission Draft Articles Concerning the Law of the Sea Article 27 provided:

> **27 Freedom of the High Seas**
>
> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas comprises, *inter alia*:
>
> (1) Freedom of navigation;
> (2) Freedom of fishing;
> (3) Freedom to lay submarine cables and pipelines;
> (4) Freedom to fly over the high seas.[10]

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4 Powell (n 2) 265.

5 Ibid 265.

6 M Shaw, *International Law* (CUP 2008) 611; see also D Guilfoyle, 'The High Seas' in A Elferink and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 209.

7 Published in defence of actions taken by Admiral Jakob van Heemskerk in plundering a Portuguese merchant ship H Grotius, *Mare Libervm Sive, De Ivre Qvod Batavis Competit Ad Indicana Commercia Dissertatio* (Ex officina Ludovici Elzevirij 1609).

8 W Tetley, 'Law of the Flag, Flag Shopping, and Choice of Law' (1992) 17 Tul Mar L J 139, 140.

9 R Young, 'Recent Developments with Respect to the Continental Shelf' (1948) 42(4) AJIL 849; see also E Guntrip, 'The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed' (2003) 4 Melb J Int'l L 3766, 388; D Watt, 'First Steps in the Enclosure of the Oceans: The Origins of Truman's Proclamation on the Resources of the Continental Shelf' (1979) 3 Mar Pol 211.

10 Draft Articles Concerning the Law of the Sea with Commentaries, ILC (1956) UN Doc A/3159 (ILC Draft Articles on Law of the Sea) art 27.

The four freedoms in Article 27(1)-(4) are not exhaustive.[11] Article 27 reflected the Grotius notion that the 'high seas are open to all nations' and that no 'State may subject any part of the high seas to its sovereignty'.[12] This was reflected in the 1958 High Seas Convention.[13] Article 2 of the High Seas Convention provides:

> **2 High Seas Convention**
> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:
>
> (1) Freedom of navigation;
> (2) Freedom of fishing;
> (3) Freedom to lay submarine cables and pipelines;
> (4) Freedom to fly over the high seas.
>
> These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.[14]

These early attempts at codification resulted in the UNCLOS.[15] Following three law of the sea conferences, UNCLOS was adopted on 10 December 1982 and came into force two years later with ratifications from 60 nations.[16] It was a compromise deal that would enshrine freedom of navigation and the role of the flag State whilst granting coastal States a 12-nautical mile territorial sea measured from the 'baseline'.[17] Article 87 of UNCLOS sets out the principles relating to freedom of the seas.[18] It states:

> **87 Freedom of the High Seas**
> (1) The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
>
> (a) freedom of navigation;
> (b) freedom of overflight...
>
> (2) These freedoms shall be exercised by all States with due regard for the interests

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11 ILC Draft Articles on Law of the Sea, 2 (art 27 commentary).

12 ILC Draft Articles on Law of the Sea, 1 (art 27 commentary).

13 Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11 (1958 High Seas Convention) art 2.

14 1958 High Seas Convention, art 2.

15 UN Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

16 UNCLOS; The first had resulted in the Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205; 1958 High Seas Convention; Convention on the Continental Shelf (adopted 29 April 1958, entered into force 10 June 1964) 499 UNTS 311; and the Convention on Fishing and Conservation of the Living Resources of the High Seas (adopted 29 April 1958, entered into force 20 March 1966) 559 UNTS 285.

17 That is, in most cases, the low-water mark of the coastline. See UNCLOS, art 3.

18 S Nandan and S Rosenne, *The United Nations Convention on the Law of the Sea 1982: A Commentary, Volume III* (M Nordquist and others eds, Martinus Nijhoff 1993) 68–69.

of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.[19]

While emphasising the Grotian principle of high seas freedoms Article 87 makes it clear that such freedoms are subject to UNCLOS and other rules of public international law.[20] In addition, it provides for the qualification that high seas freedoms are to be exercised with due regard to the interests of other States.

2.2 Registration and Genuine Link

The corollary of the high seas freedoms regime in UNCLOS is the principles governing flag State registration of vessels. The development of principles concerning the registration of vessels resulted in articles 90 and 91 of UNCLOS. Article 90 states that:

90 Right of navigation
Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.[21]

Article 90 was based on Article 4 of the High Seas Convention[22] and Article 28 of the 1956 ILC Draft Articles.[23] Article 90 should be read alongside Article 91, which sets out the conditions of registration. Article 90 states:

91 Nationality of ships
(1) Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.
(2) Every State shall issue to ships to which it has granted the right to fly its flag documents to that effect.[24]

The reference to a genuine link was based on Article 5 of the High Seas Convention[25] and Article 29(1) of the ILC Draft Convention.[26] In the commentary accompanying the draft

[19] UNCLOS, art 87.
[20] Nandan and Rosenne (n 18) 73; cited by D Guilfoyle, 'High Seas' in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft mbH & Co KG 2017) 679.
[21] UNCLOS, art 90.
[22] 'Every State, whether coastal or not, has the right to sail ships under its flag on the high seas': 1958 High Seas Convention, art 4; Nandan and Rosenne (n 18) 100.
[23] The 1956 ILC draft proposed Article 28 which provides that: 'Every State has the right to sail ships under its flag on the high seas': ILC Draft Articles on Law of the Sea, art 28.
[24] UNCLOS, art 91.
[25] Article 5(1) states that: 'Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag': 1958 High Seas Convention, art 5(1).
[26] Article 29(1) of the ILC Draft states that 'Each State shall fix the conditions for the grant of its nation-

articles the ILC noted that flag States:

> must accept certain restrictions. As in the case of the grant of nationality to persons, national legislation on the subject must not depart too far from the principles adopted by the majority of States, which may be regarded as forming part of international law. Only on that condition will the freedom granted to States not give rise to abuse and to friction with other States. With regard to the national element required for permission to fly the flag, a great many systems are possible, but there must be a minimum national element ... The Commission accordingly thought it best to confine itself to enunciating the guiding principle that, before the grant of nationality is generally recognized, there must be a genuine link between the ship and the State granting permission to fly its flag. The Commission does not consider it possible to state in any greater detail what form this link should take. This lack of precision made some members of the Commission question the advisability of inserting such a stipulation. But the majority of the Commission preferred a vague criterion to no criterion at all. While leaving States a wide latitude in this respect, the Commission wished to make it clear that the grant of its flag to a ship cannot be a mere administrative formality, with no accompanying guarantee that the ship possess a real link with its new State. The jurisdiction of the State over ships, and the control it should exercise ... can only be effective where there exists in fact a relationship between the State and the ship other than mere registration or the mere grant of a certificate of registry.[27]

UNCLOS, like its predecessors, provides the qualification in Article 92 that ships 'shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas' [and] 'may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry'.[28] In reference to the exclusive jurisdiction as bestowed by Article 92 of UNCLOS, Geiß and Tams argue that it is worth noting that from the perspective of public international law:

> the idea that on the high seas the diverse interests held in a ship should be subject to regulation by one state— and one state only—presents a major normative achievement: the flag links the ship to a particular state, and this link supersedes other links, including other traditional categories such as ownership or nationality of seafarers, or more recent grounds justifying assertions of jurisdiction in other fields such as effects or impact.[29]

The relationship between flag States and vessels carrying their flags is subject to ongoing controversy. Open registries (or flags of convenience) have become a major issue confronting maritime policy-makers. As Anderson notes, the term 'flag of convenience' is

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ality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. Nevertheless, for purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship': ILC Draft Articles on Law of the Sea, art 29(1).

27 ILC Draft Articles on Law of the Sea, 278–9 (art 29(1) commentary).

28 UNCLOS, art 92.

29 R Geiß and C Tams, 'Non-Flag States as Guardians of the Maritime Order: Creeping Jurisdiction of a Different Kind?' in *Jurisdiction over Ships* (Brill — Nijhoff 2015) 21–2 (citation omitted).

'used commonly in a pejorative sense and indicates that a vessel owner, for one reason or another, does not want to create mutual obligations with a country with stricter standards for registration'.[30] Many nations have open registries permitting registration of ships by foreign nationals in exchange for a 'registration fee' and 'annual tonnage tax' from which the registry makes a profit.[31]

The ship registration process is often termed 'flag shopping'. It is very much the industry reality (and legal reality) that it is very much akin to shopping among an array of regulatory regimes.[32] Open registries are effectively 'businesses and the service offered is determined by the register's maritime laws and the way they are enforced'.[33] Today, the largest registries by deadweight tonnage (DWT) are Panama, Liberia and the Marshall Islands.[34] For each of these registries nationals of the States involved own less than one per cent of their fleets.[35] As Human Rights at Sea (HRAS) noted in 2019:

> In order to register a vessel under a particular flag, several certificates and other requirements, such as the age of the vessel or owner nationality, must be presented and approved by the flag State registry. Closed registries are those that only permit vessels owned by persons residing or companies registered in the country to be registered under the flag of that country. By contrast, open registries or 'flags of convenience' do not impose any nationality restriction in the registration process.[36]

The use of open registries was at issue during the formation of the Inter-Governmental Maritime Consultative Organization (IMCO), now the International Maritime Organization (IMO). The IMCO Assembly was tasked with electing members of the Maritime Safety Committee (MSC). Article 28(a) of the 1948 Convention for the Establishment of the Organization[37] provided that:

> The Maritime Safety Committee shall consist of fourteen Members elected by the Assembly from the Members, governments of those nations having an important interest in maritime safety, of which not less than eight shall be the largest ship-owning nations, and the remainder shall be elected so as to ensure adequate representation of Members, governments of other nations with an important interest in maritime safety, such as nations interested in the supply of large numbers of crews or in the carriage of large numbers of berthed and unberthed passengers, and of major geographical areas.[38]

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30 H Anderson, 'The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives' (1996) 21 Tul Mar L J 139, 157.

31 M Stopford, *Maritime Economics* (Routledge 2008) 671.

32 For an example of the range of regulatory regimes offered by flag States see Hill Dickinson, Shipping "At A Glance" Guide 7: International Ship Registration Requirements (2015).

33 Stopford (n 31) 671.

34 UNCTAD, 2014 Review of Maritime Transport [2014].

35 Ibid.

36 Human Rights at Sea, Flag States and Human Rights: A Study on Flag State Practice in Monitoring, Reporting and Enforcing Human Rights Obligations on Board Vessels (17 July 2018) 7.

37 1948 Convention for the Establishment of the Organization (entered into force 17 March 1958, adopted 6 March 1948) 289 UNTS 3.

38 Ibid art 28.

The IMCO Secretariat produced a working paper for consideration by the assembly relating to the election of members. That working paper set out the 'merchant fleet of IMCO members according to the Lloyd's Register of Shipping Statistics Tables 1958'.[39] Flag states within it were listed in descending order based on their total gross registered tonnage (GRT). Liberia was third on the list and Panama was eighth.[40]

In the lead-up to the vote the UK and the Netherlands sought to exclude Liberia and Panama from election to the MSC. Speaking before the Assembly, the UK delegation stated that it would be wrong to 'pretend to ignore the essential difficulty, namely, the special position of Liberia and Panama'.[41]

It was argued that Liberia and Panama should not qualify for election to the MSC as those nations lacked the requisite interest in maritime safety,[42] nor were they important ship-owning nations.[43] The delegation of the Netherlands supported this with the assertion that 'a country's registered tonnage might in no way reflect its actual importance as a ship owning nation'.[44]

In response, Liberia and Panama argued that positions should be determined by reference to the total GRT of each state.[45] To do otherwise would not comply with the requirements of Article 28. The Liberian delegate acknowledged that strict observation of Article 28 would mean it was not 'an election in the usual sense of the word' and that the assembly had no discretion but to elect the eight largest ship-owning nations.[46] The IMCO Assembly adopted a draft resolution put together by the UK.[47] That resolution required each of the eight places on the committee to be elected separately. These elections would be held in order of total GRT. The eight nations that first received a majority of votes in favour would be declared elected. The election took place with the assembly voting in order of

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39 IMCO Secretary-General, Working Paper 5, IMCO [1959]; Lloyd's Register, *Lloyd's Register of Shipping 1958* (LLP 1958).

40 *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Advisory Opinion) [1960] ICJ Reports 150 (*IMCO Constitution Case, Advisory Opinion*) 155.

41 *IMCO Constitution Case, Advisory Opinion*, 156. The UK argued that there was 'clearly no question of dealing with the problem of flags of convenience, which lay outside the limits of discussion. What the Assembly had to do was to choose eight countries which, on the one hand, had an important interest in maritime safety and, on the other hand, were the largest ship-owning nations, as these were the criteria laid down in Article 28 of the Convention':

42 The UK noted that the Assembly had 'to consider how far governments were interested in maritime questions and to see to what extent they were able to make a contribution in various fields connected with safety... It was obvious that in all those fields neither Liberia nor Panama was, at the moment, in a position to make any important contribution to maritime safety': *IMCO Constitution Case, Advisory Opinion*, 156.

43 'As to the second criterion he had mentioned, namely, relative importance as a ship-owning nation, he would emphasize that expression was being used for the first time, but it was perfectly clear. Vessels had really to belong to the countries in question, which was obviously not the case with Panama and Liberia': *IMCO Constitution Case, Advisory Opinion*, 156.

44 *IMCO Constitution Case, Advisory Opinion*, 157.

45 Citing figures as set out in Lloyd's Register (n 39).

46 *IMCO Constitution Case, Advisory Opinion*, 155.

47 Working Paper 5 (n 39).

GRT.[48] However, when Liberia came up for election it failed to win a majority of votes. Similarly, Panama also failed to achieve a majority of votes from the assembly.[49]

In the 1948 Convention for the Establishment of the Organization,[50] case the International Court of Justice (ICJ) was requested to give an advisory opinion as to whether, by failing to elect Liberia and Panama to the MSC, the IMCO Assembly had contravened the requirements of Article 28(a). The ICJ held that the election was invalid and that Liberia and Panama were entitled to be elected to the MSC. In doing so they rejected the notion that being a 'ship-owning nation' required something more than registration.[51]

The ICJ explained that had the Assembly, as was argued, been free to 'to look at the realities' based on the 'true situation' the election process would have become entirely subjective and discretionary.[52] Members would 'be bound by no ascertainable criteria' but instead 'be entitled to have regard to any considerations they might think relevant'.[53] Such discretion, 'uncontrolled by any objective test of any kind', would mean that the structure built into Article 28(a) to ensure the predominance of the largest ship-owning nations would be 'undermined and would collapse'.[54] The ICJ concluded that the determination of the largest ship-owning nations depended solely upon their registered tonnage.[55]

Many have been critical of the failure of the ICJ to engage the *genuine link* concept as set out in UNCLOS. In their written submissions to the ICJ the Government of the Netherlands contended that 'States are *not* completely free in fixing the conditions for the right to fly their flag'.[56] In support of this the Netherlands cited Article 5 of the Convention on the High Seas,[57] which required 'a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'.[58] Whilst not in force, it was argued that the article codified the position of customary international law and 'clearly imposes limitations to the freedom of a State to determine which ships "belong" to that State'.[59]

This argument was expanded upon during hearings in Norway through an analogy with the

48 *IMCO Constitution Case, Advisory Opinion*, 155–7.
49 *IMCO Constitution Case, Advisory Opinion*, 155–7.
50 1948 Convention for the Establishment of the Organization (n 37).
51 *IMCO Constitution Case, Advisory Opinion*, 14–5.
52 *IMCO Constitution Case, Advisory Opinion*, 166.
53 *IMCO Constitution Case, Advisory Opinion*, 166.
54 *IMCO Constitution Case, Advisory Opinion*, 166.
55 *IMCO Constitution Case, Advisory Opinion*, 171.
56 *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization* (Written Statements) [1960] ICJ Reports 150 (*IMCO Constitution Case, Written Statements*) 250 (Written Statement of the Netherlands Government).
57 1958 High Seas Convention.
58 UNCLOS, art 5.
59 *IMCO Constitution Case, Written Statements*, 251 (Written Statement of the Netherlands Government).

decision in *Nottebohm* (*Liechtenstein v Guatemala*)[60] where the ICJ held that following State practice, nationality was a 'legal bond' concerning 'a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties'.[61]

Having determined the case by determination of the largest ship-owning nations, examination of the 'genuine link [was] irrelevant'.[62] The IMCO decision has been the subject of academic criticism. For one commentator it was regrettable that 'the opportunity was not taken of considering the problems of flags of convenience or the meaning' of a genuine link in 'light of the true ownership of the ships involved, and so the doubts and ambiguities remain'.[63] Another commentator went further, arguing that the decision amounted to a rejection of 'a parallel between "genuine link" requirements for vessel nationality and those for the nationality of individuals'.[64] Despite this, the genuine link requirement as set out in the 1958 High Seas Convention was incorporated into UNCLOS.[65] Whilst, at face value, the 'genuine link' requirement could appear to limit the use of open registries, this has been interpreted loosely.

The 'genuine link' requirement as set out in Article 91 of UNCLOS came up for consideration by the International Tribunal for the Law of the Sea (ITLOS) in the *M/V Saiga (No 2)* (*Saint Vincent and the Grenadines v Guinea*)[66] case. Proceedings were brought before ITLOS following the boarding and seizure of a Vincentian flagged vessel by Guinean authorities. Guinea responded by arguing that there was no genuine link between the vessel and the Vincentian registry. As a consequence, Guinea was not bound to recognise the Vincentian nationality of the vessel. Its conduct in seizing the vessel was not a violation of the principle of freedom of navigation. Guinea further argued that, unless a State 'exercises prescriptive and enforcement jurisdiction over the owner or, as the case may be, the operator of the ship', it cannot be said to fulfil 'its obligations as a flag State' under UNCLOS and, as a result, there could be no 'genuine link' with the vessel.[67]

The Tribunal framed the relevant question as being whether the lack of a genuine link

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60 *Nottebohm* (*Liechtenstein v Guatemala*) (Judgment) [1955] ICJ Reports 4 (*Nottebohm*).

61 The ICJ noted that since 'this is the character which nationality must present when it is invoked to furnish the State which has granted it with a title to the exercise of protection and to the institution of international judicial proceedings, the Court must ascertain whether the nationality granted to Nottebohm by means of naturalization is of this character or, in other words, whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter': *Nottebohm*, 23; cited by Shaw (n 6) 660.

62 *IMCO Constitution Case, Advisory Opinion*.

63 Shaw (n 6) 612.

64 Tetley (n 8) 175.

65 Anderson (n 30) 150.

66 *M/V Saiga (No 2)* (*Saint Vincent and the Grenadines v Guinea*) (Judgment) 1999 ITLOS Reports 10 (*M/V Saiga (No 2)*).

67 *M/V Saiga (No 2)* [76].

'entitles another State to refuse to recognize the nationality of the ship'.[68] In answering the question it referred to the work of the International Law Commission (ILC) on the Draft Articles on the Law of the Sea adopted in 1956, which proposed that for 'purposes of recognition of the national character of the ship by other States, there must exist a genuine link between the State and the ship'.[69] ITLOS did not accept that the genuine link should form the basis for recognition of nationality.[70] It noted that while the essence of Article 5 was split between articles 91 and 94 of UNCLOS. Whilst the genuine link requirement was found in Article 91, it was Article 94(1) that echoed the requirement that the flag State 'effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'.[71] The Tribunal then turned to the remaining provisions in Article 94 and made three key points. First, the steps a flag State must take to exercise effective jurisdiction were set out in paragraphs (2)-(5). Second, paragraph (6) addresses situations when States have grounds to believe proper jurisdiction and control over ships has not been exercised. This includes when flag States fail to respond with necessary and appropriate action to matters reported by States. Third, there was nothing in Article 94 to permit another State 'which discovers evidence indicating the absence of proper jurisdiction and control' by flag States to refuse to recognise the right of their ships to fly the flag of that State.[72]

ITLOS explained that the purpose of the genuine link requirement was 'to secure more effective implementation of the duties of the flag State'.[73] The requirement was not designed to establish criteria by which the validity of registration could be challenged.[74] The Tribunal concluded that Guinea could not rely on the lack of a genuine link between the *Saiga* and the Vincentian registry as grounds to refuse to recognise the right of the *Saiga* to fly the flag of Saint Vincent and the Grenadines.[75] It was not necessary to decide the question of whether there was a genuine link between the *Saiga* and the Vincentian registry. Despite this, ITLOS considered that the evidence was insufficient to refute a genuine link at the material time.[76]

ITLOS reaffirmed the *M/V Saiga (No 2)* (*Saint Vincent and the Grenadines v Guinea*),[77] approach in the 2014 case of the *M/V Virginia G* (*Panama/Guinea-Bissau*).[78] The tribunal emphasised that the genuine link requirement reflected an obligation on flag

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68 *M/V Saiga (No 2)* [79].
69 ILC Draft Articles on Law of the Sea, art 29.
70 *M/V Saiga (No 2)* [80].
71 UNCLOS, 94(1).
72 *M/V Saiga (No 2)* [82].
73 *M/V Saiga (No 2)* [83].
74 *M/V Saiga (No 2)* [83].
75 *M/V Saiga (No 2)* [86].
76 *M/V Saiga (No 2)* [87].
77 *M/V Saiga (No 2)*.
78 *M/V Virginia G* (*Panama/Guinea-Bissau*) (Judgment) 2014 ITLOS Reports 4 (*M/V Virginia G*).

States to exercise 'effective jurisdiction and control' over vessels to ensure they operated 'in accordance with generally accepted international regulations, procedures and practices'.[79] The result is that, given that it is up to the flag State to define the nature of the genuine link, in practice 'it can register any ship it chooses'.[80]

In effect, any nation, coastal or landlocked, may act as the flag State for a ship despite the lack of a meaningful connection between the ship, its company and the flag State. The use of these registries has the potential to undermine the efficacy of flag State jurisdiction as the 'paramount mechanism to determine the applicable law aboard a vessel'.[81] Such registries, it has been argued, lack the 'capacity to enforce their laws' on flagged vessels.[82] Many flag States lack both the incentive and resources 'to remedy the deficienc[ies]' of open registries.[83]

One particular consequence of the tenuous nationality requirement is that it is 'easy to change legal jurisdiction' by simply reflagging a vessel.[84] The practise of reflagging ships has happened over time for a variety of motivations, and 'gathered momentum during the twentieth century'.[85] The variations in the legal regimes of flag States mean shipowners may change registry to seek a more preferable regulatory framework. This can also have economic consequences for the flag States involved.

Several flag States have feared the loss of ships as a result of stricter PCASP rules. Some have expressed concerns that their flagged vessels would reflag to more permissive jurisdictions. It is understood that Germany was motivated to allow PCASP following some German flagged vessels 'flagging out' and moving to alternative registries.[86] States wishing to prohibit PCASP may be pressurised into changing their laws in favour of using them. As a result, there is a limit on what flag States acting alone can achieve.

A similar change appears to be in progress in the Netherlands. Dutch law prohibits the use of PCASP on ships using its flag.[87] The Dutch government argued that the deployment of

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79 *M/V Virginia G* [113]; cited by Guilfoyle, 'The High Seas' (n 6) 215.

80 Stopford (n 31) 664.

81 S Kaye, 'Threats from the Global Commons: Problem of Jurisdiction and Enforcement' (2007) 8 Melb J Int'l L 186, 197; cited by K Lewins, Submission No 1 to House of Representatives Standing Committee on Social Policy and Legal Affairs, Troubled Waters: Inquiry into the Arrangements Surrounding Crimes Committed at Sea (2012) 4 fn 20.

82 Kaye (n 81) 197.

83 Ibid 197.

84 Stopford (n 31) 666.

85 Stopford provides a table of examples of reflagging throughout history. One example he cites is the reflagging of various American Cruise Liners to Panama to escape the reach of US prohibition legislation in the 1920s. See Stopford (n 31) 667–8; See able Anderson (n 30) 156.

86 A Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies' (2013) 62 Int Comp Law Q 667, 676–7.

87 'In order to make private armed protection possible, it would be necessary to make an amendment to the Arms and Ammunitions Act, which prohibits armed self-defence': W Molenaar, B van Ginkel, and F van der Putten, *State Or Private Protection Against Maritime Piracy?: A Dutch Perspective* (2013) 13; See Adviesraad Internationale Vraagstukken, *Piraterijbestrijding Op Zee: Een Herijking van Publieke En*

PCASP on vessels would breach the State's 'monopoly on the use of force', and instead decided to offer protection to Dutch vessels through VPDs provided by the Ministry of Defence.[88] However, the debate on the legality of the use of PCASP on Dutch-flagged ships 'keeps coming back to the political arena in the Netherlands', with many shipowners arguing that VPDs are too expensive and inflexible for the task.[89] Many shipowners have hired PCASP in contravention of Dutch law, but are limited to the offerings of sub-standard private maritime security companies (PMSCs) who are willing to provide services unlawfully.[90] Other shipowners have reflagged. It appears that concerns over flagging out and problems with VPDs have led to a move to end the Dutch prohibition on the use of PCASP. The government has announced plans to reform the current regime and allow the use of armed guards in particular circumstances.[91]

2.3 Port and Coastal States

The other two key actors in the UNCLOS separation of powers regime are port and coastal States. A vessel visiting a port will enter the internal waters of a coastal State; that is, waters landward of the baseline from which the other maritime zones of the coastal State are measured.[92] Foreign vessels in internal waters are subject to the jurisdiction of the coastal State *in addition* to that of the flag State.[93] There is some contention regarding port State jurisdiction over matters relating to the internal conduct of foreign vessels. This is particularly so where such internal conduct does not affect the interests of the port State. While State practice would suggest that, as a matter of comity, port State jurisdiction over foreign vessels is exercised sparingly, this does not amount to a qualification of that jurisdiction.[94] Movement of weapons on and off a ship in port cannot be characterised as

Private Verantwoordelijkheden (2010) 13.

88 See De minister van Buitenlandse Zaken, Beveiliging Zeevaartroutes Tegen Piraterij (5 April 2011); Molenaar, van Ginkel, and van der Putten (n 87) 9. 'Article 97 of the Dutch Constitution stipulates that the army is there to defend the Kingdom, protect the interest of the Kingdom and to maintain and promote the international legal order' at fn 5.

89 Molenaar, van Ginkel, and van der Putten (n 87) 9.

90 'Moreover, sticking to a legalistic approach which is too strict could even push shipping companies towards the practice of illegally hiring Private Security Companies (PSCs). An additional negative aspect that follows from this development is the fact that the certified PSCs with good reputations are not willing to take the job of sailing with ships under a flag of a country that prohibits the use of armed PSCs. As a consequence, Dutch shipping companies have to turn to smaller companies which are not certified, and which do not have a track record of good conduct, nor the extensive network to make the best security assessments of the region. The risk of abuse and unrecorded incidents is obviously much higher in this grey sector': ibid 34.

91 See De Minister van Buitenlandse Zaken, Kamerbrief Over Beleidsstandpunt Bescherming Nederlandse Schepen Tegen Piraterij (2015).

92 'Except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State': UNCLOS, 8(1); Shaw (n 6) 556.

93 E Molenaar, 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use' in R Barnes, D Freestone, and D Ong (eds) (OUP 2006) 196; Shaw (n 6) 557.

94 R Churchill and V Lowe, *The Law of the Sea* (3rd edn, Juris Publishing 1999) 65–8.

wholly internal conduct. It would follow that such activity is almost certainly subject to the jurisdiction of the port State. In cases where weapons are merely stowed on board while a ship is in port, port States would have a strong argument that such internal conduct does affect their interests. As such, port States would be able to exercise jurisdiction over stowed weapons while a foreign ship is in port.

In addition, armed guards may become subject to regulations and prohibitions from various coastal States. A vessel travelling from Singapore to Rotterdam will traverse the territorial seas of fifteen coastal States.[95] The sovereignty of a coastal State extends to an adjacent belt known as the territorial sea extending no more than 12 nautical miles from the baseline.[96] The sovereignty of a coastal State over its territorial sea is 'exercised subject to UNCLOS and to other rules of international law'.[97] In addition to the jurisdiction of the vessel's flag State, PCASP may also become subject to the laws and regulations of each of these. The innocent passage regime in Part II of UNCLOS limits the jurisdiction of coastal States over foreign-flagged vessels traversing their territorial sea. Article 17 provides that, 'subject to the Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea'.[98] The meaning of 'passage' is defined by Article 18:

> **18 Meaning of passage**
> (1) Passage means navigation through the territorial sea for the purpose of:
>
> (a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or
> (b) proceeding to or from internal waters or a call at such roadstead or port facility.
>
> (2) Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only in so far as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.[99]

Article 19(1) provides that passage will be considered innocent 'so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law'.[100] Article 19(2) sets out a number of instances where the passage of a foreign-flagged vessel will be considered prejudicial to the peace, good order or security of the coastal State.[101] They are:

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95 P Cook, Private Maritime Security and the Introduction of an International Regulatory Structure (4 March 2013).
96 UNCLOS, art 2.
97 UNCLOS, arts 2–3.
98 UNCLOS, art 17.
99 UNCLOS, art 18.
100 UNCLOS, art 19(1).
101 UNCLOS, art 19(2).

19 Meaning of innocent passage

(2) Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(a) 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;
(b) any exercise or practice with weapons of any kind;
(c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
(d) any act of propaganda aimed at affecting the defence or security of the coastal State;
(e) the launching, landing or taking on board of any aircraft;
(f) the launching, landing or taking on board of any military device;
(g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
(h) any act of wilful and serious pollution contrary to this Convention;
(i) any fishing activities;
(j) the carrying out of research or survey activities;
(k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
(l) any other activity not having a direct bearing on passage.[102]

Pursuant to Article 19(2)(b) a ship will lose the protection of the innocent passage provisions where it engages in, *inter alia*, 'any exercise or practice with weapons of any kind'.[103] Whether this extends to the mere carriage of weapons is in dispute.[104] While the discharging of firearms would appear to be covered by this, and as a result be lawfully subject to the legislative reach of the coastal State, it is much less clear whether the mere stowage of weapons by PCASP amounts to an 'exercise or practice' with those weapons. Foreign ships carrying firearms through a coastal State's territorial sea are the subject of some debate.[105] This question has been prone to 'varied interpretation with some coastal States at least adopting the restrictive view'.[106] While the mere stowage of weapons does not appear to violate innocent passage it is arguable that while in the territorial sea of a foreign State the discharging of weapons:

> even in self-defence, a coastal state might well argue it was entitled to assert criminal

[102] UNCLOS, art 19.
[103] UNCLOS, art 19.
[104] See S Casey-Maslen and A Priddy, 'Counter-Piracy Operations by Private Maritime Security Contractors Key Legal Issues and Challenges' (2012) 10 J of Int'l Criminal Justice 839; N Ronzitti, 'The Use of Private Contractors in the Fight Against Piracy: Policy Options' in F Francioni and N Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law and Private Contractors* (OUP 2011).
[105] Casey-Maslen and Priddy (n 104) 849.
[106] C Schofield, 'Arming Merchant Vessels: Enhancing or Imperilling Maritime Safety and Security?'' (2014) 2 Korean J of Int'l & Comp L 46, 64.

jurisdiction over such an event.[107]

The practice of dumping weapons at sea outside territorial waters has been attributed to the uncertainty over the applicable legal regimes in territorial seas.[108] In addition to this, the IMO position on private armed guards presumes that merchant ships traversing the territorial seas of another State with firearms on board 'are subject to that State's legislation'.[109] This oversimplification by the IMO ignores the complexity of the innocent passage regime and is arguably misleading.

Article 25 governs circumstances where the passage exercised by a foreign vessel is not innocent. It provides:

> **25 Rights of protection of the coastal State**
> (1) The coastal State may take the necessary steps in its territorial sea to prevent passage which is not innocent.
> (2) In the case of ships proceeding to internal waters or a call at a port facility outside internal waters, the coastal State also has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships to internal waters or such a call is subject.
> (3) The coastal State may, without discrimination in form or in fact among foreign ships, suspend temporarily in specified areas of its territorial sea the innocent passage of foreign ships if such suspension is essential for the protection of its security, including weapons exercises. Such suspension shall take effect only after having been duly published.[110]

Despite this, any coastal State enforcement action over foreign-flagged vessels must comply with Article 27. Article 27 states that:

> **27 Criminal jurisdiction on board a foreign ship**
> (1) The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:
> (a) if the consequences of the crime extend to the coastal State;
> (b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;
> (c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or
> (d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.
> (2) The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign

[107] D Guilfoyle, 'National Regulatory Frameworks for On-Board Vessel Security: Some Key Issues' (2013) 5.
[108] N Florquin, 'Escalation at Sea: Somali Piracy and Private Security Companies' in E Berman and others (eds), *Small Arms Survey 2012: Moving Targets* (CUP 2012).
[109] Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery Against Ships, IMO MSC (26 June 2009) IMO Doc MSC.1/Circ.1333.
[110] UNCLOS, art 25.

ship passing through the territorial sea after leaving internal waters.

(3) In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.

(4) In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.

(5) Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.[111]

For Schofield, it 'is difficult to see quite how the carriage of weapons on a merchant vessel, as opposed to their use, can be construed as a crime extending to the coastal State'.[112] However, this interpretation does not appear to be shared by the Indian authorities. On 12 October 2013 the Sierra Leone-flagged *MV Seaman Guard Ohio* was seized by Indian coastal police within what the authorities argued were Indian territorial waters and taken to the port of Tuticorin.[113] The crew and guards on board were charged with various firearms-related offences under Indian law. In an interesting twist, on 10 July 2014, Justice Prakash of the High Court dismissed the charges, based on contravention of the Arms Act, finding that 'the anchoring of *MV Seaman Guard Ohio* within' the Indian 'territorial sea was out of necessity' and saved by the doctrine of innocent passage.[114] As a result, the crew and security guards could not be prosecuted for an offence under the Indian Arms Act.[115] Despite being cleared by the court, though, the crew and guards were not allowed to leave India for several years.[116]

The stalemate was finally resolved on an appeal heard in November 2017 before Justice A.M. Basheer Ahamed.[117] In a decision deeply critical of the Indian coastguard and the trial Judge, Justice Ahamed followed a more orthodox approach to the law of the sea, noting the primacy of the flag State (being Sierra Leone). Both India and Sierra Leone were parties to UNCLOS.[118] As a foreign vessel the Seaman Guard Ohio enjoyed the right of innocent passage.[119] In reference to Article 27 of UNCLOS Justice Ahamed found that:

111 UNCLOS, art 27.

112 Schofield (n 106) 64.

113 S Kumar, 'Ship with Armed Guards Detained in Indian Waters' *The Hindu* (19 October 2013).

114 A Subramani, 'Madras High Court Quashes Criminal Case against Crew of US Ship' *The Times of India* (10 July 2014); *Vijay v State* (2014) 3 MLJ (Crl) 139 (Madras High Court) 29.

115 Subramani (n 114); *Vijay v State* (n 114) 29.

116 'India "Must Return Detained UK Men"' *BBC* (11 March 2015); 'MV Seaman Guard Ohio: US Sailor Held in India "Attempts Suicide"' *BBC* (2015).

117 *Valentyn vs The Inspector of Police* (2017) 2018 LW (Crl) 518 (Madras High Court).

118 Ibid [78].

119 Ibid [78].

> The prosecution has failed to prove that the disputed ship is engaged in any of the activities prejudicial to the peace, good order or security of the State and the burden of proving the fact is only on the prosecution. It is proved in this case that the ship was anchored at the given place on account of distress for want of provisions and fuel.[120]

Justice Ahamed noted that the 'ship never had an intention of visiting Indian ports, because the captain was waiting for further instructions and for getting provisions and fuel'.[121] It was 'obvious' from the vessel logs that the ship had run out of supplies.[122] As to the location of the vessel when it was intercepted by Indian authorities, Justice Ahamed noted that the prosecution had failed to prove the vessel was situated within the territorial sea of India.[123] Even when the vessel had been invited into port by the Indian authorities the prosecution had not alleged any violation of Article 27(1)(a)-(d) of UNCLOS and therefore the crew could not be prosecuted pursuant to the Arms Act 1959.[124] Justice Ahamed ordered that the appellants be released and have their passports returned.[125] This case demonstrates that, whilst the carriage of weapons would not appear to violate the rules of innocent passage, the matter is far from settled and ships carrying PCASP do so at their peril.

Beyond the 12 nautical miles (nm) limit of the territorial sea, coastal States are entitled to claim an additional 188 nm as an exclusive economic zone (EEZ).[126] Within the EEZ a coastal State is granted sovereign rights for the purpose of exploring, exploiting, conserving and managing natural resources including fish, oil and gas, in addition to jurisdiction over artificial islands and installations, marine research and the protection and preservation of the marine environment.[127] Article 56(2) provides that in 'exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention'.[128]

Most importantly, through Article 58, the high seas regime in Part VII is by and large retained throughout the EEZ. Article 58(1) guarantees the ability of all States to enjoy high seas freedom of navigation within the EEZ.[129] As Article 58(3) makes clear, while

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120 Ibid [78].
121 Ibid [78].
122 Ibid [79].
123 Ibid [80].
124 Ibid [79].
125 Ibid [82].
126 Extending up to 200 nautical miles from the baseline. See UNCLOS, art 55.
127 UNCLOS, art 56(1)(a)–(b).
128 UNCLOS, art 56(2).
129 Article 58(2) goes on to state that 'Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part'. This essentially incorporates the High Seas regime in Part VII except for the provisions of Section 2 relating the conservation and management of living resources. See UNCLOS, art 58(2).

freedom of navigation does apply in the EEZ, it requires flag States have due regard to coastal State rights and duties and comply with coastal State laws and regulations adopted in accordance with the provisions of UNCLOS and 'other rules of international law in so far as they are not incompatible with' Part V.[130]

It is important here to consider the question of how *exclusive* flag State jurisdiction really is. The *SS Lotus* (*France v Turkey*)[131] case is best known for establishing the 'effects doctrine' as a head of jurisdiction in international law.[132] This doctrine may allow States to exercise jurisdiction where the effects of extra-territorial conduct impact those States.[133] However, in addition to this, the decision had significant implications for the law of the sea. The French-flagged SS Lotus collided with a Turkish vessel on the high seas north of Greece. When the SS Lotus later visited the Turkey, its first officer (a French national) was requested to go ashore to give evidence relating to the collision. He was subsequently arrested by Turkey and charged with manslaughter. The French government sought recourse against Turkey in the Permanent Court of International Justice (PCIJ), arguing that the assertion of Turkish jurisdiction was unlawful. In a blow to the primacy of flag State jurisdiction, the PCIJ rejected France's claim of exclusive jurisdiction over the SS Lotus and its crew. The PCIJ noted that it was 'certainly true that – apart from certain special cases which are defined by international law - vessels on the high seas are subject to no authority except that of the State whose flag they fly.[134] Despite this, the PCIJ stated that:

> it by no means follows that a State can never in its own territory exercise jurisdiction over acts which have occurred on board a foreign ship on the high seas. A corollary of the principle of the freedom of the seas is that a ship on the high seas is assimilated to the territory of the State the flag of which it flies, for, just as in its own territory, that State exercises its authority, upon it, and no other State may do so. All that can be said is that by virtue of the principle of the freedom of the seas, a ship is placed in the same position as national territory but there is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory properly so called. It follows that what occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies.[135]

This reasoning lead to the conclusion that there is 'no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting,

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130 UNCLOS, 58(3).

131 *SS Lotus* (*France v Turkey*) (Judgment) 1927 PCIJ Series A no 10 (*SS Lotus*).

132 D Guilfoyle, 'Defending Individual Ships From Pirates' in C Chinkin and F Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 310.

133 *SS Lotus*, 23.

134 *SS Lotus*, 25.

135 *SS Lotus*, 25.

accordingly, the delinquent'.[136] The PCIJ treated the Turkish ship as akin to Turkish territory.[137] As the 'effects' of the conduct were felt on what was akin to its territory, Turkey was entitled to exercise jurisdiction.[138]

For current purposes the critical question is to what extent the *SS Lotus* holding remains good law in the face of UNCLOS and other subsequent developments in international law. Following the *SS Lotus* a consensus began to develop that permitted the exercise of prescriptive jurisdiction over foreign vessels on the high seas where otherwise justified on the basis of customary international law principles. As Guilfoyle argues:

> However, the phrase 'exclusive jurisdiction' may be misleading. Certainly, the most important aspect of so-called 'exclusive' flag State jurisdiction is that it confers immunity upon a ship from interference by foreign government vessels. The flag State thus has exclusive enforcement jurisdiction over its national vessels on the high seas (subject to exceptions based on consent, treaty law and custom). Nonetheless, it is clear in State practice that flag State jurisdiction does not prevent other States from attaching consequences to the conduct of their nationals on the high seas, even when aboard foreign vessels.[139]

For Guilfoyle the high seas are a 'commons into which all States can, theoretically, project their authority to varying extents'.[140] It is therefore possible to have 'concurrent prescriptive jurisdiction over activities on the high seas'.[141] For Honniball, this approach is' convincingly covered and stated by arguably the majority in academia'.[142] For Honniball:

> The 'jurisdiction' in 'exclusive flag state jurisdiction' provides neither a rebuttable presumption of exclusive prescription on the high seas, nor a limitation on otherwise valid extra-territorial prescription, because it is solely concerned with limiting enforcement at sea in the high seas/EEZ... [t]he unfortunate lack of an explicit reference to enforcement in the wording of Article 92 has misled the above interpretations into including a presumptive limitation on prescriptive jurisdiction—a wide and significant treaty-based departure from general prescriptive jurisdiction—that one would expect to be supported by conclusive practice, if not explicit wording. The lack of evidence for such a presumption should be telling.[143]

This approach was put in question in the 2019 ITLOS case of the *M/V "Norstar"* (*Panama v Italy*).[144] The *Norstar* concerned coastal State prescriptive jurisdiction over foreign vessels

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136 *SS Lotus*, 25.

137 *SS Lotus*, 25.

138 Shaw (n 6) 656; *SS Lotus*, 25; The international maritime community has been highly critical of the decision. See T Treves, 'Historical Development of the Law of the Sea' in A Elferink and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 18.

139 Guilfoyle, 'The High Seas' (n 6) 209 (footnotes omitted).

140 Ibid 209 (footnotes omitted).

141 Ibid 209.

142 AN Honniball, 'The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?' (2016) 31(3) The International Journal of Marine and Coastal Law 499, 520–1 (footnotes omitted).

143 Ibid 508.

144 *M/V "Norstar"* (*Panama v Italy*) (Judgment of 10 April 2019) 2018-2019 ITLOS Reports 10 (*M/V Norstar*).

beyond a coastal State's territorial seas. The *Norstar* had been arrested in Spain pursuant to a Italian request relating to its role in megayacht bunkering scheme contrary to Italian law. The bunkering was said to have taken place off the Italian coast, beyond Italy's territorial sea. This issue turned on the construction of the high sea's freedom of navigation in Article 87(1). Panama argued before ITLOS that Italy had violated its freedom of navigation by regulating activities taking place on the high seas contrary to Article 87(1) or within Italy's EEZ where Article 87(1) freedoms apply by way of Article 58.[145]

The majority found that the bunkering of leisure boats on the high seas fell under Article 87 of UNCLOS.[146] Italy had argued that Article 87 did not apply (as was not breached) as the relevant coastal laws were not 'enforced not on the high seas but in internal waters'.[147] For the majority, the location of enforcement, while relevant to Article 87, was not the only factor in determining whether Article 87 applied or was breached.[148] They stated:

> Contrary to Italy's argument, even when enforcement is carried out in internal waters, article 87 may still be applicable and be breached if a State extends its criminal and customs laws extraterritorially to activities of foreign ships on the high seas and criminalizes them. This is precisely what Italy did in the present case.[149]

For ITLOS, the interpretation of high seas freedoms in Article 87 is bound to the notions of no claims of sovereignty in Article 89 and exclusive flag State jurisdiction in Article 92.[150] As to what could be considered a breach of the freedom of navigation under Article 87(1), the majority argued:

> any act of interference with navigation of foreign ships or any exercise of jurisdiction over such ships on the high seas constitutes a breach of the freedom of navigation, unless justified by the Convention or other international treaties.[151]

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145 ITLOS noted that 'The Convention provides for an elaborate regime of navigation. Navigational rights enjoyed by foreign ships differ in the various maritime zones. Freedom of navigation applies to the high seas and also to the exclusive economic zone pursuant to article 58, paragraph 1, of the Convention': *M/V Norstar* [220]; It should be noted that while bunkering within an EEZ within a illegal, unreported and unregulated (IUU) context had been answered by ITLOS in *M/V Virginia G* by way of Article 56 of UNCLOS. However that did not apply to the *Norstar*, as it was not concerned with fishing. See: 'The Tribunal is of the view that the regulation by a coastal State of bunkering of foreign vessels fishing in its exclusive economic zone is among those measures which the coastal State may take in its exclusive economic zone to conserve and manage its living resources under article 56 of the Convention read together with article 62, paragraph 4, of the Convention. This view is also confirmed by State practice which has developed after the adoption of the Convention': *M/V Virginia G* [217]; UNCLOS, art 56.

146 *M/V Norstar* [219].

147 *M/V Norstar* [226].

148 *M/V Norstar* [226].

149 *M/V Norstar* [226].

150 'The Tribunal considers that the notions of the invalidity of claims of sovereignty over the high seas and of exclusive flag State jurisdiction on the high seas are inherent in the legal status of the high seas being open and free. When article 87 of the Convention is being interpreted, therefore, articles 89 and 92 of the Convention may be relied upon. The fact that Panama did not invoke article 92 in its Application does not bar the Tribunal from considering article 92 in determining whether article 87 of the Convention was breached in the present case': *M/V Norstar* [218].

151 *M/V Norstar* [222].

On the 'thorny issue of prescriptive jurisdiction'[152] the majority found that as 'exclusive flag State jurisdiction is an inherent component of the freedom of navigation' under Article 87 this prohibited the extension of prescriptive jurisdiction by other States 'to lawful activities conducted by foreign ships on the high seas.[153] They noted:

> The Tribunal, therefore, cannot accept Italy's arguments that article 87 is not concerned with territoriality or extraterritoriality but rather with interference with navigation and that extraterritoriality is not the test to assess a breach of article 87. On the contrary, if a State applies its criminal and customs laws to the high seas and criminalizes activities carried out by foreign ships thereon, it would constitute a breach of article 87 of the Convention, unless justified by the Convention or other international treaties. This would be so, even if the State refrained from enforcing those laws on the high seas.[154]

In a seven-strong 'vociferous'[155] dissent, Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin and Lijnzaad joined Judge Ad Hoc Treves in finding that Italy has not violated Article 87.[156] For the minority, Article 87(1) did not apply to the case, and would not have been breached regardless if it did apply.[157] The minority stated that 'Article 87 of the Convention protects the free movement of vessels primarily from the exercise of enforcement jurisdiction by non-flag States on the high seas'.[158] Enforcement action against the *Norstar* did not occur until it voluntarily entered the Internal waters of Spain.[159]

The minority argued that Italy had executed a form of territorial jurisdiction concerning the 'alleged crimes of tax evasion and smuggling which were considered under Italian law to have been committed on Italian territory'.[160] Despite not finding that the Italian prescription did target the activities of the *Norstar* on the high seas, the minority argued that even if this was incorrect, 'the conduct on the high seas was merely an element of the alleged crime which took place in Italian territory'.[161] In contrast to the majority, the minority accepted that a coastal State could extend its prescriptive criminal jurisdiction to conduct beyond its territory where an element of an alleged crime has occurred in its territory or where there is a sufficient connection to it.[162] This could include, where the an

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152 *M/V Norstar* [222]–[223].
153 *M/V Norstar* [225].
154 *M/V Norstar* [225].
155 C Miles, 'The MV "Norstar" Case (Panama v. Italy)' (2020) 114(1) American Journal of International Law 116, 116.
156 *M/V \Norstar"* (*Panama v Italy*) (Dissenting Opinion of Judges Cot, Pawlak, Yanai, Hoffmann, Kolodkin, Lijnzaad and Judge ad hoc Treves) 2018-2019 ITLOS Reports 10 [1].
157 Ibid [13].
158 Ibid [15].
159 Ibid [16].
160 'Italian law does not criminalize bunkering activities of foreign vessels on the high seas, and Italy never claimed that bunkering of mega yachts by the M/V "Norstar" on the high seas was unlawful under its own or international law': ibid [21] (footnotes omitted).
161 Ibid [33].
162 Ibid [31].

alleged crime originated within its territory; was completed in its territory; and least in some cases, when the alleged crime produces harmful effects in the State's territory.[163]

There was 'more than enough' of a connection between the alleged crime and Italy for Italy to exercise its prescriptive criminal jurisdiction under international law.[164] The minority cited Guilfoyle in support who argues that exclusive jurisdiction 'creates only a prohibition on exercising enforcement jurisdiction over foreign vessels on the high seas; multiple States may still attach legal consequences to acts committed on a vessel on the high seas as a matter of prescriptive jurisdiction'.[165] While 'Article 87 may also protect vessels on the high seas from the prescriptive jurisdiction of non-flag States':

> nothing in the text of the Convention, in its travaux préparatoires, in other international treaties, in customary international law, or in the practice of States suggests that article 87 and its corollary article 92 altogether excludes the right of non-flag States to exercise their prescriptive criminal jurisdiction with respect to activities on the high seas.[166]

The minority thus aligned with the position in the *SS Lotus*, a State may exercise prescriptive jurisdiction over the acts of a foreign flagged vessel on the high seas where it is not prohibited be international law from doing so.[167] The minority approach was a 'bold rebuke' to the majority and arguably went 'further than Italy's position itself required'.[168]

For Honniball, *Norstar* was a 'welcome contribution' building on the 'well-established case law to the effect that, unless an exception applies, non-flag state enforcement' on the high seas or in an EEZ may breach the high seas freedoms.[169] Despite this, he argues that the majority decision raises some issues. As the minority noted the majority approach 'would seem to suggest that a non-flag State is not excluded from extending, in conformity with international law, its prescriptive jurisdiction to the unlawful activities of foreign vessels or of persons on the high seas'.[170] For Collins this 'argument—as well as how it was applied in this case—is arguably at odds with a substantial body of opinion in the literature that flag state exclusivity extends only to enforcement activity occurring on the high seas'.[171]

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163 *M/V \Norstar"* (n 156) [31].

