

2014

## Blackwater's New Battlefield: Toward a Regulatory Regime in the United States for Privately Armed Contractors Operating at Sea

Sean P. Mahard

Follow this and additional works at: <https://scholarship.law.vanderbilt.edu/vjtl>



Part of the [Commercial Law Commons](#), [International Law Commons](#), and the [Law of the Sea Commons](#)

---

### Recommended Citation

Sean P. Mahard, Blackwater's New Battlefield: Toward a Regulatory Regime in the United States for Privately Armed Contractors Operating at Sea, 47 *Vanderbilt Law Review* 331 (2021)  
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol47/iss1/6>

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact [mark.j.williams@vanderbilt.edu](mailto:mark.j.williams@vanderbilt.edu).

# Blackwater's New Battlefield: Toward a Regulatory Regime in the United States for Privately Armed Contractors Operating at Sea

"[W]hen evil is the only solution, you do evil."<sup>1</sup>  
Shamun Indhabur, Somali Pirate Leader

## ABSTRACT

*Piracy has reemerged with a vengeance in the twenty-first century. Although it is confined primarily to the horn of Africa, piracy poses a significant problem to commercial shipping companies that need to traverse the Gulf of Aden for business. In response to modern-day piracy, shipowners have begun to employ privately armed contractors for protection. Countries and international organizations have recently developed regulations to address this growth in private maritime security. This Note analyzes both international and domestic regulatory regimes for privately armed contractors with a specific focus on the United States and Norway. This Note concludes that current U.S. regulations are inadequate and do not sufficiently restrain the use of force by private contractors when combating pirates at sea. Consequently, this Note recommends that the United States Coast Guard (USCG) use its administrative authority to publish binding rules of engagement for private contractors defending U.S.-flagged vessels.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	333
II.	THE REEMERGENCE OF PIRACY .....	337
	A. <i>Modern-Day Piracy: Blackbeard's New Business Model</i> .....	337

---

1. Rod Nordland, Q & A: Somali Pirate Explains How to Steal Ships, NEWSWEEK (Dec. 17, 2008, 7:00 PM), <http://www.thedailybeast.com/newsweek/2008/12/17/the-evil-solution.html>.

	B.	<i>Shipowners in a War Zone: The Costs of Piracy and the Benefits of PCASP</i> .....	340
III.		AN ANALYSIS OF THE INTERNATIONAL AND DOMESTIC REGULATORY REGIMES FOR PCASP .....	343
	A.	<i>UNCLOS</i> .....	343
	B.	<i>IMO's Guidance to PMSCs, Shipowners, and Flag States on PCASP</i> .....	345
	1.	IMO's Interim Guidance to PMSCs .....	345
	2.	IMO's Interim Guidance for Shipowners, Ship Operators, and Shipmasters.....	346
	3.	IMO's Interim Recommendations for Flag States.....	348
	C.	<i>U.S. Regulations for PCASP</i> .....	349
	1.	33 U.S.C. § 383.....	350
	2.	PSA 3-09: Guidance on Self-defense or Defense of Others by U.S.-Flagged Commercial Vessels Operating in High Risk Waters .....	351
	3.	PSA 2-09: MARSEC Directive 104-06 and PSA 9-09—Expected Courses of Action Following Attacks by Pirates in the Horn of Africa Region .....	352
	4.	PSA 5-09: Minimum Guidelines for Contracted Security Services in High Risk Waters and PSA 6-09—Procedures for Obtaining a Name-Based Terrorism Check for Security Personnel Operating in High Risk Waters .....	354
	D.	<i>Norwegian Regulations for PCASP</i> .....	356
IV.		RESOLVING THE UNITED STATES' INADEQUATE REGULATION OF PCASP .....	359
	A.	<i>The Need for Binding RUF in the United States</i> .....	359
	B.	<i>USCG Should Promulgate Binding RUF for PCASP</i> .....	360
	C.	<i>Mandated Certification for PMSCs by an International Organization</i> .....	365
V.		CONCLUSION.....	367