164 Ibid [33].

165 Guilfoyle, 'High Seas' (n 20) 700–701.

166 *M/V \Norstar"* (n 156) [19].

167 R Collins, 'The M/V "Norstar" Case (Panama v. Italy) (ITLOS)' (2019) 58(4) International Legal Materials 673, 674.

168 Collins notes that 'Italy's caution in this regard may well be explicable, however, given its position in the ongoing Enrica Lexie arbitration. Indeed, at the Preliminary Measures stage before ITLOS, Italy has argued inter alia that India's arrest and detention of two Italian marines for the unlawful killing of two Indian fishermen on board another vessel was an interference with its freedom of navigation and its exclusive flag state jurisdiction protected under Article 92': Collins (n 167) 675; see *The `Enrica Lexie' Incident, Provisional Measures* (*Italy v India*) (Order of 24 August 2015) 2015 ITLOS Reports 182 (*The `Enrica Lexie' Incident*) [39]–[40]; Honniball (n 142) 518.

169 AN Honniball, 'Freedom of Navigation Following the M/V 'Norstar' Case' [2019] The JCLOS Blog, 2.

170 *M/V \Norstar"* (n 156) [20].

171 Collins (n 167) 674 (footnotes omitted).

As a result, it is clear that the M/V *Norstar* decision would 'not be the last word on the thorny topic of the exclusivity of flag state jurisdiction for criminal acts occurring on the high seas'.[172] For Miles, the majority finding 'relied on an expansive understanding of flag state jurisdiction' as 'extending to prescriptive as well as enforcement jurisdiction.[173] He argues this position is an extreme one and represents a 'significant' and 'radical' expansion of flag state rights that 'will have a corresponding impact on the way that shipping is regulated internationally'.[174] For Miles, unless qualified, the 'undesirable' approach of the majority in *Norstar* was innovation at the 'expense of practicality' and 'will have a significant impact on the way that states regulate international shipping in the future'.[175]

The consequences of *Norstar* depend on what the ITLOS majority meant by 'lawful'.[176] It also depends on whether an exercise of prescriptive jurisdiction in these circumstances can be 'justified by the Convention or other international treaties'.[177] Does this require an express provision directly enabling the prescription in question? Or is there a broader scope for example for matters incidental to treaty powers? The majority[178] and minority[179] both accepted the general lawfulness of bunkering on the high seas. However, the majority appeared to accept the finding in the *Virginia G* that coastal States could exercise prescriptive jurisdiction over fishing vessels in the EEZ.[180] As that case stated, Article 58 when read together with Article 56, does not prevent coastal States from regulating bunkering of foreign vessels fishing in their EEZs.[181]

Other questions remain, is the majority holding confined to prescriptions of a criminal nature or does it extend to any State prescription including those relating to Marine Insurance law, contract law and even law of torts (or delict)? Does it also extend to an exercise of adjudicative jurisdiction[182] relating to events on the high seas even where for instance they would be justified by notions of party autonomy and private international law?[183] What about matters not dealt with by UNCLOS? It should be remembered that

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172 Ibid 675.

173 Miles (n 155) 116.

174 Ibid 116, 122–3.

175 Ibid 123.

176 *M/V Norstar* [225].

177 *M/V Norstar* [222].

178 *M/V Norstar* [219].

179 *M/V \Norstar"* (n 156) [29].

180 *M/V Norstar* [219]; *M/V Virginia G* [223].

181 This coastal State competence 'derives from the sovereign rights of coastal States to explore, exploit, conserve and manage natural resources': *M/V Virginia G* [222], [213]; see UNCLOS, arts 56, 58.

182 See, generally, A Mills, 'Rethinking Jurisdiction in International Law' (2014) 84(1) British Yearbook of International Law 187, 194–195.

183 'In relation to civil disputes, prescriptive and adjudicative jurisdiction are also addressed through rules of private international law, as discussed further below. Questions of jurisdiction in the public international law sense are implemented in private international law both through rules of 'jurisdiction' (in the domestic sense) – determining when a court will hear a case and thus exercise its prescriptive (and enforcement) powers – and through rules of 'choice of law' – determining which law should govern a dispute and thereby the scope of application of that law': ibid 196.

the UNCLOS preamble countenances 'matters not regulated by [UNCLOS] continue to be governed by the rules and principles of general international law'.[184] For Lagoni, this 'habitual formula' used in many treaties is 'more comprehensive' than 'international custom' as per Article 38(1)(b) of the Statute of the International Court of Justice.[185] Lagoni argues that whether a matter is regulated by UNCLOS is a question of 'interpretation of the relevant provisions of the Convention' in accordance with Articles 31 to 33 of the Vienna Convention on the Law of Treaties (VCLT).[186] Lagoni, the purpose of this entry in the preamble 'is to avoid lacunae in the law' and to 'complement the legal order for the seas and oceans envisaged' in the convention.[187]

Another noticeable modification made to *SS Lotus* by the consolidation of the law of the sea in the 1958 High Seas Convention and UNCLOS has been the restriction of flag State jurisdiction in 'matters of collision or any other incident of navigation'.[188] Article 97(1) of UNCLOS provides:

> **97 Penal jurisdiction in matters of collision or any other incident of navigation**
>
> (1) In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.
>
> (2) In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.
>
> (3) No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.[189]

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184 UNCLOS, (Preamble).

185 Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute) Article 38(1)(b).

186 'A non-regulated matter may also be a particular aspect of an issue which cannot be resolved by interpretation. A matter which is not regulated by the Convention, as e. g. the preservation of marine biodiversity or measures against maritime terrorism beyond the territorial sea, but regulated in other conventions or agreements is, of course, not subject to customary law if the respective convention or agreement applies between the relevant States Parties.': R Lagoni, 'Preamble' in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft mbH & Co KG 2017) 15–16; Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT) arts 31–33.

187 Lagoni notes 'one may ask whether the legal situation concerning the Convention would be different without Preamble 8. Despite the general assumption that redundancy of a rule cannot be presumed, the answer would be in the negative because the applicability of customary international law to a matter not regulated by the Convention would in itself rest upon a principle of general international law.': Lagoni (n 186) 16; As to this order envisaged, the preamble States that 'Recognizing the desirability of establishing through this Convention, with due regard for the sovereignty of all States, a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment': UNCLOS, (Preamble).

188 1958 High Seas Convention, art 11(1).

189 UNCLOS, art 97.

On 15 February 2012 Italian marines fired on a fishing boat off the Indian coast. They were part of a six-member vessel protection detachment (VPD) onboard the *Enrica Lexie* as it sailed from Singapore to Djibouti.[190] The shooting resulted in the deaths of two Indian fishermen. On 19 February 2012 Indian authorities boarded the vessel, arresting two of the marines suspected of being involved in the shooting, and seized weaponry on board the vessel. In subsequent judicial proceedings the Supreme Court of India dismissed the applicability of Article 97, finding that a deliberate discharge of firearms did not fall within the ambit of 'matters of collision or any other incident of navigation'.[191] Having found that Article 97 was not invoked, the court went on to apply the *SS Lotus* principle to find that India had jurisdiction over the incident and that crimes 'should be dealt with by the States whose social order is most closely affected'.[192]

2.4 Conclusion

This chapter has examined the allocation of responsibility to States under the law of the sea (and UNCLOS in particular). UNCLOS confers broad powers on flag States concerning prescriptive and enforcement jurisdiction. UNCLOS allows States to determine the criteria for registration of vessels. While Article 92 of UNCLOS appears to require a 'genuine link' between States and their flagged vessels, international courts and tribunals have not interpreted that phrase in a manner that restricts the ability of States to offer registration to vessels that have no real link to that State. For ITLOS, the purpose of the genuine link phrase is to secure the effective implementation of flag State duties. Despite this, this interpretation has not prevented the flagging of vessels by States lacking the resources or willingness (or both) to effectively implement their duties and take measures to ensure compliance by vessels with international legal norms. International shipping routinely uses open registries with little financial or proximate relationship to vessels, their owners and crew. While some inroads have been made in terms of port and coastal State enforcement, flag States remain the most important players in the monitoring and enforcement of international law on vessels on the High Seas and within the exclusive economic zones of other States.

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190 See *The `Enrica Lexie' Incident*.

191 *Italy v India* (2013) 4 SCC 721 (Supreme Court of India) 95, 100; Guilfoyle, 'The High Seas' (n 6) 219.

192 *Italy v India* (n 191) 98.

Chapter 3

Implications of the Flag State Model for Counterpiracy Activities

As Chapter 2 made clear flag States play a dominant role in the regulation of maritime activity. This is particularly so following the decision of Norstar which severely limited the scope of third States such as coastal States to concurrently regulate maritime activity where not otherwise prohibited by the United Nations Convention on the Law of the Sea (UNCLOS). This chapter will consider the implications of this model for the regulation of counterpiracy activities with a focus on flag State obligations, rules relating to the shipmaster's authority, human rights obligations and the regulation of firearms licensing.

3.1 Flag State Obligations Under UNCLOS

Article 94 sits at the very heart of flag State obligations in UNCLOS. It provides:

> **94 Duties of the flag State**
> (1) Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
> (2) In particular every State shall:
>
> (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and
> (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
>
> (3) Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, *inter alia*, to:
>
> (a) the construction, equipment and seaworthiness of ships;
> (b) the manning of ships, labour conditions and the training of crews, taking into

account the applicable international instruments;

(c) the use of signals, the maintenance of communications and the prevention of collisions.

(4) Such measures shall include those necessary to ensure:

(a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;

(b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

(c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

(5) In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

(6) A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

(7) Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.[1]

As Guilfoyle notes, the term 'administrative, technical and social matters' is 'not defined elsewhere in the Convention'.[2] He argues that the term 'should also be interpreted to include criminal jurisdiction generally, as a flag State must be able to effectively discipline seafarers in criminal cases' involving 'incidents of navigation'.[3]

Questions arise as to the subject matter scope of the Article 94 duties and whether they extend to the use and activities of privately contracted armed security personnel (PCASP). For example, Article 94(3)(b) refers to 'the manning of ships, labour conditions and the

[1] UN Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 94; cited in D Guilfoyle, 'Defending Individual Ships From Pirates' in C Chinkin and F Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 316.

[2] For Guilfoyle, it 'obviously extends, however, at least to such matters as are expressly provided for in the Convention concerning construction and seaworthiness, the crewing of vessels, and matters regarding communication and avoidance of collisions': Guilfoyle, 'Defending Individual Ships From Pirates' (n 1) 316 (footnote omitted).

[3] Guilfoyle, 'Defending Individual Ships From Pirates' (n 1) 316; see UNCLOS, art 97.

training of crews, taking into account the applicable international instruments' and could arguably extend to PCASP.[4] However, despite the potential limitations of Article 94(3)(b) it is important to note that the list of measures imposed on flag States by Article 94(3) is prefaced '*inter alia*'. Thus paragraphs (a)-(c) of Article 94(3) do not represent an exhaustive list of flag State requirements pertaining to what is 'necessary to ensure safety at sea'.

A similar situation exists with Article 94(4). The measures set out in paragraphs (a)-(b) of Article 94(4) are prefaced with 'shall include', suggesting the list is not an exclusive litany of the objectives that flag State measures shall seek to achieve.[5] It is unclear whether PCASP are included in the definition of 'manning' or 'crew' in terms of the language of Article 94. The Article 94(3) obligation notes that it is not limited to the considerations in Article 94(3)(a)-(c), and the wording of 'shall include' in Article 93(4) suggests that the Article 94(3)(a)-(c) measures are not exclusive.

However, 4(b) relates to the appropriateness of the qualifications and numbers of a ships 'crew'.[6] Further, 4(c) also uses the term 'crew' in relation to the requirement for training and observation of 'the applicable international regulations concerning the safety of life at sea'.[7] Seta argues for the potential inapplicability of Article 94(4) to PCASP.[8] For Seta, Article 94(4) 'sets out that the flag State shall take adequate measures to ensure safe navigation. The provision does not provide any specific rules on the use of PCASP on board at all'.[9] While it is true that Article 94(4) lacks specific rules targeted to the use of PCASP it is arguable that, as Article 94(4) does not set out an exclusive list of objectives that flag State measures pertaining to safety at sea required by Article 94(3), Article 94(3) can be extended to cover such requirements.

One problematic area which had been reported pre-MSC90 was the on-board categorisation of PCASP. The classification of PCASP as crew would create unintended consequences in terms of shipping safety conventions (in particular, crew number limitations) and the Maritime Labour Convention (MLC).[10] For example, the Marshall Islands registry states that PCASP 'shall be declared as supernumeraries, temporarily employed for a specific purpose other than the normal operation of the vessel'.[11] This practice of

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4 UNCLOS, art 94(3)(b).
5 UNCLOS, art 94(4).
6 UNCLOS, art 94(4)(b).
7 UNCLOS, art 94(4)(c).
8 M Seta, 'The Contribution of the International Organization for Standardization to Ocean Governance' (2019) 28(3) RECIEL 304, 309.
9 Ibid 309.
10 Maritime Labour Convention (adopted 23 February 2006, entered into force 2 July 2013) 2952 UNTS 7 (MLC).
11 'PCASP shall be declared as supernumeraries, temporarily employed for a specific purpose other than the normal operation of the vessel': Republic of the Marshall Islands, Use of Privately Contracted Armed Security Personnel (PCASP), Republic of the Marshall Islands, Marine Notice. No. 2-011-39, Rev 1/16

designating PCASP as supernumeraries rather than crew or passengers was also noted by the International Maritime Organization (IMO) Facilitation Committee (FAL) in 2011.[12]

The designation of PCASP as supernumeraries raises the question of whether this invokes State duties pursuant to UNCLOS Article 94(3)(b) relating to the 'manning of ships' and 'training of crews'.[13] It is questionable whether reference to crew includes PCASP. This could depend on how strict the definition of crew is. It should also be remembered that Article 94(3) is prefaced '*inter alia*', possibly suggesting a more expansive interpretation. Article 94(4)(c) is also of potential relevance as it concerns the extent to which 'officers' and 'crew' must be conversant with 'applicable international relations concerning the safety of life at sea'.[14] It is submitted that the wording of these provisions can extend to PCASP embarked as supernumeraries. As a result, this would give rise to the more specific safety of life at sea-related flag State duties.

3.2 Masters' Authority

A critical substantive objective of rulemaking in the context of maritime private maritime security companies (PMSCs) is reconciling the legal and practical implications of PCASP with the role of the shipmaster and other treaty-based shipping requirements.[15] The authority of a vessel's master sits at a critical crossroads between the public international law of the sea and maritime law. Commonly known as the captain, the shipmaster (or master) is a qualified seafarer in command of the ship.[16] The master is effectively *sui generis* in international law, acting as a key exception to the rules of international legal personality. The significance of the master in international law is echoed by Article 94 of UNCLOS, which requires that flag States 'take such measures for ships flying its flag as are necessary to ensure safety at sea', including those necessary to ensure each ship is in the charge of an appropriately qualified master that is:

> fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution.[17]

(2016) [7.1].

12 'The Committee noted the information regarding the practice of categorizing PCASP as supernumeraries, and agreed to forward it to the Correspondence Group on General review of the Convention, including harmonization with other international instruments': Report of the Facilitation Committee on its Thirty-Seventh Session, IMO FAL (19 September 2011) IMO Doc FAL 37/17 [4.41], [8.33].

13 UNCLOS, art 94(3)(b).

14 UNCLOS, art 94(4)(c).

15 See, generally, S Nandan and S Rosenne, *The United Nations Convention on the Law of the Sea 1982: A Commentary, Volume III* (M Nordquist and others eds, Martinus Nijhoff 1993) 145–146; cited by D Guilfoyle, 'High Seas' in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft mbH & Co KG 2017) 711.

16 J Cartner, R Fiske, and T Leiter, *International Law of the Shipmaster* (Informa Law 2009) [1.0].

17 UNCLOS, art 94.

The overarching power and responsibility of the master is emphasised by Article 34-1 of the Safety of Life at Sea Convention (SOLAS).[18] This provides that:

> The owner, the charterer, the company operating the ship as defined in regulation IX/1, or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgement, is necessary for safety of life at sea and protection of the marine environment.[19]

The SOLAS provision is also reflected in several maritime safety and environment protection conventions including the International Ship and Port Facility Security Code (ISPS Code)[20] and the International Safety Management Code (ISM Code).[21] The integrity of the master's role is central to commercial shipping and insurance arrangements. Any deviation from the requirements imposed by international law may breach contractual terms, undermine insurance coverage and even render these arrangements null and void by operation of the doctrine of illegality. Many early PCASP contracts were drafted by PMSCs with little regard to the master's authority. Many used or were feared to use RUFs that would purport to put the PCASP team leader in control of a vessel during an actual or perceived attack. This potential departure from the international, domestic and commercial framework of commercial shipping was enough to cause concern among shipowners, insurers and protection and indemnity (P&I) clubs. A vessel that allowed, or contracted to allow, the displacement of the master's authority could be deprived of its insurance, P&I coverage and be subject to civil and criminal liability.

3.3 The Use of Force and the Right to Life

The resort to self-defence by States has been described as an 'absolute right, in as much as no law can disregard it'.[22] Despite this, international law scholars reject a treaty or customary international law basis for personal self-defence.[23] Hessbruegge argues that the personal right to self-defence under international law is best characterised as an individual right *sui generis* that survived the creation of the Westphalian State.[24] He states:

> Even though international law recognizes an individual right to self-defense as a general principle of law, this right does not amount to a human right in and of itself. The right to self-defense and human rights may share roots in natural law, but they are ultimately of a different nature and have different functions. The right

[18] International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS) art 34(1).
[19] SOLAS, art 34(1).
[20] MSWG, International Ship and Port Facility Security Code, Diplomatic Conference of the IMO [2002].
[21] The International Safety Management Code, IMO Assembly [1993].
[22] H Lauterpacht, *The Function of Law in the International Community* (OUP 1933) 188.
[23] J Hessbruegge, *Human Rights and Personal Self-Defense in International Law* (OUP 2017) 17–22.
[24] Ibid 89.

> to self-defense is a genuinely pre-societal right that evolved in the *absence* of the state. It survived the formation of the state because no state will ever have *enough power* to perfectly protect individuals. Conversely, human rights evolved in response to the overbearing presence of the state and serve primarily to ensure that states do not accumulate *too much power*.[25]

In relation to the applicable legal regime, as non-State actors acting outside an armed conflict context, there is no basis for the application of International Humanitarian Law (IHL) norms to the use of force by PCASP on merchant ships.[26] There is the problem of characterising armed violence off the coast of Somalia as an 'armed conflict'.[27] Despite this however, there are a number of other legal regimes such as human rights law that may apply to the use of force by PCASP. The applicability of international human rights law to the use of force by non-State actors has been the subject of academic discussion in both on-land and at-sea contexts.[28]

Flag states are subject to international human rights law.[29] The right to life has been described as 'the supreme right of the human being'.[30] The right to life is recognised by the Universal Declaration of Human Rights (UDHR),[31] the International Covenant on Civil and Political Rights (ICCPR),[32] the European Convention on Human Rights and Fundamental Rights (ECHR),[33] the American Convention on Human Rights (ACHR)[34]

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[25] 'Unlike human rights, self-defense does not additionally incorporate a vision to transform the state. It can accommodate any type of state, including authoritarian states that fail to respect human rights': Hessbruegge (n 23) 89.

[26] J Schechinger, 'Responsibility for Human Rights Violations Arising from the Use of Privately Contracted Armed Security Personnel against Piracy. Re-Emphasizing the Primary Role and Obligations of Flag States' in *What's Wrong with International Law?* (Brill 2015).

[27] A Priddy, 'The Use of Weapons in Counterpiracy Operations' in S Casey-Maslen (ed), *Weapons Under International Human Rights Law* (CUP 2014) 134–5: for Priddy although 'the issue is potentially contentious given claims, occasionally made, as to the links between pirate groups and al-Shabaab, and despite the fact that Somali pirates are often relatively heavily armed and well organised, the present author believes that they do not constitute an armed group with a sufficient nexus to the Somali conflict to be deemed a party to that conflict. Having concluded that IHL is not applicable in the present context, it follows that actions taken to counter piracy must occur under the international law of law enforcement' (footnotes omitted).

[28] See Geneva Academy of International Humanitarian Law and Human Rights, Counterpiracy Under International Law (August 2012).

[29] Schechinger (n 26) 40.

[30] N Jayawickrama, 'The Right to Life' in *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence* (2nd edn, CUP 2017) 210; citing Human Rights Committee, CCPR General Comment No. 6: Article 6 (Right to Life), Human Rights Committee (30 April 1982) UN Doc HRI/GEN/1/Rev.1.

[31] 'Everyone has the right to life ...': Universal Declaration of Human Rights (adopted 10 December 1948, entered into force 10 December 1948) 217 UNGA Res (UDHR) art 3.

[32] International Covenant on Civil and Political Rights (adopted 16 October 1966, entered into force 23 March 1976) Resolution 2200A (XXI) UNGA Res (ICCPR) art 6.

[33] Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, as amended by Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 27 May 2009, entered into force 1 September 2009) CETS No 204 (ECHR) art 2.

[34] 'Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life': American Convention on Human Rights (signed 22 November 1969, entered into force 18 July 1978) (ACHR) art 4(1).

and the African Charter on Human and Peoples' Rights (ACHPR).[35] Article 6 of the ICCPR states that:

> **6 International Covenant on Civil and Political Rights (ICCPR)**
> (1) Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
> (2) In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.
> (3) When deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.
> (4) Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.
> (5) Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.
> (6) Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.[36]

The right in Article 6 of the ICCPR extends to '[e]very human being'[37] and no distinction is drawn between a State's nationals and non-citizens.[38] Article 6 also refers to the '*inherent* right to life'.[39] The use of 'inherent' here is to emphasise the 'supreme character' of the right to life as an inherent as part of humanity rather than something conferred on individuals by the State.[40] For Jayawickrama:

> It follows, therefore, that one's right to life cannot be taken away by the state or waived, surrendered or renounced by the person involved, since a human being cannot be divested, nor can he divest himself, of his humanity.[41]

The extraterritorial invocation of the right to life in Article 6 is subject to the jurisdictional trigger in Article 2 of the ICCPR. Article 2 provides that ICCPR obligations are owed by State parties to individuals 'within that State Party's territory *and* subject to its

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35 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right': African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986), art 4.

36 ICCPR, art 6.

37 ICCPR, art 6(1).

38 Jayawickrama (n 30) 214.

39 Emphasis added ICCPR, art 6(1).

40 Jayawickrama (n 30) 226; citing Draft International Covenants on Human Rights: report of the 3rd Committee : Rapporteur: Mr. Carlos Manuel Cox (Peru), UNGA (5 December 1957) UN Doc A/3764 [112]; CCPR General Comment No. 6: Article 6 (Right to Life) (n 30).

41 Jayawickrama (n 30) 226.

jurisdiction'.[42] Article 2 of the ICCPR states:

> **2 International Covenant on Civil and Political Rights (ICCPR)**
>
> (1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> (2) Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
>
> (3) Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.[43]

Despite this the United Nations Human Rights Committee (UNHR Committee) takes a broader approach to the question of jurisdiction. As the General Comment states:

> the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained...[44]

Thus for the UNHR Committee, the threshold question of jurisdiction can be invoked with regard to individuals outside a State's territory where they are subject to the State's power *or* effective control.[45] Where this is the case, Article 2 of the ICCPR 'requires that States Parties adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations'.[46] As the UNHR Committee noted in General Comment Number 31:

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42 Emphasis in original Priddy (n 27) 136; citing ICCPR, art 2.

43 ICCPR, art 2.

44 Human Rights Committee, General Comment 31 [80], Human Rights Committee (29 March 2004) UN Doc CCPR/C/Rev.1/Add.13 [10].

45 General Comment 31 [80] (n 44) [10]; cited in Priddy (n 27) 136.

46 General Comment 31 [80] (n 44) [7].

> The legal obligation under article 2, paragraph 1, is both negative and positive in nature. States Parties must refrain from violation of the rights recognized by the Covenant, and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.[47]

States must therefore take appropriate steps to 'safeguard the lives of those within its jurisdiction'.[48] The jurisdictional threshold is particularly important in the context of non-State actors. Where it is met, the right to life requires States to also 'protect the right from infringement by third parties'.[49] As the UNHR Committee have argued:

> the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.[50]

It follows that human rights violations by non-State actors may 'trigger a State's legal responsibility' where a State fails to act with 'due diligence in preventing and punishing' a non-State actor.[51] As the UNHR Committee noted, this includes where a State fails to 'take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities'.[52]

The ECHR[53] is another significant instrument with consequences for European States.[54] Article 2 of the ECHR provides:

> **2 Right to life**
>
> (1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> (2) Deprivation of life 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:
>
> (a) in defence of any person from unlawful violence;

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47 Ibid [6].

48 Jayawickrama (n 30) 228; citing Draft International Covenants on Human Rights, Annotation, UNGA (1 July 1955) UN Doc A/2929, ch VI s4.

49 D Shelton and A Gould, 'Positive and Negative Obligations' in D Shelton (ed), *The Oxford Handbook of International Human Rights Law* (OUP 2013) 562.

50 General Comment 31 [80] (n 44) [8].

51 T Koivurova, 'Due Diligence' (*Max Planck Encyclopedia of Public International Law*, November 2010) ⟨https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034?prd=OPIL⟩ accessed 9 November 2019, 33.

52 General Comment 31 [80] (n 44) [8].

53 ECHR.

54 Priddy (n 27) 136; Schechinger (n 26) 40–1.

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.[55]

The ECHR requires State parties to secure ECHR rights for individuals within that State party's jurisdiction.[56] There are two main bases for the establishment of jurisdiction under the ECHR: personal jurisdiction and geographical jurisdiction.[57] Geographical jurisdiction concerns the exercise of effective control by military forces of a State over extraterritorial areas. Personal jurisdiction occurs where the State exercises 'effective control over foreign territory' or where an individual 'comes under the authority and control of State agents acting extraterritorially'.[58] In cases concerning State jurisdiction over flagged vessels under ECHR 'it has become common simply to refer to the extra-territorial power exercised ... aboard flagged ships and aircraft as clear cases where there is jurisdiction over persons therein'.[59]

A broader precedent was set out in *Gray v Germany*.[60] This concerned the conduct of a German doctor in the UK whose alleged negligence resulted in the death of a patient. In *Gray v Germany*,[61] despite the German government lacking any control over UK territory and individuals within UK territory the duty to investigate was still enlivened by the subsequent return of the doctor to Germany. The result of this is that *Gray* significantly widened the circumstances that could give rise to a State's duty to investigate violations of the right to life.[62] It has been argued by maritime and insurance law practitioners within the UK that:

> Nevertheless, the potential scope of Gray is broad and States Parties might find themselves obliged to investigate potential breaches of the ECHR at sea, whether in international waters or the territorial sea of a foreign State.[63]

The right to life under the ICCPR and ECHR gives rise to a number of positive and negative obligations.[64] For example, when examining the right to life, the negative component of the State obligation prevents State interference with the exercise of the right.[65] In addition, the positive component requires that States 'take action' through 'affirmative

55 ECHR, art 2.
56 D Guilfoyle, 'Human Rights Issues and Non-Flag State Boarding of Suspect Ships in International Waters' in C Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff 2011) 87.
57 Priddy (n 27) 137.
58 Footnotes omitted Guilfoyle, 'Human Rights Issues and Non-Flag State Boarding of Suspect Ships in International Waters' (n 56) 87.
59 Ibid 88 (footnote omitted).
60 *Gray v Germany* App no 49278/09 (ECtHR, 22 May 2014) (*Gray*).
61 *Gray*.
62 Stephenson Harwood and Human Rights at Sea, The Increasing Scope of the Obligation to Investigate Human Rights Abuses at Sea (13 February 2015) 3.
63 Ibid 3.
64 Schechinger (n 26) 40; Shelton and Gould (n 49) 562.
65 Shelton and Gould (n 49) 563.

steps to ensure rights protections'.[66] While the precise content of the duty is difficult to ascertain,[67] it has been argued that the due diligence requirement requires, at a minimum, the mandatory reporting and investigation of excessive uses of force by PCASP and the provision of rules as to the use of force by PCASP.[68] For Jayawickrama, States must have in place legal frameworks that include, *inter alia*, procedures, penalties, reporting, monitoring and enforcement mechanisms 'which will, to the extent reasonably practicable, deter the commission of offences against the person and thereby protect life'.[69]

There is a growing consensus that the State obligation to respect the right to life,[70] flag States must investigate alleged violations of the right to life that result from the embarkation of PCASP on flagged vessels.[71] For Schechinger:

> In view of this, it can be concluded that flag states have an obligation under international human rights law to adequately respond to an incident involving alleged human rights abuses by PCASP. Flag states are required to have their domestic authorities conduct a prompt, comprehensive, effective and impartial investigation into violations that allegedly occurred, involving the (disproportionate) use of (lethal) force by PCASP against suspected pirates at sea. Whenever a violation has taken place, the perpetrators must be held to account. However, in practice some difficulties might arise as a consequence of the transnational nature of PCASP operating at sea.[72]

In terms of the obligation to investigate, the form of the investigation needed will be informed by the particular circumstances.[73] The investigation should be impartial and independent, should not take unreasonably long, and be thorough and subject to a degree of public scrutiny.[74] The 'essential purpose' of these investigations 'is to secure the effective implementation of the domestic laws which protect the right to life'.[75] Echoing the language of due diligence, Jayawickrama argues that an investigation into violations of the right to life must be 'effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances, and to the identification and punishment of those responsible'.[76] Jayawickrama notes:

> This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident,

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66 Ibid 562–3.

67 R Barnes, 'Flag States' in A Elferink and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015).

68 Priddy (n 27) 134.

69 citations omitted Jayawickrama (n 30) 228; see also *Osman v UK* ECHR 1998–VIII 3124 .

70 See ICCPR, art 2; see also ECHR, art 2.

71 In the context of the ECHR, see e.g. *Osman v Turkey* ECHR ; *El-Masri v Macedonia* ECHR 2009 ; cited by Schechinger (n 26) 42.

72 Schechinger (n 26) 42.

73 Jayawickrama (n 30) 231.

74 The 'degree of public scrutiny required may vary from case to case': ibid 232–3.

75 Ibid 231.

76 Ibid 231.

> including, *inter alia*, eye-witness testimony, forensic evidence and, where appropriate, an autopsy providing a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.[77]

Arguably, when considering the duty to investigate as part of a set of other State requirements meant to deter the use of lethal force, it is possible to extrapolate the State duty to investigate arising out of Article 6 to instances of threatened or attempted use of lethal force, even where that threatened or attempted use of force does not result in any death *per se*. For Schechinger, for the obligation to investigate violations of the right to life to be triggered a jurisdictional link must exist.[78] This is arguably the case where a flag State failed to investigate the use of force involving one of its flagged vessels.[79] For Schechinger:

> This is because a flag state has exclusive prescriptive, enforcement and adjudicatory jurisdiction concerning PCASP on board, and the wrongful act that originated from the flag state's vessel.[80]

As Schechinger argues, State responsibility is less likely to be established on the basis of a flag State failing to prevent human rights violations by PCASP at sea than it is from 'failing to adequately investigate when harm occurred *ex post facto*'.[81]

The right to life also gives rise to a flag State duty to have a sufficient regulatory framework in place. Schechinger argues that by combining flag State obligations concerning human rights protection and the law of the sea:

> the conclusion may be drawn that when a flag state allows PCASP on board its vessels without enacting legislation to regulate their activities, a flag state is by default responsible for failing to exercise the required measure of due diligence when human rights violations are committed by PCASP.[82]

Another issue is the extent to which positive obligations are qualified by contextual considerations. They must be read with regard to 'difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources'.[83] In this sense obligations arising from the right to life should not impose unreasonable or disproportionate burdens on States.[84] In *Osman v UK*[85] the European Court of Human Rights (ECtHR) found that, in certain well-

77 Citations Omitted Jayawickrama (n 30) 231–2.
78 Schechinger (n 26) 41.
79 Ibid 44, 47.
80 Ibid 42.
81 Ibid 43.
82 at fn 67 'Although a flag state may be responsible for failing its positive obligation of safeguarding the right to life, which, as noted, includes a duty to prevent harm being inflicted by a private actor. Consequently, a flag state is required to have a legislative framework in place to regulate the activities of PCASP, and enforce its legislation': ibid 44,47.
83 citations omitted Jayawickrama (n 30) 230.
84 *Tanribilir v Turkey* App no 21422/93 (ECtHR, 16 November 2000).
85 *Osman v UK* (n 69).

defined circumstances, the right to life obligation in Article 2 of the ECHR[86] imposes a positive obligation on member States to take preventative operational measures to protect individuals whose lives are at risk from the criminal acts of other individuals.[87] Despite this, the Court qualified the obligation, stating that:

> For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.[88]

The Court noted that 'not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising'.[89]

The increased embarkation of PCASP on commercial ships results in an obligation being imposed upon States to 'regulate their activities effectively'.[90] Flag States should have in place 'legislative and administrative frameworks to regulate PMSCs' actions and ensure accountability where they are permitted to operate on a state's flagged vessels'.[91] It is critical that this should set out circumstances under which armed guards may be embarked on vessels and 'when and how' weapons may lawfully be used.[92]

For Percy, '[w]hether or not the bare minimum is sufficient to regulate an industry that has significant lethal potential is questionable',[93] and given the potential for use of lethal force reliance on self-regulation is also questionable.[94] Guilfoyle argues that mere compliance with IMO recommendations is not enough, stating:

> Neither formal compliance with the IMO Recommendations nor reliance on self-regulation will likely be enough to discharge any duty of due diligence. The key will be effective monitoring and enforcement. Weaknesses of flag State supervision is an acknowledged reality in matters such as fisheries management, and, if oversight of PCASP is no better, this could be deeply worrying.[95]

Guilfoyle notes that IMO recommendations are not a substitute for State regulation, but 'simply point the way towards States devising effective regulatory systems of their own'.[96]

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86 ECHR, art 2.

87 *Osman v UK* (n 69) [115]; Guide on Article 2 of the European Convention on Human Rights: Right to life (30 April 2020) 15; Schechinger (n 26) 40.

88 *Osman v UK* (n 69) [116].

89 Ibid [116].

90 S Casey-Maslen and A Priddy, 'Counter-Piracy Operations by Private Maritime Security Contractors Key Legal Issues and Challenges' (2012) 10 J of Int'l Criminal Justice 839, 842 (footnote omitted); citing Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN HRC (21 March 2011) UN Doc A/HRC/17/31 (UNGPs).

91 Casey-Maslen and Priddy (n 90) 842 (footnote omitted).

92 Ibid 842 (footnote omitted).

93 S Percy, 'Private Security Companies and Civil Wars' (2009) 11(1) Civil Wars 57, 955.

94 Guilfoyle, 'Defending Individual Ships From Pirates' (n 1); citing Percy (n 93) 955.

95 Guilfoyle, 'Defending Individual Ships From Pirates' (n 1) 321.

96 'They represent little more than a bare minimum supplemented by industry self-regulation': ibid 321.

Guilfoyle considers the potential relevance of international minimum standards partly influenced by private contributions but also their limitations.[97] He notes that the International Court of Justice (ICJ) and International Tribunal for the Law of the Sea (ITLOS) define 'an obligation to act with due diligence' as involving 'an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators'.[98] For Guilfoyle, 'This makes the obvious point that due diligence involves not only identifying the risks that may be posed by "private operators" and taking appropriate steps (including implementing any relevant international minimum standards) but also monitoring those private operators with an appropriate degree of vigilance'.[99] Reliance on a 'general framework' is not enough, and 'more specific regulation and guidance is urgently needed, especially with respect to the use of force and firearms'.[100]

3.4 Flag States and Due Diligence

The doctrine of due diligence provides a promising solution to the potential for human rights abuses by non-State actors on foreign flagged vessels.[101] Due diligence reflects the practical impunity that non-State actors may enjoy given a flag State's '*failure* to act'.[102]

The nature of due diligence obligations turns on the conduct expected of flag States as opposed to the results.[103] This is based on a failure of States to exercise due diligence to ensure that activities within their jurisdiction or control do not cause harm to other States.[104]

Due diligence sets out a connection between State and non-State entities that embodies a benchmark standard of conduct.[105] The law of negligence provides a useful analogy

97 Guilfoyle, 'Defending Individual Ships From Pirates' (n 1) 321.

98 Footnotes omitted *Case Concerning Pulp Mills on the River Uruguay* (Judgment) [2010] ICJ Reports 14 [197]; cited in *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion of 1 February 2011) (2011) 2011 ITLOS Reports 10, 115; cited by Guilfoyle, 'Defending Individual Ships From Pirates' (n 1) 321.

99 Guilfoyle, 'Defending Individual Ships From Pirates' (n 1) 321.

100 Casey-Maslen and Priddy (n 90) 842–3 (footnote omitted).

101 N White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs' (2012) 31 Crim Just Ethics 233.

102 Emphasis in original F Azizi and S Marks, 'Responsibility for Violations of Human Rights Obligations: International Mechanism' in J Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 729.

103 S Heathcote, 'State Omissions and Due Diligence: Aspects of Fault, Damage and Contribution to Injury in the Law of State Responsibility' in K Bannelier, T Christakis, and S Heathcote (eds), *The ICJ and the Evolution of International Law* (Routledge 2012) 308; cited by White (n 101) 243.

104 *Corfu Channel Case* (*United Kingdom v Albania*) (Merits) (1949) 1949 ICJ Reports 4.

105 'The standard of *diligens paterfamilias* influenced the development of the tort of negligence in many legal systems. The tort of negligence has common elements across different legal systems – duty, breach, caus-

here. Where, in negligence, a duty of care is established, a defendant is obliged to take reasonable care in any given circumstances. This evaluation of a standard of care turns on the comparison between the conduct of a defendant and a hypothesised benchmark based on what may be considered reasonable care in the circumstances.[106]

The due diligence principle received some early discussion in the *Alabama claims of the United States of America against Great Britain* (*United States v Britain*),[107] concerning interpretation of the Treaty of Washington.[108] In *SS Lotus* (*France v Turkey*),[109] in a dissenting opinion, Judge Moore acknowledged the 'well settled' obligation of a State to 'use due diligence to prevent the commission within its dominions of criminal acts against another nation or its people'.[110] In the *Corfu Channel Case* (*United Kingdom v Albania*)[111] the ICJ acknowledged 'every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[112] The ICJ further commented in the *Legality of the Threat or Use of Nuclear Weapons*,[113] stating that the 'existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment'.[114] The ICJ endorsed the *Legality of the Threat or Use of Nuclear Weapons*,[115] and the *Corfu Channel Case* (*United Kingdom v Albania*),[116] as well as decisions in the *Case Concerning Pulp Mills on the River Uruguay*.[117] In the *Case Concerning Pulp Mills on the River Uruguay*,[118] Article 41 of the Statute of the River Uruguay[119] provided that:

> **41 Statute of the River Uruguay**
> Without prejudice to the functions assigned to the Commission in this respect, the Parties undertake:

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ation and harm – although they are often classified differently. In determining whether a defendant has been negligent, the central question is whether the defendant has met a standard of expected conduct'. (Footnotes omitted) J Bonnitcha and R McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) 28 EJIL 899, 903.

106 Heathcote (n 103) 308; cited by White (n 101) 243.

107 *Alabama claims of the United States of America against Great Britain* (*United States v Britain*) (Award of September 14 1872) (1872) XXIX RIAA 122.

108 Treaty of Washington (signed 8 May 1871, entered into force 17 May 1871) 17 Stat 863.

109 *SS Lotus* (*France v Turkey*) (Judgment) 1927 PCIJ Series A no 10 (*SS Lotus*).

110 *SS Lotus* (*France v Turkey*) (Dissenting Opinion by Mr. Moore) 1927 PCIJ Series A 87, 88; D French and T Stephens, *ILA Study Group on Due Diligence in International Law, First Report* (ILA Study Group Report, International Law Association 2014) 2.

111 *Corfu Channel Case* (n 104).

112 Ibid 22.

113 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Reports 2.

114 Ibid 29.

115 Ibid.

116 *Corfu Channel Case* (n 104).

117 *Case Concerning Pulp Mills on the River Uruguay* (n 98).

118 Ibid.

119 Statute of the River Uruguay (signed 26 February 1975, entered into force 18 September 1976) 1295 UNTS 340.

(a) To protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies;
(b) Not to reduce in their respective legal systems:
    (1) The technical requirements in force for preventing water pollution, and
    (2) The severity of the penalties established for violations;
(c) To inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems[120]

The ICJ sought to interpret the obligations under Article 41(a) by reference to whether it could be established that a State party had 'failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction'.[121] For the ICJ the application of a due diligence standard had 'the advantage of ensuring that the rules and measures adopted by the parties both have to conform to applicable international agreements and to take account of internationally agreed technical standards'.[122] The decision revealed a willingness on behalf of the court to imply due diligence as the relevant mechanism for establishing State responsibility where it would not otherwise undermine the content of the obligation. Further, the approach demonstrates a willingness on behalf of the international judiciary to further the ongoing jurisprudence on due diligence as a mechanism for establishing State accountability in international law, both treaty and custom.

Due diligence was the subject of a study group report by the International Law Association (ILA). The study group was established to 'consider the extent to which there is a commonality of understanding between the distinctive areas of international law in which the concept of due diligence is applied'.[123] As the report of the study group noted:

> at its heart, due diligence is concerned with supplying a standard of care against which fault can be assessed. It is standard of reasonableness, of reasonable care of, that seeks to take account of the circumstances of wrongful conduct the extent to which such consequences could feasibly have been avoided by the state or which international organisation that either commissioned the relevant act or which omitted to prevent its occurrence. We should be seen against the backdrop of general approaches to accountability and international law.[124]

The study group noted that the principle of due diligence is core to many different areas

120 Statute of the River Uruguay (n 119) art 41.

121 The ICJ added that the 'obligation of due diligence under Article 41 (a) in the adoption and enforcement of appropriate rules and measures is further reinforced by the requirement that such rules and measures must be "in accordance with applicable international agreements" and "in keeping, where relevant, with the guidelines and recommendations of international technical bodies"': *Case Concerning Pulp Mills on the River Uruguay* (n 98) [197].

122 Ibid [197].

123 D French and T Stephens, *ILA Study Group on Due Diligence in International Law, Second Report* (ILA Study Group Report, International Law Association 2016) 1.

124 Ibid 2.

of public international law. They attributed this primarily to the lack of uniformity in the standard of conduct expected of states and international organisations in discharging their obligations in international law. Due diligence is a principle that preserves for States 'a significant measure of autonomy and flexibility in discharging their international obligations'.[125] A more rigid up application of the rules of public international law that either mandated particular results or imposed stricter penalties for any breach of international law would cut 'against the grain of notions of state sovereignty and domains of noninterference'.[126] Due diligence assist in making public international law adaptable to the 'particular needs of states within a diverse international community'.[127]

In exercising rights of freedom of navigation on the high seas States must, pursuant to Article 87 of UNCLOS, 'have due regard for the interests of other States in their exercise of the freedom of the high seas'.[128] It provides:

> **87 Freedom of the high seas**
> (1) The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:
>
> (a) freedom of navigation;
> (b) freedom of overflight...
>
> (2) These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.[129]

For Guilfoyle, the obligations set out in Article 87 could, on their own, 'sustain a finding that a due diligence obligation exists regarding activities conducted aboard a vessel under a flag State's jurisdiction'.[130] Guilfoyle argues that, taken together, the duties in articles 87, 94 and 97:

> suggest that if PCASP embarked on a vessel wrongfully injure foreign nationals or a foreign vessel, the flag State may risk incurring international responsibility. As above, this would not be vicarious liability for the acts of the PCASP themselves. Nonetheless, liability could arise from a failure of 'due diligence', such as a failure to take the minimum necessary steps to have an adequate regulatory regime in place governing PCASP and their acts.[131]

Due diligence has featured prominently in three recent decisions of ITLOS. In the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities*

[125] Ibid 2.
[126] Ibid 2.
[127] Ibid 2.
[128] UNCLOS, art 87(2); cited in Guilfoyle, 'Defending Individual Ships From Pirates' (n 1) 316.
[129] UNCLOS, art 87.
[130] Guilfoyle, 'Defending Individual Ships From Pirates' (n 1) 316.
[131] Ibid 316–7.

in the Area[132] ITLOS considered the expression 'to ensure' as 'often used in international legal instruments' as referring to obligations 'in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law'.[133] For ITLOS, the requirement of a State 'to ensure' concerns the 'obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result'.[134] It is an obligation of appropriate conduct, as opposed to actual results of States, and is thus an 'obligation of "due diligence"'.[135] Approving of the ICJ decision in the *Case Concerning Pulp Mills on the River Uruguay*,[136] ITLOS stated that:

> The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity. As regards activities in the Area, it seems reasonable to state that prospecting is, generally speaking, less risky than exploration activities which, in turn, entail less risk than exploitation. ... The standard of due diligence has to be more severe for the riskier activities.[137]

For Schechinger, applying this reasoning to PCASP, 'it can be argued that the standard of due diligence needs to be set high'.[138] However, this must be weighed against the limitations of State control over acts that occur on the high seas.[139] She states:

> A state's capacity to *de facto* control the conduct of private actors may depend on the maritime zone involved and the resources of a flag state, but in any case differs

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132 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 98).

133 Ibid 112.

134 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 98) 110; The tribunal also affirmed the work of the International Law Commission (ILC) in its Commentary to article 3 of its Articles on Prevention of Transboundary Harm from Hazardous Activities: 'The obligation of the State of origin to take preventive or minimization measures is one of due diligence. It is the conduct of the State of origin that will determine whether the State has complied with its obligation under the present articles. The duty of due diligence involved, however, is not intended to guarantee that significant harm be totally prevented, if it is not possible to do so. In that eventuality, the State of origin is required ... to exert its best possible efforts to minimize the risk. In this sense, it does not guarantee that the harm would not occur': Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, ILC [2011] [3].

135 For ITLOS, the 'notions of obligations "of due diligence" and obligations "of conduct" are connected'. See *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 98) 110–3; citing UNCLOS, art 194(2).

136 *Case Concerning Pulp Mills on the River Uruguay* (n 98).

137 *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (n 98) 117.

138 Schechinger (n 26) 43.

139 'However, control of a state over acts of private individuals within its jurisdiction, and the ability to properly enforce its laws, is more limited when it comes to acts that occur on the high seas, particularly given its vast area': ibid 43.

> from what can be expected from a state on land territory. This is important for determining the level of due diligence that can be required from flag states in relation to PCASP. A flag state can hardly be expected to patrol the high seas in order to physically monitor all vessels flying its flag in search of human rights violations.[140]

The *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*[141] looked at flag State obligations both generally under UNCLOS and specifically in respect of illegal, unreported and unregulated (IUU) fishing. ITLOS reasoned that the 'liability of the flag State arises from its failure to comply with its "due diligence" obligations concerning IUU fishing activities conducted by vessels flying its flag in the exclusive economic zones of the Sub-Regional Fisheries Commission (SRFC) Member States'.[142]

> However, the flag State is not liable if it has taken all necessary and appropriate measures to meet its "due diligence" obligations to ensure that vessels flying its flag do not conduct IUU fishing activities in the exclusive economic zones of the SRFC Member States ... Breach 'of "due diligence" obligations of a flag State arises if it has not taken all necessary and appropriate measures to meet its obligations to ensure that vessels flying its flag do not conduct IUU fishing activities.[143]

For ITLOS, 'the frequency of IUU fishing activities by vessels in the exclusive economic zones of the SRFC Member States is not relevant to the issue as to whether there is a breach of "due diligence" obligations by the flag State'.[144] The ongoing development and application of the due diligence mechanism suggests a broader remit in future. It is submitted that due diligence is well-suited to other aspects of flag State responsibility outside the environmental protection context. Due diligence offers a useful tool for reconciling State responsibility with respect to human rights abuses committed by third parties and the content of flag State obligations as set out in Article 94 of UNCLOS.

The South China Sea Arbitration (*Philippines v China*)[145] provided an indication that due diligence-based principles are growing in importance in the interpretation and extrapolation of general principles of flag State responsibility, as opposed to just being confined to discrete topics such as marine environmental protection. ITLOS followed the approach of the *SRFC* case in finding that State due diligence obligations extended to 'entities of their nationality and under their control'.[146] As subsequent discussion of the award suggests, the 'obligation

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140 Ibid 143.

141 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion) 2015 ITLOS Reports 4 (*SRFC Advisory Opinion*).

142 *SRFC Advisory Opinion* [146].

143 *SRFC Advisory Opinion* [148]–[50].

144 *SRFC Advisory Opinion* [150].

145 *The South China Sea Arbitration* (*Philippines v China*) (Award of 12 July 2016) 2016 PCA.

146 *The South China Sea Arbitration* (n 145) 126; citing *SRFC Advisory Opinion* [108]; cited in J Hebert, 'The South China Sea Arbitration Award and its Widespread Implications Notes' (2018) 19 Or Rev Int Law 289, 733.

is a corollary' of Article 94(1) of UNCLOS, requiring flag States to effectively exercise jurisdiction and control over ships flying their flag for all administrative, technical and social matters.[147]

3.5 Firearms and Maritime Security Policy

Prior to *Norstar* it seemed that the use of force by armed guards could potentially be adjudged pursuant to the laws of a number of States. These include the flag State of the vessel from which the armed guard(s) fired, the flag State of the vessel on the receiving end of the use of force, the State of nationality of the armed guard(s), the State of nationality of the perceived pirate(s) and any relevant coastal State.[148]

The IMO FAL has attempted to clarify port and coastal State laws on PCASP. The IMO FAL is tasked with working with member States and other IMO bodies to ensure the smooth passage of commercial shipping.[149] The committee noted the 'urgent need' to develop further guidance to coastal and port States on the 'customs-related aspects of the carriage, embarkation and disembarkation of firearms and security equipment in areas under the jurisdiction of such States'.[150] They cited the 'urgent need to develop further guidance to Governments reflecting the concerns of port and coastal States with respect to the presence of teams of armed personnel entering their territorial waters or embarking or disembarking at their ports'.[151] The FAL decided that it should liaise with the various national authorities responsible for regulating the embarkation, disembarkation and carriage of firearms, security equipment and armed personnel and 'collect and disseminate information on the relevant national legislation, policies and procedures'.[152] To this effect the committee drafted a questionnaire to be completed and returned by member States.[153] The questionnaire response rate was disappointingly low, particularly amongst those States littoral to the High Risk Area.[154]

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147 Hebert (n 146) 733.

148 D Guilfoyle, 'The High Seas' in A Elferink and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 210.

149 Assembly Resolution A.724(17), IMO Assembly (7 November 1991) IMO Doc Res A.724(17) [3].

150 Report of the Facilitation Committee on its Thirty-Seventh Session (n 12) [8.3].

151 Ibid [8.3].

152 Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security on Board Ships, IMO MSC & FAL (22 September 2011) IMO Doc MSC-FAL.1/Circ.2.

153 The Inter-sessional Working Group met from 13 to 15 September 2011 and agreed to circulate the finalised questionnaire to member States. This took place on 22 September 2011 through IMO Circular MSC-FAL.1/Circ.2. ibid [4].

154 C Trelawny, Armed Personnel Onboard Vessels – IMO Perspective (31 May 2013); In addition to the IMO questionnaire, there was a similar questionnaire done by the World Customs Organization (WCO) World Customs Organization, Customs-Related Aspects of the Carriage, Embarkation and Disembarkation of PCASP Firearms and Security Equipment, IMO MSC (2012) IMO Doc MSC 90/20/12; By May 2012 only 'four or five' nations littoral to the high-risk area (HRA) had responded to the WCO Measures to Enhance Maritime Security, Piracy and Armed Robbery Against Ships, Report of the Working Group, IMO MSC

The failure of port and coastal States to enunciate clear PCASP policies has had several unintended consequences. In particular, PMSCs have 'developed different strategies to avoid falling subject to coastal State enforcement measures'.[155] In some instances this has led to non-compliance with port State rules through the failure of PCASP to declare the presence of weaponry. Others have dumped weapons overboard while entering ports to avoid falling foul of local laws. Security industry sources have reported on the practice of PCASP throwing weapons overboard to circumvent port State regulations and compliance requirements.[156] At the 90th session of the IMO Maritime Safety Committee (MSC) India proposed that ships carrying PCASP should report details of their PCASP to coastal States while traversing their EEZs.[157] The committee declined to support India's proposal.[158]

In February 2011 Bradley Hope reported that thousands of guns were being dumped into the ocean by PCASP.[159] The 'varying laws and regulations about taking weapons into ports across the region' had led some security providers to save time and money 'by getting rid of their guns before arriving in various countries' territorial waters'.[160] Hope quotes Richard Skinner, a director of a PMSC, as noting that this practice was 'happening on a daily basis' and that he suspected there were 'literally thousands of semi-automatic and automatic weapons down there at the bottom of the Red Sea for fish to swim around'.[161] For one security insider the costs of compliance requirements lead many PCASP to conclude that it is 'easier to buy weapons illegally and drop them down to Davy Jones's locker when you get out of the danger area'.[162]

(2012) IMO Doc 90/WP.6 [3.2]; J Kraska, 'International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy' in D Guilfoyle (ed), *Modern Piracy: Legal Challengers and Responses* (Elgar 2013) 244.

155 A Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies' (2013) 62 Int Comp Law Q 667, 686; Casey-Maslen and Priddy (n 90) 849.

156 'Reports emerged in early 2011 that PSCs were dumping weapons at sea to avoid violating arms transfer regulations when arriving at ports of call or a final destination': Geneva Small Arms Survey, 'Escalation at Sea: Somali Piracy and Private Security Companies' in *Small Arms Survey 2012* (CUP 2012) 210; Saul cites a PMSC director as saying that 'fly-by-night' contractors would 'buy weaponry on the black market in places such as Djibouti and subsequently dump them overboard before entering a states' 12 nautical mile territorial sea (on the way to port) to 'avoid getting caught breaking the law' ... as a result, when ships did additional transits, PCASP would buy new arms leading to what he described as 'a vicious circle of the proliferation of illegal arms': J Saul, 'Facing Piracy, Ship Security Firms Set Ethics Code' *Reuters* (2011).

157 India, Armed Security Personnel on Board Ships: Comments on MSC 90/20/5, IMO MSC (27 March 2012) IMO Doc MSC 90/20/16 [3.4].

158 IMO Secretariat, Report of the Maritime Safety Committee on its Ninetieth Session, IMO MSC (2012) IMO Doc MSC 90/28 [20.7].

159 B Hope, 'Firearms an Odd Casualty of Piracy' *The National (Abu Dhabi)* (2011).

160 Ibid.

161 Hope (n 159); Petrig (n 155) 686: 'Some companies apparently dump their weapons at sea before entering waters subject to a third State's sovereignty [and]later acquire them anew':

162 C Eagar, 'To Catch a Pirate: The British Ex-Servicemen Battling to Protect International Shipping from the Clutches of Somali Pirates' *The Daily Mail* (20 December 2011); J Brown, Pirates and Privateers: Managing the Indian Ocean's Private Security Boom (1 September 2012) 8; 'Due to the complex web of legal requirements relating to the carriage and transport of arms, some PMSCs are dumping weapons at sea to avoid violating arms regulations when calling at ports or disembarking at a final destination': Y Dutton, 'Gunslingers on the High Seas: A Call for Regulation' in J Basedow, U Magnus, and R Wolfrum

These allegations of non-compliance by PCASP were supported by the findings of the 2012 House of Commons Foreign Affairs Committee (UK) Piracy off the Coast of Somalia report.[163] The report repeated a claim by industry group Baltic Exchange that 'difficulties involved in ensuring compliance with local licensing laws' had resulted in the practice of regulatory avoidance through weapon disposal.[164] The Baltic Exchange had referred to 'anecdotal evidence' of ships embarked with PCASP traversing the Gulf of Aden subsequently having to 'dump weapons overboard prior to landing in a port hostile to the principle of weapons being carried on board ships'.[165] For the Baltic Exchange the 'biggest barrier' to the use of PCASP was 'the inconsistent stance taken by individual ports with regard to weapons on board vessels'.[166] The result of this was that the shipping industry was in the 'unfortunate position of not being allowed to adequately protect itself'.[167] The Baltic Exchange concluded that there 'needs to be greater clarity and consistency internationally on the use of armed guards on board ships to facilitate their employment under the appropriate licensing safeguards'.[168]

UK policy on the use of armed guards is particularly important given its significance as a maritime nation and the fact that it is home to more than 50% of PMSCs. Ships sailing under the British flag required weapons licensing under the Firearms Act 1968 (UK)[169], and government policy 'strongly discouraged'[170] the granting of licences to PCASP. In addition to British ships, UK export controls were also invoked where a PMSC was incorporated in the UK or PCASP were UK nationals. It is odd that this extraterritorial assertion of jurisdiction appears not to have been contemplated by IMO in adopting its noninterventionist approach to PCASP. The UK export control regime extended beyond exports from the UK to the movement of controlled goods between two other nations by UK persons or incorporated entities.[171] The Export Control Order 2008[172] covers equipment including weapons and ammunition, body armour, night vision equipment and long-range acoustic devices (LRAD). The House of Commons Foreign Affairs Committee (UK) report

(eds), *The Hamburg Lectures on Maritime A airs 2011-2013* (Springer 2014) 264; Pirates and Privateers: Managing the Indian Ocean's Private Security Boom (n 162) 8.

163 House of Commons Foreign Affairs Committee, *Piracy o the Coast of Somalia* (HC 2011, 1318).

164 Ibid [41].

165 Ibid [41].

166 The Baltic Exchange noted that 'South African ports, for example, have taken a particularly hard line against weapons on board ships. This raises questions about how armed guards can legally be transferred on to ships in South African ports and away from ships seeking to dock there': House of Commons Foreign Affairs Committee, *Piracy o the Coast of Somalia, Written Evidence from the Baltic Exchange* (HC 2011, 1318) [3.6].

167 Ibid [3.6].

168 Ibid [3.6].

169 Firearms Act 1968.

170 'Armed Guards to Protect UK Ships' *BBC* (30 October 2011).

171 UK Department of Transport, *UK Department of Transport, Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances, Version 1.2 (May 2013)* (2013) 32–3.

172 Export Control Order 2008.

into *Piracy off the Coast of Somalia* heard evidence that the UK weapons-licensing regime was 'simply not formulated'[173] with the maritime deployment of PCASP in mind and had led to 'some companies allegedly flouting the law'.[174] 'Most' UK PMSCs were 'simply ignoring UK licensing laws'.[175]

The UK experience illustrates the difficulties in relying on State laws 'that were never designed with PCASP in mind'.[176] An 'about-face' on PCASP occurred in October 2011 when Prime Minister David Cameron announced plans to allow British flagged vessels to carry armed guards.[177] For the Prime Minister, the 'fact that a bunch of pirates in Somalia are managing to hold to ransom the rest of the world and our trading system is a complete insult and the rest of the world needs to come together with much more vigour'.[178] In November 2011 the United Kingdom Department for Transport released Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances.[179] The Guidance acknowledged that the balloon effect caused by the successive military operations in the Gulf of Aden meant that the scale of the area susceptible to pirate attacks was such that it could preclude 'international military response in sufficient time to prevent a successful seizure' of the pirates.[180] Under the new policy, PCASP would be permitted aboard a UK flagged ship where:

1. the ship is transiting the High Risk Area;
2. the latest Best Management Practices (BMP) were being followed;
3. compliance with BMP was not on its own deemed sufficient to protect against acts of piracy; and
4. the use of armed guards was assessed to reduce the risk to the lives and wellbeing of those aboard the ship.

The risk assessment process is detailed in Part 2 of the Interim Guidance. Amongst the factors that must be considered include the threat of piracy based on up-to-date information obtained from the UK Maritime Trade Organisation in Dubai (UKMTO), the Maritime Security Centre, Horn of Africa (MSCHOA), and the International Maritime Bureau (IMB). Factors also include the ship's proposed route, the vulnerability of the ship and those on

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173 House of Commons Foreign Affairs Committee, *Piracy o the Coast of Somalia, Stephen Atkins, Oral Evidence* (HC 2011, 1318) [Q]65.

174 *Piracy o the Coast of Somalia* (n 163) [41].

175 'BIS and HMRC are waking up to the fact that a whole host of maritime security operators are shifting a large number of weapons around on any given day and are simply not abiding by UK law to do it': ibid [41].

176 D Guilfoyle, 'National Regulatory Frameworks for On-Board Vessel Security: Some Key Issues' (2013) 2.

177 'Armed Guards to Protect UK Ships' (n 170).

178 Ibid.

179 UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances, rst published 6 December 2011 (Version 1.1)* (2011).

180 Ibid [1.2].

board, and the ship's cargo. Where the risk assessment shows there to be a 'significant risk to the ship and its crew from piracy' the shipowner should consider alternative measures, including an alternative route avoiding the high risk area, confirmation that all BMP ship protection measures are being followed, and engaging additional *unarmed* security personnel.[181] The Guidance also makes explicit reference to the potential for the misuse of firearms, resulting in bodily injury or death, as well as unforeseen accidents and the potential for the presence of firearms to escalate a confrontation with pirates.[182]

While the new UK Guidance provides a good example of *targeted* flag State policy as to the use of PCASP, it provides no guarantee of the quality of the PCASP a ship may contract. The UK Guidance explicitly acknowledges that the British Government does not recognise any accreditation process for PCASP and stresses that shipowners must be 'extra vigilant in selecting an appropriate [PCASP] to provide armed security aboard their ships'.[183] This is a consequence of the unilateral nature of the maritime security policy that has flourished in the absence of IMO leadership. In February 2012 the UK Government moved to simplify the export control licensing regime as it applies to UK PMSCs through the introduction of the Open General Trade Control Licence (OGTCL). The OGTCL enables UK PMSCs to move firearms and other controlled security equipment from one foreign State to another.[184]

The *Norstar* decision analysed in the previous chapter has a number of consequences for policy such as that of the UK. Without qualification, expansive approach of the majority in *Norstar* appears to have consequences for the operation of the UK prescriptive jurisdiction to activities on foreign flagged vessels on the High Seas or in EEZs. One basis potential for coastal State prescriptive jurisdiction over PCASP is the operation of the piracy provisions in UNCLOS. It may be that unlawful activities by PCASP could amount to piracy. In the context of Somalia, it should be noted that while piratical acts within Somalian territorial seas are prima facie beyond the piracy enforcement powers in UNCLOS. However, following calls from the IMO and the express consent of the Somalian Transitional Federal Government (TFG) the United Nations Security Council (UNSC) eventually passed a resolution authorising navies to conduct counter-piracy operations within Somalian territorial waters.[185] Pirates have earned themselves their own body of law, distinct from legal regimes generally governing similar criminal conduct. They are

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181 UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances, rst published 6 December 2011 (Version 1.1)* (n 179) [2.4].

182 While noting that there is no official accreditation process in place, the UK Guidelines set out some general points in Part 3, including checks as to the PMSC and the individual PCASP ibid [2.7].

183 Ibid [1.8].

184 Department for Business, Innovation & Skills, 'Open General Trade Control Licence (Maritime Anti-Piracy)' (22 February 2012) accessed 1 March 2015 1

185 See, UNSC Res 1816, UNSC (2 June 2008) UN Doc S/RES/1816; UNSC Res 1846, UNSC (2 December 2008) UN Doc S/RES/1846.

hostes humani generis: the enemies of all mankind. As such, public international law has long recognised that piracy gives rise to universal jurisdiction.[186] This customary norm is reflected in the Article 101 of UNCLOS, which states:

> **101 Definition of piracy**
>
> (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;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)[187]

Article 100 provides for the Duty to cooperate in the repression of piracy.[188] Article 105 provides for:

> **105 Seizure of a pirate ship or aircraft**
>
> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and

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[186] J Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 468; citing *SS Lotus*, 70–1 (Justice Moore).

[187] UNCLOS, art 101; The requirement that piracy be for private ends has been one of the more lively points of contention over the past few decades, including, for example, conduct that is not private in the sense of directly benefiting the interests of those involved but that at the same time cannot be fully characterised as public. Anti-whaling and anti-hydrocarbon drilling activities provide two pertinent examples of conduct that does not neatly fit a binary choice of private or non-private. The protesters involved in the *Arctic Sunrise* case and the ongoing anti-whaling activities of Greenpeace and Sea Shepherd can be included in this. See *Arctic Sunrise* (*Netherlands v Russian Federation*) (Order of 22 November 2013) [2013] ITLOS Reports; J Roeschke, 'Eco-Terrorism and Piracy of the High Seas: Japanese Whaling and the Rights of Private Groups to Enforce International Conservation Law in Neutral Waters' (2009) 20 Vill Envtl L J 99; A Caprari, 'Lovable Pirates-The Legal Implications of the Battle between Environmentalists and Whalers in the Southern Ocean' (2009) 42 Conn L Rev 1493; S Menefee, 'The Case of the Castle John, or Greenbeard the Pirate: Environmentalism, Piracy and the Development of International Law' (1993) 24 Case W Res J Intl L 1; A Hoek, 'Sea Shepherd Conservation Society v. Japanese whalers, the Showdown: Who is the Real Villain' (2010) 3 Stan J Animal L & Pol'y 159; P Lentini and G Nagtzaam, 'Vigilantes of the High Seas?: The Sea Shepherds and Political Violence' (2007) 20 Terror Political Violence 110; see also J Kraska, 'The Laws of Civil Disobedience in the Maritime Domain' in C Esposito and others (eds), *Ocean Law and Policy* (Brill 2016) 166; A Elferink, 'The Arctic Sunrise Incident: A Multi-Faceted Law of the Sea Case with a Human Rights Dsimension' (2014) 29 Int J Mar Coast Law 244; D Guilfoyle and C Miles, 'Provisional Measures and the MV Arctic Sunrise' (2014) 108 AJIL 271; R Caddell, 'Platforms, Protestors and Provisional Measures: The Arctic Sunrise Dispute and Environmental Activism at Sea' (2014) 45 NYIL 358; In addition, the requirement that piratical conduct be directed against *another* ship has also caused some legal and conceptual dilemmas. As the 1958 *Achille Lauro* hijacking demonstrated, piratical-like threats can emanate from within the target vessel. See G McGinley, 'The Achille Lauro Affair-Implications for International Law' (1984) 52 Tenn L Rev 691; M Halberstam, 'Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety' (1988) 82 AJIL 269; G Gooding, 'Fighting Terrorism in the 1980's: The Interception of the Achille Lauro Hijackers' (1987) 12 Yale J Int'l L 158.

[188] 'All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State': UNCLOS, art 105.

> under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.[189]

As articles 100, 101 and 105 make clear the powers of States with respect to piracy extend to the high seas and places 'outside the jurisdiction of any State'.[190] While the EEZ does dilute some of the high seas rights of foreign vessels, the 'UNCLOS provisions on the high seas have continued application to the EEZ'.[191] As a result the extraordinary enforcement powers of coastal States with regard to piracy extend to another State's EEZ by way of Article 58 subject to due regard to coastal state interests.[192] As Guilfoyle argues the 'logical corollary' of the 'exceptional enforcement jurisdiction' given to States over piracy is 'that each State also has prescriptive and adjudicative jurisdiction over the offence'.[193] These enforcement powers arguably justify a broad scope of coastal State regulation where it concerns piracy and matters incidental to preventing and repressing piracy.

As a 2013 Australian parliamentary committee report into crimes at sea recognised, the question of jurisdiction over crimes at sea is a 'notoriously complex area of law that does not readily provide rules for straightforward application'.[194] The report notes that crimes at sea present a 'dynamic legal scenario', with international law recognising a 'multitude of domestic jurisdictions existing concurrently'.[195] In the counterpiracy context it may be that coastal State prescriptive jurisdiction may also be 'justified' with respect to offences in the SUA convention[196] and subject matters pursuant to SOLAS, the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) and the International Regulations for Preventing Collisions at Sea (COLREGS).

Some assistance may also be gleaned from the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition (Firearms

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189 UNCLOS, art 105.

190 UNCLOS, arts 100, 101, 105.

191 Nandan and Rosenne (n 15) 68–69; cited by Guilfoyle, 'The High Seas' (n 148) 667.

192 Guilfoyle, 'High Seas' (n 15) 734 (footnote omitted); 'In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part': UNCLOS, 58(3); Nandan and Rosenne (n 15) 73.

193 As Guilfoyle notes piracy is the 'original case of universal jurisdiction in international law' with States having 'extra-territorial powers to act to suppress and punish piracy in areas outside the territory and territorial sea of any State': Guilfoyle, 'High Seas' (n 15) 718, 734 (footnotes omitted).

194 The 'application of these principles [of international law] requires a balancing of the rights and obligations of flag States and coastal States, as well as a consideration of both Australia's international legal obligations and matters of international practice and comity': House of Representatives Standing Committee on Social Policy and Legal Affairs, *House of Representatives Standing Committee on Social Policy and Legal A airs, Troubled Waters: Inquiry into the Arrangements Surrounding Crimes Committed at Sea* (2012) 3.

195 Ibid 3.5.

196 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (entered into force 1 March 1992, adopted 10 March 1988) 1678 UNTS 221 (SUA Convention).

Protocol) where the use of firearms is transnational in nature and involves organised criminal groups.[197] It is arguable that coastal State jurisdiction where the Protocol applies it enables the taking of such measures as may be necessary to establish its jurisdiction over offences committed by their nationals, or those committed against their nationals. These measures would arguably extend to those relating to the aims and objectives as set out in the protocol concerning matters such as record keeping, import/export and transit licensing, security measures, information, cooperation as pursuing the objective of where those offences are transnational in nature and involve an organised criminal group.[198]

There was an attempt in 2005 to establish a treaty based framework for mercenaries. The Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination resulted in a draft convention on private military and security companies. Despite this achievement, the draft convention has received little attention of late and does not appear to be a high priority on the international agenda.[199]

If adopted, the Draft UN Convention on PMSCs would potentially make flag States (and States home to PMSCs) directly liable for any human rights violations committed by PCASP. However, the convention is unlikely to come into force given that it faces strong opposition from States home to the majority of PMSCs.[200] According to White:

> An earlier version of the Draft Convention on PMSCs would have enabled corporations to have become parties to it, but the version that finally saw the light of day before the Human Rights Council in 2010 would be open only to states and organizations (a major breakthrough in itself if accepted) but not PMSCs.[201]

Further, even if the convention did come into force, many open registries may not become signatories in light of liability concerns and costs associated with its implementation.

Despite this, regulation of PCASP on merchant vessels was again raised by the UN Working Group on the Use of Mercenaries in December 2012 when its Chairperson, Faiza

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197 'Aware of the urgent need to prevent, combat and eradicate the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, owing to the harmful effects of those activities on the security of each State, region and the world as a whole, endangering the well-being of peoples, their social and economic development and their right to live in peace': The Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, UNGA, UN Doc A/RES/55/255 (Firearms Protocol).

198 Firearms Protocol, arts 7, 10–13.

199 'the Council established an open-ended intergovernmental working group to consider the possibility of developing an international regulatory framework, including the option of drafting a legally binding instrument on the regulation, monitoring and oversight of private military and security companies. ...The working group is currently exploring both a legally binding instrument for private military and security companies and considering a range of other options, including international standard-setting and developing guidelines (A/HRC/30/47)': Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on the Right to Life and the Use of Force by Private Security Providers in Law Enforcement Contexts, UN HRC (2016) UN Doc A/HRC/32/39 [69].

200 J Gómez del Prado, 'A UN Convention to Regulate PMSCs?' (2012) 31 Crim Just Ethics 262.

201 White (n 101) 241–242 (footnote omitted).

Patel, 'called upon the international community to reach an agreement on regulations and procedures regarding the use of armed personnel in the shipping industry, cautioning that a failure to do so created risks for human rights violations at sea'.[202]

Further, in its report dated 1 July 2013, the UN Working Group on the use of Mercenaries cited 'unreported human rights violations' by maritime security contractors and stated that 'binding international regulations should be developed to regulate the use of armed guards on board ships'.[203]

3.6 Conclusion

This chapter has examined the legal and policy framework governing the use of PCASP at sea. As this chapter has found, public international law has the substance necessary to regulate many of the aspects of the use of PCASP. In addition, the ongoing development of due diligence in terms of the law of the sea and human rights obligations presents a promising way of extrapolating more detailed flag State obligations concerning the need for regulation of PCASP and investigating potential violations of the right to life. Despite these considerations, maritime security policy remains a complex area for States, particularly in the area of firearms licensing.

[202] 'Somalia: UN experts on use of mercenaries urge greater oversight for private security contractors' *UN News* (18 December 2012).

[203] Human Rights Council, Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, UN HRC (2013) UN Doc A/HRC/24/45/Add.2.

Chapter 4

State Responsibility and Enforcement

As Chapter 2 set out, flag States are the primary players in the enforcement of international norms concerning conduct on vessels at sea. This chapter considers the enforcement of those international norms in light of the dominant flag State enforcement model prescribed by the the United Nations Convention on the Law of the Sea (UNCLOS). It considers the problems associated with connecting norms with non-State actors given the lack of international legal personality. As this chapter concludes, the primacy of flag States in UNCLOS combined with the legal and practical complexities of flag State monitoring and enforcement results in critical enforcement gaps.

4.1 Monitoring and Enforcement Gaps in the Flag State Model

Enforcement concerns the 'assertion of jurisdiction over the vessel or aircraft in question'.[1] As a result of the allocation of jurisdiction under UNCLOS a vessel's flag State has primacy over the enforcement of international human rights and law of the sea norms concerning their vessels. The overly permissive interpretation of the genuine link criteria in Article 93 of UNCLOS[2] means that international norm enforcement is reliant on the operation of a clearly imperfect system of flag State jurisdiction. Compliance with, monitoring and enforcement of international norms is heavily reliant on flag States meeting their obligations

[1] AN Honniball, 'The Exclusive Jurisdiction of Flag States: A Limitation on Pro-active Port States?' (2016) 31(3) The International Journal of Marine and Coastal Law 499, 504; citing J Roach and R Smith, *Excessive Maritime Claims: Third Edition* (Brill — Nijhoff 2012) 559.

[2] UN Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 93.

under the law of the sea and international human rights law. It assumes that flag States undertake sufficient due diligence concerning their vessels, including the monitoring and mandated reporting of human rights abuses and violations of law of the sea conventions such as those concerning shipping safety. It needs flag States to have proper regulatory frameworks in place for the selection, training and embarkation of PCASP. It requires flag States to effectively regulate the handling of firearms and security-related equipment and ensure embarked PCASP are versed in both the legal and practical requirements concerning human rights and the use of force.

This at least is how it should work. However, the reticence of international courts to give more substantial meaning to the genuine link criteria means that 'shipowners have long been able to decide which jurisdiction their vessels are subject to'.[3] The UNCLOS division of powers means that flag States retain the key role in the authorisation of use of force by private entities at sea.[4] For Aarstad, in open registries such as Liberia:

> the space carved out for the shipping industry is virtually unrestricted with reference to the use of private security . . . In all these cases, private maritime security companies operate within, and not outside, the regulatory frameworks provided by the state, and are, in turn, considered to be legitimate and collaborating actors in the nationally anchored governance arrangement.[5]

Open registries enjoy a central position in the framing of norms governing private power in terms of maritime security.[6] They enjoy 'primacy in terms of shaping the nature of private power in policing at sea' and tend to be more non-interventionist 'in terms of the strength of the regulatory controls they impose'.[7] In addition, their operation and decision making is often obscured by their corporatised structure. As Gould notes:

> The major open registries are now akin to global commercial organisations, with offices around the world, even where capacity to enforce ecological, labour or other forms of national or international law may be non-existent.[8]

Open registries generally lack both the power and administrative machinery necessary to 'effectively impose any government or international regulations; nor has the country the wish or the power to control the companies themselves'.[9] While States may 'perceive a need to construct regimes that profess to govern the use of PMSCs at sea', the reality of

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3 A Gould, 'Sovereign Control and Ocean Governance in the Regulation of Maritime Private Policing' (2020) 30 Polic Soc 1, 8.

4 'The rigor of such authorizations, understood as the degree of regulation and oversight accompanying them, is left at the discretion of the state': A Aarstad, 'Maritime Security and Transformations in Global Governance' (2017) 67 Crime Law Soc Change 313.

5 Ibid 324 (citations omitted).

6 Gould (n 3) 8; citing T Prenzler and R Sarre, 'Developing a Risk Profile and Model Regulatory System for the Security Industry' (2008) 21(4) Secur J 264.

7 Gould (n 3) 8.

8 Ibid 6.

9 BN Metaxas, 'Flags of Convenience' (1981) 5(1) Mar Pol 52, 58; cited in Gould (n 3) 6.

ocean governance is such that 'robust state control is deemed unnecessary, too demanding, or too costly'.[10] Many open registries lack any maritime law enforcement capacity.[11] Gould argues that navies have been:

> substantially less inclined to operate near those merchant vessels registered with UKMTO as having armed security on board ... illustrating the unfeasibility of routine, effective monitoring of private security by any (flag) state.[12]

Flag State control, even with more historically reputable registries has been likened to creating a 'regulatory facade' that 'conveys the impression of state control but allows for significant transfer of authority and responsibility to commercial actors'.[13] Traditional law enforcement under international law has:

> not been able to provide a sufficient and wide-ranging response to the exercise of jurisdiction and law enforcement against criminality at sea, even though UNCLOS provides a main framework of reference. This is mostly due to the legal, economic and political challenges that are difficult to fully overcome.[14]

For Gould the absence of comprehensive flag State[15] codes of conduct for the embarkation of PCASP is 'illustrative of the reality that few (if any) states have sufficiently pervasive maritime law enforcement capabilities to monitor or discipline private security at sea'.[16]

As Rayfuse notes in the context of illegal, unreported and unregulated fishing, high seas freedoms are subject to the 'two general obligations of due regard and peaceful purposes'.[17] As a result, States 'must ensure that their activities on the high seas, and those of their nationals, are carried out with due regard for the interests of other states'.[18] This necessitates a delicate 'balancing of interests taking into consideration the circumstances of the case, both legal and extra-legal'.[19] For Rayfuse an 'underlying objective of any exposition of flag and non-flag state rights and responsibilities must therefore be to ensure' the high seas are used for peaceful purposes, and 'to that end they must refrain from the use of force in their international relations'.[20] Referring to regional fisheries obligations, Rayfuse states that:

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10 J Berndtsson and Å Østensen, 'The Scandinavian Approach to Private Maritime Security—A Regulatory Façade?' (2015) 46(2) Ocean Dev Int Law 138, 148; cited in Gould (n 3) 5.

11 Gould (n 3) 8; citing House of Commons Foreign Affairs Committee, *Piracy o the Coast of Somalia* (HC 2011, 1318).

12 Gould (n 3) 8.

13 Referring to Scandinavian flags Berndtsson and Østensen (n 10) 139; cited in Gould (n 3) 5.

14 V Becker-Weinberg, 'Flag States' Liability for Wrongful Acts by Private Military and Security Companies on Board Ships' in C Esposito and others (eds), *Ocean Law and Policy* (Brill 2016) 222.

15 Gould refers to all 'major flag state regulatory' systems. See Gould (n 3) 8.

16 Ibid 8.

17 R Rayfuse, *Non-Flag State Enforcement in High Seas Fisheries* (Brill — Nijhoff 2004) 31; S Nandan and S Rosenne, *The United Nations Convention on the Law of the Sea 1982: A Commentary, Volume III* (M Nordquist and others eds, Martinus Nijhoff 1993) 73.

18 Rayfuse (n 17) 31.

19 Ibid 31.

20 Ibid 31.

> there has been a notorious failure on the part of flag states to effectively ensure their vessels comply with conservation and management measures adopted by RFOs of which they, themselves, may even be a member. Factors giving rise to this paucity of flag state effectiveness range from legitimate practical inability, to the less legitimate lack of political will, to the wholly illegitimate basic greed. Nevertheless, the result is the same and fishing vessels have been no less quick to take advantage of these failings than others.[21]

Rayfuse is critical of what is described as the 'free rider phenomenon', where the use of flag of convenience registries for flagging and reflagging ships has been undertaken for 'practical expediency'.[22] In practice, 'the absence of effective flag state implementation, compliance and enforcement of both international and domestic obligations'[23] has lead to a '*de facto* freedom for the individual exploiter'.[24] Rayfuse argues that not all instances involve open registries and prefers the terminology of 'flags of non-compliance' or 'non-responsible flags'.[25] Even States bound by international fisheries obligations 'often fail to adopt legislation to implement agreed measures'.[26] Rayfuse states:

> Even if bound, member states often fail to adopt legislation to implement agreed measures. Where implementing legislation exists, member states may be hampered from controlling the activities of their vessels by the sheer tyranny of geography. Alternately, they may simply fail to prosecute violations either on the basis of lack of interest or lack of resources. Traditional law of the sea posits that only the flag state may take action and no sanctions exist in international law for its failure to do so. In the absence of such sanctions, the effective exercise of flag state jurisdiction cannot be guaranteed.[27]

In the context of the European Convention on Human Rights and Fundamental Rights (ECHR) the European Court of Human Rights (ECtHR) in *Medvedyev v France*[28] stated that 'the special nature of the maritime environment cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction'.[29] Human Rights at Sea (HRAS) emphasises the need for States to recognise that 'much more needs to be done at a regulatory and enforcement level to protect human rights at sea',[30] adding that for commercial shipping

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21 Rayfuse (n 17) 34.

22 Ibid 34.

23 Ibid 31.

24 A Fleischer, 'Fisheries and Biological Resources' in *A Handbook on the New Law of the Sea* (Martinus Nijhoff 1991) vol 2, 1112.

25 Rayfuse (n 17) 34.

26 Ibid 36–7.

27 Ibid 36–7 (footnote omitted).

28 *Medvedyev v France* App no 3394/03 (ECtHR, 29 March 2010).

29 *Medvedyev v France* (n 28) [81]; cited in *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012) [178]; see also Human Rights at Sea, *Arbitration as a Means of E ective Remedy for Human Rights Abuses at Sea* (2020) 3 [7] (footnote omitted).

30 Human Rights at Sea, *Brie ng Note: Are the 2011 UN Guiding Principles Working E ectively and Being Rigorously Applied in the Maritime Industry?* (2020) 13.

companies to be able to fully respect human rights:

> States must make sure, at the very minimum, national legal frameworks and supporting legislation is available, or developed where necessary and most importantly, robustly enforced in order to support the widest application of human rights at sea through the resultant deterrent effect.[31]

For Gould, 'it is open to question whether flags of convenience, in particular, operate like 'states' in any meaningful sense in governing private security on the high seas'.[32] The reliance on an exclusive flag State regulation, enforcement and jurisdiction model has resulted in regulatory and enforcement gaps.[33] The 'lack of effective and binding regulation of the use of force' adds to a number of 'specific shortcomings in addressing human rights abuses on the high seas by PCASP exist'.[34] Worryingly, the dependence by policy makers on flag States to meet their due diligence obligations by having sufficient frameworks as well as monitoring and enforcement procedures in place to govern privately contracted armed security personnel (PCASP) has resulted in fragmentation and confusion.

4.2 State Responsibility and Access to Remedies

State responsibility may arise from the failure of a flag State to investigate the use of force (or a related potential human rights violation) involving a flagged vessel when it was required.[35] This is consistent with the protect pillar of the United Nations Guiding Principles on Business and Human Rights (UNGPs). As Chapter 3 noted, the protect pillar requires that States protect 'against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises' by 'taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication'.[36]

There are two key conceptual dilemmas concerning the enforcement of international norms against non-State actors concerning the use of force by embarked PCASP: who can enforce them and who can they be enforced against. The starting point is the traditional international law conception of States as being the sole subjects of international law. There

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31 Ibid 13.

32 Gould (n 3) 8.

33 V Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28(2) EJIL 563, 566.

34 J Schechinger, 'Responsibility for Human Rights Violations Arising from the Use of Privately Contracted Armed Security Personnel against Piracy. Re-Emphasizing the Primary Role and Obligations of Flag States' in *What's Wrong with International Law?* (Brill 2015) 46.

35 Ibid 44, 47.

36 Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN HRC (21 March 2011) UN Doc A/HRC/17/31 (UNGPs) 1.

is considerable academic and judicial critique of the notion that States are the sole subjects of international law and are exclusively able to enforce, or be subject to the enforcement of, international law.[37] As D'Aspremont notes, from a positivist point of view:

> most non-state actors, even the most influential of them are neither proper law-makers nor subjects of international law. The opposite, however, has been heard in the international legal scholarship where some authors have ventured to infer a quasi-formal status of non-state actors from their growing role and influence.[38]

The questions of who could bring a claim against a flag State and in what forum such a claim could be made are closely linked. As Schechinger states:

> The question remains, however, what the forum would be where international responsibility of a flag state might be established. For example, will Somalia in the future bring a case against a flag state for failing to prevent Somali citizens (whether pirates or fishermen) from being killed? Will a claim be brought by an individual against a flag state under an international or regional human rights mechanism, or will state responsibility of a flag state be established before a domestic court?[39]

There is a possibility that aggrieved individuals could raise a complaint through the United Nations Human Rights Committee (UNHR Committee) on the basis of a breach of the International Covenant on Civil and Political Rights (ICCPR) where the State is a party to the Optional Protocol to the International Covenant on Civil and Political Rights (Optional Protocol).[40] At this time neither the Marshall Islands nor Liberia (both popular flag States) have ratified the protocol. Where a State has ratified the Optional Protocol individuals subject to that State's jurisdiction may submit communications to the UNHR Committee when they are victims of a violation by that State of any of the rights set forth in the ICCPR.[41] Individuals may make such applications once they have exhausted all available domestic remedies.[42] Before considering an application the UNHR Committee must ascertain that the 'same matter is not being examined under another procedure of international investigation or settlement'.[43] The UNHR Committee must also ascertain that the applicant has exhausted all available domestic remedies, unless those remedies are unreasonably prolonged.[44] Where the UNHR Committee finds that a

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37 J D'Aspremont, 'Non-State Actors from the Perspective of Legal Positivism: the Communitarian Semantics for the Secondary Rules of International Law' in *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) 25.

38 Ibid 25.

39 'It remains to be seen what will happen in the future, but since international law has proven to be adaptive to new challenges, there is hope that the current situation will be effectively dealt with': Schechinger (n 34) 47.

40 Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR Optional Protocol).

41 ICCPR Optional Protocol, art 1.

42 ICCPR Optional Protocol, art 2.

43 ICCPR Optional Protocol, art 5(2)(a).

44 ICCPR Optional Protocol, art 5(2)(b).

violation is established it may invite the State concerned to report on steps it has taken to give effect to the UNHR Committee findings and recommendations.[45]

Where the State party to the ECHR has not met its obligations pursuant to the right to life under the ECHR, Article 34 allows individuals, NGOs and groups of individuals claiming to be victims of violations of ECHR rights to make applications to the ECtHR.[46] As Article 35 requires, the ECtHR can only deal with the matter in the application once all remedies have been exhausted, according to general principles of international law.[47] Such applications may give rise to remedies including friendly settlements,[48] just satisfaction,[49] individual measures[50] and general measures.[51]

The complexities involved in meeting the local remedies requirement are illustrated in *Gray*. In that case the German Government sought to argue that the application was inadmissible on the basis that the applicants had had failed to exhaust domestic remedies.[52] The ECtHR dismissed the Government's objection of non-exhaustion of domestic remedies.[53] In doing so it explained that Germany had conceded that the applicants lacked an effective remedy under German domestic law to the standard required by Article 35(1) of the ECHR, which requires the ECtHR to only deal with a matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law.[54] This was due to the fact that the the applicants complaint was that 'the criminal proceedings in Germany had not involved a proper investigation into their father's death'.[55]

The ECtHR reiterated that the obligation under Article 35 of the ECHR treaty only requires the applicant to have had normal resource to remedies likely to be effective, adequate and accessible.[56] It appears from *Gray* that the evidentiary burden then shifts to the government 'claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success'.[57] In *Gray*, the government itself had indicated

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45 ICCPR Optional Protocol, art 4.

46 Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, as amended by Protocol No 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature 27 May 2009, entered into force 1 September 2009) CETS No 204 (ECHR) art 34.

47 ECHR, art 35.

48 ECHR, art 39.

49 ECHR, art 41.

50 ECHR, art 45.

51 ECHR, art 46.

52 *Gray v Germany* App no 49278/09 (ECtHR, 22 May 2014) (*Gray*) [65].

53 *Gray* [70].

54 ECHR, art 35.

55 *Gray* [66].

56 *Gray* [69].

57 *Gray* [69] (citations omitted).

that, with respect to the applicants' complaints, German domestic law either did not provide an effective remedy or, for the other complaints, would not have allowed for any prospect of success.[58]

The ECtHR stated that the Article 2 procedure obligation requires States to have an effective independent judicial system capable of determining the cause of deaths (of patients in medical care in that case) and ensuring those responsible are held accountable.[59] While the convention does not guarantee a right to have domestic criminal proceedings brought against an individual for a death, the ECtHR has stated in a number of cases that the effective domestic judicial system required by Article 2 may (and in certain circumstances must) include recourse to criminal law.[60] Where, however, there is no allegation of intentionally caused loss of life the procedural obligation under Article 2 may be satisfied where the domestic legal system affords victims a civil remedy (such as damages and/or publication of the decision) on its own or in addition to that arising out of criminal courts.[61] The ECtHR further noted that the Article 2 State procedural obligation 'will not be satisfied if the protection afforded by domestic law exists only in theory: above all, it must also operate effectively in practice and that requires a prompt examination of the case without unnecessary delays'.[62]

In *Gray* the ECtHR noted that German authorities began investigating Mr Gray's death on their own initiative in June 2008 after being informed about the circumstances of the incident when British authorities sought legal assistance in the case.[63] The German investigation established cause of death and the doctor's involvement.[64] The applicants had alleged that they were not sufficiently involved in the German investigations and criminal proceedings. The ECtHR noted that the German investigators did not advise the applicants of the commencement of criminal investigations or about their application for criminal conviction or all of their potential rights.[65]

The ECtHR found that German criminal procedure did not require the prosecution to inform applicants about the commencement and progress of the proceedings against the doctor. That was not required by the procedure in Article 2(1).[66] The ECtHR noted that, in cases involving questions of the responsibility of State agents in a death, Article 2(1) required that, within the scope of the required investigation, 'the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate

58 *Gray* [69].
59 *Gray* [80].
60 *Gray* [81].
61 *Gray* [81].
62 *Gray* [82] (citations omitted).
63 *Gray* [84].
64 *Gray* [84].
65 *Gray* [86].
66 *Gray* [87].

interests'.[67] However, as the *Gray* case did not raise questions of the involvement of State agents, and the circumstances of the death were not suspicious or unclear, it was 'arguable whether and to what extent the applicants' involvement as next of kin is required in the event the prosecution authorities seek a criminal sanction'.[68] The ECtHR held that there was 'nothing to establish that the legitimate interests of the deceased's next of kin were not respected in the domestic proceedings'.[69] The ECtHR gave a reminder that 'the procedural guarantees enshrined in Article 2 do not entail a right or an obligation that a particular sentence be imposed on a prosecuted third party under the domestic law of a specific State. It reiterates in this connection that the procedural obligation under Article 2 is not an obligation of result but of means only'.[70]

The ECtHR concluded that Germany had provided for effective remedies to determine the cause of the applicant's fathers death and the doctors responsibility.[71] The investigation and proceedings by German authorities met the procedural requirements of Article 2(1)[72] and hence there was no violation of Article 2.[73]

As to the second question of who may enforcement action be brought against, it is arguable that flag States can face liability under the law of the sea and international human rights law arising from a lack of regulation, monitoring, reporting requirements and investigations into potential violations by flagged vessels of:

1. domestic and international laws concerning the possession of and use of firearms (and otherwise use of force)
2. shipping safety treaties
3. rules concerning training and selection of personnel re shipping. safety, use of force, human rights, firearms
4. domestic and international laws concerning the reporting of instances of threatened and actual use of force

Article 1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts provides that:

> **1 Responsibility of a State for its internationally wrongful acts**
> Every internationally wrongful act of a State entails the international responsibility of that State.[74]

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67 *Gray* [87] (citations omitted).
68 *Gray* [87].
69 *Gray* [92].
70 *Gray* [93] (citations omitted).
71 *Gray* [95].
72 *Gray* [95].
73 *Gray* [96].
74 Draft Articles on Responsibility of States for Internationally Wrongful Acts, ILC [2001] [1].

In the event of a internationally wrongful act by a State the 'responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act'.[75] The elements of an internationally wrongful act are set out in Article 2 of the Draft articles:

> **2 Elements of an internationally wrongful act of a State**
> There is an internationally wrongful act of a State when conduct consisting of an action or omission:
> (a) is attributable to the State under international law; and
> (b) constitutes a breach of an international obligation of the State.[76]

For Schechinger there are two critical questions.[77] First, can a flag State incur international responsibility for the wrongful killing of an individual by PCASP?[78] Second, can a flag State incur international responsibility for a violation of the right to life as a result of it failing to prevent, regulate or investigate the use of force by PCASP embarked on vessels flying its flag?[79] The conduct of private PCASP embarked by commercial shipowners is unlikely to be directly attributed to the flag State.[80] The weight of discussion on this point rejects the argument that the conduct of these actors can be directly attributable to States as they lack *de facto* agent status.[81] For White the strict rules of attribution in the Draft Articles suggests that there:

> has been no loosening of the rules on attribution of private conduct to a state, making it very difficult in reality to establish that a contracting state is directly responsible for the wrongful acts of PMSCs. ... [It] is even less likely that the home state or the host state will be in effective control of the PMSC conduct in question to allow for direct attribution of any wrongful conduct to those states.[82]

As a result, attribution as set out in Article 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts[83] is unlikely. It seems fairly clear that establishing State responsibility for PCASP contracted for by a ship is not possible through direct attribution under the Draft Articles.[84]

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75 Draft Articles on Responsibility of States for Internationally Wrongful Acts (n 74) [31]; cited in A Burke and L Persi-Vicentic, 'The Use of Weapons in Counterpiracy Operations' in S Casey-Maslen (ed), *Weapons Under International Human Rights Law* (CUP 2014) 546.