## I. INTRODUCTION

"I'll give you a weapons free when ready[,] just stand by," barks the private security commander to his comrade.<sup>2</sup> The two men are armed with assault rifles and standing guard aboard the *Avocet*, a merchant vessel traversing the Indian Ocean.<sup>3</sup> The Trident Group security commander has just spotted an approaching skiff, likely filled with pirates, and is preparing his team's attack.<sup>4</sup> "Go ahead warning shots," shouts the commander as he exits the bridge of the vessel and takes up a shooting position overlooking the water.<sup>5</sup> Immediately, the second guard begins firing his rifle in rapid succession at the pirates' small craft.<sup>6</sup> There is no delay between the "warning" shot and the suppressive fire.<sup>7</sup> The pirates have not fired a single shot, and, under a heavy volley of fire, they collide into the *Avocet*.<sup>8</sup> The contractors continue to engage the pirate's skiff from the advantageous position offered by the deck of the ship.<sup>9</sup> The pirate

2. hogfeederyahoo, *Pirate Attack Somalia Defeated—Pirates Shot off the Somalia Coast*, YOUTUBE (Apr. 10, 2012), <http://www.youtube.com/watch?v=1a1KZ0llt-Y> [hereinafter *Pirate Attack*]. The U.S. Army defines *weapons free* as a "weapon control order imposing a status whereby weapons systems may be fired at any target not positively recognized as friendly." HEADQUARTERS DEP'T OF THE ARMY, OPERATIONAL TERMS AND GRAPHICS 1-6 (2004). The proper command given the pirates' approach of the maritime vessel in the *Pirate Attack* video was "weapons hold," not "weapons free." See *id.* (defining *weapons hold* as "a weapon control order imposing a status whereby weapons systems may only be fired in self-defense or in response to a formal order"); *Pirate Attack*, *supra* (demonstrating that the pirates did not fire one shot at the security contractors prior to the contractors firing numerous shots at the pirates). Also, this video is reminiscent of Blackwater's firefight in Baghdad, Iraq, on September 16, 2007, which killed seventeen Iraqi civilians. See Theodore T. Richard, *Reconsidering the Letter of Marque: Utilizing Private Security Providers Against Piracy*, 39 PUB. CONT. L.J. 411, 454 (2010) (noting agreement between the United States and Iraq that the Blackwater contractors used excessive force in Iraq).

3. Michelle Wiese Bockmann & Alan Katz, *Shooting to Kill Pirates Risks Blackwater Moment*, BLOOMBERG (May 8, 2012), <http://www.bloomberg.com/news/2012-05-08/shooting-to-kill-pirates-risks-blackwater-moment.html>.

4. *Id.*; *Pirate Attack*, *supra* note 2. It appears from the video that the commander is allowing the pirate skiff to approach as close as possible to the *Avocet* before engaging the pirates.

5. *Pirate Attack*, *supra* note 2.

6. *Id.*

7. See *id.* (depicting a rapid succession of shots from the private guard after the commander's order for a warning shot). Based on this author's experience as a platoon leader in Afghanistan in 2009, the use of warning shots in combat operations is typically inappropriate for two reasons. First, there are other nonlethal methods as effective as warning shots that can force a suspected enemy combatant (in many situations it is difficult to accurately determine if an individual is an enemy combatant) to comply. Second, warning shots can result in death when deadly force is not necessarily authorized.