76 Draft Articles on Responsibility of States for Internationally Wrongful Acts (n 74) [2].

77 Schechinger (n 34) 42.

78 Ibid 42.

79 Ibid 42.

80 It is 'not likely that PCASP can be considered as a *de jure* or *de facto* organ of a flag state (Articles 4 and 5 ARSIWA). State responsibility based on Article 8 ARSIWA is also unlikely since the flag state did not instruct, nor exercised control over the conduct of PCASP': ibid 43.

81 Ibid.

82 N White, 'Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs' (2012) 31 Crim Just Ethics 233, 238.

83 Draft Articles on Responsibility of States for Internationally Wrongful Acts (n 74).

84 Lanovoy (n 33) 566.

Despite the difficulties associated with direct attribution, a flag State may incur responsibility under international law for a failure to exercise effective control over flagged ships. For Schechinger:

> While in principle there is nothing wrong with outsourcing security at sea, there is a risk that flag states do nothing in response to, or even turn a blind eye to, human rights violations that may take place as a consequence. Such outsourcing does not absolve flag states from their obligations under international law regarding PCASP, to whom they have *de facto* delegated the task of providing security. Whenever a flag state allows PCASP on board its vessels, it should make use of its exclusive prescriptive, enforcement and adjudicatory jurisdiction on the high seas regarding PCASP activities.[85]

The doctrine of due diligence plays an increasingly important role in allocating accountability to States for human rights abuses by non-State actors within their jurisdictions.[86] The nature of Article 94 obligations as those of due diligence allows those obligations to be read in line with the developing jurisprudence concerning due diligence in a range of contexts including international environmental protection, shipping safety and human rights law. Despite this potential scope for enforcement action by States and individuals against flag States based on a failure to exercise due diligence, such action is both legally and practically impaired by a lack of flag State reporting and the need to exhaust (or prove the absence of) domestic remedies. Thus, access to remedies remains a critical issue for those aggrieved by the behaviour of non-State actors as sea.

4.3 Accountability and Non State Actors

The notion of accountability is 'fairly new' to public international law scholarship.[87] Despite its increasing use it 'has not acquired a clearly defined legal meaning'.[88] For van Aaken, accountability 'includes responsibility, liability, and various forms of legal control and compliance-monitoring' and extends to non-legal market mechanisms 'which have been hitherto been neglected'.[89] Van Aaken argues that international-law academics have focused on *legal* accountability and coercion as primary means of holding the subjects of public international law responsible.[90] In contrast, she notes that those from an international

[85] Schechinger (n 34) 46–7.

[86] 'A similar trend is discernible in human rights law, as most of the human rights treaties contain provisions setting out the States Parties' general obligations in guaranteeing human rights to all individuals under their jurisdiction': T Koivurova, 'Due Diligence' (*Max Planck Encyclopedia of Public International Law*, November 2010) ⟨https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1034?prd=OPIL⟩ accessed 9 November 2019, 33.

[87] A van Aaken, 'Markets as an Accountability Mechanism in International Law' in *Responsibilities of the Non-State Actor in Armed Con ict and the Market Place* (Brill | Nijhoff 2015) 155.

[88] J Brunnée, 'International legal accountability through the lens of the law of state responsibility' (2005) 36 NYIL 21, 22; cited in van Aaken (n 87) 155.

[89] van Aaken (n 87) 155 (footnote omitted).

[90] Ibid 154.

affairs background 'have always been more skeptical of the effectiveness of this approach'.[91] As a result public international law scholars have begun to shift their attention to alternative mechanisms of responsibility and accountability beyond the traditional international legal conception of responsibility.[92] Van Aaken argues that legal conceptions of responsibility and liability are 'insufficient in capturing the gaps in legal accountability created in a multi-layered and multi-actor globalizing world'.[93]

Liability of non-State actors for human rights violations international norms is a 'drastically urgent question'.[94] For White although 'there appears to be no conceptual barrier to accepting corporations as having international legal personality', and therefore making them directly subject to international human rights law, there has been little progress in achieving this.[95] Human rights violations are frequently 'committed by private actors, although these are not formally bound by human rights conventions which directly bind only the contracting states'.[96] PCASP can be employees or sub-contractors for a private maritime security company (PMSC) registered in one jurisdiction, working on a vessel potentially owned, operated and managed from varying jurisdictions in addition to the State of registration of the vessel.[97] As White states:

> Given the weaknesses of international law in imposing direct responsibility on states, organizations, or corporations for the wrongful acts of individuals working for the latter, the specter is raised of a legal black hole in which PMSCs operate with impunity despite the existence of human rights law and international humanitarian law.[98]

From a private law perspective, Powell cites four impediments to holding shipowners accountable for human rights violations concerning vessels registered in open registries

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91 van Aaken (n 87) 154.

92 Van Aaken notes the Draft Articles on State Responsibility adopt a 'strictly legal and narrow concept' of responsibility 'thereby denying a broader notion of accountability'. See van Aaken (n 87) 154; Draft Articles on Responsibility of States for Internationally Wrongful Acts (n 74); For White, it is surprising that 'just as international legal doctrine has failed to keep pace with the changing nature of sovereignty of the main actors (states), it has also failed to fully accommodate non-state actors within the subjects of the international legal order'. White adds that corporations, 'despite the huge power and influence of multinational corporations especially in the era of economic globalization, are in many ways barely touched by international law at least directly in the form of binding treaty or customary obligations'. White (n 82) 241.

93 van Aaken (n 87) 155; citing D Curtin and A Nollkaemper, 'Conceptualizing Accountability in International and European Law' (2005) 36 NYIL 3, 6, 11.

94 P Zumbansen, 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law' (2002) 8(3) Eur Law J 400, 421; citing D Thürer, 'The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State' in *Non-State Actors as New Subjects of International Law* (Duncker & Humblot 1999).

95 White (n 82) 242.

96 A Peters, T Förster, and L Koechlin, 'Towards Non-State Actors as Effective, Legitimate, and Accountable Standard Setters' in A Peters and others (eds), *Non-State Actors as Standard Setters* (CUP 2009) 541.

97 White (n 82) 243.

98 Ibid 243 (footnote omitted).

(with an emphasis on private international law).[99] First, shipowners of vessels registered in flag of convenience States are difficult to identify.[100] Some open registries will not make available information relating to ownership. Second, even if the registered owner can be identified the true beneficial ownership of vessels can be obscured through the use of holding companies and trust vehicles.[101] Third, even if 'owners and other key personnel are identified and tracked, they may be able to avoid personal jurisdiction by not visiting the flag State'.[102] Fourth, those owners and key personnel may 'refuse to testify, seemingly without penalty'.[103] These complications relating to identifying relevant defendants by reference to shipowners of vessels registered in open registries is one of the main rationales behind the ability to arrest ships in admiralty jurisdiction.[104] As Payoyo argues, in the maritime context:

> The governance of the world's seas and oceans requires new ways of thinking and new ways of doing things that are fundamentally different from the established modes of terrestrial governance that have been built on the traditional foundation of state freedom and sovereignty.[105]

For HRAS addressing 'abuses of human rights at sea with effective judicial intervention resulting in effective remedy for victims must be at the forefront of any flag State's priorities, policies and which should be undertaken in a transparent manner'.[106] Despite this, as HRAS noted:

> In practice, remediation often proves difficult for business actors due to the complex systemic issues underlying the human rights impact, more so in the maritime industry. For example, remediation of human trafficking of seafarers may require companies to deal with complex global labour recruitment networks over which companies have limited leverage.[107]

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99 'Critics additionally allege that ship owners can escape enforcement in FOC States': E Powell, 'Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience' (2013) 9 Ann Surv Int & Comp L 263, 276.

100 Powell (n 99) 276; citing H Anderson, 'The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives' (1996) 21 Tul Mar L J 139, 164; Anderson citing UNCTAD, Action on the Question of Open Registries, a Report by the UNCTAD Secretariat (3 March 1981) TD/B/C.4/220.

101 Powell (n 99) 276; citing Anderson (n 100) 164.

102 Powell (n 99) 276; citing Anderson (n 100) 164; citing by comparison Federal Rules of Civil Procedure, r 12.

103 Powell (n 99) 276; citing Anderson (n 100) 164.

104 Claimants seeking private relief against shipowners due to the conduct of their vessels often elect to bring an action in rem against the ship (as *the res*) in a port State (most often unrelated to the flag State) as a means of forcing the beneficial owners to identify themselves and provide security for any judgments in local courts as a means of having their ship released. See F Berlingieri, *Berlingieri on Arrest of Ships* (Informa Law 2013).

105 P Payoyo, 'Seafarers' Human Rights: Compliance and Enforcement' in *The Future of Ocean Governance and Capacity Development* (Brill | Nijhoff 2019) 468.

106 Human Rights at Sea, *Alleged Rape on MSC Divina Ship Highlights Need for Clear Understanding of Flag State Responsibilities at Sea* (2019).

107 *Brie ng Note: Are the 2011 UN Guiding Principles Working E ectively and Being Rigorously Applied in the Maritime Industry?* (n 30) 7 (footnote omitted).

HRAS cites the example of the MSC Divina alleged rape of a UK national by an Italian on a Panamanian flagged cruise ship sailing between Malloca and Valencia, Spain.[108] Despite travelling between Spanish ports the alleged rape occurred outside of the Spanish territorial sea and involved non-Spanish residents. As a result the Spanish courts lacked jurisdiction to hear the matter. As HRAS noted, this meant it was now for Panamanian authorities to respond to the allegations.[109] Until that took place, 'the English victim was apparently left without justice or remedy'.[110]

For White the 'solution may take the form of due diligence, by which these actors have obligations to try to prevent misconduct'.[111] Here, it is useful to draw upon the work of the Human Rights Council (HRC) on Business and Human Rights here to establish the broader theoretical context of holding states accountable for the acts of multinational businesses operating within the supply chain. In 2007 John Ruggie, the former UN Secretary-General's Special Representative on the Issue of Human Rights and Transnational Corporations (SRSG), submitted a report to the Human Rights Council entitled 'Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts'.[112] The report represented a significant departure from the 'command-and-control' strategy that had prevailed in international human rights policy up until that time. Command-and-control describes a State-based regulatory model with State entities dominanting the formation and implementation of norms.[113] Command-and-control governance reflects the 'tacit assumption that government regulation is in fact the only source of accountability'.[114] 'Command-and-control' was seen as inadequate for influencing the behaviour of non-State entities such as corporations and individuals. Ruggie's report recognises the conceptual hurdle, noting that 'Long-standing doctrinal arguments over whether corporations could be "subjects" of international law . . . impeded conceptual

[108] Human Rights at Sea, *Alleged Rape on MSC Divina Ship Highlights Need for Clear Understanding of Flag State Responsibilities at Sea* (n 106); See I Lyons and G Couzens, 'Italian Teenager Accused of Raping British Girl on Cruise in International Waters Walks Free on Legal Technicality' *The Telegraph* (14 April 2019); PW Rome, 'Spanish Court Frees Cruise Rape Suspect' *The Times* (15 April 2019).

[109] Human Rights at Sea, *Alleged Rape on MSC Divina Ship Highlights Need for Clear Understanding of Flag State Responsibilities at Sea* (n 106).

[110] MSC told HRAS that authorities of the 'country of residence of the victim as well as those of the country of residence of the person accused have been informed. In addition, we have promptly liaised with the Flag Administration and provided all information needed for them to start an investigation. The competent bodies of the Republic of Panama have since taken over the matter and a public attorney has been appointed to investigate' ... 'We can only confirm that the ship responded very promptly when alerted to these allegations and took the necessary measures to protect the victim from the person accused and involve the competent authorities': *Brie ng Note: Are the 2011 UN Guiding Principles Working E ectively and Being Rigorously Applied in the Maritime Industry?* (n 30) 5 (footnote omitted).

[111] White (n 82) 243.

[112] Human Rights Council, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN HRC (8 February 2007) UN Doc A/HRC/4/35.

[113] D Cole and P Grossman, 'When Is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection' [1999] Wis L Rev 887, fn 1.

[114] F Furger, 'Accountability and Systems of Self-Governance: The Case of the Maritime Industry' (1997) 19 Law & Policy 445, 446.

thinking about and the attribution of direct legal responsibility to corporations'.[115] As Ruggie made clear:

> Clearly, a more fundamental institutional misalignment is present: between the scope and impact of economic forces and actors, on the one hand, and the capacity of societies to manage their adverse consequences, on the other. This misalignment creates the permissive environment within which blameworthy acts by corporations may occur without adequate sanctioning or reparation.[116]

In 2008, Ruggie released the Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (UN "Protect, Respect and Remedy" Framework).[117] The UN "Protect, Respect and Remedy" Framework subsequently formed the basis for the UNGPs released by the UN HRC in 2011. For Buhmann, the UN "Protect, Respect and Remedy" Framework and UNGPs are 'grounded in problems resulting from governance gaps and expectations that businesses step in where public politics and law are ineffective'.[118] These governance gaps result from:

> limitations of international law and policy to address business, and from national governments' inadequate implementation of obligations under international and sometimes national law. Unlike conventional public policy and legal regulation, the two instruments pragmatically sidestep the limitations that conventional public law and policy encounter in terms of regulation of transnational business activity ...[119]

The UNGPs are prefaced with three key principles:

> These Guiding Principles are grounded in recognition of: (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms; (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights; (c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.[120]

These three objectives form the basis of the three pillars of the UNGPs. The first pillar, reflected in paragraph (a), provides that:

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115 Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts (n 112) [20].

116 Ibid [3].

117 Human Rights Council, 'Protect, Respect and Remedy': a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN HRC (7 April 2008) UN Doc A/HRC/8/5 ('Protect, Respect and Remedy' Framework).

118 K Buhmann, 'Connecting Corporate Human Rights Responsibilities and State Obligations under the UN Guiding Principles' (2016) 136(4) J Bus Ethics 699, 701; citing L Backer, 'Multinational Corporations, Transnational Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsility in International Law' (2006) 37 Colum Hum Rts L Rev 287; J Ruggie, *Just Business: Multinational Corporations and Human Rights* (W W Norton & Company 2013).

119 Buhmann, 'Connecting Corporate Human Rights Responsibilities and State Obligations under the UN Guiding Principles' (n 118) 701.

120 UNGPs.

> States *must* protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.[121]

This is the 'protect' pillar. As the commentary to the UNGPs notes, in line with States' international human rights law obligations the protect pillar requires that they 'respect, protect and fulfil the human rights of individuals within their territory and/or jurisdiction. This includes the duty to protect against human rights abuse by third parties, including business enterprises'.[122] The State duty to protect is a standard of conduct. While it is acknowledged that States are not *per se* responsible for human rights abuses by private actors, States may breach their obligations where 'they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse.[123] The UNGPs detail four objectives that States should seek to achieve in meeting their duty to protect, including:

a Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

b Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

c Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

d Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.[124]

Additionally, in terms of the State duty to protect, States should 'set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations'.[125]

Pillar II is dedicated to the corporate responsibility to respect human rights. It begins with the proposition that business enterprises should 'avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved'.[126] In addition, Guiding Principle 13 provides that the 'responsibility to respect human rights requires that business enterprises:

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121 UNGPs, Guiding Principle 1.

122 UNGPs, Guiding Principle 1.

123 'While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures, including policies, legislation, regulations and adjudication. States also have the duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty, and procedural and legal transparency': UNGPs, 6–7, Commentary to Guiding Principle 1.

124 UNGPs, Guiding Principle 3.

125 UNGPs, Guiding Principle 2.

126 UNGPs, Guiding Principle 11.

a Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

b Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts'.[127]

The UNGPs go on to state that for business enterprises to meet their responsibility to respect human rights they should have in place:

a A policy commitment to meet their responsibility to respect human rights;

b A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

c Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.[128]

Guiding Principle 17 of the UNGPs introduces the concept of human rights due diligence.[129] This due diligence formulation is targeted at business enterprises rather than States and mirrors some of the human rights due diligence standard that applies to States. This business-targeted human rights due diligence standard 'should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed'.[130]

The second pillar has a number of provisions dedicated to the monitoring of the effectiveness of business measures to minimise human rights impacts. Principle 20 suggests business enterprises should conduct verification of their efforts through 'appropriate qualitative and quantitative indicators' and 'feedback from both internal and external sources, including affected stakeholders'.[131] It has been argued that the corporate duty to respect human rights is a strategic mix of risk mitigation notions long associated with due diligence in a commercial context[132] with State-like due diligence obligations concerning human rights.[133]

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127 UNGPs, Guiding Principle 13.

128 UNGPs, Guiding Principle 15.

129 UNGPs, Guiding Principle 17.

130 Guiding Principle 17 continues that human rights due diligence '(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships; (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations; (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve': UNGPs, Guiding Principle 17.

131 UNGPs, Guiding Principle 20.

132 Bonnitcha and McCorquodale have argued that the adoption of the term due diligence in the UNGPs 'appears to be a clever and deliberate tactic, as it is familiar to business people, human rights lawyers and states, among whom Ruggie sought to build a consensus on his approach'. For them, 'due diligence is normally understood to mean different things by human rights lawyers and by business people' and the UNGPs 'invoke both understandings of the term at different points, without acknowledging that there are two quite different concepts': J Bonnitcha and R McCorquodale, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights' (2017) 28 EJIL 899, 900—901 (footnotes omitted).

133 For Bonnitcha and McCorquodale, the term 'due diligence' as referenced in Guiding Principles 17–21 as

The third pillar concerns access to remedies for victims of business-related abuses. It requires that States take 'appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy'.[134] This includes appropriate steps to ensure the effectiveness of domestic 'judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy'.[135] In addition, States should provide effective and appropriate non-judicial grievance mechanisms to remedy business-related human rights abuse[136] and 'consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms'.[137]

So, to break it down, the UNGPs potentially create three broad categories of due diligence obligations. First, State due diligence to protect human rights and ensure adequate remedies for human rights abuses are in place. Second, business due diligence which is directly imposed on business to ensure business entities are well-versed in their human rights responsibilities and human rights-related risks and take appropriate measures to respect this.[138] Third, the possible emergence of a third category which combines the first and second options where a State could be in breach of its due diligence responsibilities by failing to take sufficient measures to ensure a business entity meets its obligations. Put another way, business entities failing to exercise effective due diligence could form the basis for State accountability on the basis of a lack of State due diligence being a contributing factor in the failure of businesses to have sufficient due diligence procedures in place.

The UNGPs have 'great potential to improve human rights at sea by expanding responsibility for human rights at sea to commercial maritime companies and not just the default reliance on State intervention'.[139] One very promising component of the UNGPs is that of corporate human rights due diligence. As the HRAS report into the implementation of the UNGPs to the shipping industry states:

> When deployed properly, human rights due diligence can be a powerful tool to help companies understand how their business may be impacting human rights

'human rights due diligence ... describe a range of processes and procedures that business should have in place to identify, avoid and monitor their human rights impacts. All of these procedures fit squarely within the understanding of due diligence as a set of business processes'. For business enterprises to comply with 'their responsibility to respect human rights' they should have in place 'policies and processes' including 'human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights': Bonnitcha and McCorquodale (n 132) 908–9.

134 UNGPs, Guiding Principle 25.

135 UNGPs, Guiding Principle 26.

136 UNGPs, Guiding Principle 27.

137 UNGPs, Guiding Principle 28.

138 Complicated by business entities not traditionally considered to have international legal personality

139 *Brie ng Note: Are the 2011 UN Guiding Principles Working E ectively and Being Rigorously Applied in the Maritime Industry?* (n 30) 13.

> throughout their operations and where this is the case, how to act upon those findings. Unfortunately, maritime companies risk taking a high-level and too simplistic approach that disregards the unique steps human rights due diligence requires.[140]

There is a real fear that, as human rights violations committed at sea are less visible than those committed on land, many violations have occurred at sea without being noticed.[141] For example, ship operators and security teams may be discouraged from reporting of non-lethal discharging of firearms due to the commercial costs and delays involved and the risk of being stuck in a foreign port while an investigation takes place. A lack of reporting requirements for violations of human rights obligations on the high seas means that 'the scale of the problem involving PCASP is difficult to estimate'.[142] Despite this, it is arguable that the requirement on shipmasters to report violations of human rights involving their vessels 'is arguably part of the due diligence obligations of a flag state'.[143]

4.4 Conclusion

This chapter has established, that despite having the substantive norms necessary to address the embarkation of armed guards at sea, the enforcement of public international law is being undermined by the law and practice concerning flag State jurisdiction over vessels. The resulting enforcement gaps have given rise to an alarming degree of impunity concerning the use of force by non-State actors such as PCASP at sea. Over-reliance on the flag State model, combined with the problems concerning international legal personality and responsibility regarding non-State actors, means that a purely public international law-focused approach to maritime governance of PCASP fails to effectively regulate armed guards at sea. While public international law does have a number of applicable doctrines concerning human rights law and the law of the sea, the enforcement and monitoring of these norms is impaired by reliance on flag States to exercise the necessary control over flagged vessels. While flag States may be the most important actors in the UNCLOS separation of powers there are problems inherent in relying on them to regulate PCASP. The consequence of policy makers relying so heavily on the UNCLOS separation of powers to deliver a comprehensive framework for the use of force by PCASP is significant regulatory and enforcement gaps.

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140 'For example, when assessing risk, companies should take care to not just ask "what is the risk to our social acceptance as a company?" but rather "what is the risk of us impacting people's human rights?" or even engage in a full human rights impact assessment': ibid 6 (footnotes omitted).

141 Schechinger (n 34) 44.

142 Ibid 44.

143 (footnote omitted) ibid 44.

Part II

How does private ordering contribute to the governance of PCASP at sea?

Chapter 5

The Development of the Industry Consensus

This chapter concerns the unique nature and role of shipping and marine insurance-related industries in the development of private ordering. The chapter considers the early reluctance of International Maritime Organization (IMO) member States and some industry representatives to regulate privately contracted armed security personnel (PCASP) in fear that doing so would condone their use. Next, this chapter examines industry-led rulemaking outside of the IMO and the engagement of those rulemaking ventures with the IMO, particularly their attempts to get member State and broad industry approval. This chapter then looks at the subsequent maturity of this rulemaking process and how the process informs future regulatory challenges faced by the IMO in the maritime security context.

5.1 Industry Networks and Gatekeepers

5.1.1 Shipowner/Manager Associations

Shipowners are represented by a number of organisations. The most prominent are those organisations that form part of the 'Round Table' of International Shipping Associations.[1] They include the Baltic and International Maritime Council (BIMCO),[2] the Interna-

[1] E Williams, 'Private Armed Guards in the Fight against Piracy' in E Papastavridis and K Trapp (eds), *La Criminalite En Mer* (Martinus Nijhoff 2014) 341.

[2] Carreira Da Cruz notes that BIMCO is the 'world's largest international shipping association, with more than 2100 members in more than 120 countries'. See M Carreira Da Cruz, 'Regulating Private Maritime Security Companies by Standards: Causes and Legal Consequences' (2017) 3 Mar Safe Law Journal 63, 80.

tional Chamber of Shipping (ICS),[3] the International Association of Independent Tanker Owners (INTERTANKO)[4] and the International Association of Dry Cargo Shipowners (INTERCARGO).[5]

5.1.2 First and Third-Party Insurance

Extensive first and third-party insurance is a prerequisite for participation in maritime transport. This can include hull and machinery underwriting, cargo insurance, protection and indemnity (P&I), war risks and kidnap and ransom coverage. Ships without comprehensive coverage may be denied entrance to ports and can struggle to find cargo owners willing to contract with them. They may also struggle to find flag States willing to register their vessels. P&I club cover indemnifies shipowners from legal liabilities to third parties. P&I clubs are mutual organisations with shipowner members acting as both insurers and insured.[6] As Furger notes:

> Identifying solutions to common concerns in an informal manner is greatly facilitated by geographical proximity. Most P&I clubs are located in the City of London. Clubs with headquarters elsewhere also have offices in London. Geographic proximity enables P&I clubs' representatives to meet informally on a daily basis. More serious issues are addressed within the International Group of P&I clubs.[7]

Eleven P&I clubs cover in excess of 90% of global tonnage and together pool their risk into an umbrella mutual organisation known as the International Group of P&I Clubs (International Group). Large claims are often 'pooled' within this umbrella organisation (and then onto re-insurers).[8] The International Group in essence acts to harmonise norms between the various clubs and promote internal consistency. For Furger:

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3 R Nersesian and S Mahmood, 'International Chamber of Shipping & International Shipping Federation' in *Handbook of Transnational Economic Governance Regimes* (Brill — Nijhoff 2010) 775–7.

4 See R Nersesian and S Mahmood, 'International Association of Independent Tanker Owners' in *Handbook of Transnational Economic Governance Regimes* (Brill — Nijhoff 2010).

5 R Nersesian and S Mahmood, 'International Association of Dry Cargo Shipowners' in *Handbook of Transnational Economic Governance Regimes* (Brill — Nijhoff 2010); F Furger, 'Accountability and Systems of Self-Governance: The Case of the Maritime Industry' (1997) 19 Law & Policy 445, 454. For Furger 'INTERTANKO and INTERCARGO offer a wide range of services to their members, and the scope of their activities is not limited to regulatory issues. INTERTANKO could be viewed as an embryonic example of a system of self-governance. Membership in INTERTANKO is subject to a number of requirements, and members not found in compliance may be expelled from the association': J Harrison, 'Regime Pluralism and the Global Regulation of Oil Pollution Liability and Compensation' (2009) 5(4) IJLC 379, 382–3.

6 Harrison, 'Regime Pluralism and the Global Regulation of Oil Pollution Liability and Compensation' (n 5) 383.

7 Furger (n 5) 466.

8 As Bennett explains, beyond $30 million USD, claims are 'reinsured with commercial insurers for a further $2 billion. The International Group would meet any part of a claim between $2.03 billion and $4.25 billion, beyond which liability returns to the shipowner. Following a large P&I claim, commercial insurers would want an increase in premiums in the following year, potentially creating a further incentive for the Clubs to regulate their members'. See P Bennett, 'Mutuality at a Distance? Risk and Regulation in Marine Insurance Clubs' (2000) 32 Environ Plan 147, 153.

> balancing competition and cooperation is the subject of the "International Group Agreement." ... While some industry observers tend to dismiss these practices simply as a cartel, it is important to note that this "cartel" has shown a remarkable ability to address autonomously its own institutional problems and to produce outcomes acceptable both to the clubs and to the shipowners' community.[9]

As a representative of 'many of the largest and most influential P&I Clubs' the International Group 'plays an important part in advocacy at the international level, representing its members in many international organisations'.[10] The central role of the International Group in the maritime industry gives it 'significant influence in the field of liability and compensation'.[11] As Bennett asserts, given that approximately 90% of potential new members will have come from another International Group Club, the former club is 'contractually obliged under the International Group Agreement' to:

> inform the new Club about the performance and rates of the shipowner. This information need only be very basic and empirical (providing description but no explanation). However, social networks between managers within the International Group of P & I Clubs mean the opinions may be exchanged as to the riskiness of certain shipowners.[12]

For mutual operations such as P&I clubs each new member represents potential for greater risk spreading as well as potential for greater risk. Risky members increase the cost and volatility of P&I membership.[13]

5.1.3 Classification Societies

P&I clubs and flag States also interface with another system of maritime transnational private regulation in the form of intermediate organisations. A notable example of these are classification societies.

Ship classification involves defining vessel safety standards and surveying ships to determine whether they meet those standards. For example, following a number of high profile tanker pollution incidents in the 1990s many P&I clubs:

> tightened their admission requirements, implemented extensive survey programs, and began to adopt loss-prevention policies. Whereas, in the past, a good reputation and a recommendation by a club member would have opened a club's doors, today almost all Clubs require a pre-entry survey carried out by an independent surveyor and make the admission of a new member conditional upon addressing the problems identified by the survey.[14]

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9 Furger (n 5) 466.

10 Harrison, 'Regime Pluralism and the Global Regulation of Oil Pollution Liability and Compensation' (n 5) 383.

11 Ibid 383 (footnote omitted).

12 Bennett, 'Mutuality at a Distance? Risk and Regulation in Marine Insurance Clubs' (n 8).

13 Furger (n 5) 460.

14 Ibid 461.

Classification societies act as intermediate organisations, certifying vessels against standards.[15] Information provided by classification societies is relied on by flag States and insurers.[16] As a result, classification societies act as gatekeepers to participation in maritime transportation. Classification societies are represented in international fora through the International Association of Classification Societies (IACS).[17]

5.1.4 Flag States and Open Registries

As Part I set out, flag States play a predominant role in maritime security policy formation, monitoring and enforcement. Flag States enjoy full participation and voting rights at the IMO and on its committees such as the Maritime Safety Committee (MSC) and Facilitation Committee (FAL).

The move towards open registries such as Liberia and Panama is further complicated by privatisation. Many of the regulatory aspects of running these registries are contracted to private companies. For example, International Registries Inc, which operates the registry of the Marshall Islands,[18] was formally Stettinius Associates-Liberia Inc and managed Liberia's registry. The Liberian registry is now administered by the Liberian International Ship & Corporate Registry (LISCR, LLC), a privately owned US company. As a combined study from Human Rights at Sea (HRAS) and the University of Bristol Human Rights Implementation Centre and The University of Bristol Human Rights Law Clinic on flag States and human rights stated:

> The Marshall Islands is a state which holds an open registry, enabling foreign-owned ships to be registered under its flag through a quick, easy and relatively inexpensive registration process. In March 2017, the Marshall Islands registry became the second largest in the world, with a total 231,853,515 DWT and 3,796 vessels. The Marshall Islands ship registry, which is headquartered in Reston, Virginia, US, allows online applications with few restrictions at a relatively low cost.[19]

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15 As Furger explains,'classification amounts to defining and maintaining acceptable standards of safety for the entire marine industry. This means that shipyards, naval engineers, components manufacturers, ship owners, ship operators, major oil companies, P&I clubs, and insurance companies may all be involved in the rule-making process, although to a different degree'. See Furger (n 5) 456–7.

16 Ibid 457. Furger argues that the 'insurance sector created these organizations as a way to reduce uncertainty and to manage marine risk. In fact, many classification societies would immediately lose their legitimation if marine insurers and P&I clubs would not routinely require vessels to be classed as a condition for obtaining insurance coverage. In addition, many classification societies have assumed statutory functions of behalf of maritime nations unable to assure compliance with international treaties, thus further blurring the distinction between intermediary institutions and systems of selfgovernance':

17 See R Nersesian and S Mahmood, 'International Association of Classification Societies' in *Handbook of Transnational Economic Governance Regimes* (Brill — Nijhoff 2010) 765–6.

18 Human Rights at Sea, Flag States and Human Rights: A Study on Flag State Practice in Monitoring, Reporting and Enforcing Human Rights Obligations on Board Vessels (17 July 2018) 7: 'The Marshall Islands domestic legislation sets out several monitoring and reporting duties in relation to the implementation of the MLC 2006, all of which is outsourced to a US company - International Registries Inc. (IRI)':

19 They add that 'registries vary significantly in type and as a result the extent of obligations placed on

The UK is considering part-privatisation of its registry as part of Brexit-related policy changes.[20]

5.1.5 The Central Role of the International Maritime Organization (IMO) in Establishing the Policy Consensus

The IMO acts as another critical forum for maritime policy-making networks. The IMO affords a special, albeit non-voting, status to relevant non-governmental organisations (NGOs) such as shipowner associations and insurance sector trade bodies. Such NGOs enjoy speaking rights and directly engage in policy development through plenary debate and in working groups. Moreover, State delegations themselves very often include private interests.

The strength of private NGOs in relation to the IMO's work is reflected in the organisation's leading work on the tragic humanitarian crisis in the Mediterranean Sea.[21] Shipping companies, many of which had detoured from their cargo routes to save those seeking refuge, were increasingly frustrated by a lack of support from European member States. The IMO acted on these private concerns and brought State players in to reflect industry concerns and the need for cooperation on policy in this area to prevent loss of life.

5.2 Formation of the Industry Consensus

5.2.1 The IMO: Pre-MSC 89

Private maritime security services are not altogether new. They have previously undertaken mine-clearing operations following conflict. They have advised ship owners on compliance with the International Ship and Port Facility Security Code (ISPS Code),[22] introduced after the September 2001 terrorist attacks in New York, and provided various other advisory and related services. Despite this, employing private armed guards aboard commercial

shipowners also differs. Closed registries, such as the UK, offer a higher level of safeguard against the operation of a vessel likely to violate the terms of MoUs or other international obligations. Conversely, open registries, such as those operated by the Marshall Islands and Saint Kitts and Nevis seem to prioritise ease of access over stringent compliance': ibid 7.

20 The European Union Committee of the House of Lords has noted that the 'UK flag has attracted a number of registrations from EU and EEA interests, as allowed under EU law. This has supported the growth of the UK Ship Register (UKSR) and strengthened its international reputation. Post-Brexit, the UK will be able to review registration rules and determine if the UKSR should become a national registry, remain open to EU and EEA interests, or open up internationally': House of Lords, European Union Committee, *Brexit: Road, Rail and Maritime Transport* (HL 355, 2019) [191].

21 See e.g. IMO Secretariat, Outcome of the Inter-Agency High-Level Meeting to Address Unsafe Mixed Migration by Sea, IMO MSC 95th sess, item 21 (17 April 2015) IMO Doc MSC 95/21/4/Rev.1.

22 MSWG, International Ship and Port Facility Security Code, Diplomatic Conference of the IMO [2002].

ships has been very controversial within the shipping community. The use of firearms on merchant ships came before the 85th session of the IMO MSC held from 26 November to 5 December 2008.[23] Many were concerned that the use of PCASP would lead to an escalation of violence between ships and pirates.[24] The pirates had a reputation for being 'fierce and adaptable' and had 'changed tactics by keeping some hostages as an "insurance policy", even after payment of ransom'.[25] There was a fear that such hostages could be punished if deadly force were to be used against a related pirate gang.[26] The International Parcel Tankers Association (IPTA) representative argued that the possibility of a firefight in the vicinity of volatile cargoes carried by its members was 'too terrible to contemplate'.[27] IPTA advised the committee that:

> The observer from IPTA advised the Committee that there were limits to what could be done by owners and crews of chemical tankers to protect themselves and to avoid attack. By their very nature these vessels tended to be small, with a low freeboard and without the capacity to outrun the high-speed vessels often utilized by the pirates. Chemical tankers often carried extremely volatile cargoes and there was therefore no question of firearms being taken on board, either by vessel crews or by specialist security guards. Equally, if faced by pirates threatening to use firearms the master would, in most cases, have no option but to capitulate.[28]

The MSC agreed that there was a need for a full re-examination of PCASP and the presence of firearms and related security equipment on commercial vessels. The MSC instructed a working group led by Denmark to update the existing IMO counter-piracy guidance.[29] This work became the basis for two circulars adopted by the 86th session of the IMO Maritime Safety Committee (held from 27 May to 5 June 2009).[30] They included *Guidance to Shipowners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships* (Shipowner Guidance)[31]

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23 See Report of the Maritime Safety Committee on its Eighty-Fifth Session, IMO MSC (19 December 2008) IMO Doc MSC 85/26.

24 S Casey-Maslen and A Priddy, 'Counter-Piracy Operations by Private Maritime Security Contractors Key Legal Issues and Challenges' (2012) 10 J of Int'l Criminal Justice 839, 840; cf A Murdoch, 'Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia' in C Symmons (ed), *Selected Contemporary Issues in the Law of the Sea* (Martinus Nijhoff 2011) 163: 'One concern is that the presence of such contractors might lead to an arms race between pirates and guards, with recourse to more powerful weapons, placing ships and crews at increased risk. While this is possible, it is unlikely. The vessels available to the pirates would simply not facilitate the mounting of larger calibre weapons, and more advanced weapons in functional condition are not as readily available as is suggested':

25 J Kraska, 'International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy' in D Guilfoyle (ed), *Modern Piracy: Legal Challengers and Responses* (Elgar 2013) 221–2.

26 Ibid 221–2.

27 Report of the Maritime Safety Committee on its Eighty-Fifth Session (n 23) [18.11].

28 Ibid [18.11].

29 Ibid [18.10].

30 See generally Kraska, 'International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy' (n 25) 226.

31 Guidance to Shipowners and Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships, IMO MSC (23 June 2009) IMO Doc MSC.1/Circ.1334.

and *Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery Against Ships* (Governmental Recommendations).[32]

Three key points were reflected throughout the two circulars. First, the IMO guidance considered it acceptable for shipowners to use *unarmed* security personnel in an advisory capacity aboard ships or in the form of enhanced watch keeping capacity.[33] Second, the IMO made it clear that seafarers themselves should not be armed. In its guidance to shipowners the IMO stated that the carriage and use of firearms by seafarers for their personal protection was strongly discouraged given the lack of special training and the risk of accidents due to having firearms on board a ship. Further, the carriage of arms by seafarers could encourage potential pirates to carry firearms or even more dangerous weapons 'thereby escalating an already dangerous situation'.[34] In addition, firearms on board could themselves become an attractive target for potential attackers.

Shipowners were further warned of legal risks resulting from the discharging of weapons during potential pirate attacks, even where such force was used in self-defence or defence of others. Shipowners were reminded that, in light of the various State customs and security requirements relating to the carriage and importation of firearms, even the possession of a small handgun could amount to an offence. For legal and safety reasons flag States were advised to 'strongly discourage the carrying and use of firearms by seafarers for personal protection or for the protection of a ship'.[35]

Third, it was for flag States to determine whether the carriage of *armed* security personnel and associated weaponry was allowed, in consultation with shipowners, operators and companies.[36] In determining their policies on the embarkation of PCASP flag States were 'recommended to take into account the possible escalation of violence that could result from the carriage of armed personnel'.[37] Shipowners wishing to embark PCASP were recommended to contact their flag State to seek clarity over national policy on the legality of their use. In addition, shipowners were instructed that all 'legal requirements of the flag, port and coastal States should be met'.[38] They were warned both that 'ships entering the territorial sea and/or ports of a State are subject to that State's legislation' and that importation of firearms would be subject to port and coastal State regulations.[39]

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32 Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery Against Ships, IMO MSC (26 June 2009) IMO Doc MSC.1/Circ.1333.

33 Shipowner Guidance MSC.1/Circ.1334 (n 31) [62]; MSC Piracy Recommendations MSC.1/Circ.1333 (n 32) [6].

34 Shipowner Guidance MSC.1/Circ.1334 (n 31) [60].

35 MSC Piracy Recommendations MSC.1/Circ.1333 (n 32) [5].

36 Shipowner Guidance MSC.1/Circ.1334 (n 31) [63]; MSC Piracy Recommendations MSC.1/Circ.1333 (n 32) [7].

37 MSC Piracy Recommendations MSC.1/Circ.1333 (n 32) [7].

38 Shipowner Guidance MSC.1/Circ.1334 (n 31) [63]; MSC Piracy Recommendations MSC.1/Circ.1333 (n 32) [4].

39 Shipowner Guidance MSC.1/Circ.1334 (n 31) [59]; MSC Piracy Recommendations MSC.1/Circ.1333 (n 32)

There was concern at the MSC that the carriage of firearms on ships could escalate violence and be particularly dangerous on vessels with volatile cargo and other dangerous goods. This concern was echoed in both the shipowner guidance and State recommendations.[40]

The lack of a targeted international framework relating to the embarkation of PCASP at sea meant shipowners were faced with deriving rules from various national legislative regimes concerning the movement, carriage and use of firearms and other security-related equipment. These national regimes then needed to be considered in light of the prescriptive and enforcement jurisdiction as set out in the United Nations Convention on the Law of the Sea (UNCLOS) and international law generally. This involves questions of interpretation and national and international limits on extra-territorial application of laws. The reluctance of the IMO to take a leadership role in the regulation of PCASP arguably left a number of critical lacunas in maritime security governance.

5.2.2 Industry

By 2011 the embarkation of PCASP on ships was becoming accepted practice. The United States joined shipowners and insurers in promoting the use of PCASP in the high-risk area (HRA).[41] The perceived failure of IMO member States to provide a regulatory framework for the use of PCASP meant little was done to slow the practice. This made the problem worse, providing a legal vacuum for maverick-like private maritime security companies (PMSCs) to operate with impunity. A lack of certification meant that shipowners could not assess the adequacy of PCASP. Concern among shipowners and insurers prompted the industry to establish a normative framework for the use of PCASP.[42]

The unchecked practice of embarking heavily armed guards without proper certification and training meant a tailored normative framework was necessary. Sovereign States, fearful of promoting the practice, failed to formulate regulatory norms that would ensure compliance with international law. Early circulars issued by the IMO lacked sufficient clarity as to the substance of relevant norms and their operation. Shipowners and operators were equally concerned. With no accreditation and certification in place vessels had no way of accessing the adequacy of PCASP teams. This is in marked contrast to a ship's master and crew,

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[4]; See Kraska, 'International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy' (n 25) 247.

40 Shipowner Guidance MSC.1/Circ.1334 (n 31) [59]–[60], [63]; MSC Piracy Recommendations MSC.1/Circ.1333 (n 32) [4]–[5], [7].

41 To date 'no ship with an armed security team aboard has been successfully pirated': SJ Shapiro, Remarks to the Defense Trade Advisory Group (2011); cited in S Mahard, 'Blackwater's New Battlefield: Toward a Regulatory Regime in the United States for Privately Armed Contractors Operating at Sea' (2014) 47 Vand J Transnat'l L 331, 359 fn 217–8.

42 Measures to Enhance Maritime Security, Piracy and Armed Robbery Against Ships, Report of the Working Group, IMO MSC (2012) IMO Doc 90/WP.6 [6.8].

all of whom must present evidence of competency across a range of relevant skills before being let on board. The use of armed guards in the Gulf of Aden was manifestly increasing. The lack of coordinated governmental regulation meant that private individuals were now patrolling the world's second-largest shipping lane with very powerful weaponry.

Subsequently, the shipping and insurance industries drove the agenda to develop standards for PMSCs. As something of a wake-up call the powerful Round Table of International Shipping Associations (comprising BIMCO, the ICS, INTERCARGO and INTERTANKO) fired a shot across the bows of the MSC through the submission of an informal working document called a 'J Paper'.[43] The J Paper proposed guidelines for the accreditation and selection of PMSCs and challenged the committee to abandon their hands-off attitude to the subject. Flag and industry consensus on the floor of the MSC would be a breakthrough many had been waiting for: a step from the unilateral to the multilateral.

Contemporaneously, and an influence on the J Paper, a PMSC representative organisation called the Security Association for the Maritime Industry (SAMI) was created.[44] SAMI combined active stakeholder representation with in-depth shipping industry knowledge and contacts. SAMI formed a vital partnership with the Marshall Islands, now the second-largest registry by gross registered tonnage (GRT), giving them a crucial presence on the floor of the 89th session of the MSC as part of the Marshall Islands delegation.

Working with the National Security Inspectorate (NSI), a UK-based third-party certification organisation with a focus on standards relating to security companies, SAMI embarked on a pilot programme based on the specification. The standard operated through a three-step auditing process (which was reflected in the final International Organization for Standardization (ISO) standard). Auditing against the SAMI standard would require a desk-based review of the PMSC's accounts and documentation (due diligence), on-site audit at the PMSC's registered headquarters and a spot inspection with one of the PMSC's security teams embarking or disembarking a ship in the HRA.

5.2.3 The IMO: MSC 89 and Beyond

MSC 89 started with comments by the IMO Secretary-General on the subject of the employment and use of armed security personnel on board ships.[45] The Secretary-General invited attendees to consider the need for regulation, stating:

> I do appreciate that making a decision on whether armed guards should be sanctioned

[43] Passenger Ship Expert Working Group – Summary Outcome of Meeting (2014) 3.

[44] SAMI was subsequently dissolved in April 2016. H Birkett, 'SAMI Goes into Liquidation After Membership Halves' *Splash 247* (19 April 2016).

[45] IMO Secretariat, Address of the Secretary-General at the Opening of the Eighty-Ninth Session of the Maritime Safety Committee, IMO MSC (2011) IMO Doc MSC 89/INF.26 [2].

> on board merchant ships to repel pirates is not an easy one – especially if, so doing, would place the lives of seafarers at risk, a predominant factor in any decision you will also make when dealing with "mother ships". But a decision, nonetheless, is needed and should be made now. And, once made, it should be implemented with prudence and due regard to the prevailing circumstances. Such a decision should be supplemented by the demonstration of a positive attitude from port States where armed guards would embark pending a passage through known risk areas – if, of course, your decision is in favour of armed guards. A decision on this sensitive issue by IMO would, more than on others, justify the Organization's role in orchestrating the response.[46]

A submission by IPTA, further demonstrated the pressure being exerted on the IMO by shipowners to coordinate the regulatory process. While IPTA had previously opposed the embarkation of PCASP, the association noted that in the months before MSC 89 there had been 'an almost total reversal of opinion among IPTA members and increasing numbers of those who operate in the high risk areas are employing or considering employing private armed security providers'.[47] IPTA noted that, while in many cases vessels succeeded in relying on the passive resistance measures in version 3 of the Best Management Practices (BMP), its members were:

> increasingly of the opinion, however, that it is unreasonable to expect crews to deal with such attacks by themselves and that some form of armed protection should be provided. Ideally, such protection would be provided by a military vessel protection detachment (VPD), but where military VPDs are not available many owners are reluctantly coming to the conclusion that they have no option but to employ private armed security companies.[48]

IPTA, while recognising many member States had reservations about the use of PCASP, were 'nevertheless of the opinion that the time has come for a frank and open discussion of the various issues, be they legal, practical or otherwise, within the IMO'.[49] They noted:

> There is no shortage of private security companies willing to sell their services to shipowners, indeed this can be seen as one of the newest "growth industries". The challenge for the shipowner is to distinguish between the true professionals and those who are simply seeing an opportunity to profit from the situation in which the shipping industry currently finds itself. Above all it should be recognized that the maritime environment poses particular challenges and it may not be appropriate for

[46] Address of the Secretary-General at the Opening of the Eighty-Ninth Session of the Maritime Safety Committee (n 45) [3].

[47] International Parcel Tankers Association (IPTA), Employment of Private Armed Security Providers, IMO MSC (2011) IMO Doc MSC 89/18/11 [3].

[48] In addition, the use of 'mother ships' meant that 'pirates are now able to operate throughout the Indian Ocean. While the military forces are doing an extremely good job of protecting vessels around the Gulf of Aden, they simply do not have the resources to patrol an area as vast as the Indian Ocean'. Further, given the increased use of violence by the pirates who 'now fire indiscriminately upon vessels' this largely negated the arguments about avoiding a firefight and 'also means that it is relatively easy to distinguish between pirates and legitimate fishermen, since the latter do not approach vessels at speed while firing on them': ibid [4]–[6].

[49] Ibid [7].

> a security team accustomed to operating in areas of armed conflict on land to be deployed into a totally different sort of situation in the maritime world.[50]

Therefore, IPTA opined that 'while guidance and self regulation by the security industry may be useful in the short term, the ultimate aim should be for the IMO, as the competent authority, to develop an accreditation and oversight capacity for such companies'.[51] IPTA emphasised that it was not asking the IMO to endorse the use of PMSCs. Instead, it stressed that its submission 'should simply be seen as a recognition of the fact that such companies are being employed and will continue to be employed'.[52]

One issue for the Working Group on Maritime Security and Piracy was the potential applicability of the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict (Montreux Document) and the International Code of Conduct (ICoC). The Secretariat produced a number of briefing notes for MSC 89 including a briefing note[53] relating to the use of vessel protection detachments (VPDs), as well as papers on the Montreux Document[54] and ICoC[55] initiatives and their potential relevance and implications. The Montreux Document formed the basis of the ICoC. While overwhelmingly focused on land-based activities, the code envisaged the potential for expansion to security services in the maritime domain.[56] Following the production of ICoC, the International Code of Conduct Association (ICoCA) was established. The Swiss-based ICoCA plays a coordinating role in the implementation of ICoC. These two soft-law frameworks developed from the 2007 'Blackwater incident' in Iraq, where private contractors were alleged to have killed 17 civilians without justification.[57] Applying the Montreux Document and ICoC directly to PCASP was complicated by the maritime

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50 Ibid [8].

51 IPTA suggested this be 'possibly linked to the work being carried out in respect of land-based companies under the International Code of Conduct for Private Security Service Providers (ICoC)': ibid [9].

52 'Likewise, action by the IMO in this regard should not be seen as "institutionalizing" the use of armed guards. Many owners, particularly those who operate large, fast vessels, will see no need to use private security companies. Where an owner has concluded on the basis of risk assessment that it is right to do so, however, we believe that they should be given every assistance by the flag State in the selection and employment of the security provider. Since the IMO is the agency that deals with issues relating to the maritime industry, it is right that any oversight of such companies should be under the auspices of the IMO': ibid [10].

53 IMO Secretariat, A Preliminary Brief on Legal Issues Relating to the Use of Armed Security Services Aboard Vessels, IMO MSC (2011) IMO Doc MSC 89/INF.27.

54 IMO Secretariat, Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies, IMO MSC (25 March 2011) IMO Doc MSC 89/INF.20 (Montreux Document).

55 IMO Secretariat, International Code of Conduct for Private Security Service Providers, IMO MSC (28 March 2011) IMO Doc MSC 89/INF.21 (ICoC).

56 ICoC [4].

57 'This case has become emblematic of the impunity PMSCs seem to enjoy': N Jägers, 'Regulating the Private Security Industry: Connecting the Public and the Private Through Transnational Private Regulation' (2016) 6 Hum Rts & Int'l Legal Discourse 56, 58 fn 2; Y Dutton, 'Gunslingers on the High Seas: A Call for Regulation' (2013) 24 Duke J Comp & Int'l L 107.

context. As Carreira Da Cruz notes:

> the Maritime Safety Committee has specifically stated that other famous instruments, such as the Montreux Document and the ICoC, were not directly relevant to the situation of piracy and armed robbery in the maritime domain and did not provide sufficient guidance for PMSCs.[58]

The working group agreed to adopt the J Paper as the base document for industry guidance.[59] The private provenance of that guidance was not lost on some delegations. Some expressed concern over the inclusion in this ship-owner guidance of 'certain commercial aspects which appeared in the source document, which originated from industry and was drafted from an industry perspective'.[60] Despite this, the MSC was of the view that the commercial aspects of the guidance provided essential practical context for the selection of PMSCs. Therefore, the MSC found those aspects should be reflected in the shipowner guidance, albeit in a general way.[61]

The consideration of the J Paper at the 89th session of the MSC resulted in the production of two circulars. The first circular (MSC.1/Circ.1405) contained guidance to shipowners on how to ensure armed guards met minimum standards.[62] The second circular (MSC.1/Circ.1406) provided recommendations to flag States regarding the use of PCASP on board vessels flying their flag.[63] Following this positive reception by the IMO of industry-driven regulatory initiatives SAMI set to work forming their own standard for PCASP. The rationale behind the standard was to create a management standard for PMSCs against which third-party certification bodies could audit them. SAMI extrapolated the contents of MSC circulars MSC.1/Circ.1405 and MSC.1/Circ.1406 to derive a standard for industry and member State approval at the IMO.

MSC 90 took place from 16 to 25 May 2012. It was here that the PMSC representative body SAMI worked with the popular flag State for the Marshall Islands to submit an accreditation programme to the MSC of the IMO.[64] Leading up to MSC 90 the use of PCASP had further increased.[65] The MSC acknowledged the need for an accreditation model for PCASP. It had become clear at the MSC that there were 'no procedures in place

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58 Carreira Da Cruz (n 2) 70–2.

59 IMO Secretariat, Report of the Working Group, IMO MSC (2011) IMO Doc MSC 89/WP.6 [6.8].

60 Ibid [6.17].

61 Ibid [6.17].

62 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, IMO MSC (2011) IMO Doc MSC.1/Circ.1405.

63 IMO Secretariat, Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, IMO MSC (2011) IMO Doc MSC.1/Circ.1406.

64 Marshall Islands, Security Association for the Maritime Industry (SAMI) Programme and Standards for Private Maritime Security Company (PMSC) Accreditation, IMO MSC (2011) IMO Doc MSC 90/20/11.

65 Ibid [1].

for the professional accreditation of PCASP unique to the maritime industry'.[66] In terms of the applicability of the Montreux Document[67] and ICoC, some IMO delegations argued that these frameworks should be used as the basis for PCASP regulation with 'logical editorial amendments' to cover sea-based private security.[68] Despite this, the prevailing view was that the Montreux Document and ICoC:

> were not appropriate to use as the basis for the development of flag State guidance related to piracy as they addressed the deployment of private security forces acting under the direct control of governments in areas of armed conflict, which was not applicable to piracy, and further did not address the unique characteristics of the maritime environment.[69]

The IMO adopted the SAMI-Marshall Islands proposal to 'avoid a patchwork of conflicting national standards spread around the world'.[70] Some member-State delegations were deeply sceptical of any self-regulation by the industry.[71] To this end, the MSC requested the ISO to develop a standard for PMSCs supplying PCASP to commercial vessels. As Carreira Da Cruz noted:

> it is on this very precise occasion that the Maritime Safety Committee formally agreed that the ISO would be in the best position to develop international standards for PMSCs based on the IMO-developed guidance and with relevant IMO liaison and participation in the ISO process for the development of standards.[72]

The ISO is used for a number of maritime standards and it was thought appropriate to make it part of the 28000 series relating to supply chain security.[73] The standard was developed by a working group brought together under the auspices of the ISO Technical Committee 8 (ISO/TC 8).[74] The core drafting team consisted of representatives from BIMCO, the ICS, the SAMI and the Security in Complex Environments Group (SCEG).[75] To fast-track the

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66 Measures to Enhance Maritime Security, Piracy and Armed Robbery Against Ships, Report of the Working Group (n 42).

67 See Montreux Document.

68 Measures to Enhance Maritime Security, Piracy and Armed Robbery Against Ships, Report of the Working Group (n 42) [6.9].

69 Ibid [6.9].

70 Kraska, 'International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy' (n 25) 242.

71 IMO Secretariat, Report of the Maritime Safety Committee on its Ninetieth Session, IMO MSC (2012) IMO Doc MSC 90/28 [20.58].

72 Carreira Da Cruz (n 2) 70–2.

73 Carreira Da Cruz notes that 'one should remember that the ISO is not a novice in the standardization of maritime matter' but rather that the ISO 'has a long history of collaboration with the IMO in this field, as it has been in charge of more than 300 standards (plus more than 90 in progress) related to ships and marine technology, with standardization of design, construction, structural elements, outfitting parts, equipment, methods and technology, and marine environmental matters, used in shipbuilding and the operation of ships, comprising sea-going ships, vessels for inland navigation, offshore structures, ship-to-shore interface and all other marine structure subjects to IMO requirements': ibid 70–2.

74 ISO, ISO Statutes (2016) [14].

75 A Aarstad, 'Maritime Security and Transformations in Global Governance' (2017) 67 Crime Law Soc Change 313, 323.

development of the standard the working group took advantage of the ISO publicly available specification (PAS) mechanism.[76] Ordinarily, it takes a considerable amount of time for ISO standards to be published. However, as in the case of ISO/PAS 28007:2012 Guidelines for PMSCs Providing PCASP on Board Ships (ISO/PAS 28007:2012), a standard may first be released as a 'publicly available standard' or PAS. PAS standards are released more promptly and are endorsed as full standards, amended or dropped by the ISO within three years. ISO/PAS 28007 was released in December 2012.[77]

For the MSC guidance material targeted at private security personnel operating in land-based contexts 'required amendment to address the needs the maritime sector'.[78] The working group emphasised the maritime nature of the task undertaken by PCASP and agreed that their deployment 'should be based on an assessment of the maritime experience of the PMSCs including the training, knowledge and proficiency of its staff'.[79] MSC 90 resulted in updated shipowner guidance on the use of PCASP[80] and port and coastal State recommendations.[81] In addition, for the first time the MSC formulated guidance to PMSCs (MSC.1/Circ.1443).[82]

The introductory paragraphs of the revised shipowner guidance reflected a change in attitude at the IMO on the subject of PCASP and a greater willingness to work collaboratively with industry on a regulatory framework:

> The increased threat to commercial shipping by Somalia based pirates has led to extended use of armed guards and a marked expansion in the number of firms offering armed maritime security services for vessels transiting the High Risk Area (HRA). The Organization, whilst not endorsing the use of privately contracted armed security personnel (PCASP), understands that shipping companies may find it difficult to identify reliable, professional private providers of armed security.[83]

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76 The 'expeditious development' of the ISO PAS 28007 specification was widely acknowledged. See ISO, Guidelines for Private Maritime Security Companies (PMSC) Providing Privately Contracted Armed Security Personnel (PCASP) on Board Ships (and Pro Forma Contract) (ISO/PAS 28007:2012) (2012) (ISO/PAS 28007:2012).

77 ISO/PAS 28007:2012.

78 in any event 'defined criteria could not currently be established because an international approved set of rules did not presently exist': Measures to Enhance Maritime Security, Piracy and Armed Robbery Against Ships, Report of the Working Group (n 42).

79 Ibid.

80 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, IMO MSC (2012) IMO Doc MSC.1/Circ.1405/Rev.2.

81 IMO Secretariat, 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, IMO MSC (2012) IMO Doc MSC.1/Circ.1408/Rev.1.

82 Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, IMO MSC (2012) IMO Doc MSC.1/Circ.1443; Carreira Da Cruz (n 2) 70–2.

83 'The decision on the employment of PCASP on board ships is a complex one for a shipowner. The absence of applicable regulation and industry self-regulation coupled with complex legal requirements governing the legitimate transport, carriage and use of firearms2 gives cause for concern. This situation is further complicated by the rapid growth in the number of private maritime security companies (PMSC) and

Subsequently, MSC 94 agreed that 'the work of ISO in developing ISO/PAS 28007:2012 should be reflected and referenced appropriately in IMO guidance on PMSC in MSC1/Circ.1406/Rev.2'.[84] It was also important that the wording of the guidance could accommodate national PMSC licenses such as the those being developed by the German government.[85] Thus, the convergence of State and industry policy that non-State policymakers wished for had begun to take place.

ISO 28007-1:2015 Guidelines for PMSCs Providing PCASP on Board Ships (ISO 28007:2015) was published as a full international standard and submitted to the MSC for 'due recognition' in March 2015.[86] In its submission to the MSC the ISO noted that the 'final standard has not significantly changed from the original ISO/PAS 28007:2012 and that those few changes that were made were mainly related to interpretation and guidance, not to requirements or specification.[87] The ISO called on IMO member States to 'give due recognition to the full delivery of accredited certification to IMO as promised' and stated that, given ISO 28007:2015's:

> proper availability for examination through the IMO Secretariat for more than two years; its successful passage through public scrutiny to a full International Standard; and, last but not least, its effectiveness in protection of seafarers and in providing confidence to shipowners and other stakeholders. ISO is again requesting Member States to require accredited ISO certification with a proper scope of application for PMSC activities, and also for IMO to recommend this accordingly through a relevant circular or similar instrument.[88]

During MSC 95 Germany had proposed that the flag State recommendations be amended to accept either 'accredited certification to ISO 28007:2015 or meet applicable national

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doubts about the capabilities and maturity of some of these companies. Significant competence and quality variations are present across the spectrum of contractors offering services': Revised Interim Shipowner Guidance MSC.1/Circ.1405/Rev.2 (n 80) [1.1]–[1.2].

84 Germany, National Legislation on Private Maritime Security Companies (PMSCs), IMO MSC (2015) IMO Doc MSC 95/INF.15 [1-2].

85 'In lieu of requesting a working group to develop appropriate text, MSC 94 agreed to invite Member States and observer organizations to submit proposals for amending MSC.1/Circ.1406/Rev.2 to the next session. It was also acknowledged that an informal group could work on a joint proposal based on document MSC 94/14/1': ibid [1-2].

86 'ISO is therefore requesting that IMO Member States give due recognition to the full delivery of accredited certification to IMO as promised; its proper availability for examination through the IMO Secretariat for more than two years; its successful passage through public scrutiny to a full International Standard; and, last but not least, its effectiveness in protection of seafarers and in providing confidence to shipowners and other stakeholders. ISO is again requesting Member States to require accredited ISO 28007 certification with a proper scope of application for PMSC activities, and also for IMO to recommend this accordingly through a relevant circular or similar instrument': ISO, Publication of International Standard ISO 28007, IMO MSC (1995) IMO Doc MSC 95/15/3 [6]–[12].

87 'Examples of changes include: the role of human rights, which has been clarified by referencing the UN Guiding Principles on Business and Human Rights; increased emphasis on the role of flag States and the need to meet requirements set by them; clarification of different concepts of "threat assessment" and "risk"; replacement of the phrase "interested parties" by the standard ISO terminology "stakeholders" for textual consistency; and replacement of the phrase "reasonable and proportionate" by "reasonable and necessary" to maintain standard UN terminology': ibid [6]–[10].

88 Ibid [11].

requirements'.[89] The MSC concluded:

> The Committee also considered document MSC 95/INF.15 (Germany), proposing text to amend MSC1/Circ.1406/Rev.2 in response to the decision of the Committee to reflect and reference ISO standard ISO 28007 while retaining the right of Member States to apply their own national standard, and agreed to forward both documents on the issue to the working group with a view to amending MSC1/Circ.1406/Rev.2 accordingly.[90]

The MSC approved the publication of MSC1/Circ.1406/Rev.3[91] to include the standard.[92] The ISO 28007:2015 standard obliges maritime PMSCs seeking certification to respect the human rights of those affected by PMSC operations and those of its PCASP by conforming with relevant legal and regulatory obligations and the United Nations Guiding Principles on Business and Human Rights (UNGPs). PMSCs seeking to be certified to ISO 28000 'should respect the human rights of those affected by the organisations operations', including conformance with 'relevant legal and regulatory obligations' and the UNGPs.[93] As a core substantive requirement ISO 28007:2015 obliges PMSCs to 'carry out a meaningful consultation with relevant interested parties and stakeholders, including those directly affected by its operations' as part of their risk assessment process.[94]

Reporting and grievance mechanisms also play a central role in the ISO 28007:2015. For ISO 28007:2015 PMSCs:

> should establish and maintain procedures for incident monitoring and reporting, follow up investigation and protection of evidence and disciplinary arrangements. Such procedures should apply where there has been any attack and response to an attack, where personnel have used a firearm, where there has been damage or injury to personnel or equipment or any other significant event which should be reported.[95]

In addition, PMSCs should use a standard incident report form that is agreed with the shipowner and annexed to the contract, 'both for its own internal use and to submit where appropriate, to international liaison as a joint report with the Master as well as to the client and to flag State'.[96] ISO 28007:2015 also requires PMSCs to 'establish

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89 National Legislation on Private Maritime Security Companies (PMSCs) (n 84) [4].

90 'The Committee approved MSC1/Circ.1406/Rev.3 on Revised interim recommendations for flag States regarding the use of privately contracted armed security personnel on board ships in the High Risk Area, which includes amendments related to certification of PMSC, to address publication of International Standard ISO': IMO Secretariat, Report of the Maritime Safety Committee on its Ninety-Fifth Session, IMO MSC (1995) IMO Doc MSC 95-22 [15.29], [15.41].

91 IMO Secretariat, Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, IMO MSC (1995) IMO Doc MSC.1/Circ.1406/Rev.3 (IMO Doc MSC.1/Circ.1406/Rev.3).

92 Report of the Maritime Safety Committee on its Ninety-Fifth Session (n 90) [15.41].

93 ISO, Ships and Marine Technology: Guidelines for Private Maritime Security Companies (PMSCs) Providing Privately Contracted Armed Security Personnel (PCASP) on Board Ships (and Pro Forma Contract) (ISO 28007-1:2015) (2015) (ISO 28007-1:2015) [vi].

94 ISO 28007-1:2015 [4.1.1].

95 ISO 28007-1:2015 [5.5].

96 ISO 28007-1:2015 [5.5].

and maintain accessible procedures to document and address complaints or grievances received from internal or external interested parties and stakeholders (including clients and whistle-blowers or witnesses)'.[97]

The ISO 28007:2015 standard was not the only hybrid, extra-IMO attempt to regulate private security providers. The US Department of Defense worked with ASIS International (ASIS) and the American National Standards Institute (ANSI) to produce a management standard for private security companies.[98] Subsequently, the ANSI PSC.1 standard[99] 'was pushed in the pipeline of the ISO 28007:2015 channel to feed the creation of a global standard – thus an ISO 28007:2015 standard'.[100]

Around the same time as these standardisation efforts was the production of the GUARDCON Contract for the Employment of Security Guards on Vessels, to be used by shipowners when engaging the services of PMSCs.[101] GUARDCON was drafted by shipping industry representative body BIMCO in consultation with shipowners, P&I clubs, marine underwriters, PMSCs and legal practitioners specialising in the area.

GUARDCON is one of the BIMCO's most popular standard-form contracts. It has been described 'as one of the most famous standard contracts for the contracting of PMSCs'.[102] GUARDCON is modular in nature: that is, it is presented in a form that allows rules as to the use of force outside armed conflict (RUF) to readily be packaged with GUARDCON as an annex. GUARDCON requires a RUF compatible with international law, IMO guidance and relevant State legal systems to be attached in annex B.[103] Like ISO 28007:2015, GUARDCON also addresses the question of investigations following the use of force. Clause 11 provides:

> **11 Investigations and Claims**
>
> (a) Following any incident where a discharge of Firearms occurs, the Master and the Team Leader shall provide formal written records of the incident as may be required by applicable national law.
>
> (b) If an incident takes place which leads to an investigation by the Owners and/or Flag State and/or other authorised body, the Contractors shall cooperate in such an investigation.

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97 The PMSC should also establish an document procedures to 'assess effectiveness of complaints and grievance mechanisms' as well as es procedures 'to document and report improper or illegal conduct either internally or by third parties to competent authorities': ISO 28007-1:2015 [5.9].

98 Carreira Da Cruz (n 2) 69–70; See ASIS International, Standard (PSC.1): Management System for Quality of Private Security Company Operations (2012) (ANSI/ASIS PSC.1-2012); Maturity Model for The Phased Implementation of a Quality Assurance Management System for Private Security Service Providers (2013).

99 ANSI/ASIS PSC.1-2012.

100 Carreira Da Cruz (n 2) 69–70.

101 BIMCO, GUARDCON: A Standard Contract for the Employment of Security Guards on Ships, IMO MSC (2012) IMO Doc MSC 90/INF.5.

102 Carreira Da Cruz (n 2) 80.

103 GUARDCON (n 101) cl 1.

(c) Each party shall assist the other party in defending any third party claims arising out of the provision of the Security Services, in which case the reasonable costs of such assistance shall be borne by the defending party.[104]

As the explanatory notes to GUARDCON state:

> If there is an incident on board the vessel involving firearms, this will generally result in an enquiry by the vessel's Flag State or, at the very least, by the vessel's owners. In such cases the contractors are obliged to assist in the enquiry – which may entail the submission of written reports from the Master, team leader and other members of the security team/crew.[105]

Another important facet of the GUARDCON standard form contact is is that the contract not only binds shipowner and PMSCs, but also extends to any sub-contractors. This is important as the instruments would otherwise be rendered useless if obligations could simply be avoided by the use of subcontractors without deep pockets. Clause 6(d) provides:

6(d) Contractors' Right to Sub-Contract

(i) The Contractors shall not sub-contract any of their obligations hereunder without the prior written consent of the Owners. In the event of such permitted sub-contracting the Contractors shall remain fully liable for the due performance of their obligations under this Contract.

(ii) Where the Contractors sub-contract personnel (or a company substantially all of whose shares are owned by an individual) who are not in the direct employment of the Contractors, the Contractors shall ensure that such sub-contracted personnel agree to be bound by all the terms and conditions of this Contract.[106]

The third component of the industry consensus is in the form of the 100 Series Rules as to the Use of Force (100 Series RUF).[107] The 100 Series RUF is designed to complement State-law and industry guidance in situations where a shipowner employs PCASP 'in order to protect a ship and the persons on board from acts of piracy, armed robbery or hijacking'.[108] The 100 Series RUF is a product of legal professionals working in maritime and insurance sectors operating to provide some clarity between international law and differing flag State and coastal/port State law. The drafters of the 100 Series RUF conducted a comparative analysis of State criminal law doctrines regarding the circumstances in which use of force may be excused based on self-defence or defence of another.

Prefacing the rules is a number of paragraphs including an introduction, the purpose and scope of the rules and what are listed. as 'fundamental principles' set out in paragraphs 10 to 17. The four rules only take up two pages, some definitions and a bibliography on a

[104] GUARDCON (n 101) cl 4.

[105] GUARDCON Standard Contract for the Employment of Security Guards on Vessels: Explanatory Notes , 10.

[106] GUARDCON (n 101) cl 6(d).

[107] Human Rights at Sea, The 100 Series Rules for the Use of Force, IMO MSC (2013) IMO Doc MSC 92/INF.14.

[108] Ibid [3].

further three. Each of the four rules (100 to 103) are followed with two or three explanatory notes. For example, RULE 100 provides:

> **RULE 100**
>
> In the event of any actual, perceived or threatened attack by third parties the Team Leader (TL) or, in the TL's absence, other PCASP, shall advise the Master or (in the Master's absence) the Officer of the Watch that he intends to invoke these Rules for the Use of Force.
>
> (NOTE 1) Nothing in these Rules shall be construed as a derogation of the Master's authority under SOLAS. Accordingly, the Master always retains the authority to order the PCASP to cease firing. However, for the avoidance of doubt, nothing in these rules shall compromise each of the PCASP's right of self-defence in accordance with applicable and relevant national and international law.
>
> (NOTE 2) The Master shall, at all times have and retain ultimate responsibility for the safe navigation and overall command of the ship. Any decisions made by the Master shall be binding and the PMSC must instruct the PCASP accordingly.
>
> (NOTE 3) Each of the PCASP shall always have the sole responsibility for any decision taken by him for the use of any force which must always be in accordance with these Rules and applicable and relevant national and international laws.[109]

In addition, RULE 101 states that 'Non-kinetic warnings may be used where there is a reasonable belief that a craft is displaying behaviour(s) assessed to be similar to those of a potential attacker'.[110] RULE 102 provides for the use of warning shots where it is assessed by a security team leader that such shots 'may deter an actual, perceived or threatened attack'.[111] RULE 103 allows for the reasonable and necessary use of force, in self defence when 'under attack or when an attack is imminent'.[112]

While it is not in itself law, complying with it operates to provide some comfort to shipowners, masters and guards as its content is informed by other potentially applicable State and international legal regimes. The 100 Series RUF was drafted by barrister David Hammond under the HRAS banner in London. The objective of the RUF Rules is explained by HRAS as twofold:

> Firstly, to provide the PCASP, Master and crew with guidance on lawful graduated response measures and lawful use of force in accordance with the right of self-defence when subjected to either perceived or actual acts of maritime piracy, armed robbery or hijacking. Secondly, to reduce risk to the Master, crew, PMSC, PCASP ship owner, charterer, insurer and underwriters of civil liability claims and/or potential criminal or other charges.[113]

As Peter Cook notes, the 100 Series RUF were developed to benefit 'the entire maritime industry and under-pinned by a thorough public international and criminal law legal review

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109 Ibid RULE 100.

110 Ibid RULE 101.

111 Ibid RULE 102.

112 'When under attack or when an attack is imminent, reasonable and necessary use of force may be used in self-defence, including, as a last resort, lethal force': ibid RULE 103.

113 Ibid 2.

using an objective international law test of what is "reasonable and necessary" when force is used, as a lawful last resort, in self-defence'.[114] For Cook, this test was 'deemed to be of a higher legal standard' than other subjective national legislative provisions for self defence.[115] The 100 Series RUF have been described as 'a sort of harmonized version of the right to self defence'.[116] The 100 Series RUF was designed to work 'in conjunction with applicable national and industry RUF guidance' to address the situation where, following a detailed risk assessment, a shipowner engages a PMSC to provide PCASP to protect a ship and those aboard from 'acts of piracy, armed robbery or hijacking'.[117] As a review into the application of the 100 Series RUF to counterpiracy activities off East Africa noted:

> In the absence of international comprehensive rules of use of force and self defence that specifically cover private persons, the Rules partly draw their legitimacy from international instruments that partially cover the theme and, for a larger extent, draw legitimacy in settled rules of self defence in domestic jurisdictions. The latter scenario, however, subject the Rules to some exceptions as to jurisdiction ratione materiae and jurisdiction ratione loci. This is so even though the crime of piracy attract universal jurisdiction in many countries.[118]

As the preface to the rules notes, they 'should fully support any contractual relationship and division of decision-making responsibility as between the Master and PCASP'.[119] Ideally, ISO 28007:2015, GUARDCON and the 100 Series RUF would act together as mutually reinforcing instruments.[120] The 100 Series RUF was packaged so as to be readily annexed to GUARDCON[121] and was developed 'in parallel to the ISO 28007 creation process' forming part of the ISO/PAS 28007:2012.[122] Despite this, explicit references to the 100 Series RUF was dropped from the full ISO 28007:2015 standard.

The focus on the role of the shipmaster is a critical component of each of the three instruments. As Chapter 3 analysed, the authority of the shipmaster is long-established in both the law of the sea and private maritime law.[123] Prior to intervention by the shipping and marine insurance industries PMSCs would use boilerplate contractual language that empowered PCASP in a manner inconsistent with the power and responsibility of the

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114 P Cook, Private Maritime Security and the Introduction of an International Regulatory Structure (4 March 2013).

115 Ibid.

116 R Kamuli, An East African Legal Review of the Application of the 100 Series Rules for The Use of Force (2015) 3–4.

117 The 100 Series Rules for the Use of Force (n 107) 3.

118 An East African Legal Review of the Application of the 100 Series Rules for The Use of Force (n 116) 3–4.

119 The Rules 'are also subject to the respect of individual flag State, national and international laws; in particular SOLAS, Chapter XI-2, Regulation 8': The 100 Series Rules for the Use of Force (n 107) 4.

120 GUARDCON (n 101); The 'Rules have been drafted with due diligence taking into account current IMO Maritime Safety Committee (MSC) Circulars, ISO PAS 28007, as well as applicable and relevant national and international laws where practicable': The 100 Series Rules for the Use of Force (n 107) 5.

121 R McCabe, *Modern Maritime Piracy: Genesis, Evolution and Responses* (1st edn, 2017) 240.

122 GUARDCON (n 101); Carreira Da Cruz (n 2) 80.

123 J Kraska, 'Regulation of Private Maritime Security Companies in International Law' in (Brill — Nijhoff 2015) 124–6; Williams (n 1) 372.

shipmaster, such as allowing the PCASP team leader to assume authority over the vessel. Such provisions are clearly in breach of Safety of Life at Sea Convention (SOLAS) and a flag State could potentially incur liability under Article 94 of UNCLOS for a failure to exercise control over its flagged vessels. Additionally, the consequence of those agreements was that many of them were arguably void *ab initio* on grounds of illegality and could undermine a ship's first and third-party insurance (and indemnification).

ISO 28007:2015, GUARDCON and the 100 Series RUF build upon the legal requirements of shipmasters' authority as derived from international law. ISO 28007:2015 requires 'a command and control structure recognising that at all times the Master remains in command and is the overriding authority on board'.[124] ISO 28007:2015 also requires training with International Safety Management Code (ISM Code)[125] and ISPS Code[126] requirements.[127]

GUARDCON expressly states that the 'Master shall ... have and retain ultimate responsibility for the safe navigation and overall command of the Vessel. Any decisions made by the Master shall be binding'. In the event of 'any actual, perceived or threatened act of piracy and/or violent robbery and/or capture/seizure by third parties the Team Leader shall advise the Master' that they intend to invoke the RUF. Individual PCASP have the sole responsibility for any use of force, including the targeting and discharge of weapons. The Master retains the authority to order a 'ceasefire subject to the PCASP's right of self-defence in accordance with applicable national law'.[128] The 100 Series RUF makes it clear that nothing in the 100 Series RUF 'shall be construed as a derogation of the Master's authority under' the SOLAS.[129] They state that:

> The Master shall, at all times have and retain ultimate responsibility for the safe navigation and overall command of the ship. Any decisions made by the Master shall be binding and the PMSCs must instruct the PCASP accordingly.[130]

Rule 100 of 100 Series RUF further sets out how the master's authority operates in the event of an actual, perceived or threatened attack. In this instance the PCASP Team Leader 'shall advise the Master ... that he intends to invoke these Rules for the Use of Force'. In this instance the master 'always retains the authority to order the PCASP to cease firing', subject to the caveat that for 'the avoidance of doubt, nothing in these rules shall compromise each of the PCASPś right of self-defence in accordance with applicable and relevant national and international law'.[131]

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124 ISO 28007-1:2015 [5.2.1].
125 The International Safety Management Code, IMO Assembly [1993].
126 ISPS Code (n 22).
127 ISO 28007-1:2015 [4.4.3].
128 GUARDCON (n 101) 4.
129 The 100 Series Rules for the Use of Force (n 107) [12].
130 Ibid.
131 Ibid rule 100.

One issue related to the use of PCASP has been the creation of floating armouries able to load and unload weapons on to passing commercial vessels.[132] Sitting just outside the jurisdiction of port and coastal States, these floating armouries are saved from the issues of coastal state regulation.[133] This enables PCASP to 'arm themselves for transits and sidestep arms trafficking regulations enforced in ports'.[134] This practice came to light in 2010 when the Sea Scorpion was forced by bad weather and a shortage of fuel into Eritrean territorial waters carrying security personnel, weapons and equipment in violation of a UN arms embargo.[135] A report by the Monitoring Group on Somalia and Eritrea revealed that the Sea Scorpion was deployed by the UK-based PMSC Protection Vessels International Ltd (PVI) as a 'floating platform for storing and transferring weapons, equipment and personnel between operations'.[136] Interviews conducted as part of the 2012 Small Arms Survey indicated that other PMSCs were deploying similar floating armouries using the PVI model.[137] Many littoral states close to these floating armouries are alarmed by their presence but, given their geographical location outside coastal waters, there is not much the coastal State can do. If four armed guards on a traversing ship were cause for concern, then an anchored ship full of weapons must be worse.

MSC 95 considered a Marshall Islands proposal to survey the number of floating armouries within the HRA to ascertain the extent of their use as well as their methods of operation:

> The delegations that spoke concurred with the view of the Marshall Islands that floating armouries were of concern to the safety and security of seafarers as well as to States in the region and supported the conduct of a survey on the number of floating armouries and their *modus operandi*.[138]

In addition, Argentina suggested that flag States report to the MSC with information relating to authorisation for floating armouries.[139] India had been particularly suspicious

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132 Report of the Monitoring Group on Somalia and Eritrea Pursuant to Security Council Resolution 2002, UNSC (2012) UN Doc S/2012/544 [9].

133 Casey-Maslen and Priddy argue that faced with 'complex regulations, some PMSCs have relied on floating "arms platforms" to embark and disembark firearms at sea, while others have simply dumped firearms at sea before entering territorial waters': Casey-Maslen and Priddy (n 24) 849.

134 J Brown, Pirates and Privateers: Managing the Indian Ocean's Private Security Boom (1 September 2012); K Houreld, 'Piracy Fighters Using Floating Armories' *Herald Telegraph* (2012); see also C Eagar, 'To Catch a Pirate: The British Ex-Servicemen Battling to Protect International Shipping from the Clutches of Somali Pirates' *The Daily Mail* (20 December 2011).

135 Despite this, there was 'no evidence to suggest that the arms, ammunition and equipment in question were destined for import to, or use in, Eritrea': UN Monitoring Group on Somalia and Eritrea, Report of the Monitoring Group on Somalia and Eritrea Pursuant to Security Council Resolution 1916 (2010), UNSC (18 June 2011) UN Doc S/2011/433, 310–1 and annex 6.5 [1]-[11]; see also UNSC Res 1907, UNSC (23 December 2009) UN Doc S/RES/1907.

136 Report of the Monitoring Group on Somalia and Eritrea Pursuant to Security Council Resolution 1916 (2010) (n 135) 310–1; Geneva Small Arms Survey, 'Escalation at Sea: Somali Piracy and Private Security Companies' in *Small Arms Survey 2012* (CUP 2012) 210.

137 Geneva Small Arms Survey (n 136) fn 50.

138 Report of the Maritime Safety Committee on its Ninety-Fifth Session (n 90) [15.31].

139 Some delegations 'raised the issue of what actions were to be taken if the number and *modus operandi* of floating armouries were provided to the Committee, bearing in mind that the registration and authorization of such ships was the responsibility of Member States of the Organization': ibid [15.32].

of vessels carrying weaponry close to its shores.[140] In a submission to MSC 98 India noted that its concerns were:

> borne out of several instances of major and serial terrorist attacks directly targeted towards sea borders; the landing of large caches of lethal weapons (arms and ammunitions), explosives, etc. on the west coast of India, which led to serial bomb blasts in Mumbai in March 1993; landings of terrorists with weapons in the mid-2000s; and landings of terror operators at Mumbai in November 2008.[141]

India stressed that the applicability of 'international treaties, standards, guidelines and IMO Conventions' to floating armouries 'especially with respect to marine environment pollution control, marine accidents casualty investigation, maritime security and safety maritime training and education etc. is not clear'.[142] In addition, India argued the situation was complicated by the lack of information on the use of floating armouries that was made available to coastal States.[143] Regarding the lack of adequate industry standards, India argued that:

> For the long term, IMO may, to fill this void and meet the perceived need, consider developing international standards, through ISO, incorporating relevant provisions of the extant international treaties, conventions, global and national legislations, as may be applicable, as was done earlier for the regulation of PMSCs and PCASPs, through the same route of IMO urging ISO to do so, culminating in the promulgation of ISO-PAS 28007 for the PMSCs and PCASPs in 2012.[144]

It may be that India's push for regulation was undermined by its handling of the Enrica Lexie incident and refusal at the time to allow for the Italian marines involved in that incident to return to Italy. As an observer to two IMO conferences in 2015 the author noticed a clear sense of frustration towards the Indian delegation from other State, IGO and NGO delegates over the matter. Despite this, it is still revealing how attitudes of member States at the IMO to private ordering and the ISO have changed as a result of the development of PCASP regulation. Member States are less suspicious of role of the ISO and private industry in the development of management standards and show a greater appreciation for the gap-filling role such initiatives can play in the absense of a comprehensive State-based regime.

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140 India, Proposed Draft Guidelines for Floating Armouries, IMO MSC (2017) IMO Doc MSC 98/15/2 [6].

141 'Thousands of ships are transiting waters off the west coast of India and through sea lanes of communication in and around the Indian coast. The floating armouries entail the potential risk of turning rogue or being hijacked by terrorist organizations or pirates. The maritime security risk in such eventualities will not be limited to India at national level but also to international merchant shipping when the same floating armouries with loads of arms and ammunition are used by terrorists and pirates to hijack merchant ships transiting in the area of operations of floating armouries, especially in the waters off the east coast of Africa, the high risk area, and off the Indian west and east coasts': ibid [6]–[7].

142 India, Proposal for the Development of an International Regulatory Framework for "Floating Armouries", as a New Output, IMO MSC (2016) IMO Doc MSC 97/19/11 [25].

143 'Non-availability of critical information to the coastal/littoral States concerned on the antecedents of the armed guards employed on board the FAs, their training/expertise in handling arms and ammunition, etc., the inventory thereof and more saliently whether they are licensed, authorized and regulated is another challenge': ibid [22].

144 Ibid [31].

5.3 Conclusion

This chapter analysed the development of the industry consensus represented by ISO 28007:2015, GUARDCON and the 100 Series RUF. This industry consensus results from contributions made by industry, states, IGOs and NGOs. ISO 28007:2015, GUARDCON and the 100 Series RUF organise and distil a vast array of international norms concerning the safety of life at sea and human rights protection as they pertain to the embarkation of PCASP. In the following chapters this dissertation will examine how these instruments aid in the transmission of the substantive norms into the relevant commercial relationships and also evaluate their weaknesses.

Chapter 6

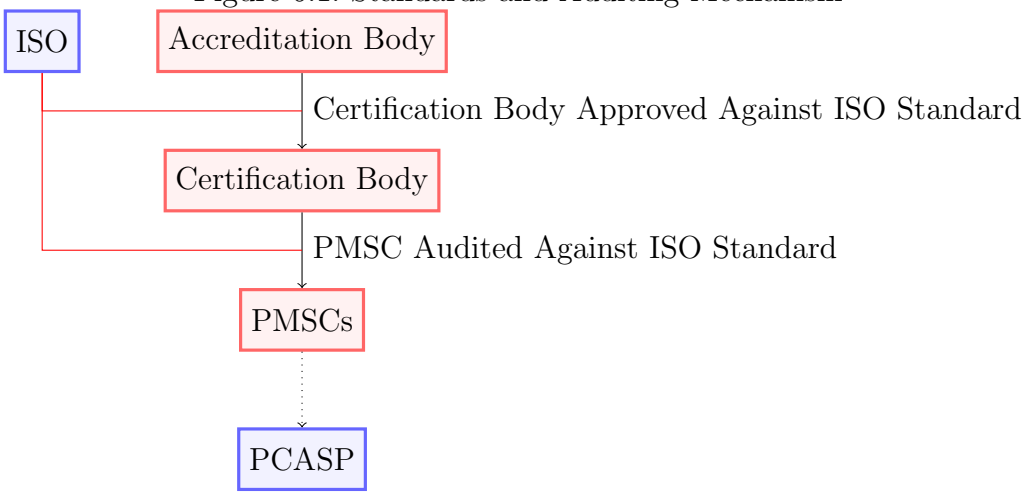
Private Ordering and Norm Transmission

This chapter evaluates the ways in which private ordering can facilitate the transmission of international norms into private commercial relationships, thereby helping to ensure compliance with international law by privately contracted armed security personnel (PCASP). Particular consideration will be given to the role of standardisation, standard form contracting and mutualisation in the hardening of international law requirements in this context. As this chapter argues, ISO 28007-1:2015 Guidelines for PMSCs Providing PCASP on Board Ships (ISO 28007:2015), the GUARDCON Contract for the Employment of Security Guards on Vessels and the 100 Series Rules as to the Use of Force (100 Series RUF) leverage shipping insurance arrangements as well as supply chain arrangements to require compliance with international law by private actors such as PCASP, private maritime security companies (PMSCs) and shipowners. This integration of international public policy into commercial relationships creates the possibility to punish non-compliant actors with domestic legal consequences and, in the case of protection and indemnity (P&I) club rules, market exclusion. The chapter will consider how these instruments and the rules they incorporate are strengthened through State laws and State-based dispute resolution mechanisms. As the chapter argues, the ability of third parties to seek a remedy for human rights abuses remains complex and could be improved through arbitration based mechanisms.

6.1 Standardisation

The International Organization for Standardization (ISO) is an international non-governmental organisation with a membership of national standards bodies.[1] The ISO defines a standard as 'a document, established by consensus and approved by a [recognised] body, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context'.[2] Historically, ISO standards were predominantly technical product standards. However, starting with ISO 9001, the organisation began turning its attention to more comprehensive corporate management, environmental and supply chain system standards.

Figure 6.1: Standards and Auditing Mechanism



Norm transmission through the ISO 28007:2015 consists of three components. First, the creation of a standard. Second, the national accreditation (for example, the United Kingdom Accreditation Service (UKAS)) of certification bodies (such as the Lloyd's Register Quality Assurance (LRQA)) to enable the certification body to conduct auditing and certification of PMSCs against the standard. Third, the auditing and certification of PMSCs by certification bodies.

[1] See generally K Abbott and D Snidal, 'International 'Standards' and International Governance' (2001) 8(3) JEPP 345; H Ward, 'The ISO 26000 International Guidance Standard on Social Responsibility: Implications for Public Policy and Transnational Democracy Mapping the Hard/Soft Law Terrain: Labor Rights and Environmental Protection' (2011) 12 Theor Inq Law 665; DA Wirth, 'The International Organization for Standardization: Private Voluntary Standards as Swords and Shields' (2009) 36 BC Envtl Aff L Rev 79; T Hemphill, 'The ISO 26000 Guidance on Social Responsibility International Standard: What are the Business Governance Implications?' (2013) 13(3) Corp Govern 305; M Delmas and M Montes-Sancho, 'An Institutional Perspective on the Diffusion of International Management System Standards: the Case of the Environmental Management Standard ISO 14001' (2011) 21(1) Bus Ethics Q 103; P Strauss, 'Private Standards Organizations and Public Law Symposium: Professor Charles H. Koch, Jr. Memorial Symposium Administrative Law' (2013) 22 Will Mary Bill Rts J 497.

[2] British Standards Institution, A Standard for Standards. Guide to BSI Committee Procedures (1991) 1.2.

The ISO standard-setting process may be considered in narrow and wide sense. From a narrow perspective the ISO remains a private entity, something it strongly emphasised at the International Maritime Organization (IMO). ISO standards are available to purchase for a fee from the ISO website. The ISO plays no direct role in the accreditation of certification bodies, nor in the auditing of PMSCs against ISO standards. National accreditation bodies, such as UKAS, accredit certification bodies such as LRQA. Accredited bodies may then certify PMSCs as ISO 28007:2015 compliant. This description of the ISO's power in global regulation perhaps fails to reflect the organisations expansive and significant role as the first-mover in a chain of causation connecting the formulation of norms with their eventual enforcement. As Scott notes:

> The effective implementation of technical standards is frequently more a matter of rational market behaviour of actors than top-down enforcement [and]whilst the opposition between hierarchies and markets as basic governance choices has long been observed, significant attention is now being paid to the importance of a third organizing mode, based in communities and networks.[3]

However, in a wider sense, the ISO clearly plays a very powerful role in the production and monitoring of standards. The strong perceived legitimacy among IMO member States means that uptake of and compliance with ISO standards is part of the formal requirements for registration with flag States and interaction with port and coastal States.

In 1995 Roht-Arriaza considered in detail the impact of private standards in the international environment context.[4] Roht-Arriaza argues that market conditions can be harnessed effectively for environmental ends, in particular where relevant actors have sufficient information.[5] Roht-Arriaza also notes that State-based international law increasingly intersects with privately generated rules such as standards, codes of conduct, and agreements on environmental measures.[6]

For Seta, private standards can help complement the system established by the the United Nations Convention on the Law of the Sea (UNCLOS) when it comes to ocean governance.[7]

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[3] C Scott, 'Regulatory Governance and the Challenge of Constitutionalism' in D Oliver, T Prosser, and R Rawlings (eds), *The Regulatory State: Constitutional Implications* (OUP 2010) 25.

[4] N Roht-Arriaza, 'Private Voluntary Standard-Setting, the International Organization for Standardization, and International Environmental Lawmaking' (1996) 6 Yb Int'l Env L 107.

[5] Ibid.

[6] Roht-Arriaza concludes that when compared to 'public international lawmaking efforts ... the results of the private process are much more limited': Roht-Arriaza (n 4); As Prakash and Potoski noted in 2006: 'while voluntary regulatory programs such as ISO 14001 may have virtues, they invite much skepticism. Recent scandals in the accounting industry have undermined public trust in voluntary regulations. Environmentalists tend to be skeptical of voluntary regulations': M Potoski and A Prakash, 'Racing to the Bottom? Trade, Environmental Governance, and ISO 14001' (2006) 50 Am J Polit Sci 350, 351.

[7] M Seta, 'The Contribution of the International Organization for Standardization to Ocean Governance' (2019) 28(3) RECIEL 304, 304; for the term 'ocean governance', Seta cites among others D Rothwell and T Stephens (eds), *The International Law of the Sea* (Hart Publishing 2010) 507; and Y Takei, 'A Sketch of the Concept of Ocean Governance and its Relationship with the Law of the Sea' in C Ryngaert, E Molenaar, and N S (eds), *What's Wrong with International Law?* (Brill — Nijhoff 2015) 60.

Being the largest of all standard-setting entities, Seta argues that the ISO 'can serve as a model for other non-State actors in setting private standards for ocean governance'.[8]

Despite its voluntary nature the regulatory potency of ISO 28007:2015 is best illustrated by the operation of the IMO's International Safety Management Code (ISM Code).[9] Marine underwriters, P&I clubs and cargo insurers mandate strict compliance with the code, as do flag States and many port States, including those in the European Union (EU).[10] As for norm transmission, the provenance of the code matters far less than its reception by these industry gatekeepers. This is the case with ISO 28007:2015. As Carreira argues:

> Considering all the previous elements, ISO 28007 can be seen as a potential international regulation tool of reference for PMSCs. As underlined, it benefits from unprecedented support from the IMO and also from shipowners (notably BIMCO) and the PMSC industry. It has the capacity to connect with other international public (IMO Maritime Safety Committee guidance) and private instruments (the '100 Series Rules for the Use of Force', GUARDCON) on PMSCs and, more importantly, it generates multiple legal consequences, beyond its role as a benchmark (in contracts, law, insurance policies and courts).[11]

Further, Carreira notes the potential for ISO 28007:2015 to act as 'leverage' when it is referenced and reinforced by other soft law instruments.[12] The predecessor to ISO 28007, ISO/PAS 28007:2012, explicitly included the GUARDCON standard form contract as an annex. That was also the original intention for the 100 Series RUF. As Carreira acknowledges, some internal politics involving the 100 Series Rules and the drafting of the ISO standard created something of a 'game of mutual support between these soft law instruments between 2012 and 2013'.[13] The 100 Series RUF was submitted to the ISO for inclusion in the PAS as Part II of the PAS standard. The ISO even co-sponsored their submission to the IMO MSC 92nd session.[14] The 100 Series RUF represented an ongoing struggle by the Human Rights at Sea charity and Security Association for the Maritime Industry (SAMI) to obtain governmental and shipping industry endorsement for the rules. While originally part of the publicly available specification (PAS) standard, the 100 Series RUF were subsequently dropped from the standard because of political pressure and the concerns of some industry bodies.

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8 Seta (n 7) 304.

9 The International Safety Management Code, IMO Assembly [1993].

10 C Anderson and C de la Rue, 'The Role of the PI Clubs in Marine Pollution Incidents Symposium: Maritime Catastrophes: Marine Investigation and Mass Claims Practice' (2010-2011) 85 Tulane Law Review 1257, 1298.

11 M Carreira Da Cruz, 'Regulating Private Maritime Security Companies by Standards: Causes and Legal Consequences' (2017) 3 Mar Safe Law Journal 63, 81.

12 Ibid 80.

13 Ibid 80.

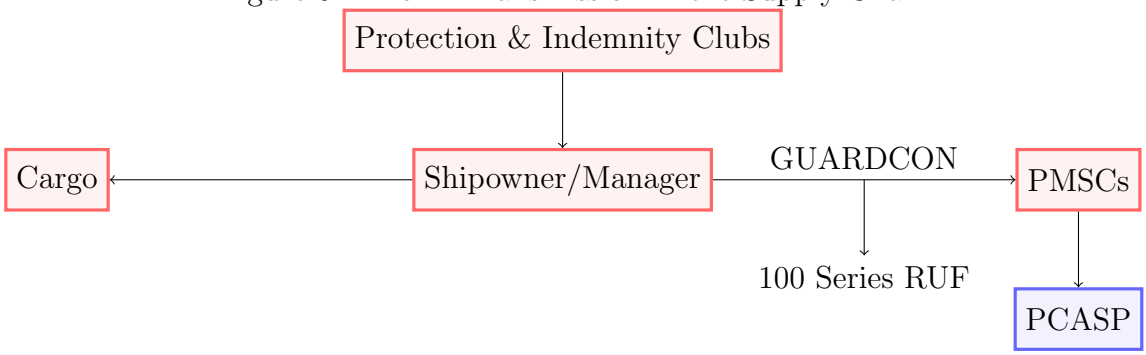
14 Human Rights at Sea, The 100 Series Rules for the Use of Force, IMO MSC (2013) IMO Doc MSC 92/INF.14; ' Eventually, the Rules state themselves that it was drafted with due diligence taking into account current IMO Maritime Safety Committee Circulars, and - interestingly – ISO 28007, as well as applicable and relevant national and international laws where practicable': Carreira Da Cruz (n 11) 80 (footnote omitted).