8. *Id.*

9. See *id.* (showing the contractors leaning over the starboard side of the ship and discharging their firearms directly into the pirates' skiff).

vessel falls behind the *Avocet* but is continually engaged by the team commander until it is out of sight.<sup>10</sup> Trident Group, the U.S.-based employer of both guards on the *Avocet*, later admitted that the firefight likely claimed the lives of some of the pirates.<sup>11</sup>

This clash between private contractors and pirates occurred on March 25, 2011, in the Indian Ocean, but it is not an isolated incident in this region of the world.<sup>12</sup> In fact, these types of confrontations have become much more frequent with the steady rise in piracy off the coast of Somalia.<sup>13</sup> In 2012 alone, Somali pirates attacked over seventy vessels.<sup>14</sup> In 2013, there were thirteen piracy-related incidents with two reported hijackings.<sup>15</sup> Although these numbers represent a significant decrease from recent years—such as 2009, when pirates conducted 217 attacks, captured 867 hostages, and hijacked 47 vessels—piracy is still a major threat in this part of the world.<sup>16</sup> In response to these attacks and hijackings, the shipping industry has begun employing private maritime security companies (PMSCs).<sup>17</sup> PMSCs provide privately contracted armed security personnel (PCASP) to defend merchant vessels traversing pirate-filled waters.<sup>18</sup> To date, no ship employing PCASP has been hijacked,

---

10. *Id.*

11. See Bockmann & Katz, *supra* note 3 (highlighting the statement of Trident Group's president, Thomas Rothrauff, that "[a]t least some of the boats' occupants were probably killed or injured").

12. See *id.* (noting the lack of rules regarding "how much force is legal and necessary to fight Somali piracy attacks, which targeted a record 237 ships last year").

13. See Koji Sekimizu, Sec'y-Gen., Int'l Maritime Org., Opening Address at the Maritime Safety Committee's 90th Session: High-level Segment on Arms on Board (May 16, 2012) (transcript available online at <http://www.imo.org/MediaCentre/SecretaryGeneral/Secretary-GeneralsSpeechesToMeetings/Pages/msc90highlevel.aspx>) (noting that piracy has been a problem off the coast of Somalia for 5 years but that the proportion of successful attacks has decreased recently, possibly due to shipowners use of PCASP).

14. *IMB Reports Drop in Somali Piracy, But Warns Against Complacency*, INT'L CHAMBER OF COMMERCE (Oct. 22, 2012), <http://www.icc-ccs.org/news/811-imb-reports-drop-in-somali-piracy-but-warns-against-complacency> [hereinafter *Drop in Piracy*]. The article indicates that piracy off the coast of Somalia is dropping but still remains a significant problem.

15. *Piracy & Armed Robbery News & Figures*, INT'L CHAMBER OF COMMERCE, <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> (last visited Dec. 19, 2013) [hereinafter *Piracy Statistics*].

16. See Richard, *supra* note 2, at 418 (discussing the pirates' success in 2008 and 2009).

17. Int'l Maritime Org., *Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, Annex § 1.1, IMO MSC.1/Circ.1443 (May 25, 2012) [hereinafter *IMO Guidance to PCASP*], available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Guidance/Documents/MS.C.1-Circ.1443.pdf>.

18. *Id.*

providing considerable incentive for merchant vessels to utilize contractor services.<sup>19</sup>

The rise of PCASP operating aboard merchant vessels poses a number of unanswered legal questions.<sup>20</sup> There are currently no legally binding international regulations governing PCASP.<sup>21</sup> Additionally, PMSCs and PCASP are not required to report to any international organization.<sup>22</sup> PCASP do have to follow the laws of the state whose flag the ship flies while on board a vessel, but many nations have very limited regulations for them.<sup>23</sup> One of the major concerns is that PMSCs will operate in countries with the least restrictive laws in order to avoid the cost of compliance with stringent regulations.<sup>24</sup> This possibility is particularly disturbing since the number of pirates that private contractors have killed at sea is unknown.<sup>25</sup> Trident Group's disproportionate use of force against a small band of pirates supports this startling reality and indicates a