Additional support for the uptake of ISO 28007:2015 has come from BIMCO. BIMCO requires its members to check whether any PMSC they intend to use are ISO 28007:2015 certified before using them. In addition BIMCO enables PMSCs to become associate members.[15] To join PMSCs must 'have obtained ISO 28007 certification before being accepted by BIMCO's Executive Committee'.[16] Any loss of ISO 28007 certification results in revocation of the PMSC's BIMCO associate membership.[17] For Carreira, 'ISO 28007 certification acts as strong leverage to make the sector evolve in the new regulatory framework'.[18]

6.2 Standard Form Contracting and P&I

A significant aspect of norm transition is the incorporation of international public policy into GUARDCON. It represents a contractual relationship between the shipowner and PMSC.

Figure 6.2: Norm Transmission in the Supply Chain



Critically, GUARDCON takes advantage of internal supervision within P&I clubs and supply chains to drive uptake and encourage compliance. One of the core drivers behind the production of GUARDCON was the nature and operation of P&I club rules as they relate to the contractual liability of club members. A common feature of P&I club rules is that a member cannot recover for liabilities, losses or expenses resulting from their entering a contract unless the terms of that contract have previously been approved by managers of that P&I club.[19]

Prior to GUARDCON, PMSCs each offered services based on their own contractual terms. Contracts for PMSC services as drafted by PMSCs were perceived as one-sided,

15 BIMCO, BIMCO Security Update on ISO and illegal PMSCs, 'Hellenic Shipping News' (4 July 2015).
16 BIMCO, How to Join BIMCO as an Associate Member (2020) 1.
17 Carreira Da Cruz (n 11) 80: 'In July 2015, the powerful association insisted on reminding all its members of this rule as it had come to BIMCO's attention that some PMSCs may have had their certification withdrawn' (citation omitted).
18 Ibid 80.
19 H Bennett, *Law of Marine Insurance* (OUP 2006) [16.08]; Anderson and Rue (n 10) 1295–1296.

purporting to shift any liability they could face onto shipowners. Thus, P&I club members seeking to use PCASP needed approval from club managers or risk not being covered for liability incurred under those contracts. P&I club managers had become inundated with variations in the terms of contracts for private armed guards needing approval.[20] As a result, shipowners embarking PCASP needed a standard contract they could use 'safe in the knowledge [that it would] not prejudice their P&I cover'.[21] This lead P&I clubs (and their shipowner members) to demand the production of a standard form contract for the PCASP by shipowners, and subsequently to make its use compulsory for club members wishing to embark PCASP.

GUARDCON not only meant uniformity of contractual terms for the use of PCASP but also rejected PMSC-favourable indemnities in favour of 'knock--for--knock' stipulations,[22] removing the potential for costly indemnity and liability arguments between private security and shipowners. Under these provisions parties to a contract agree to cover their own losses without seeking an indemnity because of the fault of the other party.

Mutuality is critical to meaningful compliance by club members that is consistent with the public policy goals that GUARDCON seeks to achieve. Recent developments in maritime environmental protection suggest that diversity of P&I club membership is also critical in avoiding a regulatory 'race to the bottom'.[23] For example, catastrophic oil tanker incidents such as the Torrey Canyon in 1967 exposed P&I clubs and members to significant and uncertain potential liabilities.[24] To avoid similar catastrophes it was the industry and governmental consensus that single-hulled ships needed phasing out in favour of double-hulled ones. This change was undoubtedly needed and overwhelmingly in the best interest of the public. Tanker owners were the most disadvantaged when faced with the potential costs of this reform. Replacing ships with newer doubled-hulled vessels required significant capital expenditure. In addition, it favoured shipowners with newer double-hulled fleets.

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20 'BIMCO Publishes Standardized Contract for the Use of Armed Guards on Ships' (*gCaptain*, March 2012) ⟨https://gcaptain.com/bimco-publishes-standardized-contract/⟩ accessed 31 August 2021; P&I Circulars - Circulars .

21 G Noakes, BIMCO on PMSC and PCASP Regulation on Board Merchant Vessels: "GUARDCON" (29 March 2012).

22 W O'Neil, 'Insuring Contractual Indemnity Agreements Under CGL, MGL and P & I Policies' (1997) 21 Tul Mar L J 358; 'As regards liability in respect of crew or other personnel, the contract usually contains "knock--for--knock" indemnity provisions relating to loss of life and personal injury, whereunder each party will be responsible for his own crew. Such liability of both the owner and the carrier or tug--owner could be covered by a P&I club': S Mankabady, 'The Development of Offshore Insurance Law' (1985) 16 JMLC 101, 111.

23 For DeSombre, shipping is a 'particularly relevant sector within which to examine hypotheses about the effects of globalization. This industry demonstrates the very real threat of lowered standards in response to globalization and freer trade. If regulatory havens or races to the bottom are to be encountered anywhere, they would likely be found in shipping'. See E DeSombre, 'Globalization, Competition, and Convergence: Shipping and the Race to the Middle' (2008) 14 Global Governance 179, 180–181.

24 S Rares, 'Ships that changed the law - the Torrey Canyon disaster' (October 2017) ⟨https://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-rares/rares-j-20171005⟩ accessed 31 August 2020.

P&I club members are profit-seeking commercial players. Their interests are not always aligned. In this sense Bennett describes P&I as a form of self regulation that depends on 'horizontal relations of self interest over [the] vertical chain of scales characteristic of government'.[25] For example, in the context of marine environmental protection the priorities of P&I members diverge based on their business type. Oil-tanker owners will typically oppose any increase in regulatory burdens aimed at their ships. In contrast, other club members impacted less by proposed rules may favour their introduction. More stringent rules governing the safety of oil tankers may indeed be in their commercial favour: stronger tanker regulation may well reduce the collective financial liability of all club members. Altruism need not exist in the thinking for elements of public good to be achieved in the outcome.

For Martin, shipowners as mutual members of a P&I club are both insureds and insurers.[26] In their capacity as insurers, they 'assume risks to which the insureds, [ie] all other members, are exposed'.[27] He notes that shipowner members 'share risks with many who are engaged in quite different operations, and with some in direct competition' and that these ricks 'must therefore be mutual to the membership as a whole, in the sense that each member is prepared to underwrite them on behalf of all others'.[28] As Martin argues:

> The general rules of the club thus reflect the fact that members who have invested in quality, and who are committed to proper standards of operation, should not assume and insure liabilities incurred by those wh have no such commitment. The fair sharing of defined and acceptable risks is one thing; the exploitation (as one might call it) of mutual insurance to subsidise reckless or otherwise substandard operations is another. Hence the need to safeguard members against potential abuse of the mutual system, largely through conditions (club rules) requiring adherence to proper standards and excluding cover if such standards are not met.[29]

A similar example exists for ships using PCASP. Club members who operate in areas other than Somalia favour increased regulation of PCASP as they want to avoid increased P&I club membership calls resulting from, say, liability associated with the excessive use of force by PCASP. It follows that risk-averse P&I club members operate as important regulators vis-à-vis their colleagues to reduce potential exposure.

The diversity of commercial interests within the supply chain is also key. Enforcement of human rights norms, as incorporated into contracts, can occur between contracting parties

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[25] 'In theory this creates a mutual incentive to reduce risk': P Bennett, 'Mutuality at a Distance? Risk and Regulation in Marine Insurance Clubs' (2000) 32 Environ Plan 147, 148; P Bennett, 'Mutual Risk: P&I Insurance Clubs and Maritime Safety and Environmental Performance' (2001) 25 Mar Pol 13; See generally M Tilley, 'The Origin and Development of the Mutual Shipowners' Protection & (and) Indemnity Associations' (1986) 17 JMLC 261.

[26] S Martin, 'Marine Protection and Indemnity Insurance: Conduct, Intent, and Punitive Damages' (2003) 28 Tulane Maritime Law Journal 45, 47.

[27] Ibid 47 (footnote omitted).

[28] Ibid 47 (footnotes omitted).

[29] Ibid 48 (footnote omitted).

within those supply chain networks. Desierto provides the following hypothetical scenario, stressing the unique ability of supply chain relationships to address human rights-related violations:

> An international fashion retailer based in Italy, may procure its raw material from Uzbekistan, and manufacture its products in Vietnam. It may partner with smaller local companies in these locations for sourcing the raw material and for manufacturing. This corporation based in Italy is eventually answerable to its investors and shareholders, and it has to ensure that no laws or international regulations were violated in the manufacture of the products sold under its brand. If it were to come to light that child labour was employed for picking the cotton that was eventually used in the garment, or that the workmen who manufactured the garments were made to work in oppressive or inhuman conditions, then this would negatively affect the reputation and brand name of the Italian company, thereby affecting the value of its shares and eventually causing loss to its investors and shareholders. Therefore, it is in the interest of every business to ensure that human rights are not being violated in their supply chains.[30]

Another strength of GUARDCON is its utilisation of standard form contracting, both familiar to and favoured by industry players such as insurers and shipowners. International trade and maritime transportation depend on standard form contracts to enhance the legal clarity of cross-jurisdiction transactions and reduce uncertainty. You may wish to buy a car from someone in Hong Kong. You speak little Cantonese and the vendor speaks little English. You know little of the vendor. Here we begin to see the true utility of standardised forms to the players involved in this transaction. The car is advertised for $15,000 (USD) FOB. In those three letters, representing the words Free On Board, the rest of the contract can be gleaned by reference to the INCOTERMS – a set of internationally understood terms that vary the distribution of risk between vendor and purchaser.[31] You know from INCOTERMS that FOB means risk in the transaction passes to you once the vehicle is over the ship's rail. You will be liable for costs, insurance and freight. Not being an expert in these matters you send the purchaser an offer of "$18,000 (USD)" CIF. Changing the INCOTERMS reference from FOB to CIF makes it clear to the seller that you are offering a transaction that requires the seller to insure the vehicle during transit and pay any relevant costs and freight. Your offer is higher than the asking price as you know a transaction on these terms is dearer to the seller. This example is only the very beginning of a vast range of standardised contracts that will occur in relation to a transaction. The maritime trade, transport and insurance sectors rely on standard-form contracts to reduce

[30] D Desierto, 'Why Arbitrate Business and Human Rights Disputes? Public Consultation Period Open for the Draft Hague Rules on Business and Human Rights Arbitration' (*EJIL*, 12 July 2019) ⟨https://www.ejiltalk.org/public-consultation-period-until-august-25-for-the-draft-hague-rules-on-business-and-human-rights-arbitration/⟩ accessed 3 May 2020.

[31] 'Incoterms 2020' (*ICC - International Chamber of Commerce*) ⟨https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020/⟩ accessed 31 August 2020.

commercial uncertainty and encourage compliance with domestic and international legal orders.

Standard form contracting represented a strategic choice that helped drive the uptake of GUARDCON in shipping and insurance circles. This strategic choice of form was further strengthened by the backing of BIMCO, as a well known and respected producer of standard form contracts for the maritime industry. GUARDCON represents a significance advance in the ability of hybrid (government and non-government) and purely private standardisation. Much of its substance is drawn directly from international law, such as the law of the sea and human rights. Its easy adaptability, legal compliance and industry-targeted language encourage its incorporation into the supply chain as well as the ability to give legal efficacy and enforcement mechanisms. This bridges the gap between what is otherwise national and international, public and private. The most interesting aspect of GUARDCON is not what it does but how it does it. It is in this regard that we can learn the most in terms of future international policy issues.

6.3 State Reinforcement

Standards such as ISO 28007:2015 are appealing to flag States for a number of reasons. They encourage uniformity among jurisdictions, have the backing of key industry groups (thereby allaying concerns of 'flagging-out') are developed to complement IMO regulatory efforts and can strengthen the international reputation of the registries. In addition to the 'powerful endorsement of the IMO, the standard is backed by other important actors' including INTERPOL, the European Commission, the Contact Group on Piracy off the Coast of Somalia (CGPCS), SAMI, the OCIMF, major PMSCs, BIMCO[32] and national shipping associations.[33] Additionally, the UK Department of Transport Interim Guidance on the use of PCASP formally encourages 'shipping companies to use accreditation to ISO 28007:2015 28000, incorporating the requirements of ISO 28007:2015 as part of their selection criteria when choosing a PMSC'.[34] Many PMSCs:

[32] 'An extremely important matter is the fact that BIMCO, the world's largest international shipping association, with more than 2100 members in more than 120 countries, has implemented a strong policy of linking the associate membership and the ISO certification ... BIMCO members must check whether any PMSC they are using is ISO certified; any PMSC which is a member of BIMCO, or wishes to join, is required to be and to remain ISO certified, and any revocation of the ISO certification would also incur revocation of BIMCO membership': Carreira Da Cruz (n 11) 80;

[33] Carreira Da Cruz (n 11) 79–80.

[34] UK Department of Transport, *UK Department of Transport, Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances, Version 1.2 (May 2013)* (2013); 'In addition to these valuable institutional acknowledgements, private support and inclusion in national public law, has ISO 28007 been endorsed by PMSCs and the shipowner's sector? As a matter of fact, the creation of an international standard dedicated to PMSCs has been globally welcomed by the sector: for shipowners and PMSCs that already fulfilled strict quality and compliance systems, there was a critical need94 for an international compliance system that could guarantee profes-

> have embraced the standard and - more importantly - they have been certified ISO 28007 by external auditors. Here, it is important to note that world actors of maritime risk and assurance industry, such as Lloyd's Register Quality Assurance, have directly created certification offers98 after the standard creation process. Having a notable certification body was fundamental for the empowerment of ISO 28007 in the international maritime security regulatory framework.[35]

The significance of public-private cooperation in maritime policy-making networks is illuminated by the partnership between the government of the Marshall Islands, International Registries Inc[36] and SAMI. SAMI was part of the Marshall Islands' official delegation to the IMO and provided the registry operator with support and guidance. As the Marshall Islands now advises its flagged ships:

> It is essential that PCASP or VPDs not be used as an excuse to put to one side the highly effective self-protection measures of BMP ... The RMI accepts no liability and shall not accept any liability for any claims of whatsoever nature made against it by PMSCs, the Supplying National Authorities, any personnel of the PCASP or VPD, or parties of interest arising or resulting from the shipowner, manager, or operator's use of PCASP or VPDs or related activities ... Any agreement entered into for the use of PCASP must, at a minimum, contain provisions for the use of force in compliance with established international standards regarding the Rules for the Use of Force (RUF) and within the law.[37]

Like the Marshall Islands, a growing number of flag States insist on or strongly recommend ISO/PAS 28007:2012 Guidelines for PMSCs Providing PCASP on Board Ships (ISO/PAS 28007:2012) or ISO 28007:2015 certification. They include the Bahamas,[38] Antigua and Barbuda,[39] Bermuda[40] and the United Kingdom.[41] An even larger number of flag States

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sionalism as the market of PMSCs was infested by maverick companies'. (Footnote omitted): Carreira Da Cruz (n 11) 70–2.

35 Carreira Da Cruz (n 11) 70–2.

36 The privatised Virginia-based operator of that State's registry

37 Republic of the Marshall Islands, Piracy, Armed Robbery, and the Use of Armed Security (2016).

38 The Bahamas Maritime Authority requires that shipowners 'should be able to demonstrate that due diligence has been carried out when selecting the PMSC' and 'take into account any national certification to ISO/PAS 28007:2012': Guidance on the Carriage of Privately Contracted Armed Security Personnel (PCASP) for Vessel Protection (5 February 2015) [5.1].

39 'The IMO has very recently agreed an international ISO standard for companies providing armed security teams (Standard PAS.280007). It is expected that most reputable companies supplying teams will seek accreditation to this standard during 2013 and ADOMS would recommend using only companies with this accreditation once companies start to get certified'. See Antigua and Barbuda, Department of Marine Services and Merchant Shipping (ADOMS), 'Security' ⟨https://www.abregistry.ag/technical-services/security/⟩ accessed 24 November 2019; Antigua and Barbuda, Department of Marine Services and Merchant Shipping (ADOMS), *Piracy and Armed Robbery* (2013-003, 2013).

40 'The Bermuda Maritime and Shipping Authority is not in a position to approve private maritime security companies (PMSC), however will accept PMSC's approved by the UK Administration. It is recommended that shipping companies only employ private security providers that are accredited to the current ISO 28007-1:2015': Bermuda Shipping and Maritime Authority, *Bermuda Merchant Shipping Notice, Piracy Counter Measures* (2018-012, 2017) [2.4].

41 'The UK Government regards the publication of ISO PAS 28007:2012 as an important contribution to promoting high professional standards, including human rights, among maritime security providers operating on merchant ships transiting the High Risk Area and would encourage shipping companies to use inde-

insist on compliance with the IMO shipowner guidance in MSC.1/Circ.1405/Rev.2.[42] Paragraph 4 of that guidance provides:

> **4 PMSC selection criteria**
>
> (4.1) As with any other type of contractor, it is important to undertake the usual due diligence, which normally includes investigation and enquiries in relation to:
>
> (.1) company structure and place of registration;
> (.2) company ownership;
> (.3) financial position (e.g. annual accounts/bank references);
> (.4) extent of insurance cover (in particular covering third-party risks);
> (.5) senior management experience; and
> (.6) quality management indicators – e.g. ISO certification.[43]

This is consistent with the flag State recommendations in MSC.1/Circ.1406/Rev.3.[44] This circular recommends that flag States 'should have in place a policy on whether or not the use of PCASP will be authorized and, if so, under which conditions'.[45] In addition, where 'the use of PCASP is determined to be an appropriate and lawful measure, flag States should establish a policy which may include, *inter alia*':

> (5.2) As a second step, if the use of PCASP is determined to be an appropriate and lawful measure, establish a policy which may include, *inter alia*:
>
> (.1) the minimum criteria or minimum requirements with which PCASP should comply, taking into account the relevant aspects of the guidance set out in 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;
> (.2) ensuring that PMSC employing PCASP on board ships hold valid accredited certification to 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) or meet applicable national requirements;
> (.3) a process for authorizing the use of PCASP which have been found to meet

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pendent third party certification to ISO 28000 incorporating the requirements of ISO PAS 28007:2012 as an important component of their criteria in selecting a PMSC... With established, successful procedures in place, the emphasis must now be on ensuring high standards both in the UK and internationally in this area. In December 2012, the industry developed ISO standard ISO PAS 28007 was published. The Government supports the development and use of this standard and would encourage shipping companies to use accreditation to ISO 28000, incorporating the requirements of ISO PAS 28007 as part of their selection criteria when choosing a Private Maritime Security Company'. See UK Department of Transport, *UK Department of Transport, Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances, Version 1.3 (December 2015)* (2015) 6, 18.

42 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, IMO MSC (2012) IMO Doc MSC.1/Circ.1405/Rev.2.

43 Ibid [4.1].

44 IMO Secretariat, Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, IMO MSC (1995) IMO Doc MSC.1/Circ.1406/Rev.3 (IMO Doc MSC.1/Circ.1406/Rev.3).

45 IMO Doc MSC.1/Circ.1406/Rev.3 [5].

minimum requirements for ships flying its flag;

(.4) a process by which shipowners, ship operators or shipping companies may be authorized to use PCASP;

(.5) the terms and conditions under which the authorization is granted and the accountability for compliance associated with that authorization;

(.6) references to any directly applicable national legislation pertaining to the carriage and use of firearms by PCASP, the category assigned to PCASP, and the relationship of PCASP with the master while on board;

(.7) reporting and record-keeping requirements ... [46]

In addition, several IMO conventions require vessels entering ports to provide evidence of insurance cover. In such instances the requirements of non-State rulemaking are reinforced, albeit indirectly, by compulsory insurance requirements put in place by treaties and individual States to implement conventions concerning marine environmental protection and seafarers' rights. For example, the International Convention on Civil Liability for Oil Pollution Damage[47] and the Maritime Labour Convention[48] both mandate insurance coverage. The exclusion of a vessel or shipowner from the P&I system for unrelated reasons such as nonconformity with the industry consensus can result in exclusion from participation in maritime commerce.

The deference of States to P&I rulemaking systems was noted in a 2010 report to the IMO Legal Committee[49] in the context of the International Convention on Civil Liability for Bunker Oil Pollution Damage (BUNKER Convention).[50] The BUNKER Convention is designed to ensure the availability of compensation for those aggrieved by spillages of ship bunker oil. The report notes that States recognise P&I club 'Blue Cards' for the purposes of certifying a vessel's third-party coverage.[51] The Swedish Club notes that 'it has long been accepted practice among the States Parties to recognise International Group Clubs as approved insurers, and to issue certificates based on Blue Cards'.[52]

Does the incorporation of non-State norms into international law extend only to the norms themselves? Is recognition limited only to the output of those systems or does it perhaps amount to recognition of the systems themselves? The legal significance of nation-State

46 IMO Doc MSC.1/Circ.1406/Rev.3 [5.2].

47 International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 May 1975) 973 UNTS 3 (CLC).

48 Maritime Labour Convention (adopted 23 February 2006, entered into force 2 July 2013) 2952 UNTS 7 (MLC).

49 International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001: Implementation of the Convention, Report of the Correspondence Group, IMO Legal Committee (10 September 2010) IMO Doc LEG 97/7 (Correspondence Group Report).

50 International Convention on Civil Liability for Bunker Oil Pollution Damage (adopted 23 March 2001, entered into force 21 November 2008) IMO LEG/CONF.12/19 (BUNKER Convention).

51 'Bearing in mind that most States accept Blue Cards issued by the P&I Clubs, all States Parties are recommended to follow this practice': Correspondence Group Report [28]–[31]; see BUNKER Convention, art 7(1).

52 The Swedish Club, Compulsory Insurance — "Blue Cards" (2010).

recognition of non-State P&I rulemaking can be elaborated on by reference to Thomas Schultz's cogent analysis of the relative and absolute legality of international commercial arbitration.[53] Schultz argues that legal rules do not exist in the abstract; rather, they are dependent on the existence of a legal system. Legality follows from their belonging to a legal system and subsequent recognition through a secondary rule.[54]

Arguably, an example of this recognition of P&I as a system can be found in the EU port entry rules. Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the Insurance of Shipowners for Maritime Claims[55] requires evidence of insurance coverage for vessels entering EU ports.[56] Ships must carry evidence of this insurance in the form of insurance certificates.[57] Importantly, insurance for the purposes of the EU directive is defined as 'indemnity insurance of the type currently provided by members of the International Group of P&I Clubs, and other effective forms of insurance (including proved self insurance) and financial security offering similar conditions of cover'.[58] It is particularly significant that the directive makes reference to the rulemaking, monitoring and certification system of P&I clubs. Failure to adopt and follow P&I-supported rulemaking for the use of PCASP on ships may jeopardise shipowners' P&I coverage and result in exclusion from ports by States.

Another key consideration is the interaction between mandatory rules relating to insurance law. Municipal insurance and contract law regimes under statute and general law typically combine three types of substantive norms. First, mandatory stipulations derived from the public policy of the forum (including international public policy implemented at the domestic level). Second, express and implied stipulations based on the objective intention of contracting parties. Third, presumptions implied on an opt-out basis from accepted practice in a particular industry. English insurance law has developed a reputation for being ruthless with insured parties. Contracts are often vitiated for breaches of warranty even when the breach is unrelated to a particular claim or loss. The shipping business is composed primarily of established experienced business players operating in well-understood markets. As a result, courts are less likely to second-guess their private arrangements. In addition to the potential implications for insurance coverage, claims and termination of cover discussed

53 T Schultz, *Transnational Legality* (OUP 2014).

54 Ibid 84–7.

55 Directive 2009/20/EC of the European Parliament and of the Council of 23 April 2009 on the Insurance of Shipowners for Maritime Claims 2009.

56 'If the certificate referred to in Article 6 is not carried on board, and without prejudice to Directive 2009/16/EC providing for detention of ships when safety issues are at stake, the competent authority may issue an expulsion order to the ship which shall be notified to the Commission, the other Member States and the flag State concerned. As a result of the issuing of such an expulsion order, every Member State shall refuse entry of this ship into any of its ports until the shipowner notifies the certificate referred to in Article 6': ibid art 5(2).

57 Ibid arts 5–6.

58 Ibid art 3.

above, the use of PCASP draws attention to two particular mandatory rules of English marine insurance law. First, the definition of a maritime 'adventure' is central to marine insurance because it distinguishes marine insurance from its on-land counterpart. Section 1 of the Marine Insurance Act 1906 defines a marine insurance contract as one where:

> **1 Marine insurance defined**
> (1) A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.[59]

This definition involves a determination of the substance rather than the form of a particular policy.[60] Section 3(1) of the Act provides that 'every lawful marine adventure' may be the subject of a contract of marine insurance. A 'marine adventure' occurs where:

> **3 Marine adventure and maritime perils defined**
> (1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.
> (2) In particular there is a marine adventure where—
>
> (a) Any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as "insurable property";
> (b) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;
> (c) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils.
>
> "Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seisures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.[61]

The second issue relates to warranties of legality in marine insurance. P&I club cover as well as first-party hull and machinery cover (another commercial imperative for shipowners) may be vulnerable to arguments of illegality where the voyage or adventure includes relevant illegality occurring from a perceived pirate attack or from armed guards.[62] Manchuk performs a comprehensive analysis of illegality exclusions in maritime underwriter policies stemming from common law and the Act. He notes that such arrangements may be

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59 Marine Insurance Act 1906, s 1.

60 M Posch, 'Questions on the Liability of Classification Societies. Responsibility or Recovery?' (Masters Thesis, University of Lund 2004) 9.

61 Marine Insurance Act 1906, s 3.

62 See Anderson and Rue (n 10) 1296; G Gauci, 'Compulsory Insurance under EC Directive 2009/20/EC: An Adequate Solution for Victims, or is it Also Time for the Abolition of Maritime Limitation of Liability and the Establishment of an International Fund as an Insurer or Last Resort?' (2014) 45 JMLC 77; G Gauci, 'Piracy and its Legal Problems: With Specific Reference to the English Law of Marine Insurance' (2010) 41 JMLC 541; J Martin, 'Fighting Piracy with Private Security Measures: When Contract Law Should Tell Parties to Walk the Plank Troubled Waters: Combating Maritime Piracy with the Rule of Law' (2009) 59 Am U L Rev 1363.

vulnerable where maritime 'adventures', such as shipping, include what can be characterised as illegality:[63] In addition to insurance law, it is possible for other contractual arrangements within the supply chain to become vulnerable to arguments of illegality.[64] For example, a contract purporting to reduce the control and responsibility of a ship's master under UNCLOS and SOLAS is arguably unenforceable. Here there is a commercial incentive to use rules and forms that not only are consistent with international law but also enjoy the backing of the maritime community through the IMO.

6.4 The Relevance of State and Industry Practice to Flag State Obligations under UNCLOS

Another opportunity for the hardening of privately generated norms is found in UNCLOS. UNCLOS has variously been described as a 'constitution for the oceans',[65] a 'framework convention',[66] a 'framework to negotiate standards'[67] and a 'package deal'[68] which States have been 'afraid to touch since implementing it, of fear for disturbing the balance' it has struck between competing maritime interests.[69] This framework nature of UNCLOS is reflected in Article 94 by way of 'rules of reference' provisions where convention provisions are informed by generally accepted international regulations, procedures and practices (GAIRS). For example, Article 94 makes a number of references to such regulations, rules and standards. Article 94(2)(a) exempts from state registers small vessels based on 'generally accepted international regulations'.[70] Article 94(3)(b) on measures States shall take for safety at sea include those relating to manning of ships, labour conditions and crew training to include 'the applicable international instruments'.[71] Article 94(4)(c) requires State measures to ensure safety at sea include ensuring masters, officers and crew are 'fully conversant with and required to observe the applicable international regulations

63 G Manchuk, 'Armed Guards, Marine Insurance, and the Implied Warranty of Legality' (2011) 24 Univ San Franc Marit Law J 309.

64 *Holman v Johnson* (1775) 98 ER 1120, 1121; *Patel v Mirza* [2016] UKSC 42, [2017] AC 467; YY Lin, 'Statutory Illegality in Contracts' (1985) 6 Singapore Law Review 171; FA Mann, 'Illegality and the Conflict of Laws' (1958) 21 Modern Law Review 130; MC McNeely, 'Illegality as a Factor in Liability Insurance' (1941) 41 Colum L Rev 26.

65 T Koh, 'A Constitution for the Oceans', Remarks by T.B. (Tommy) Koh, President of the Third United Nations Conference on the Law of the Sea (1983); cited in A Tan, *Vessel Source Marine Pollution: The Law and Politics of International Regulation* (CUP 2006) 192.

66 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (Separate Opinion of Judge Paik) 2015 ITLOS Reports 102 (*SRFC Case, Separate Opinion of Judge Paik*) [27].

67 S Ole Drønen, 'A Constitution for the Seas' *University of Bergen News* (2014).

68 Tan (n 65) 194.

69 Ole Drønen (n 67).

70 UN Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 94(2)(a).

71 UNCLOS, art 94(3)(b).

concerning the safety of life at sea'.[72] Article 94(5) makes clear that in taking measures necessary to ensure safety at sea flag States are 'required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance'.[73]

While UNCLOS frequently makes use of a GAIRS provision, no definition is provided by the convention. The wording changes subtly between the GAIRS provisions. Variations of the term are found throughout UNCLOS, including 'generally accepted international regulations, procedures and practices',[74] 'generally accepted international regulations',[75] 'generally recommended international minimum standards',[76] 'generally accepted guidelines, criteria and standards',[77] 'generally accepted international standards',[78] 'generally accepted international standards established in this regard by the competent international organization',[79] and 'generally accepted international rules and standards established through the competent international organization or general diplomatic conference'.[80]

As a result there is considerable 'uncertainty over the precise meaning of the rules of reference, particularly 'generally accepted international rules and standards'.[81] This arguably reflects the speed of drafting and need to get agreement and should not be inferred as a deliberate attempt to differentiate the GAIRS provisions. Rather, the wording inconsistencies for what was intended to be the same concept should be used to aid in the interpretation of the concept itself. Arguably, the vagueness of the language used in the GAIRS mechanism reflects a very deliberate decision of the drafters to build a framework that can evoke and adapt without the need to resort to difficult and time-consuming amendment processes. Further, it also demonstrates a clear intention that the framework for flag and coastal State rights should by default favour uniformity. GAIRS is a powerful but so far underused and under-tested provision.

It has been argued that the GAIRS mechanism enables the law of the sea to be read in conjunction with accepted international rules and standards. This serves the dual purpose of allowing the convention to be read coherently with existing international rules and standards but also, and very significantly to respond and to reflect future developments.[82]

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72 UNCLOS, art 94(4)(c).
73 UNCLOS, art 94(5).
74 UNCLOS, arts 945, 392b.
75 UNCLOS, arts 942a 214. 392a, 413, 538.
76 UNCLOS, arts 119(1)(a), 212, 613.
77 UNCLOS, art 271.
78 UNCLOS, art 606.
79 UNCLOS, arts 603, 605.
80 UNCLOS, arts 211(2), 211(5).
81 Tan (n 65) 195; *SRFC Case, Separate Opinion of Judge Paik* [26].
82 Tan (n 65) 195: Tan argues that 'the LOSC incorporates by reference those existing as well as future instruments to be adopted under IMO auspices. In this regard, the convention is riddled with terms of reference such as "applicable international rules and standards", "internationally-agreed rules", "international rules" and "generally accepted international rules and standards". These rules of reference have the ad-

The starting point therefore seems to be:

> that the rule of reference discussed imposes a legal obligation on a state to apply a particular rule or standard, which the latter would otherwise not be legally bound to observe. The rule of reference, therefore, must be clearly intended to establish such a global standard.[83]

The variation in wording also suggests that the precise nature of the instruments is not as important as the extent to which they are generally accepted. In the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*[84] Justice Paik made a number of observations about GAIRS in a separate opinion.[85] For Paik, GAIRS operates as a rule of reference for imposing obligations on flag States to apply rules and standards which they 'would otherwise not have been legally bound to apply'.[86] Such rules and standards become binding upon flag States 'not because they are legally binding as either treaty or custom but because they are incorporated into' UNCLOS through the rule of reference.[87] Thus, UNCLOS as a 'comprehensive framework of legal principles ... first formulates a general duty, and then refers to and incorporates those rules or standards developed in other legal instruments into its ambit'.[88] As Judge Paik noted:

> This approach is intended to give specific content to the general duty enunciated by the Convention. It also serves a useful purpose of enabling the Convention to update the content of the general duty, thus ensuring the long-term relevance and validity of the Convention.[89]

Measures taken to ensure compliance must be specific and conform to GAIRS, 'lest the obligation of the flag State be rendered empty'.[90] Determining these measures requires an 'examination of those international agreements and legal instruments addressing flag State responsibility'.[91] In the context of illegal, unreported and unregulated (IUU) fishing Justice Paik interpreted those measures to include: control of vessels through authorisation by a national register, the requirement that vessels readily identify in accordance with generally accepted standards, flag State monitoring, control and surveillance of vessels and their operations;,and making contravention of the laws and regulations of the coastal State

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vantage of automatically incorporating the technical standards set by IMO as these are continuously adopted and amended to keep up with changing circumstances. At the same time, the fact that these rules and standards are referred to by the LOSC ensures their pre-eminence over national laws and regulations':

83 ILA, Committee on Coastal State Jurisdiction Relating to Marine Pollution, Final Report (2000) 37.

84 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion) 2015 ITLOS Reports 4 (*SRFC Advisory Opinion*).

85 *SRFC Case, Separate Opinion of Judge Paik*.

86 *SRFC Case, Separate Opinion of Judge Paik* [23].

87 *SRFC Case, Separate Opinion of Judge Paik* [23].

88 *SRFC Case, Separate Opinion of Judge Paik* [23].

89 *SRFC Case, Separate Opinion of Judge Paik* [23].

90 *SRFC Case, Separate Opinion of Judge Paik* [26].

91 *SRFC Case, Separate Opinion of Judge Paik* [27].

an offence under the national legislation of the flag State, enforced with the imposition of sanctions of sufficient gravity.[92]

Article 94 of UNCLOS is 'a provision of general nature' applying to all vessels 'at all time[s] irrespective of their location'.[93] While Article 94 is particularly directed to matters relating to maritime safety, 'it should be noted that the duties of the flag State are not confined to matters related to safety at sea'.[94] There is also an argument that may be made in favour of the hardening of norms contained in IMO guidelines, recommendations, resolutions and circulars. Here it is submitted that rather than the form of the instrument, it is instead the level of general acceptance that is critical. As Tan argues:

> as long as it can be established that a specific rule or standard enjoys sufficiently general state practice in a particular field of regulation, the rule of reference ought to extend to that rule or standard notwithstanding that it may have been expressed in a convention that the relevant states are not parties to, or that has yet to enter into force, or is in force with limited state acceptances, or even in a non-binding instrument such as an IMO resolution. The critical element is the sufficiently general acceptance of that rule or standard, not the general acceptance of the legal instrument in which the rule or standard appears.[95]

For Justice Paik, the GAIRS mechanism can encompass 'regulations, procedures or practices established in international legal instruments that are accepted by a sufficient number of States may be regarded as being generally accepted'.[96] The centrality of general acceptance is reflected by the comments of Justice Paik in the *SRFC* case:

> However, it is evident that such regulations, procedures or practices need not be customary law or treaties of general acceptance. Requiring such a stringent threshold would be contrary to the very objective the rule of reference is intended to achieve. In my view, regulations, procedures or practices established in international legal instruments that are accepted by a sufficient number of States may be regarded as being generally accepted. It may also be relevant that those regulations, procedures or practices are consistently upheld by a series of legal instruments.[97]

GAIRS have been characterised as rules of reference.[98] That is, 'provisions which refer to rules of public international law but which give no indication of either their content or

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92 *SRFC Case, Separate Opinion of Judge Paik* [29].

93 *SRFC Case, Separate Opinion of Judge Paik* [8].

94 *SRFC Case, Separate Opinion of Judge Paik* [8].

95 Tan (n 65) 196–7; citing E Franckx (ed), *Vessel-source Pollution and Coastal State Jurisdiction: The Work of the ILA Committee on Coastal State Jurisdiction relating to Marine Pollution* (Kluwer Law International 2001) 29, 112.

96 'It may also be relevant that those regulations, procedures or practices are consistently upheld by a series of legal instruments': *SRFC Case, Separate Opinion of Judge Paik* [26].

97 *SRFC Case, Separate Opinion of Judge Paik* [26].

98 W van Reenen, 'Rules of Reference in the New Convention on the Law of the Sea, in Particular in Connection with the Pollution of the Sea by Oil from Tankers' (1981) 12 NYIL 3, 5.

their source'.[99] This characterisation was adopted by Justice Paik's separate opinion[100] in *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC).*[101] Justice Paik made a number of observations on the nature of GAIRS and noted that GAIRS acts as a rule of reference to impose:

> legal obligations on a State to apply certain rules and standards which it would otherwise not have been legally bound to apply. In such a situation, the rules and standards apply to the State not because they are legally binding as either treaty or custom but because they are incorporated into the Convention through the rule of reference.[102]

Such rules and standards become binding upon flag States 'not because they are legally binding as either treaty or custom but because they are incorporated into' UNCLOS through the rule of reference.[103] Thus, UNCLOS as a 'comprehensive framework of legal principles ... first formulates a general duty, and then refers to and incorporates those rules or standards developed in other legal instruments into its ambit'.[104]

Surprisingly few scholars have analysed the unique nature of UNCLOS to facilitate the development of the law of the sea through mechanisms that do not require the strict requirements of treaty amendments. A select few authors such as Boyle[105] and Redgwell[106] are exceptions. Their writing, predominately in the context of marine environmental protection, has appreciated that many of the built-in mechanisms of UNCLOS evidence the move to informal, soft law and non-State influences on international law.

For Redgwell the purposes of GAIRS are threefold. First, to harmonise UNCLOS by replacing 'the (generally unsatisfactory) *lex generalis* with explicit treaty rules (*lex specialis*) on the treaty relationship'.[107] Second, GAIRS function to ensure the ability of UNCLOS to adapt over-time 'without the need to go through the cumbersome and politically difficult process of treaty amendment'.[108] Third, GAIRS operate in a gap-filling capacity to ensure

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99 Ibid 5: For van Reenan, this 'does not mean that the application of the projected Convention itself is overridden by the rules of reference indicated. On the contrary, the indicated rules are incorporated into the projected Convention by reference':

100 *SRFC Case, Separate Opinion of Judge Paik*.

101 *SRFC Advisory Opinion*.

102 *SRFC Case, Separate Opinion of Judge Paik* [23].

103 *SRFC Case, Separate Opinion of Judge Paik* [23].

104 *SRFC Case, Separate Opinion of Judge Paik* [23].

105 See A Boyle and K McCall-Smith, 'Transparency in International Law-making' in A Bianchi and A Peters (eds) (CUP 2013).

106 See e.g. C Redgwell, 'Mind the Gap in the GAIRS: The Role of Other Instruments in LOSC Regime Implementation in the Offshore Energy Sector' (2014) 29 Int J Mar Coast Law 600, 603.

107 Ibid 617.

108 Redgwell argues that the 'vitality and integrity' of UNCLOS 'is safeguarded by ensuring the consistency of external norms with the LOSC as the "constitution for the oceans" and the development of a "universal law of the sea"': Redgwell (n 106) 617; citing J Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (CUP 2011) 171: Harrison notes that GAIRS 'creates a degree of dynamism, as the standards may change over time, without having to amend the Law of the Sea Convention'.

that the law of the sea can reflect ongoing technical developments.[109] As Redgwell argues, UNCLOS was 'never intended to be a "one stop shop" for the regulation of all offshore' activities,[110] but rather:

> to set forth fundamental rules and principles of enduring application functioning alongside more specific global and regional rules and standards. The role of other instruments has been one of facilitating, strengthening and updating the LOSC in the light of legal and technical developments since its conclusion.[111]

There is disagreement as to the interpretation and operation of these rule of reference provisions in UNCLOS. In the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*[112] Justice Paik noted that there is no 'agreed definition' of generally accepted, nor was it clear what was meant by regulations, procedures or practices.[113] The progressive approach, adopted by those such as Paik argues that 'non-binding instruments, such as IMO resolutions or conventions which have not been widely ratified, may also qualify as GAIRS, provided they are widely supported in State practice'.[114] This approach does appear to be consistent with the nature of UNCLOS as an evolving framework.

Despite this, Paik's approach has yet to receive widespread support. Commentators such as James Harrison,[115] as well as Churchill and Lowe[116] are less progressive in their interpretation. While it seems commonly accepted that obligations in treaties such as SOLAS and MARPOL are capable of becoming GAIRS, beyond that it is less clear.[117] Arguably, the frequency of reference in UNCLOS to GAIRS and the wording of those provisions suggest a broader operation beyond what would already be encompassed under international law. Despite this, more restrictive approaches have limited the meaning of GAIRS to norms that have achieved the status of customary international law.[118] A slightly less restrictive approach extends that interpretation to IMO treaties even where States may not be a party to them.[119] This approach was adopted in the *The South China Sea Arbitration* (*Philippines v China*)[120] arbitration award. That award made a number

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109 Redgwell (n 106).
110 Ibid 619.
111 Ibid 619.
112 *SRFC Advisory Opinion*.
113 *SRFC Case, Separate Opinion of Judge Paik* [26]; as discussed in D Guilfoyle, 'High Seas' in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Nomos Verlagsgesellschaft mbH & Co KG 2017) 696.
114 H Ringbom, *The EU Maritime Safety Policy and International Law.* (Publications on Ocean Development v. 64, Brill — Nijhoff 2008) 395 (footnotes omitted).
115 Harrison, *Making the Law of the Sea: A Study in the Development of International Law* (n 108) 161–2.
116 R Churchill and V Lowe, *The Law of the Sea* (3rd edn, Juris Publishing 1999) 265–72.
117 D Guilfoyle, 'The High Seas' in A Elferink and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 713.
118 van Reenen (n 98); cited in Ringbom (n 114) 393–4.
119 Churchill and Lowe (n 116).
120 *The South China Sea Arbitration* (*Philippines v China*) (Award of 12 July 2016) 2016 PCA.

of comments relating to the nature of Article 94 of UNCLOS. The tribunal gave some much needed analytical insight into the requirement of flag States to effectively exercise jurisdiction and control in administrative, technical and social matters over ships flying their flag.[121] In that award the tribunal found that Article 94 incorporated the International Regulations for Preventing Collisions at Sea (COLREGS) by reference through GAIRS and that a violation of COLREGS 'concerning measures necessary to ensure maritime safety, constitutes a violation of' UNCLOS itself.[122]

It is submitted that the key to GAIRS is the general acceptance requirement. The form is less critical. With sufficient State support a broad range of instruments are capable of informing the GAIRS provisions in UNCLOS. Arguably, it is theoretically possible that, with the right degree of general acceptance among State members of the IMO, guidelines, recommendations, resolutions and circulars such as those developed by the International Maritime Organization (IMO)'s Maritime Safety Committee (MSC) could constitute GAIRS. A less strong argument may be made in favour of non-State rulemaking referred to or even annexed to those MSC guidelines, recommendations, resolutions and circulars.

6.5 Private Ordering and Implications for Access to Remedies

The incorporation of international norms into commercial contracts and insurance arrangements may not only impact parties to those arrangements but may also provide opportunities for third parties seeking a remedy for breach of those norms. Theoretically, private ordering can both create and inform the access to remedies of those aggrieved by the use of PCASP. Standards such as ISO 28007 and the content of GUARDCON and the 100 Series RUF can inform questions of duty of care and standard of care in negligence proceedings.[123] They may also be relevant to the availability of defences for intentional torts such as assault, battery and false imprisonment.

The terms of GUARDCON (in addition to ISO 28007 and the 100 Series RUF) could provide a basis for, or at least influence, direct action proceedings against insurers under Third Parties (Rights against Insurers) Act 2010. The ibid enables claimants to proceed directly against an insurer where an insured party has become insolvent.[124] Third-party

[121] Ibid 1082.

[122] For the tribunal Article 94(3) clarified that the scope of flag State duties necessary to ensure safety at sea was subject to the GAIRS reference in Article 94(5). For the tribunal, this incorporated the COLREGS into UNCLOS and as such they became consequently binding on China: ibid 1083.

[123] See generally D Nolan, 'Varying the Standard of Care in Negligence' (2013) 72(3) Camb L J 651.

[124] Third Parties (Rights against Insurers) Act 2010, s 1.

claimants may proceed against insurers in English courts even if the insurer is based overseas, the contract nominates a foreign legal system as the proper law of the contract, or the relevant acts leading to the claim occurred outside the jurisdiction.[125] The mutual nature of P&I coverage is not in itself a bar to the application of direct action legislation.[126] A complication is that, while in substance protection and indemnity clubs are third party insurers, in reality they act to indemnify their members. This principle is reflected in the 'pay to be paid' rule that applies in most circumstances, where insured members are only entitled to claim against a club once they themselves have paid compensation for a claim.

Essentially, when third parties step into the shoes of the insured party they themselves become bound to the dispute resolution, limitation and notification clauses that may operate to restrict a claim. Such clauses often nominate fora and procedures that are unfavourable to third-party claimants. In addition, insurers may rely on any defences that the insured party may have had under the policy in resisting an action by a third party against the club.

These issues were raised in the Court of Appeal decision in the *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Cepnioglu)*[127] case. Following a grounding of the vessel in Mykonos, Greece, the charterers (who were third parties to the protection and indemnity policy) sought to proceed against the P&I club in Turkish courts using Turkish law that would enable such a third-party claim. The P&I club sought an anti-suit injunction in English courts to prevent the charterers from proceeding in Turkey. The P&I club argued that the existence of a London arbitration agreement in the policy precluded the charterers from seeking a remedy in Turkish courts despite the charterers not being privy to the P&I policy and the seeming inconsistency between the exclusive arbitration provision and the rights conferred by the Turkish statute. The Court of Appeal approached the question by characterising the claim of the charterer as a third-party as essentially contractual.[128] As third parties they were seeking to enforce the contractual rights of the insured member and thus were also subject to the obligations of that member.[129] This included the requirement to bring any claim through arbitration in London.

In addition, recent reforms of the privity rule in contract law have created the possibility for third party enforcement of contractual terms in limited instances. At common law, only parties to contracts can enforce their terms, or be the subject of enforcement action relating to them. This principle has been the subject of reform in the Contracts (Rights

[125] Third Parties (Rights against Insurers) Act 2010, s 18.
[126] Case C-368/16 *Assens Havn v Navigators Management (UK) Limited* EU:C:2017:546.
[127] *Shipowners' Mutual Protection and Indemnity Association (Luxembourg) v Containerships Denizcilik Nakliyat ve Ticaret AS (The Yusuf Cepnioglu)* [2016] EWCA Civ 386.
[128] Ibid [20]–[1], [45].
[129] Ibid [46].

of Third Parties) Act 1999. That act modified the existing common law to allow for the possibility of the enforcement of contracts by third parties where a contract expressly provides for that third party enforcement or where the contract 'purports to confer a benefit' on them.[130] However this exception will not apply where it ' appears that the parties did not intend the term to be enforceable by the third party'.[131] The current text of GUARDCON appears to exclude this possibility. While it seems clear that a contract like GUARDCON *could* create such a right to sue in favour of aggrieved third parties, Clause 28 headed 'Third Party Rights' states that '[e]xcept to the extent provided in Clause 15 (Liabilities and Indemnities) and Cl. 16 (Security Personnel Liability), no third parties may enforce any term of this Contract'.[132] It is not entirely clear from Clause 28 what parts of clauses 15 and 16 are intended to allow for third parties to enforce terms of GUARDCON. It may indeed be limited to the reference in those clauses to security personnel (also third parties to the GUARDCON contract).

Despite this, the reforms to the privity rule provide for an opportunity to improve third party access to remedies using through Business and Human Rights (BHR) Arbitration. These considerations have driven recent moves seeking to augment State-based remediation mechanisms by drawing on the strengths of international commercial arbitration. As Human Rights at Sea (HRAS) has argued potential claimants seeking access to remedies continue to face significant legal and practical hurdles.[133] They note:

> to meaningfully address human rights abuses at sea, any mechanism for redress must cater for victims' claims against States as well as against private entities and individuals. The latter is not a novel concept: the idea that an individual can bring claims for human rights violations against a company is currently under development in the emerging field of business and human rights.[134]

In 2019 the Hague Rules on Business and Human Rights Arbitration (Hague Rules) were introduced.[135] The Hague Rules are the result of a 'five-year long project' beginning with

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130 Contracts (Rights of Third Parties) Act 1999, s 1(1).

131 Ibid s 2.

132 BIMCO, GUARDCON: A Standard Contract for the Employment of Security Guards on Ships, IMO MSC (2012) IMO Doc MSC 90/INF.5, 28.

133 'The UNGPs also provide that, where business enterprises identify that they have caused or contributed to adverse impacts on human rights, they should provide for-or cooperate in-their remediation through legitimate processes. Where adjudication is needed, this should be carried out by means of legitimate, independent third party mechanisms. Yet it has proven to be very difficult to enforce business and human rights obligations and commitments via domestic, regional and international dispute resolution mechanisms, particularly in relation to transnational disputes': Drafting Team of the Hague Rules on Business and Human Rights Arbitration, 'International Arbitration of Business and Human Rights Disputes: Elements for Consideration in Draft Arbitral Rules, Model Clauses, and Other Aspects of the Arbitral Process' (November 2018) ⟨https://www.cilc.nl/cms/wp-content/uploads/2019/01/Elements-paper_international-arbitration-of-business-and-human-rights-dispute.font12.pdf⟩ accessed 2 May 2020.

134 Human Rights at Sea (Arbitration as a Means of Effective Remedy for Human Rights Abuses at Sea, 9 July 2020, Webinar) 8.

135 CILC, 'Launch of The Hague Rules on Business and Human Rights Arbitration' (12 December 2019) ⟨https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/⟩ accessed 2 May 2020.

the creation of a working group on BHR Arbitration in 2017.[136] As the Introductory Note to the Hague Rules states:

> The Hague Rules on Business and Human Rights Arbitration provide a set of procedures for the arbitration of disputes related to the impact of business activities on human rights... As with the UNCITRAL Rules, the scope of the Hague Rules is not limited by the type of claimant(s) or respondent(s) or the subject-matter of the dispute and extends to any disputes that the parties to an arbitration agreement have agreed to resolve by arbitration under the Hague Rules. Parties could thus include business entities, individuals, labor unions and organizations, States, State entities, international organizations and civil society organizations, as well as any other parties of any kind. Equally, the Hague Rules purposefully do not define the terms "business," "human rights" or "business and human rights." For the purposes of the Hague Rules, such terms should be understood at least as broadly as the meaning such terms have under the UN Guiding Principles on Business and Human Rights. However, in the vast majority of cases, no definition of these terms should be necessary at all.[137]

The Hague Rules 'highlight the importance of collaborative settlement mechanisms in business and human right disputes'.[138] John notes that, unlike institutional rules, the Hague Rules 'encourage parties to endeavour to resolve any dispute in good faith through' collaborative settlement mechanisms.[139] Article 1(6) states that:

> Without prejudice to the right of any party to commence or continue an arbitration under these Rules, the parties shall endeavour to resolve any dispute in good faith through negotiation, conciliation, mediation, facilitation or other collaborative settlement mechanisms. Such settlement may be agreed at any time, including after arbitral proceedings under these Rules have been commenced.[140]

Article 11 concerns the appointment of arbitrators. Article 11(1)(c) states that:

> The presiding or sole arbitrator shall have demonstrated expertise in international dispute resolution and in areas relevant to the dispute, which may include, depending on the circumstances of the case, business and human rights law and practice, relevant national and international law and knowledge of the relevant field or industry.[141]

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136 'After consultation and deliberation and receiving feedback on a set of draft rules and commentary thereto, the Rules on Human Rights Arbitration and the commentary were finalised and officially launched in December 2019': B John, 'The Hague Rules on Business and Human Right Arbitration' (21 April 2020) ⟨https://globalarbitrationnews.com/the-hague-rules-on-business-and-human-rights-arbitration/⟩ accessed 2 May 2020.

137 Center for International Legal Cooperation, The Hague Rules on Business and Human Rights Arbitration (December 2019) 3 (introductory note).

138 John (n 136).

139 Ibid.

140 The Hague Rules on Business and Human Rights Arbitration (n 137) 1(6).

141 Ibid art 11(1)(c). The commentary to Article 11 states that 'Paragraph 1(c) of Article 11 preserves the autonomy of the parties in the selection of their party-appointed arbitrators. However, the presiding arbitrator is required to have demonstrated expertise in international dispute resolution and in areas relevant to the dispute (e.g., business and human rights law and practice, relevant national and international law, or knowledge of the relevant field or industry). The breadth of the qualifications potentially included under paragraph 1(c) for the presiding or sole arbitrator promotes effective decision-making in the particular case': at 31.

In addition, Article 11(3) requires that the 'Parties, arbitrators and the appointing authority shall take into account the advisability of forming a diverse tribunal'.[142] Article 18 concerns the cultural appropriateness and rights-compatibility of the process:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expenses and to provide a fair, efficient, culturally appropriate and rights-compatible process for resolving the parties' dispute, including in particular by giving due regard to the urgency of addressing the alleged human rights impacts.[143]

This requires that 'arbitral proceedings should be based on inclusion, participation, empowerment, transparency and attention to vulnerable people(s). The tribunal must take care to ensure that the impact of the arbitration proceedings and its outcome does not undermine any one party or group of parties'.[144] The potential for arbitration to involve third-party beneficiaries is set out in Article 19(2):

> The arbitral tribunal may allow one or more third persons to join in the arbitration as a party provided such person is a party to or a third party beneficiary of the underlying legal instrument that includes the relevant arbitration agreement, unless, after giving all parties and the person or persons to be joined the opportunity to be heard, the arbitral tribunal finds that joinder should not be permitted. Third persons so joined shall become parties to the arbitration agreement for the purposes of the arbitration. The arbitral tribunal may make a single award or several awards in respect of all parties so involved in the arbitration.[145]

In addition, the Hague Rules require that any award 'state the reasons upon which it is based and satisfy itself that the award is human rights compatible'.[146] This means 'that the award must accord with internationally recognized human rights' and 'must also conform to public policy requirements under the law of the seat and the likely places of enforcement of the award'.[147]

The Hague Rules contain model arbitration clauses for contracts,[148] other agreements[149]

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142 Ibid art 11(3).

143 Ibid art 18(1). The commentary to Article 18 notes that drawing 'upon the commentary to Principle 28 of the UN Guiding Principles, the second sentence of Article 18(1) refers to two additional factors—cultural appropriateness and rights-compatibility—that provide further guidance to the tribunal when addressing matters relevant to business and human rights disputes': at 38.

144 John (n 136).

145 The Hague Rules on Business and Human Rights Arbitration (n 137) art 19(2).

146 John (n 136); citing The Hague Rules on Business and Human Rights Arbitration (n 137) 45(4).

147 John (n 136); citing Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN HRC (21 March 2011) UN Doc A/HRC/17/31 (UNGPs) Guiding Principle 31(f); and commentary to art 45(4) The Hague Rules on Business and Human Rights Arbitration (n 137).

148 'Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Hague Rules on Business and Human Rights Arbitration...': The Hague Rules on Business and Human Rights Arbitration (n 137) Annex.

149 'Any dispute, controversy or claim arising out of or in relation to this [agreement] [treaty] [instrument]

and existing arbitration agreements.[150] The Hague Rules also provide model clauses for the submitting of an existing dispute to arbitration under the rules.[151] The Hague Rules annex also includes suggested wording to grant arbitration rights to third-party beneficiaries pursuant to Article 19(3).[152] In addition, the model clauses provide suggested wording to allow the parties to define the scope of the arbitration to include: selected national laws, selected international instruments, industry or supply chain codes of conduct, statutory commitments and 'any other relevant business and human rights norms or instruments' as nominated by the parties to the agreement.[153]

The Hague Rules represent a potential step towards better access to remedies for human rights violations occurring in the maritime arena. Desierto argues that:

> while the BHR Arbitration Rules will never purport to be the exclusively prescribed mechanism for human rights victims of transnational business conduct and neither does it presume to displace State-based judicial or non-judicial remedies, against the realities of a continuing limited universe of legally binding human rights recourse against the impacts of private transnational activities, we cannot afford to close off the arbitral option either.[154]

HRAS, in collaboration with global firm Shearman & Sterling, released a white paper on Arbitration as a Means of Effective Remedy for Human Rights Abuses at Sea in early 2020.[155] The HRAS white paper stems from a fairly simple proposition: given that '[w]idespread and systematic human rights abuses continue to occur at sea' despite 'the existence of a well-established body of international human rights law' it follows that 'human rights abuses at sea require special attention'.[156] For HRAS:

> A concomitant of the chronic state of impunity and lack of accountability for human rights abusers at sea is the lack of effective remedy for victims. Despite the existence

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[rule] [decision] [relationship] , or the existence, interpretation, application, breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Hague Rules on Business and Human Rights Arbitration...': The Hague Rules on Business and Human Rights Arbitration (n 137) 101 (annex).

150 'Incorporation as binding rules: Where the arbitral tribunal considers that issues of human rights are relevant to the dispute, the arbitration shall be conducted in accordance with the Hague Rules on Business and Human Rights Arbitration in respect of the determination of those issues.' or Incorporation as non-binding guidelines: 'In addition to the relevant articles of the [insert name of applicable arbitration rules], the arbitral tribunal may use the Hague Rules on Business and Human Rights Arbitration as an additional guideline when considering matters of human rights': ibid 102 (annex).

151 'The parties agree to submit the following dispute to final and binding arbitration in accordance with the Hague Rules on Business and Human Rights Arbitration, as in effect on the date of this agreement: . . . [insert brief description of dispute] ...': ibid 102-3 (annex).

152 'The parties irrevocably consent that any dispute, controversy or claim arising out of or in relation to the obligations undertaken by the parties under this [contract] [agreement] [treaty] [instrument] [rule] [decision] [relationship] for the benefit of: [insert defined class of third party beneficiaries] may be submitted by any such third person to arbitration in accordance with the Hague Rules on Business and Human Rights Arbitration': ibid 106 (annex) and see art 19(3).

153 Ibid 106-7 (annex).

154 Desierto (n 30).

155 Human Rights at Sea, (n 134); This was followed by a webinar on the 9th July 2020. See Human Rights at Sea, *Arbitration as a Means of E ective Remedy for Human Rights Abuses at Sea* (2020).

156 This 'is especially true of human rights violations on the high seas, where the policing and enforcement of human rights violations is all the more difficult': Human Rights at Sea, (n 134) 2 [2]-[3].

> of a number of well-developed human rights mechanisms at the international, regional and domestic levels, the reality is that victims of maritime human rights abuses are not accessing these existing fora in any significant numbers. The vast majority therefore are left without a remedy.[157]

The white paper followed the production in 2019 of the Hague Rules. Critiquing existing mechanisms for the remedying of human rights abuse at sea, HRAS identified a number of key issues standing in the way of effective redress for human rights abuse victims. They include the identification of abuses, identification of abusers, the lack of accessibility to and bias of existing fora, practical barriers, a lack of effective remedies and procedural hurdles including recognition of treaty bodies, as well as the need to exhaust or prove the absence of domestic remedies.[158] Reflecting on these issues, HRAS noted:

> a victim's path to redress of human rights at sea violations is currently marred by numerous practical and legal hurdles, which puts any chance of an effective remedy far outside the victim's reach, while at the same time fostering a climate of impunity.[159]

HRAS has proposed an arbitration-based mechanism for the redress of human rights abuses at sea that addresses both the substantive and procedural dimensions of a human rights victim's right to a remedy. HRAS notes that:

> Human rights at sea arbitration is not a silver bullet: detailed discussion with all stakeholders and rigorous analysis are required to calibrate the system optimally, including as regards transparency levels. Two central challenges pertain to securing the necessary stakeholders' consent to arbitration and to the cost burden, as arbitration in its classic form rests on party consent and is privately funded by its users. Further, while human rights arbitration is meant to address a gap in access to remedy for rights holders, it should not be considered a substitute for the existing mechanisms. Against this background, we proceed to our recommendations for a new system for arbitration of human rights at sea disputes.[160]

The core requirements of the proposed model as set out in the White Paper are:

(i) a neutral and visible forum in which human rights issues could be resolved;

(ii) a procedure that is both efficient and financially accessible to victims;

(iii) an adjudicative process that is highly specialised and tailored to the sensitivities of human rights issues as well as to the particularities of the maritime space; and

(iv) binding arbitral awards that would be enforceable internationally.[161]

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157 Ibid 2 [4].

158 Human Rights at Sea, *Arbitration as a Means of E ective Remedy for Human Rights Abuses at Sea* (n 155) 4–5 [10].

159 Ibid 5.

160 Human Rights at Sea, (n 134) 7 [13].

161 Ibid 2 [5].

Like the dispute resolution potential mechanisms discussed earlier in this chapter, BHR is an untested proposition. It is too early to conclude that it works or whether the Hague Rules achieve the right balance of interests. However, the proposals both define the problems facing third party and inter party claimants accurately. They are consistent with both business and State responsibilities under the United Nations Guiding Principles on Business and Human Rights (UNGPs)[162] and arguably offer a route to a remedy where there is no other.[163] Further, these proposals are supported by contract law third party reforms that allow enforcement of contracts by third parties where there is sufficient contractual intention to do so.

6.6 Conclusion

This chapter has established that the potent mix of commercial imperatives and integration with municipal legal systems and dispute resolution procedures encourage contractual and insurance networks to act as gatekeepers of profitable participation in the global shipping industry. P&I clubs, shipowner associations and supply chain contracting entities operate as part of a decision-making system excluding non-conforming entities from the market and encouraging operators and shipowners to follow rules, often with varying commercial motivations. The industry consensus of GUARDCON, the 100 Series RUF and ISO 28007:2015 ground public international law norms concerning human rights protection and shipping safety within commercial arrangements with a number of domestic private legal consequences.

The conceptual walls between international and national, public and private, are in effect broken down by this normative adoption and adaption of public norms. These considerations assist us to conclude that the industry consensus, through its unique forms of norm transmission within the supply chain, can help close the enforcement gaps that result from the flag State jurisdiction model. To succeed, it is critical that non-State initiatives involve participation from a wide range of private and State actors. In addition,

[162] 'BHR arbitration could also be relied upon by corporations to enforce contractual human rights commitments vis-à-vis their business partners (e.g. in supply chains and development projects), and so prevent or resolve BHR violations.' 'With specific regard to businesses, arbitration would assist them in meeting their responsibilities under the UNGPs to both respect human rights (Pillar Two) and provide a remedy to victims (Pillar Three). As for states, the encouragement, facilitation or even prescription to use BHR arbitration would also constitute an additional tool for them to fulfil their responsibilities under UNGPs Pillars One and Three.': Drafting Team of the Hague Rules on Business and Human Rights Arbitration (n 133); see UNGPs.

[163] 'In some cases, arbitration may even be the only route available to those affected by international business operations, by providing them access to a pathway to remedy BHR violations where none might otherwise exist'. In all these situations, BHR arbitration could become a one-stop contractually-selected forum for businesses to have their BHR disputes solved in a fair, transparent, and unbiased manner, rather than being drawn into multiple protracted litigations in various national and international fora.': Drafting Team of the Hague Rules on Business and Human Rights Arbitration (n 133).

they must utilise familiar forms such as standard form contracts and certifiable standards to best achieve their regulatory objectives. A purely private system, without the IMO and flag States would struggle to gain relevance and uptake in practice.

Despite this, there is room for a further expansion of private ordering in the area of access to remedies. Statutory reform of the privity rule in contract law means the law can now better accommodate recent moves to establish arbitration mechanisms for business and human rights related claims. This provides a very unique opportunity for private ordering to supplement State based dispute resolution mechanisms to provide better opportunities for redress for those aggrieved by the use of PCASP on ships.

Chapter 7

Critical Perspectives

The increasing prominence of private ordering initiatives in global governance has concerned a number of academics. Private ordering initiatives such as GUARDCON Contract for the Employment of Security Guards on Vessels, ISO 28007-1:2015 Guidelines for PMSCs Providing PCASP on Board Ships (ISO 28007:2015) and 100 Series Rules as to the Use of Force (100 Series RUF) raise important theoretical questions concerning their legitimacy and effectiveness. This chapter will first illustrate how theories of transnational private regulation assist in evaluating private ordering. Next, this chapter evaluates the industry consensus in light of a number of key themes in the literature including regulatory capture and voluntariness.

7.1 Private Ordering and the State

The contribution of private ordering to ocean governance raises questions of legitimacy and effectiveness. It is helpful to draw on the literature of a number of overlapping theoretical frameworks such as transnational law. Transnational law describes a broad and heterogeneous collection of sociological and legal scholarship concerning cross-border trends in public and private law making.[1]

In 1959 Judge Philip Jessup defined transnational law as 'all law which regulates actions or events that transcend national frontiers'.[2] Transnational private regulation involves contributions to international rulemaking by 'private actors, firms, NGOs [and] independent experts like technical standard-setters', often through rules of reference in national

[1] In 1959 Judge Philip Jessup defined transnational law as 'all law which regulates actions or events that transcend national frontiers': P Jessup, *Transnational Law* (Yale University Press 1956) 2.

[2] Both 'public and private international law are included, as are other rules which do not wholly fit into such standard categories': Jessup (n 1) 2; cited in G Shaffer, 'Transnational Legal Process and State Change' (2012) 37 Law Soc Inq 229, 233.

legislation and international law.[3]

Many terms have been used to describe such extra-State rulemaking, including transnational private regulation,[4] global administrative law[5] and informal international law making.[6] These private (or hybrid) governance systems represent part of an increasing trend of challenging State monopolies over these functions through the operation of non-State or private rule-making networks. Such regimes are 'transnational, rather than international, in the sense that their effects cross borders, but are not constituted through the cooperation of states as reflected in treaties'.[7] Transnational private regulation takes the form of 'coalitions of nonstate actors which codify, monitor, and in some cases certify firms' compliance with labor, environmental, human rights, or other standards of accountability'.[8]

Even among those legal and sociological scholars broadly supportive of transnational private regulation there are diverse 'camps' with differing interpretations of transnational private regulation and its relationship with the State and international and domestic public policy. For example, the New Haven School[9] is one of the most radical approaches, departing from the State-centric construction of international law as reflected in Article 38 of the Statute of the International Court of Justice.[10]

The complexity of players involved in the formation, monitoring and enforcement of transnational private regulation is illustrated by Abbott and Snidal's 'Governance Triangle'.[11] The Governance Triangle was designed to depict the transnational regulatory space by focusing on the participation of a range of institutions such as States, firms and non-governmental organisations (NGOs). It 'depicts the transnational regulatory space and a range of [regulatory standard-setting] institutions in terms of the participation of

3 F Cafaggi, 'New Foundations of Transnational Private Regulation' (2011) 38 J Law Soc 20, 20–1.

4 Ibid 20–1.

5 A O'Donoghue, 'Tyranny and Constitutionalism beyond the State' in R Schtze (ed), *Globalisation and Governance* (CUP 2018) 97.

6 E Benvenisti, 'Toward a Typology of Informal International Lawmaking: Mechanisms and their Distinct Accountability Gaps' in J Pauwelyn, R Wessel, and J Wouters (eds), *Informal International Lawmaking* (OUP 2012).

7 F Cafaggi, C Scott, and L Senden, 'The Conceptual and Constitutional Challenge of Transnational Private Regulation' (2011) 38 J Law Soc 1, 3.

8 T Bartley, 'Institutional Emergence in an Era of Globalization: the Rise of Transnational Private Regulation of Labor and Environmental Conditions' (2007) 113(2) Am J Sociol 297, 298; cited in C Scott, 'Regulatory Governance and the Challenge of Constitutionalism' in D Oliver, T Prosser, and R Rawlings (eds), *The Regulatory State: Constitutional Implications* (OUP 2010) 3.

9 WM Reisman, The View from the New Haven School of International Law, 'Proceedings of the Annual Meeting (American Society of International Law)' (American Society of International Law 1992) See.

10 Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 33 UNTS 993 (ICJ Statute).

11 K Abbott and D Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State' in W Mattli and N Woods (eds), *The Politics of Global Regulation* (Princeton University Press 2009); see also HH Koh, 'Transnational Legal Process' in G Simpson (ed), *The Nature of International Law* (Ashgate 2017); D Vogel, 'The Private Regulation of Global Corporate Conduct' in W Mattli and N Woods (eds), *The Politics of Global Regulation* (Princeton University Press 2009) 154; P Verbruggen, 'Gorillas in the Closet? Public and Private Actors in the Enforcement of Transnational Private Regulation: Enforcing Transnational Private Norms' (2013) 7 Reg Gov 512, 512.

three key actor groups: States, Firms, and NGOs'.[12] The contribution is described as 'one of the most dominant and intriguing typologies of regulatory governance'.[13]

The legitimacy and effectiveness of transnational private regulation and informal governance continue to dominate the relevant literature.[14] In relation to effectiveness, scholars consider how these trends in rulemaking motivate and encourage compliance with their underlying norms.[15] This question involves the capacity of non-State contributions to rulemaking, particularly how it contributes to and detracts from the effectiveness of regimes.

Non-State rulemaking initiatives 'are only effective to the extent that they are able to influence and change the behaviour of actors'.[16] Compliance with non-State rulemaking has been attributed to a number of factors. Friedrich lists a number of motivations for compliance including improved efficiency and reductions in costs,[17] a greater reputation and perception of taking environmental responsibility,[18] fears of a reputation spillover (where the lost reputation of one industry member tarnishes that of others within that

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12 'Points on the Triangle represent actual schemes. Their dispersion demonstrates that the three actor groups have created a wide variety of institutional forms; these span most of the regulatory space, but are unevenly distributed. This section also shows how the pattern of regulatory governance has shifted over time, from predominantly domestic state regulation to firm self-regulation and NGO schemes, and finally to multi-actor schemes': Abbott and Snidal, 'The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State' (n 11) 48.

13 'Their triangle of rule-makers is divided into seven different zones, and each zone represents a major form of associational configuration. These configurations are, in turn, composed of three different rule-makers (civil society, business, and state) who engaged in voluntary, self-regulatory, and sometime collaborative exercises. They conceptualize and capture novel forms of regulatory standard-setting (RSS), defined as the promulgation and implementation of nonbinding voluntary standards of business conduct': D Levi-Faur and S Starobin, *Transnational Politics and Policy: From Two-Way to Three-Way Interactions* (Jerusalem Papers in Regulation and Governance Working Paper No. 62, 2014) 10.

14 See e.g. D Bederman, 'Legitimacy' in D Bederman (ed), *Globalization and International Law* (Palgrave Macmillan 2008); E Benvenisti and GW Downs, 'The Premises, Assumptions, and Implications of Van Gend en Loos: Viewed from the Perspectives of Democracy and Legitimacy of International Institutions' (2014) 25(1) EJIL 85; S Bernstein, 'Legitimacy in Global Environmental Governance Environment' (2004) 1 J Int'l L & Int'l Rel 139; J Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(2) Regul Gov 137; D Bodansky, 'Legitimacy' in D Bodansky, J Brunnee, and E Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007); G Demuijnck and B Fasterling, 'The Social License to Operate' (2016) 136(4) J Bus Ethics 675; H Keller, 'Codes of Conduct and their Implementation: the Question of Legitimacy' in R Wolfrum and V Roeben (eds), *Legitimacy in International Law* (Springer 2008); S Mena and G Palazzo, 'Input and Output Legitimacy of Multi-Stakeholder Initiatives' (2012) 22(3) Bus Ethics Q 527; P Zumbansen, 'The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of "Context"' (2012) 13(12) Ger Law J 1269; P Zumbansen, 'The Constitutional Itch: Transnational Private Regulatory Governance and the Woes of Legitimacy' in M Helfand (ed), *Negotiating State and Non-State Law* (CUP 2015).

15 See e.g. Zumbansen, 'The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of "Context"' (n 14).

16 'This in turn hinges to a considerable extent on the motivation of business actors to comply': J Friedrich, 'Environment, Private Standard-Setting' in *Max Planck Encyclopedia of Public International Law* (OUP 2009) 7.

17 Ibid 7.

18 An 'increasing number of companies are concerned about reputation, ie about the perception of external audiences about the performance of a company. In an increasingly complex and competitive business environment, reputation becomes a highly valuable asset and a key of a successful business strategy. Adherence to environmental standards can signal environmental responsibility of a company to its audiences': ibid 7.

industry),[19] pressure from investors, lending institutions and insurers,[20] and government pressure to follow private environmental standards.[21]

For Shaffer such regimes 'exercise power through mechanisms of coercion, reciprocity, persuasion, and acculturation'.[22] For non-State actors compliance with transnational private regulation may be coerced through legal or market means, or voluntarily in the sense that they find it in 'their self-interest through an exchange or through persuasion, or they are normatively induced to comply with it in light of its perceived legitimacy'.[23] As Scott notes, conceptually speaking, the constitutional challenge concerning transnational private regulation through industry networks 'lies in their capacity to get things done outside the structures of formal legal governance' though the generation and enforcement of norms, codes and guidance.[24] In some instances such norms may form the basis for *de facto* adoption as market standards and otherwise may crystallise into legal rules.[25] Accordingly, as Scott argues, there 'is a continuum of norms and mechanisms of monitoring and behavioural modification rather than a binary distinction between law and non-law'.[26] The interplay between public and private actors is illustrated by Mattli:

> While such international regulation is typically public, governments rely heavily on private actors. These actors possess the necessary expertise and capabilities to provide information, monitor compliance, and activate enforcement provisions in case of violation. It is also increasingly common for public institutions to set broad regulatory goals and allow private experts to work out detailed standards under the auspices of public or private standards organizations.[27]

I argue that references to 'private' or 'non-State' may be misleading as they suggest the formation, transmission and enforcement of norms to the exclusion of State actors or institutions. A more helpful way of contextualising their meaning is by referencing the

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19 In particular, this 'drives the development and enforcement of standards by industry and business associations'. This also happens within the supply chain with multinational companies and industry bodies placing pressure on suppliers 'through supplier agreements or the choice to only do business with certified suppliers. To name but one example, the Ford Motor Company requires its suppliers to adhere to the ISO 14001 standard': Friedrich (n 16) 7–8.

20 These actors 'link, as is increasingly done, investments and lending policies to private environmental standards. An example in this sense is that of the Equator Principles which have been adopted by banks and investors that represent about 85% of the international lending capital. Concerned with the negative effects of climate change on their business prospects, insurance companies also start to alter their insurance rates in accordance with environmental performance which is in turn often assessed on the basis of private standards': ibid 8.

21 Regulators use 'the threat of new regulation or reduce or waive penalties when companies have accepted private standards or installed environmental management systems': ibid 8.

22 Shaffer (n 2) 249; citing T Ginsburg and G Shaffer, 'How Does International Law Work?' in C P and H Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (OUP 2012).

23 Shaffer (n 2) 249; citing I Hurd, *After Anarchy: Legitimacy and Power at the United Nations Security Council* (Princeton University Press 2008).

24 Scott (n 8) 35.

25 Ibid 35.

26 Ibid 35.

27 W Mattli, 'The Politics and Economics of International Institutional Standards Setting: An Introduction' (2001) 8 J Eur Public Policy 328, 334.

rule-making, norm-transmission and enforcement that are done outside the traditional State-centric monopoly over international and domestic public policy creation and enforcement. It is more useful to conceptualise non-State rulemaking as 'voluntary' in the sense of being non-binding at its inception but capable of becoming *de jure* standards through incorporation by reference by legal systems, or *de facto* standards as a result of pressure from customers, suppliers, banks and insurers.

Many commentators are critical of the emerging trend of alternative rulemaking forms that deviate from what they believe should be a State monopoly on public policy.[28] Transnational private regulation, it is argued, can come at the cost of State participation.[29] These concerns can undermine the legitimacy and potential effectiveness of these rulemaking initiatives. For Mattli 'In the last few years, a growing chorus of scholars and observers has been raising concerns about global regulation that are similar to those expressed 20 years ago about trends in European regulation'.[30] He notes that critics of 'less-formal regulation, for instance, lament that the move towards new global regulation, in which private-sector actors play an increasingly central role, lacks democratic accountability and legitimacy'.[31]

Human rights initiatives such as the United Nations Guiding Principles on Business and Human Rights (UNGPs) increasingly recognise the value of non-State normative regimes in effectively implementing regulatory objectives. In this context Buhmann has made some significant contributions to the literature examining the interrelationship between law and conceptions of corporate social responsibility (CSR) and the social licence to operate (SLO).[32] The SLO can be defined as a 'contractarian basis for the legitimacy of a

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[28] W Mattli, 'Beyond the State?' in S Leibfried and others (eds), *The Oxford Handbook of Transformations of the State* (OUP 2015) 296; citing E Benvenisti and GW Downs, 'Toward Global Checks and Balances' (2009) 20 Const Polit Econ 366, 367; 'Once we conclude that IN–LAW is not devoid of impact and cannot be ignored as a normative process, the question of the accountability of the involved actors, processes, and output may be raised': J Pauwelyn, R Wessel, and J Wouters, 'An Introduction to Informal International Lawmaking' in J Pauwelyn, R Wessel, and J Wouters (eds), *Informal International Lawmaking* (OUP 2012) 10; Benvenisti, 'Toward a Typology of Informal International Lawmaking: Mechanisms and their Distinct Accountability Gaps' (n 6).

[29] Such scholars have questioned the cost to sovereignty and democracy of transnational regulatory processes, in addition to the potential for regulatory capture and regulatory competition: E Benvenisti, 'Exit and Voice in the Age of Globalization' (1999) 98 Mich L R 167, 197-201; A Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks' (2004) 39(2) Gov Oppos 159; P Alston, 'The Myopia of the Handmaidens: International Lawyers and Globalization' (1997) 8 Eur J Int'l L 435; J Weiler, 'To Be a European Citizen: Eros and Civilization' in *The Constitution of Europe* (CUP 1999); M Shapiro, 'Administrative Law Unbounded: Reflections on Government and Governance' (2001) 8 Indiana J Glob Leg Stud 369.

[30] Mattli, 'Beyond the State?' (n 28) 296.

[31] Mattli, 'Beyond the State?' (n 28) 296; citing Benvenisti and Downs, 'Toward Global Checks and Balances' (n 28) 367; M Zürn, 'Global Governance and Legitimacy Problems' (2004) 39(2) Gov Oppos 260; Black (n 14); J Graz, *Transnational Private Governance and its Limits* (Routledge 2007); S Quack, 'Law, Expertise and Legitimacy in Transnational Economic Governance: an Introduction' (2009) 8(1) Socio-Econ Rev 3.

[32] See e.g. K Buhmann, 'Corporate Social Responsibility: What Role for Law? Some Aspects of Law and CSR' (2006) 6(2) Corp Gov 188; K Buhmann, 'Public Regulators and CSR: The 'Social Licence to Operate' in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (2004) 4 J Bus Ethics 75; K Buhmann, 'Connecting Corporate Human Rights Responsibilities and State

company's specific activity or project'.[33] In this sense it 'refers to mainly tacit consent on the part of society toward the activities of the business'.[34] Where such 'consent is unanimous, it constitutes grounds for the legitimacy of these activities'.[35] CSR is more elusive to define. In 2011 the EU Commission put forward a definition of CSR as 'the responsibility of enterprises for their impacts on society'.[36]

For Buhmann, connected through the SLO, 'social expectations, the soft law UN guidance and existing as well as emerging hard law shows how ethics, politics and law may interact and lead to a juridification of CSR, which until recently was mainly seen to be distinct from regulation through public law'.[37] Buhmann adopts public law and 'transnational regulatory theory as a lens through which to observe and explain the difficulties in regulating transnational business conduct through conventional public law and the emergence of novel regulatory approaches'.[38]

Taken on its own the SLO appears more concerned with public policy. On the other hand, corporate social responsibility seems more private in nature. For Buhmann, while the SLO and the public regulation of CSR 'may appear distinct' the articulation of SLO was part of the 'discursive process' that led to the adoption of the UNGPs, 'in turn spurring revisions, development and adaptation of more detailed public soft and hard law' relating not only to 'business and human rights' but also to CSR in a 'broader sense'.[39] The consequence, Buhmann argues, is the ongoing 'juridification of CSR', where 'CSR is increasingly being subject to public regulation through hard, soft and mixed forms of law'.[40] This provides a

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Obligations under the UN Guiding Principles' (2016) 136(4) J Bus Ethics 699; K Buhmann, 'Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions' (2016) 6(2) Hum Rts & Int'l Legal Discourse 399.

33 The concept was first used in the extractives context. Demuijnck and Fasterling (n 14) 675.

34 Ibid 675.

35 From a 'normative viewpoint it is desirable to have (1) broad consent and, if possible, consensus on the general organization of society at large, (2) contractarian-based legitimacy of the organizations that operate in this broader framework and (3) a "SLO" related to the activities of these organizations that could have a negative impact on third parties such as local communities': ibid 675.

36 European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions a Renewed EU Strategy 2011-14 for Corporate Social Responsibility' COM (2011) 681, 6.

37 The UN Guidance on business and human rights resulted in 'a series of regulatory initiatives on business responsibilities for human rights that interact to mutually support and reinforce each other. As a result, authorities' expectations on businesses with regard to human rights due diligence and the provision of complaints options are solidifying with a shared point of departure in the UN Framework and UNGPs. CSR transparency requirements enable civil society to learn what businesses do in response to such expectations, and to respond through the force of the market if they are unhappy with what they see. Thus, social expectations and the SLO are connected through the mixed regulatory forms introduced based on the UN's guidance on business and human rights': Buhmann, 'Connecting Corporate Human Rights Responsibilities and State Obligations under the UN Guiding Principles' (n 32) 711.

38 Ibid 703.

39 The 'UN Global Compact Principles on Human Rights link to the UNGP, and elements of ISO's 26000 Social Responsibility Guidance Standard were influenced by the UNGP. Inspired by the UNGP, a proposal for a binding international treaty on business and human rights has been proposed for UN debate'. See ibid 699–700 (citation omitted).

40 Ibid 700.

unique opportunity to ask the question of 'which legal policy and regulatory strategies could attempt to use corporate motivations as a lever to seek an SLO in order to more effectively influence corporate behavior'.[41]

There is an evolving acceptance among such scholars that monitoring, enforcement and dispute settlement may involve both public and private doctrines of both national and international law.[42] Responding to critics of arbitration as being at the cost of State-based dispute resolution, Desierto argues such reasoning confuses the true nature of international arbitration.[43] For Desierto:

> International arbitration is possible only because of State support for the intentions of contracting parties through the law of contract. States' own laws mandating that courts refer parties to arbitration in the presence of an arbitral clause, arbitral agreement, or compromis submitting such a dispute to arbitration (and assuming the arbitrability of the dispute) are themselves completely public in nature and thus also a "public" access to justice mechanism in its own way. To the extent that international arbitration even exists, it is because States create this procedure as a mode of dispute resolution, States permit parties to avail of this mode of dispute resolution, and States recognize and enforce arbitral awards in their respective jurisdictions. There would be no international arbitration system – no international arbitrators appointed, no international arbitration centers, no international arbitration laws – if States (the very epitome of what is public) did not themselves create and support this hybrid public-private mechanism of dispute resolution in the first place.[44]

Van Aaken argues that 'international legal scholarship has largely overlooked both, private market actors as enforcers as well as (self-enforcing) market mechanisms'.[45] She states:

> although [non-State actors] and their role in effectuating international law has been analyzed (primarily by focusing on NGOs and their monitoring functions) private market actors have been neglected as actors able to contribute to the effectuation of PIL in the analysis. It is by no means my intention to deny the importance of other mechanisms; market mechanisms are complementary and especially useful when traditional mechanisms do not work well.[46]

In evaluating the legitimacy of private ordering it is important to be mindful of limitations on State capacity when it comes to monitoring compliance with public international

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41 Demuijnck and Fasterling (n 14) 676.

42 Geneva Academy of International Humanitarian Law and Human Rights, Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council (2016) 19–20.

43 D Desierto, 'Why Arbitrate Business and Human Rights Disputes? Public Consultation Period Open for the Draft Hague Rules on Business and Human Rights Arbitration' (*EJIL*, 12 July 2019) ⟨https://www.ejiltalk.org/public-consultation-period-until-august-25-for-the-draft-hague-rules-on-business-and-human-rights-arbitration/⟩ accessed 3 May 2020.

44 To 'the extent that parties consent to their form of dispute resolution as arbitration through either an arbitral clause, arbitral agreement, or compromis, it is clear that the private law of contract applies ... Thus, if one asks about the "authenticity" of access to justice mechanisms as somehow traceable to just State-based or State-created mechanisms ... one also has to ask why international arbitration is any less "authentic" as a mode of access to justice when States themselves enable it': ibid.

45 A van Aaken, 'Markets as an Accountability Mechanism in International Law' in *Responsibilities of the Non-State Actor in Armed Con ict and the Market Place* (Brill | Nijhoff 2015) 158 (footnote omitted).

46 Ibid 158.

law.[47] For Vogel, 'any realistic assessment of civil regulation should compare it not to an ideal world of effective global economic governance, but to actual policy alternatives'.[48] There are several features that operate to shield private law from the limitations of State administrative power. First, international private law treaties achieve a significant degree of uniformity between jurisdictions. Second, jurisdictions that have not ratified such treaties may uphold and enforce the choice of parties to contract according to the terms of particular treaties. Third, many jurisdictions presume parties contract according to relevant internationally shared industry practices (sometimes delineated as lex mercatoria or lex maritima). Fourth, extra-territorial application of private law in cases concerning private actors involve fewer considerations of comity than public law cases involving States. Fifth, by operation of conflict of laws private laws have greater capacity to be recognised and applied in foreign courts.

7.2 The Measurement Dilemma

Many of the benefits and potential avenues for norm transmission in Part II are undermined by the lack of publicly available information necessary to measure their effectiveness in practice. One problem is that many of the relevant dispute resolution mechanisms involving shipping industry players, marine insurance groups and security contractors are kept out of the public eye. For example, protection and indemnity (P&I) club membership disputes that might hypothetically arise out of the use of privately contracted armed security personnel (PCASP) by shipowners rely primarily on internal dispute resolution or confidential arbitration. Similar private dispute resolution mechanisms may hide the number and nature of disputes arising out of GUARDCON between shipowners and PMSCs and PCASP. As Friedrich warns:

> With the exception of some instances where a certificate or membership can be withdrawn, sanctions or penalties for violation of voluntary standards are most often absent. Industry-led initiatives often only provide for internal monitoring or in the case of external monitoring foresee that the monitoring exercise is undertaken by private auditing firms which are naturally interested in a follow-up contract.[49]

Friedrich notes that this is a 'weakness of the ISO 14001 standards and an advantage

[47] A van Aaken, 'Markets as an Accountability Mechanism in International Law' in N Gal-Or, C Ryngaert, and M Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Con ict and the Market Place* (Brill — Nijhoff 2015) 172.

[48] For Vogel, the effectiveness of civil regulations is roughly comparable to many treaties and are 'undoubtedly *more* effective' than labour, human rights and environmental regulations in many developing countries. For some countries, private regulation is 'the *only* effective form of business regulation': Vogel (n 11) 184–5; Karin Buhmann's Legal analysis of corporate social responsibility and the UN Human Rights Council is also relevant. Buhmann, 'Public Regulators and CSR: The 'Social Licence to Operate' in Recent United Nations Instruments on Business and Human Rights and the Juridification of CSR' (n 32).

[49] Friedrich (n 16) 9.

of most NGO-driven multistakeholder initiatives'.[50] Van Aaken states that '[m]onitoring requires collective action by the participants to create the public good of adherence to the law'.[51] That requires market players to be in a system where 'exclusion implies a bar to transacting or trading' and noncompliance can be detected through NGOs or transparent peer-review mechanisms'.[52] The system could be set up 'in such a way that nonmonitoring or nonreporting itself is punished by exclusion from the club'.[53] It is important to recognise that limitations on State capacity mean that 'states do not have the monitoring facilities to assure compliance' with public international law.[54] In theory, private actors can supplement State monitoring capacity. Where, for example, private actors have an 'active interest' in reporting in order to punish 'free-riders, the state's capacity may be improved'.[55] The SLO expulsion possibility stands in contrast to NGO criticism of self-regulation for lacking effectiveness but this requires incentives for punishing defectors such as 'reputational sanctions among the market players'.[56]

Human Rights at Sea (HRAS) notes that human rights due diligence 'requires active engagement from companies to assess and address human rights impacts'.[57] For HRAS, for the UNGPs to be effective companies must 'transparently and overtly tackle the unique challenges and complexities of the maritime environment when assessing and addressing human rights' impacts in the supply chain'.[58] In this sense, private ordering should be strengthened so that nonmonitoring or nonreporting 'are punished by exclusion from the club'.[59] For HRAS a first step would be to 'require maritime companies to map out which actors are active in their supply chain and who relevant stakeholders might be'.[60] While this is true, the use of PCASP means a more comprehensive understanding of human rights due diligence is urgently required. In particular, clearer expectations and requirements as to the reporting of incidents (including where weapons are not discharged, or where discharge does not result in injury or death) are part of realising the benefits of human

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50 'The latter often rely on some kind of external independent monitoring and can therefore claim superior credibility': ibid 9.

51 A van Aaken, 'Effectuating Public International Law through Market Mechanisms?' (2009) 165(1) JITE 33, 43.

52 Ibid 43.

53 Ibid 43.

54 Ibid 43.

55 Ibid 43.

56 Ibid 52.

57 Human Rights at Sea, *Brie ng Note: Are the 2011 UN Guiding Principles Working E ectively and Being Rigorously Applied in the Maritime Industry?* (2020) 7.

58 Companies 'must take their human rights requirements seriously and avoid paying lip-service to the issue': ibid 7.

59 Aaken (n 51) 43.

60 HRAS note that 'companies should be able to identify all manning and recruitment agencies from which they source crew and fishermen. This is an important first step that is all too frequently ignored, but which can allow for effective stakeholder engagement, a key component of human rights due diligence': *Brie ng Note: Are the 2011 UN Guiding Principles Working E ectively and Being Rigorously Applied in the Maritime Industry?* (n 57) 7.

rights due diligence in this context.

Arguably, the industry consensus does allow for the revocation of certification and membership (of P&I clubs, shipowner associations and bodies such as the International Code of Conduct Association (ICoCA)). However, the transparency dilemma remains. These closed networks have little incentive (or requirements) to disclose their interrelationships or their approaches to potential human rights and law of the sea violations to the public. This leaves us with many 'mights' and 'hypotheticals' about how the SLO concept and reputational sanctions could operate in this context.

Many open registries operate with a high degree of secrecy, extending to the true ownership of vessels. Registries may not enforce reporting requirements. For example, ship operators and security teams may be discouraged from reporting of non-lethal discharging of firearms due to the commercial costs and delays involved and the risk of being stuck in a foreign port white an investigation takes place. As Huggins notes:

> The reporting of incidents that are resolved without damage to the ship or injury to the crew is also effectively dis-incentivized, since the reporting PCASP may open themselves to lengthy investigation and review of certification and training. To complicate matters, confidentiality agreements, where incidents cannot be reported to outside agencies are sometimes incorporated as a part of the PMSC contract with the shipping company.[61]

It is much easier to discuss potential and capacity for effectiveness than to measure it. Commercial shipping and marine insurance relationships operate within closed networks. The content of those relationships and the identities of those involved are mostly private. Knowledge of any potential breaches and potential for dispute resolution is often limited to parties privy to those commercial relationships. Further, the gold standard of dispute resolution within these maritime supply chain relationships is often confidential arbitration. This may prevent other third parties who are aggrieved by the actions of PCASP from becoming aware of circumstances that would otherwise enable them to bring an action for redress. Expulsion from shipowner associations and P&I clubs may not be made public either.

I strongly empathise with Carrera Da Cruz, whose 2017 article on PCASP standardisation undertook a detailed and legally creative exploration of many of the ways in which the provisions of ISO 28007 may be enlivened through private law and thereby generate real consequence for the actors involved.[62] This cogent analysis of the promise of standardisation

[61] The Challenges of Maritime Private Security Oversight, 'The Challenges of Maritime Private Security Oversight' (2012); cited in S Williams, Assessing State Jurisdiction and Industry Regulation over Private Maritime Security. An International and Comparative Regulatory Review (2014) 36–7; listen also to P Cook, Private Maritime Security and the Introduction of an International Regulatory Structure (4 March 2013).

[62] M Carreira Da Cruz, 'Regulating Private Maritime Security Companies by Standards: Causes and Legal Consequences' (2017) 3 Mar Safe Law Journal 63.

was unfortunately weakened (due to no fault of the author) by the reminder that the promise of standardisation as explored in the article was qualified by the disclaimer that they were 'hypothetical' ... 'possibilit[ies]' of what 'could' occur.[63] This is illustrated by the following extract from the article (my emphases):

> The following reasoning *could* be mobilized and supported in court decisions; *it is of course hypothetical*, but it allows us to develop the idea. Even though a national law does not require a PMSC to be ISO 28007 certified, it *could perhaps be argued* when establishing if the defendant had a due diligence attitude, that one of the means is to demonstrate that the party has taken 'all reasonable steps' to prevent a violation and that 'reasonable measures' include, among other things, the ISO 28007 certification. More precisely, in a case of negligence in tort law or in a case of strict liability in criminal law, ISO 28007 *could* be used for two scenarios. *Let us imagine the question* of the potential liability of a PMSC vis-à-vis a guard or sailor who died on the ship as a result of a firearms accident. *And let us imagine* a flag state national law that only requires PMSCs to take 'necessary precautions' against firearms incidents on board, but does not define the term 'necessary precautions'.[64]

My own research shares the same limits. While is it possible to formulate and explain the general operation of mechanisms giving rise to legal consequences to non-State actors such as PCASP, as well as those involved in their embarkation, it is difficult to establish that such mechanisms are operating effectively in practice. A review of key texts on P&I clubs reveals the same problem.[65] While these texts can capably articulate the common terms of P&I club agreements and the general operation of mechanisms such as club exclusion, they do not enjoy sufficient public-facing authority (such as case law) to explain the workings of those mechanisms in detail with the benefit of examples. This again is not the authors' fault; there is little public reporting by such closed networks on issues such as violations by members of club-backed rules on environmental protection or human rights protection.

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63 'Finally, still hypothetical but again interesting, is the possibility that a court decision condemning a PMSC could include, among other things' ... 'Insurance companies could, in the shipowner's insurance contract, use an ISO 28007 certification as one requirement the PMSC hired by the shipowner must fulfil' ... 'The following reasoning could be mobilized and supported in court decisions; it is of course hypothetical, but it allows us to develop the idea. ' ... 'This potential bias - quite hypothetical but very interesting': ibid 76–7.

64 Emphasis added. The paragraph continues: 'However, the defendant *could argue* that the "necessary precautions" applied by the PMSC were in conformity with the requirements of ISO 28007, notably on firearms training, training procedures and protocols, and firearms use on board. Then one must consider that the PMSC has exercised due diligence to prevent a breach in the conditions of safe use of firearms. On the other hand, ISO 28007 *could be used* for the opposite reasoning: the lack of due diligence on the part of the defendant. Although the national law does not include or refer to this standard when defining "necessary precautions", the court *could* refer to the fact that the PMSC did not follow requirements commonly accepted...': ibid 76.

65 See e.g. D Semark, *P&I Clubs: Law and Practice* (Informa Law from Routledge 2013).

7.3 Industry Interests and Regulatory Capture

One criticism of private ordering generally, and the industry consensus in particular is that of regulatory capture. Regulatory capture is defined as 'control of the regulatory process by those whom it is supposed to regulate or by a narrow subset of those affected by regulation, with the consequence that regulatory outcomes favor the narrow "few" at the expense of society more broadly'.[66] This risk is further amplified when other 'non-industry or non-commercial groups, such as trade unions, are similarly limited or effectively excluded from participation' in international standardisation.[67] For Benvenisti the lack of accountability and transparency of informal international law-making lends itself to capture by narrow interest groups'.[68] He argues that while informal standard-setting may prove effective, at the 'same time it can mask governmental concessions to powerful private actors'.[69] This combination of the secretive and narrowed participation involved in the formation of regulatory norms is known as regulatory capture.[70]

Recent criticism regarding the IMO has highlighted the potential power of industry groups in developing and enforcing policy. The Guardian newspaper recently reported criticism of the International Maritime Organization (IMO) by the charity Transparency International following accusations of an 'emissions cheat' system that allowed ships to sidestep clean fuel regulations.[71] In 2018 the IMO had established a working group previously 'to tackle accusations earlier this year from Transparency International that it is secretive and disproportionately influenced by the private shipping industry and an unequal influence of certain member states'.[72] For Rueben Lifuka, the vice-chair of Transparency International:

> Unfortunately the IMO is far too susceptible to disproportionate influence from private interests and certain member states, meaning that there could be obstacles to meeting the targets for emissions reduction set earlier this year. The agency

66 Mattli, 'Beyond the State?' (n 28) 307.

67 Ibid 308.

68 'The more informal the policy-making, the more capture is possible and the less the process and outcome are open to public scrutiny. Such concerns intensify when governments take the back seat and allow private actors to set their own standards without public scrutiny': Benvenisti, 'Toward a Typology of Informal International Lawmaking: Mechanisms and their Distinct Accountability Gaps' (n 6) 306; citing A Slaughter, *A New World Order* (Princeton University Press 2005) 219; Benvenisti, 'Exit and Voice in the Age of Globalization' (n 29).

69 He notes that the 'informality and the lack of accountability of the process and outcome often reduce the ability to tell the difference': Benvenisti, 'Toward a Typology of Informal International Lawmaking: Mechanisms and their Distinct Accountability Gaps' (n 6) 306.

70 'In short, the problem with privatization of regulation is twofold. First, the private forums of rule-making tend to be secretive and devoid of proper due process, and, second, the number of groups involved in private regulation is small and disproportionately—if not exclusively—from industry': Mattli, 'Beyond the State?' (n 28) 300; citing W Mattli and N Woods (eds), *The Politics of Global Regulation* (Princeton University Press 2009).

71 S Laville, 'UN Shipping Agency Accused of Secrecy over Maritime Pollution' *The Guardian* (2018-11-20).

72 'Transparency International said it was concerned that moves by the UK, the US, the Cook Islands, Marshall Islands, Panama and the United Arab Emirates could hamper reform at the UN agency and damage moves to tackle climate change and clean up the shipping industry': ibid.

> needs to move towards a more open and transparent way of operating, with greater opportunities for public scrutiny and civil society engagement. The stakes are too high for the entire planet for the IMO to continue to operate as a closed shop.[73]

Gould warns of the danger of regulatory capture in maritime security policy formation[74] in a critique of ISO 28007:2015 (and its successor) and the 100 Series RUF.[75] He argues that the 'permissiveness of flag state regimes, the capacity of vessels to switch registration, and the narrow scope of industry regulation constitute the near-unlimited autonomy of ship operators in the governance of private security offshore'.[76] He warns:

> Where the drive towards cost-saving and deregulation in shipping is ever-important, do the regulatory processes created by the commercial maritime community simply reflect the financial interests of the shipping industry and the autonomy of individual ship operators, or do they reflect genuine aspirations to raise standards and protect a public good (including human rights) at sea?[77]

Gould argues that both 100 Series RUF and ISO 28007:2015 are undermined by a lack of 'authority necessary to enforce standards or disqualify non-signatories from operating in the industry'.[78] The lack of a binding authority behind ISO 28007:2015 and 100 Series RUF when combined with the costs of certification result in a 'commercial advantage in not adhering to the suggested standards'.[79] In particular, he questions the motivations behind the formation and use of the 100 Series RUF, arguing that while the 100 Series RUF have 'been used to bolster companies' professional brands, their terms are too unclear to be realistically enforceable' and lack a body to credibly enforce them.[80] For Gould, while it is clear that 100 Series RUF and ISO 28007:2015 'are regulatory frameworks that introduce best practice', their 'ambitions and capacity to raise standards and restrict autonomy across the sector are limited'.[81]

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73 Ibid.

74 'In maritime security, the line between 'responsive' regulation and 'industry capture' of the regulatory process is a blurry one, with no industry regulatory body having a clear commitment to a 'public' regulatory interest': A Gould, 'Sovereign Control and Ocean Governance in the Regulation of Maritime Private Policing' (2020) 30 Polic Soc 1, 12; citing M Button, 'Assessing the Regulation of Private Security across Europe' (2007) 4(1) Eur J Criminol 109.

75 He regards these as being the 'only regulatory initiatives to have gained significant support among flag states and the maritime commercial community': Gould (n 74) 8–9.

76 'As with flag state regulation, though in different ways, the guiding logic for industry regulation of private maritime security has been the protection of the individual autonomy of ship operators in hiring and overseeing security contractors in international waters': ibid 12.

77 Ibid 8.

78 Gould (n 74) 11; citing E Meidinger, 'The Administrative Law of Global Private-Public Regulation: the Case of Forestry' in *Crime and Regulation* (Routledge 2017).

79 'It seems likely that this is in part a function of the role of the shipping and insurance industries (and their desire to allow maximum commercial flexibility) in constructing regulation': Gould (n 74) 12; citing R Thomas, Private Eyes, 'International Maritime and Port Security' (2015).

80 For Gould, the 100 Series RUF emerged from the 'vacuum of flag state regulation'. This he argues captures 'perfectly the prevailing realities of industry regulation of the maritime security industry': Gould (n 74) 11.

81 Ibid 347.

The key weakness in this explanation is it ignores the motivations of the key drivers of regulation of the private maritime security sector, namely marine insurance and the allocation of risk within the P&I model. Third party liabilities are shared amongst shipowners as members in that mutual framework. Such interests are not best served by a policy of maximum commercial flexibility aimed at bolstering the professional brands of those in the maritime security industry. Rather, they are served by minimising the exposure of the club to potential external liabilities. As claims against members are shared within the clubs (and by way of the IG group, with members in other clubs) the commercial incentive is best served by regulation and the threat of club based enforcement that favours best practice as a means of reducing potential club liabilities. Thus, the key problem with Gould's argument is not that shipowners and insurers are serving their own interests, of course they are. The weakness in the argument is that it misreads how that pecuniary interest is indeed served by having rules and encouraging compliance with them.

It is useful to draw an analogy with private ordering in the context of environmental protection. Naomi Roht-Arriaza warns against a rush to condemn corporate control of the International Organization for Standardization (ISO) process, instead advocating a more pragmatic approach to ensuring that ISO standards fulfil their promises.[82] Such standards, 'if substantive, sector-specific, and created through a more inclusive process, may prove more easily monitored and enforced through market mechanisms than through an international regulatory agency'.[83] Roht-Arriaza argues that the ISO process, while 'deeply flawed', contains the 'germs of a number of good ideas' and reflects, 'for better or for worse, the increasing complexity and multi-dimensionality of international environmental lawmaking'.[84] As Roht-Arriaza states:

> The ISO standards' formation process supports a view of international law as composed not just of formal interactions among sovereign states, but as involving individuals, corporations, non-governmental organizations (NGOs), intergovernmental organizations like those related to the United Nations, and sub-national governments, as well as states. In this view, the state is the major agent in rulemaking and creating international norms, but it is not the only player. Rather, it is the intersection of the public and private, domestic and international spheres that creates the rules.[85]

The unique nature of P&I clubs is critical here. Their role as gatekeepers to profitable participation in maritime trade and their mutual structure where the burden of claims is

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82 The social licence to operate is based on a 'complex mix of competitive pressures, pre-empting state and international public regulation and a desire to harmonise and standardise national rules across industry': N Roht-Arriaza, 'Private Voluntary Standard-Setting, the International Organization for Standardization, and International Environmental Lawmaking' (1996) 6 Yb Int'l Env L 107, 107–8; see also Buhmann, 'Connecting Corporate Human Rights Responsibilities and State Obligations under the UN Guiding Principles' (n 32); Demuijnck and Fasterling (n 14).

83 Roht-Arriaza (n 82) 163.

84 Ibid 163.

85 (footnote omitted) ibid 138.

shared among members enables the the clubs to provide a 'most important contribution to maritime safety and environmental performance'.[86] Bennett argues that while role of State institutions in regulation is important, it is 'but one of many relationships in which shipowners are involved'.[87] He argues there is 'a danger in institutionally-focused qualitative research that the institution will a priori be found to be of central importance in regulatory and other social and economic relationships'.[88] He notes:

> But to what extent is it legitimate to involve private institutions, albeit non-profit-making co-operatives like the P&I Clubs, in safety and environmental regulation in the maritime industry? Of course, where they share common goals, private actors may simply be regarded as tools for implementing the goals of governmental programmes which, at least to some extent in liberal democracies, attempt to advance the common good. Through the P&I Clubs shipowners are shown to hold a stake in high safety and environmental performance which hitherto was deemed to be the concern of governments. However, the example of the P&I Clubs reminds us that the goals of private actors are much narrower than those of governments, and may in many cases conflict with the goals of other legitimate interests. And, in practice, governments pander to the needs of private third parties in order to enrol them offering incentives and allowing them to influence the aims of policies themselves. Appealing to 'stakeholders' is laudable in theory but, in practice, the dominance of already powerful private interest groups may simply be reproduced[89]

For Gould, another crucial weaknesses of the 100 Series RUF is that the terms of the documents regarding issues such as the protection of human rights, vetting of personnel and the use of force are vague.[90] While the rules of the RUF may be characterised as vague, this is arguably reflective of them trying to capture a broad array of national self-defense tests. Arguably in a risk and litigation-averse environmental it was in shipowners' and PMSCs' interests that the RUF established a threshold for the use of force high enough that compliance with it should not lead to criminal liability in a variety of jurisdictions. Despite this, there is an argument that the 100 Series RUF lacks sufficient detail to be of much practical use. As the preface to the rules themselves notes, they 'do not cover detailed PMSC Standard Operating Procedures'.[91]

The 100 Series RUF is similar in many respects to the BIMCO Guidance on Rules for the Use of Force by PCASP (BIMCO Guidance).[92] As Clause 5 of the BIMCO Guidance

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86 P Bennett, 'Mutual Risk: P&I Insurance Clubs and Maritime Safety and Environmental Performance' (2001) 25 Mar Pol 13, 20.

87 Ibid 20.

88 Ibid 20.

89 Ibid 20 (footnote omitted).

90 A 'director of one maritime security think-tank felt that many of the standards were introduced as a point of commercial expediency rather than to protect the rights of seafarers, prevent substandard guards and companies from operating, and curb the use of excessive force at sea': Gould (n 74) 11.

91 Human Rights at Sea, The 100 Series Rules for the Use of Force, IMO MSC (2013) IMO Doc MSC 92/INF.14, 8.

92 BIMCO, BIMCO Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV) (2012).

states it was designed to be 'read in conjunction with GUARDCON provisions relevant for the relationship between the Master of Vessel and Team Leader'.[93] The core aim of that guidance was to assist shipowners and PMSC in the review of a set of RUF to ensure a 'graduated level of response for employment by PCASP that is reasonable and proportionate'.[94] That is, the guidance aimed to assist in the selection of an appropriate RUF to annex to GUARDCON thereby assisting shipowners and PMSCs in meeting their obligations under GUARDCON and MSC Circ 1405 by setting out:

> guidelines for a graduated response by armed security guards to any actual, perceived or threatened act of piracy and/or violent robbery and/or capture/seizure by third parties in order to protect the crew and defend a vessel from being hijacked.[95]

The BIMCO Guidance is just one of the many contributions that Giles Noakes, former head of Maritime Security at BIMCO made in this area. Giles passed away in 2017, however it is not lost on the author of this dissertation that without Giles this PhD would be missing a topic.[96] The most notable difference between the BIMCO Guidance and the 100 Series RUF is the test for self-defence. While both require that the use of force be 'necessary' the Guidance requires it also be 'proportionate'[97] while the 100 Series instead requires it be 'reasonable'.[98] This appears to reflect the two key approaches by State legal systems. The UK Guidance for example, along with public international law, favours proportionate.[99] In contrast, the 100 Series RUF while countries such as Tanzania.[100] In contrast, the BIMCO Guidance makes clear that the use of force including lethal force should only be utilised 'when essential and strictly necessary, ensuring that the measures undertaken are proportional and appropriate to the circumstances, and utilized at a minimum necessary level'.[101] The BIMCO Guidance requires 'certain exemplary conditions to be met' as a prerequisite for the use of lethal force such as the failure of a show of weapons and warning shots to deter an attack, and a 'clear and visible intention' on behalf of an attacker to

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93 J Marin, M Mudrić, and R Mikac, 'Private Maritime Security Contractors and Use of Lethal Force in Maritime Domain' in *The Future of the Law of the Sea* (oapenorg 2017) 204; BIMCO Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV) (n 92) [5].

94 BIMCO Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV) (n 92) [2].

95 'In providing this Guidance it is assumed that no armed guards shall be deployed without a detailed risk assessment by the Ship owners and that the deployment of armed guards shall not be an alternative to the implementation of the current Best Management Practices (BMP) and other protective measures': ibid [1].

96 'Giles Noakes' ⟨https://www.bimco.org/giles⟩ accessed 21 April 2020.

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) (n 92).

98 The 100 Series Rules for the Use of Force (n 91).

99 UK Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances, first published 6 December 2011 (Version 1.1)* (2011) [19].

100 R Kamuli, An East African Legal Review of the Application of the 100 Series Rules for The Use of Force (2015) 7.

101 BIMCO Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV) (n 92) [4].

board the vessel while 'demonstrating the use of weapons'.[102] As that Guidance states, a 'graduated and proportional defense' requires first, the use of nonviolent means such as the show of weapons, and then the 'discharge of weapons in a graduated flow'.[103]

There were reports of some confusion with a number of GUARDCON contracts directly annexing the guidance as the RUF in Annex B.[104] Despite it not being designed to compete directly with the 100 Series RUF, it is not difficult to see from a practical standpoint why the more detailed 'guidance document' was more popular within the shipping and marine security circles. The 100 Series RUF is perhaps the weakest of the three instruments. It is a shame that the 100 Series RUF project was not more ambitious.

7.4 Non-Binding Standards under UNCLOS

Private ordering is often characterised as a form of 'soft' law. This term is a useful shorthand for noting that, as a product of rulemaking processes beyond States, it is not binding *per se*. However, there is a limit to this analysis as it does not account for the various circumstances in which the products of non-State rulemaking systems can be transformed into more binding forms of law. This is particularly so in the realm of maritime policy as a result of the generally accepted international regulations, procedures and practices (GAIRS) mechanism in the United Nations Convention on the Law of the Sea (UNCLOS). As Justice Paik argues, it is important to 'look carefully into the post-UNCLOS legal developments, not because they are binding upon States as either treaty law or customary law, but rather because they are indicative of such regulations, procedures and practices'.[105]

For Barnes, rules of reference such as GAIRS 'allow for the development of more detailed standards of conduct within a coherent framework'.[106] Barnes argues that the identification of GAIRS is a matter of State practice and is best illustrated by Memoranda of Understanding (MOUs) on port State control (PSC).[107] He states:

> Although non-binding, these MOUs establish common standards of conduct and seek to coordinate existing legal authority to act. They provide clear evidence of State

[102] BIMCO Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV) (n 92) [7(g)]; Marin, Mudrić, and Mikac (n 93) 204.

[103] For example, the 'warning shots, disabling fire, and, finally, deliberate direct fire': Marin, Mudrić, and Mikac (n 93) 204; BIMCO Guidance on Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV) (n 92) [Clause]7(a)(iii).

[104] Private Maritime Security and the Introduction of an International Regulatory Structure (n 61).

[105] *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (Separate Opinion of Judge Paik) 2015 ITLOS Reports 102 (*SRFC Case, Separate Opinion of Judge Paik*) [27].

[106] This 'maintains the pre-eminence of international standards over domestic laws and regulations, thereby contributing to uniformity': R Barnes, 'Flag States' in A Elferink and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 321.

[107] Barnes (n 106) 322; citing E Molenaar, 'Port State Jurisdiction: Towards Mandatory and Comprehensive Use' in R Barnes, D Freestone, and D Ong (eds) (OUP 2006) 192.

> practice and create institutional support mechanisms. Furthermore, they provide scope for the inclusion of soft law non-binding instruments and so can accommodate non-treaty standards. In light of these advantages, it is suggested that this form of recognition, especially within a regional mechanism that gives effect to international standards through inspection and compliance mechanisms, provides the clearest indication of the international standards to which flag States must adhere.[108]

In this light, Barnes argues that such 'mechanisms seem likely to expand to complement and reinforce, rather than replace flag State control'.[109] Where supported 'general practice and acceptance', such as 'uniform incorporation [within] contracts and the internal corporate codes of conduct', standards of responsible conduct may be regarded as a sources of law by arbitrators and courts.[110]

Seta considers three options for the use of private standards within the UNCLOS framework.[111] First, indirect incorporation through 'broad' GAIRS. In this instance standards are incorporated into treaties where those treaties are considered part of GAIRS themselves. Seta cites incorporation of ISO standards into GAIRS via the International Convention for the Prevention of Pollution from Ships (MARPOL)[112] or Safety of Life at Sea Convention (SOLAS)[113] as examples of this.[114] Second, direct incorporation of private standards based on interpretation of the GAIRS provisions themselves (Seta refers to this as 'narrow GAIRS'). Third, incorporation in a broader gap-filling capacity.

Seta acknowledges the possible incorporation of private standards into 'narrow GAIRS' based on three considerations.[115] First, the vast amount of expert knowledge from the private sector on maritime matters.[116] Second, the lack of any textual basis within UNCLOS for qualifying who must 'generally accept' standards for them to constitute GAIRS. Not only do a majority of individuals follow GAIRS but also the 'ultimate targets of narrow GAIRS are activities of individuals and companies'.[117] Acceptance by private stakeholders

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108 Barnes (n 106) 322 (footnote omitted).

109 Barnes (n 106) 322; citing Molenaar (n 107) 192.

110 A Bonfanti and F Romanin Jacur, 'Energy from the Sea and the Protection of the Marine Environment: Treaty-Based Regimes and Ocean Corporate Social Responsibility' in *Energy from the Sea* (Brill — Nijhoff 2015) 77–8 (footnotes omitted).

111 M Seta, 'The Contribution of the International Organization for Standardization to Ocean Governance' (2019) 28(3) RECIEL 304.

112 International Convention for the Prevention of Pollution from Ships (adopted 1 November 1973, entered into force 2 October 1983) 1340 UNTS 184 (MARPOL).

113 International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 278 (SOLAS).

114 Seta (n 111) See.

115 Ibid 308.

116 Seta (n 111) 308: 'The incorporation of private standards in narrow GAIRS can effectively optimize the use of such knowledge in the UNCLOS system if private standards are based on such knowledge, as the ISO standards are': citing S Trevisanut, 'The Role of Private Actors in Offshore Energy: Shifting Models of Participation' in N Bankes and S Trevisanut (eds), *Energy from the Sea: An International Law Perspective on Ocean Energy* (Brill 2015) 86; N Giannopoulos, 'Global Environmental Regulation of Offshore Energy Production: Searching for Legal Standards in Ocean Governance' (2019) 28(3) Eur J Int Law 289.

117 Seta (n 111) 308; citing B Oxman, 'The Duty to Respect Generally Accepted International Standards'

arguably forms a crucial step in the 'general acceptance' of a standard[118] and there is strong merit to the argument that 'the subject that generally accepts the standards should include private actors, rather than States alone'.[119] Third, this enhanced role of private actors is arguably in 'line with the recent tendency of privatization of international law'.[120]

An argument can be made for the IMO recommendations to flag States on the use of PCASP being analogous to a form of GAIRS. These recommendations are now in their third revision.[121] MSC.1/Circ.1406/Rev.3 has had considerable support from IMO members and flag States. Despite the permissive language of 'recommendations' and what States 'should' do, it stresses the 'importance and urgent nature' of regulating PCASP and the 'need to further develop and promulgate detailed guidance and recommendations as soon as possible'.[122] It 'urge[s]' flag States to 'bring the circular to the attention of all national agencies concerned with anti-piracy activities, shipowners, ship operators, shipping companies, shipmasters and crews' and to 'take any necessary action to implement' the recommendations.[123] That circular makes it clear that the carriage of PCASP, their firearms and their security-related equipment is subject to flag-State legislation and policies and it is a matter for flag States to determine if and under which conditions they will be authorised.[124] Further, flag States should 'provide clarity to masters, seafarers, shipowners, operators and companies with respect to the national policy on carriage of armed security personnel' and 'should require the parties concerned to comply with all relevant requirements of flag, port and coastal States'.[125]

The circular notes that flag States *should* 'have in place a policy on whether or not the use of PCASP will be authorized and, if so, under which conditions'.[126] The circular encourages flag States to take into account a number of recommendations including, where the use of PCASP is determined to be an appropriate and lawful measure, establishing a policy that may include, *inter alia*:

1. the minimum criteria or minimum requirements with which PCASP should comply, taking into account the relevant aspects of the guidance set out in 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;

(1991) 29 NYU J Int L and Pol 109, 141.

118 A Bonfanti and F Jacur, 'Energy from the Sea and the Protection of the Marine Environment: Treaty-based Regimes and Ocean Corporate Social Responsibility' in N Bankes and S Trevisanut (eds), *Energy from the Sea: An International Law Perspective on Ocean Energy* (Brill 2015) 77–8.

119 Seta (n 111) 308.

120 Seta (n 111) 308; citing P Stephan, 'Privatizing International Law' (2011) 97 Va L Rev 1573.

121 IMO Secretariat, Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, IMO MSC (1995) IMO Doc MSC.1/Circ.1406/Rev.3 (IMO Doc MSC.1/Circ.1406/Rev.3).

122 IMO Doc MSC.1/Circ.1406/Rev.3 [2], [6].

123 IMO Doc MSC.1/Circ.1406/Rev.3 [7], [8].

124 IMO Doc MSC.1/Circ.1406/Rev.3 [2] (annex).

125 IMO Doc MSC.1/Circ.1406/Rev.3 [3]–[4] (annex).

126 IMO Doc MSC.1/Circ.1406/Rev.3 [5] (annex).

2. ensuring that PMSC employing PCASP on board ships hold valid accredited certification to 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) or meet applicable national requirements;[127]

The permissive language of the circular makes it difficult to extrapolate many hard obligations. On this basis it may be difficult to establish that the recommendations can constitute GAIRS for the purposes of Article 94. This is despite the overwhelming general acceptance of the circular by IMO member States.

As Part I noted, paragraphs (3) through (5) of Article 94 elaborates on flag State duties with respect to shipping safety. It is submitted that the shipping safety requirements support the adoption of the industry consensus as part of the shipping safety measures. In particular, they align with the Article 94(3)(b) (and SOLAS) requirements concerning the role and responsibility of the master. However, even more broadly speaking the requirements of those instruments arguably contribute to safety at sea and may contribute to the seaworthiness of vessels and help ensure ships follow international norms concerning the safety of life at sea. Take the Marshall Islands as an example. In addition to a number of stipulations regarding the safety of life at sea the Marshall Islands leverages both the 100 Series RUF and ISO 28007:2015 to assist in ensuring PCASP are properly regulated. The Marshall islands requires:

> Effective 01 January 2016, Companies shall engage only those PMSCs that are certified to the ISO 28007 standard (including ISO/PAS 28007:2012 and ISO 28007-1:2015) by an accredited certification body. This requirement comports with the recommended guidance contained in IMO Circular MSC.1/Circ.1406, Rev.3.[128]

In addition, while the Marshall Islands does not explicitly mention GUARDCON it sets out a number of requirements for PCASP agreements including that they: 'at a minimum, contain provisions for the use of force in compliance with established international standards regarding the Rules for the Use of Force (RUF)',[129] that included in any agreement is a 'RUF consistent with an international model set of standards, such as the 100 Series',[130] and that a 'set plan of gradual responses for the use of force, including warning procedures, shall be documented, and signed prior to embarkation by all relevant parties, including the shipowner, the Master of the ship, and the PMSC. The plan shall include a description of the roles of the Master and the PCASP team leader'.[131] As Guilfoyle notes:

> A completely 'hands-off' approach by States, simply relying on such third-party certification, would probably not satisfy due diligence obligations. Nonetheless,

[127] IMO Doc MSC.1/Circ.1406/Rev.3 [5] (annex).
[128] Republic of the Marshall Islands, Use of Privately Contracted Armed Security Personnel (PCASP), Marine Notice. No. 2-011-39, Rev 8/13 (2011) [10.1].
[129] Ibid [6.3].
[130] Ibid [8.1].
[131] Ibid [8.3].

> instruments such as the ICoC may provide evidence of the internationally accepted minimum standards for the conduct of PCASP on issues such as the use of force. Incorporating such third-party standards into national regulations would, however, likely be desirable.[132]

A flexible application of the GAIRS mechanism is consistent with the nature of UNCLOS as an evolving framework for the law of the sea. With sufficient State support a broad range of instruments are capable of informing the GAIRS provisions in UNCLOS. Arguably, with the right degree of general acceptance among State members of the IMO, guidelines, recommendations, resolutions and circulars such as those developed by the IMO's Maritime Safety Committee (MSC) could constitute GAIRS. This approach would appear to be consistent with that of Justice Paik in his separate opinion[133] in the *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*[134] case, where he noted that a number of relevant agreements including soft law instruments were 'voluntary in nature and not legally binding'.[135] In that case he noted that:

> Nevertheless the post-UNCLOS normative developments as a whole, I believe, are relevant to the present case as they could give useful guidance as to the state and direction of international fisheries law on this question. Therefore, it would be less than judicious to turn a blind eye to them simply because they are not legally binding or they do not directly address the question at hand.[136]

Justice Paik also argued that, while the GAIRS mechanism in Article 94 is addressed to shipping safety issues, 'there is no reason to confine the rule of reference approach only to that context'.[137] He argued that the rule of reference used in Article 94(5) 'can be extended and applied by analogy to give effective content to the general yet rather vague obligations of the flag State' in respect issues such as illegal, unreported and unregulated (IUU) fishing.[138]

Bonfanti and Romanin Jacur examine the hardening of standards of conduct in the context of the offshore energy activities of private actors.[139] They adopt the terminology of ocean corporate social responsibility (OCSR), which they define as:

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132 D Guilfoyle, 'Defending Individual Ships From Pirates' in C Chinkin and F Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 319.

133 *SRFC Case, Separate Opinion of Judge Paik*.

134 *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)* (Advisory Opinion) 2015 ITLOS Reports 4 (*SRFC Advisory Opinion*).

135 *SRFC Case, Separate Opinion of Judge Paik* [5].

136 *SRFC Case, Separate Opinion of Judge Paik* [5].

137 *SRFC Case, Separate Opinion of Judge Paik* [24].

138 *SRFC Case, Separate Opinion of Judge Paik* [24].

139 'Many of these activities are generally conducted by private operators. Important players in the ocean energy scene are: the owners of the infrastructure or vessels carrying out the energy activities, their charterers, the companies in charge of their technical management, the classification societies who certify the technical and safety standards of oil platforms and the seaworthiness of vessels, and the shipyards in charge of building and repairing the energy facilities and ships': Bonfanti and Romanin Jacur (n 110) 63–4.

> OCSR embodies non-binding general principles of responsible conduct and technical guidelines. With regard to their addressees, two categories of OCSR instruments exist: those establishing standards of conduct directly addressing business operators, and those formally addressing States with recommendations to be complied with by private operators. We can also categorize based on source; thus we can identify guidelines promulgated by international organizations and States, and codes adopted by business professional associations.[140]

For Bonfanti and Romanin Jacur there is 'no doubt' that rules and standards annexed to treaties are legally binding.[141] In contrast, standards established by non-binding IMO instruments such as resolutions 'are a different case' but can become transposed into UNCLOS provisions given sufficient general acceptance.[142] When this occurs such rules acquire a legal nature and are binding on IMO member States.[143] Bonfanti and Romanin Jacur cite the IMO energy efficiency resolutions[144] as a telling example of the incorporation by reference of OCSR standards into the legal framework of UNCLOS.[145] They state that should these resolutions:

> be invoked by the LOSC provisions, they would bring OCSR rules and standards into the LOSC regime as part of their content. Echoing the pragmatic approach of the LOSC negotiators, this circulation of standards may be seen as a positive outcome, because it builds a regulatory regime based on public and private standards and law-making processes that complement and support each other.[146]

In the context of maritime environmental protection, this hardening of obligations through UNCLOS has meant that OCSR can contribute to environmental protection in a preventative capacity in addition to serving as a tool for mitigating and compensating damage following an environmental disaster.[147] In this sense, they argue that non-binding codes, recommendations and guidelines adopted by the IMO:

> although non-legally binding, these latter regulatory instruments serve as interpretive tools, supplement and provide guidance for the effective implementation of binding provisions. These technical standards are formally addressed to States who are responsible for their implementation into national legislation. However, in practice, these standards mainly regulate activities of private operators at sea and ultimately require specific behaviours and compliance from those operators.[148]

140 Bonfanti and Romanin Jacur (n 110) 73–4.
141 Ibid 71.
142 Ibid 71.
143 Thus, 'the standards of conduct on environmental protection under the IMO Resolutions are combined with other environmental standards established at international level. Whereas these standards have been adopted at an intergovernmental level, others are the result of the standardization process performed by the relevant professional associations': ibid 71, 75 (footnote omitted).
144 See 2012 Guidelines on the Method of Calculation of the Attained EEDI for new ships, IMO MEPC (2 March 2012) IMO Doc Res MEPC.212(63); 2012 Guidelines for the development of a ship energy efficiency management plan, IMO MEPC (2 March 2012) IMO Doc Res MEPC.213(63); 22012 Guidelines on Survey and Certification of the EEDI (2 March 2012) IMO Doc Res MEPC.214(63).
145 Bonfanti and Romanin Jacur (n 110) 84.
146 Ibid 84 (footnote omitted).
147 Ibid 74.
148 Ibid 67.

This hardening of norms through incorporation by reference in UNCLOS causes the 'texture' of UNCLOS 'opens to include legal and technical developments occurring within other regulatory regimes that have "lighter" decision-making processes'.[149] This normative evolution means that rules and standards 'circulate across regimes and allow [UNCLOS] to adapt to changing circumstances, such as new environmental challenges, technological progress and the related legal side-effects, without needing to engage in formal amendment of the LOSC itself'.[150] The result is that:

> These rules and standards thereby become the legal parameters that States must transpose into their national legislation and that thereby apply to energy operators in conducting their activities. As States generally prescribe and enforce national legislation in accordance with these international rules and standards, their circulation contributes to the harmonization of national laws and regulations.[151]

In addition to this formal incorporation of rules and standards, Bonfanti and Romanin Jacur argue that 'another notable normative evolution' is that of cross-fertilisation between treaty-based regimes and OCSR instruments. They describe this process as being where 'legal and technical developments within one regime influence the content or interpretation of similar rules in other regimes, or act as a stimulus for their adoption'.[152] They state:

> Such an evolution is supported by the development of a coherent practice of incorporation of the relevant standards within the internal corporate codes of conduct and the contracts entered into by the marine energy operators. In this way, normative synergies can emerge and lead to a more effective response to pollution from energy-related activities at sea.[153]

A similar argument can be made in terms of the relationship between UNCLOS and the industry consensus. Seta cites ISO 28007:2015 as an example of 'filling the gaps' in the UNCLOS system.[154] He argues that as UNCLOS 'only general and abstract principles, rather than specific and detailed rules' there is 'room for ISO standards to fill the gaps in the provisions and concretize them'.[155] For Seta, since 'State governments, such as those of the United Kingdom and the Marshall Islands, as well as the private sector, such as the Baltic and International Maritime Council, support' ISO 28007, it 'can be considered to successfully fill the gaps in the UNCLOS system'.[156] For Carreira, three reasons underlie the potential for ISO 28007:2015 to become the default standard tool of reference for private maritime security companies (PMSCs) on water:

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149 Ibid 70 (footnote omitted).
150 Ibid 70 (footnote omitted).
151 Ibid 70.
152 Ibid 69 (footnote omitted).
153 Ibid 84.
154 Seta (n 111) 309.
155 Ibid 309.
156 Ibid 309 (footnotes omitted).

> First, because of the wide support coming from the IMO Maritime Safety Committee as well as the industry. Second, because in comparison to the Montreux Document and the ICoC, it seems to be the best tool for the situation of piracy, more directly relevant to the situation of piracy and armed robbery in the maritime domain. ... Third, because it has the capacity to be articulated with other international hard law and soft law instruments on PMSCs and, more importantly, it can generate multiple legal consequences, beyond its role as a benchmark.[157]

Measures such as ISO 28007:2015, GUARDCON and the 100 Series RUF can assist in the interpretation of flag State duties in Article 94. In particular, flag State adoption of measures such as ISO 28007:2015 help inform the question of whether a flag State has effectively exercised its jurisdiction as required by UNCLOS. As Chapter 3 argued, due diligence is quickly emerging as the core mechanism by which to measure compliance by flag States with the duties as laid out in UNCLOS. As Chapter 4 noted, due diligence is also central to determine the responsibility of flag States with respect to the activities of its registered vessels. The industry consensus thus acts as an aid in the interpretation of flag State due diligence obligations in this context. This allows Article 94 to evolve in a way that harmonises international norms and maximises opportunities for monitoring and enforcing international norms, representing a promising step towards a more effective flag State accountability and responsibility model. b While insistence on these instruments is not sufficient to discharge flag State duties, their adoption provides a valuable addition to flag State frameworks. Not only is that adoption indicative of State practice but it is consistent with the ongoing development of due diligence as an accountability mechanism.

7.5 Conclusion

This chapter has examined the industry consensus in light of a number of critical perspectives concerning the effectiveness and legitimacy of transnational regulatory regimes. A number of themes were examined including transparency, regulatory capture and voluntariness. As this chapter argued, there is growing consensus in favour of rejecting State

[157] A 'crucial reminder is that, in 2007, the ISO had already produced a standard which collectively dealt with security assessment, competence of personnel and maritime facility issues: ISO 20858:2007. Indeed, this standard establishes a framework to assist marine port facilities in specifying the competence of personnel to conduct a marine port facility security assessment and to develop a security plan as required by the ISPS Code International Standard, conducting the marine port facility security assessment, and drafting/implementing a Port Facility Security Plan (PFSP). Fourth, of course, the parallel process of working on the more general topic of private security companies, which led to ISO 18788, was an element that worked in the ISO's favour. The field was therefore opportune, and the ISO could not only boast its unique and multidisciplinary expertise in a context where the IMO acknowledged the lack of standard to regulate PMSCs, but also its know-how in creating standards for the IMO requirements'. 'Hence, the ISO – and more specifically, the ISO Technical Group TC 8 working on Ships and Marine Technology – was seen by the IMO as being in the best position to develop the standard with their guidance and participation': Carreira Da Cruz (n 62) 64, 70–2.

responsibility as the exclusive mechanism for the regulation of organised non-state actors.[158] The effectiveness of global business regulation ultimately depends on the 'extent to which private and public authority, civil and government regulation, and soft and hard law, reinforce one another'.[159] It is argued that standard-setting coupled with supervisory mechanisms represents a 'more promising' and 'probably realistic' approach to achieving accountability for non-State actors.[160] Private standard-setting in the maritime security context compliments, rather than competes with, State rulemaking and enforcement. This dynamic, it is submitted, is consistent with the nature of UNCLOS as a progressive framework capable of adapting to new challenges. Despite this, the lack of transparency in non-State regimes such as ISO 28007:2015, GUARDCON and the 100 Series RUF complicates the task of measuring their effectiveness.

[158] See e.g. J d'Aspremont and others, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62 Neth Int Law Rev 49, 62.
[159] Vogel (n 11) 188.
[160] d'Aspremont and others (n 158) 62.

Chapter 8

Conclusion

Chapter 8 evaluates the role of private ordering in closing the enforcement gaps that emerge in the enforcement of international law. This concluding chapter revisits the flag State duties in the United Nations Convention on the Law of the Sea (UNCLOS) and advocates a coherent reading of Article 94 that encompasses the role played by non-State rule making and non-State rule-making systems. This chapter makes a number of findings in terms of the limitations of private ordering and how policy making in this area could be optimised to enhance the capacity of private ordering to close the enforcement gap. The chapter concludes the dissertation by reflecting on the central aims of the research project.

8.1 Private Ordering and Flag State Jurisdiction

As Chapter 2 examined, the International Tribunal for the Law of the Sea (ITLOS) has shown little inclination to qualify flag State registration by reference to the genuine link requirement in Article 92 of UNCLOS. It seems unlikely that ship registration requirements will be strengthened anytime soon. Open registries are a reality. While they do not all share the same reputations as some of the more criticised flags of convenience registries, many lack the will to sufficiently monitor their vessels using privately contracted armed security personnel (PCASP) in the Gulf of Aden. From a geographical perspective it is certainly the case that many lack the resources.

As a result of the liberal approach to ship registration, gaps have emerged in the enforcement of international law against armed non-State actors at sea. In their consideration of trends towards further developing avenues of jurisdiction by non-flag States,[1] Geiß and Tams

[1] Geiß and Tams consider trends towards non-flag State jurisdiction in areas such as illegal fishing, terrorism, piracy, and illicit trafficking. They assess, by reference to these fields, whether 'in its quest for effective compliance, international law has come to accept the possibility of decentralized enforcement, by states other than the flag state, of internationally agreed standards': R Geiß and C Tams, 'Non-Flag States as

adopt the terminology of the 'traditional regime' of jurisdiction at sea as a 'vague concept' used as a 'term of convenience seeking to describe the mélange of jurisdictional provisions set out in, or sanctioned by' UNCLOS.[2] They explain that:

> As this description suggests, it denotes no clear-cut code of jurisdictional provisions, but rather a range of principles, rules and exceptions that reflect competing perspectives on maritime governance, as they emerged in the second half of the 20th century. The traditional regime is by no means static: it has evolved over time and—as the subsequent sections demonstrate—remains caught in a process of constant adaption and re-negotiation.[3]

It is important to revisit Article 94 of UNCLOS on flag State duties and ask how it may be progressively interpreted to help close enforcement gaps. As mentioned in Part I, the core obligation set out in Article 94(1) requires a flag State to 'effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'.[4] This requirement gives rise to a number of positive obligations on behalf of the flag State. They include the need to have a framework in place to adequately protect human rights at sea. This requires flag States to monitor human rights compliance and conduct investigations into alleged breaches of human rights obligations.

Flag-State adoption of private ordering concerning the use of PCASP is consistent with measures expected of flag States to meet their Article 94 obligations. By insisting on the use of the GUARDCON Contract for the Employment of Security Guards on Vessels, ISO 28007-1:2015 Guidelines for PMSCs Providing PCASP on Board Ships (ISO 28007:2015) and the 100 Series Rules as to the Use of Force (100 Series RUF) flag States can not only take advantage of a set of uniform norms but arguably also go to some lengths to meet their obligations to adequately regulate the use of PCASP aboard flagged vessels. In addition, flag States can also enrol other actors such as protection and indemnity (P&I) clubs, certification bodies, shipping associations including the Baltic and International Maritime Council (BIMCO), shipowners, charterers and arguably even port and coastal states in the monitoring and enforcement of those norms.

Many of the private obligations that the industry consensus gives rise to are not limited by geography in the same way that some State and public international law norms may be. Obligations under GUARDCON, P&I club rules, insurance and cargo arrangements may be broken in territorial seas, exclusive economic zones (EEZs) or high seas. The parties

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Guardians of the Maritime Order: Creeping Jurisdiction of a Different Kind?' in *Jurisdiction over Ships* (Brill — Nijhoff 2015) 20.

2 Geiß and Tams (n 1) 21.

3 Ibid 21.

4 UN Convention on the Law of the Sea (opened for signature 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) art 94(1); cited in D Guilfoyle, 'Defending Individual Ships From Pirates' in C Chinkin and F Baetens (eds), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (CUP 2015) 316.

involved often have a strong commercial motivation to monitor each other's conformity with requirements. For example, the shipowner and shipmaster have an interest in ensuring PCASP abide by the terms of GUARDCON and the rules as to the use of force annexed to that agreement. Failure to do so adequately may jeopardise the vessel's insurance coverage and club membership, and may make the shipowner liable to claims from cargo interests as well as other third parties.

Private ordering such as the industry consensus also takes advantage of cross-fertilisation, as described in Chapter 7. By elaborating international legal principles, instruments such as ISO 28007:2015, GUARDCON and 100 Series RUF cross-fertilise and 'strengthen the LOSC's legal framework and contribute to the development of international law'.[5] These private norms of responsible conduct both strengthen and aid in the interpretation of flag State duties in Article 94.[6]

Another interesting finding can be made with regard to the role of decision making within systems of private ordering. As Chapter 6 argued, several IMO conventions, regulations, recommendations and circulars incorporate the decision-making procedures of P&I clubs.[7] In addition, as Chapter 6 noted, the European Union has displayed State practice by referring to ship membership of a P&I club as a prerequisite for entry into European ports.

These findings suggest that instruments such as ISO 28007:2015, GUARDCON and 100 Series RUF are capable of making a strong legal and normative contribution to the veracity of flag State obligations. This is not a replacement for flag State duties. Nor is it arguing that the adoption of private standards alone should suffice. However, it does allow for additional opportunities for monitoring and enforcing the law of the sea and human rights-related norms both among players within the commercial supply chain, contracting and insurance networks and also externally. By incorporating the requirements of the industry consensus flag States are able to take advantage of monitoring and enforcement mechanisms within shipping and marine insurance networks. This provides a greater role for private actors, port and coastal States and other States such as the home States of private maritime security companies (PMSCs).

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5 In this light, 'they can be certainly referenced as interpretative tools of the LOSC': A Bonfanti and F Romanin Jacur, 'Energy from the Sea and the Protection of the Marine Environment: Treaty-Based Regimes and Ocean Corporate Social Responsibility' in *Energy from the Sea* (Brill — Nijhoff 2015) 77.

6 Ibid 83.

7 See e.g. International Convention on Civil Liability for Bunker Oil Pollution Damage (adopted 23 March 2001, entered into force 21 November 2008) IMO LEG/CONF.12/19 (BUNKER Convention) art 7; International Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 May 1975) 973 UNTS 3 (CLC).

8.2 Closing the Enforcement Gap

The practice of marine insurers and shipowners can create substantive and uniform legal norms capable of regulating the use of force by PCASP. The industry consensus of ISO 28007:2015, GUARDCON and the 100 Series RUF assist in closing enforcement gaps and making non-State actors accountable for violations of international law. The effectiveness of private rulemaking in this context depends on understanding and adapting to commercial shipping arrangements. There is a powerful bidirectional interplay between shipping industry dynamics and legal doctrine. Law acts to influence, reinforce and amplify market-based sanctions through a variety of doctrines: public and private, national and international. ISO 28007:2015, GUARDCON and the 100 Series RUF each leverage existing industry-supported mechanisms for standardisation and certification, standard-form contracts, P&I club rules and mandatory rules of insurance law. Compliance with these measures has become akin to a legal licence to operate, with industry gatekeepers acting as the licensors (at least for ISO 28007:2015 and GUARDCON).

The evaluation of the legitimacy and effectiveness of regimes such as ISO 28007:2015, GUARDCON and the 100 Series RUF is a weighing-up exercise that must take into account the legal and practical limitations on State monitoring and enforcement ability offshore. This is particularly important in the context of open, privately-run registries, many of whom lack the resources and political will to effectively monitor the conduct of vessels flying their flags. UNCLOS provides a basis for flag States to complement regulatory efforts through the use of private ordering. This acts to mitigate some of the impunity resulting from the widespread use of open registries. In addition, it contributes to the uniformity of State approaches to the regulation of extra-territorial use of force by non-State actors.

Despite this, the potential of these initiatives is weakened as a result of complexities in measuring their effectiveness in practice. This dissertation, like Carrera Da Cruz, has explored numerous possibilities for how non-compliance may result in legal and practical consequences for the actors involved. Such possibilities could (or should) counter Gould's assertions by establishing legal bases for the hardening of otherwise soft-law obligations, particularly through private law. It is strongly arguable that Gould's critique is overly simplistic and ignores a number of nuances relating to how such standardisation and codes of conduct can be enlivened through commercial maritime and insurance relationships. Yet, the lack of reporting relating to the use of PCASP and the investigation of and consequences for actors involved in potential violations of law of the sea norms and human rights obligations creates an unfortunate hurdle to the ability to positively refute Gould's claims.

It is necessary to establish mutually reinforcing reporting obligations on shipowners,

managers and operators, underwriters, P&I clubs, flag States and PMSCs. This would allow a more thorough assessment of the effectiveness of the industry consensus to take place. These obligations should require such industry players to reveal potential human rights and law of the sea violations, as well as investigations and consequences flowing from those violations. The International Maritime Organization (IMO), and in particular the Maritime Safety Committee (MSC), is arguably the most suitable body to coordinate such reporting in addition to taking advantage of such reporting to better improve maritime security policy. Mutually reinforcing reporting requirements could arguably be best effected through these representative groups at the IMO's MSC.

Enhanced reporting is needed to provide the data necessary to back the veracity of industry ordering in this sector. Until that takes place we are left with the unsatisfactory conclusion that industry regulation as examined in Part II *could* work, along with illustrations of how it *could* work to bring order to the use of force at sea and the protection of fundamental norms of human rights and shipping safety. While public reporting of incidents may damage the reputational interests of parts of the shipping and marine security industries, the upside is that reporting could be used to defend the aims and promise of private ordering now and into the future. Until that takes place private ordering in this area will be vulnerable to attack as being weak and self-serving. Transparency is key.

Their potential is further undermined by a lack of viable avenues for remedying the harm resulting from alleged human rights violations by armed guards and should be strengthened through stronger transparency and reporting requirements and the adoption of current proposals to allow arbitration of human rights violations committed at sea.

The Human Rights at Sea (HRAS) arbitration proposal is still in its infancy. It is a very bold and broad-ranging proposal. Enhanced dispute resolution options allowing for the remediation of human rights violations would assist in achieving the goals of the United Nations Guiding Principles on Business and Human Rights (UNGPs) in the maritime environment. This would help the 'great potential' of the UNGPs 'to improve human rights at sea by expanding responsibility for human rights at sea to commercial maritime companies and not just the default reliance on State intervention'.[8] Arguably the proposal can take advantage of lessons learned from standard form contracting. Instruments such as GUARDCON, P&I member rules and charterparties enable the business and human rights arbitration of inter-party disputes and enable access to remedies by third-party human rights claimants. This proposal would also enable dispute resolution to leverage the cross-fertilisation of IMO guidelines, private ordering and other normative efforts such as the International Code of Conduct (ICoC) by defining the scope of arbitration as extending

[8] Human Rights at Sea, *Brie ng Note: Are the 2011 UN Guiding Principles Working E ectively and Being Rigorously Applied in the Maritime Industry?* (2020) 13.

to the consideration of mutually reinforcing public and private regulation. Further research is required in this area.

Armed, non-State actors on commercial ships have the capacity to engage in human rights violations in addition to risking the safety of shipping with relative impunity. There are a number of hurdles facing policy makers hoping to hold these actors to account. Some are legal and some are practical. While there was a great deal of initial confusion as to the rules applicable to governing the actions of PCASP at sea, this was primarily a matter of codification and organisation of existing norms drawn from international and domestic public policy, including the law of the sea, human rights, firearms and shipping safety. The challenge has been more to do with imposing these norms on the relevant actors, ensuring the availability of sufficient monitoring and enforcement procedures, and ensuring the reporting of any potential human rights abuses.

In light of an increasingly globalised private shipping industry, flag State jurisdiction is now an inadequate means of prosecuting the IMO's mandate to ensure 'the safety and security of shipping and the prevention of marine pollution by ships'. The problems in this sense are both legal and practical. In the first place, ease of lawful movement between domestic registries creates interstate regulatory competition and incentivises the creation of less onerous regulatory regimes. In the second, many flag States with substantial registries (such as Liberia or St Vincent and the Grenadines) lack the capacity (or desire) to investigate and prosecute crimes committed on flagged vessels. In these circumstances a dispute-settlement model based on the will and capacity of the flag State to enforce international norms is on the verge of failure. An alternative is required.

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