---

19. See, e.g., David Isenberg, *The Rise of Private Maritime Security Companies*, HUFFINGTON POST (May 29, 2012, 1:50 PM), [http://www.huffingtonpost.com/david-isenberg/private-military-contractors\\_b\\_1548523.html](http://www.huffingtonpost.com/david-isenberg/private-military-contractors_b_1548523.html) (explaining that the demand for PMSCs is due to the fact that "no ship with armed security has been successfully hijacked"); *Laws and Guns: Armed Guards on Ships Deter Pirates. But Who Says They Are Legal?*, THE ECONOMIST (Apr. 14, 2012), <http://www.economist.com/node/21552553> [hereinafter *Laws and Guns*] (noting that "[n]o ship carrying armed guards has so far been hijacked"); Thom Shanker, *U.S. Reports that Piracy off Africa Has Plunged*, N.Y. TIMES (Aug. 28, 2012), <http://www.nytimes.com/2012/08/29/world/africa/piracy-around-horn-of-africa-has-plunged-us-says.html> (declaring that "no vessel with . . . a [private maritime security] team on board has been hijacked"); Andrew J. Shapiro, Assistant Sec'y, Bureau of Political-Military Affairs, Remarks to the Defense Trade Advisory Group (Nov. 9, 2011) (transcript available online at <http://www.state.gov/t/pm/rls/rm/176925.htm>) (stating that "to date no ship with an armed security team aboard has been successfully pirated").

20. See Alan Cowell, *In First, Private Guards Kill Somali Pirate*, N.Y. TIMES (Mar. 24, 2010), <http://www.nytimes.com/2010/03/25/world/africa/25pirate.html> (quoting Arvinder Sambei, a lawyer at the UN's antipiracy program, asking rhetorically "[w]ho are [the PMSCs] responsible to?"); Sekimizu, *supra* note 13 (discussing the lack of a uniform policy or even minimum performance standards for PCASP across member governments).

21. *IMO Guidance to PCASP*, *supra* note 17, at Annex § 1.1.

22. See Isenberg, *supra* note 19 (noting that PMSCs have "no obligation to file public reports").

23. See *IMO Guidance to PCASP*, *supra* note 17, at Annex § 1.2 (recognizing that flag states ultimately have the choice as to whether to allow PCASP aboard ships); *Comparison of Flag State Laws on Armed Guards and Arms on Board*, INT'L CHAMBER OF SHIPPING (June 2012), <http://www.ics-shipping.org/ICS-ECSA%20Private%20Armed%20Guards%20Flag%20State%20Laws%20June%202012.pdf> [hereinafter *Comparison of Flag State Laws*] (listing various nations' requirements for PMSCs and PCASP).

24. See *Laws and Guns*, *supra* note 19 (noting that PMSCs could respond to regulation in one country by moving to another country with a less restrictive regime).

25. See *id.* (reporting that human rights groups are advocating for regulations for PMSCs because "[u]nknown numbers of Somali pirates have been killed at sea since 2005").

need in the United States for legally binding use of force standards for private maritime contractors.<sup>26</sup>

Maritime officials agree that PCASP need to be regulated because there is a “glaring absence of regulation,” domestically and internationally.<sup>27</sup> Commentators worry that governments are relying on self-regulation, goodwill, and luck to manage the explosive growth in the maritime security industry.<sup>28</sup> This indifference is especially distressing when only 26 percent of civilian ships traversing pirate-infested waters disclose the use of PCASP but estimates indicate that approximately 50 percent of ships utilize private security services.<sup>29</sup> Governments, the public, and the shipping industry have recognized that PCASP—as armed groups of privateers—need to be properly regulated.<sup>30</sup> The International Maritime Organization’s (IMO) secretary-general, Koji Sekimizu, has challenged the international community to consider how to deal with the issue of PCASP.<sup>31</sup> Secretary-General Sekimizu notes that the maritime industry is a global industry, which means that domestic policies have international consequences.<sup>32</sup> As a result, individual nations—including the United States—must make a detailed and comprehensive domestic policy on PCASP a priority.

Part II of this Note discusses modern-day piracy and the methods pirates use to attack and hijack merchant vessels. It also describes the parts of the world where piracy thrives and the

---

26. See Bockmann & Katz, *supra* note 3 (asking “how much force is legal and necessary to fight Somali piracy attacks”); *Pirate Attack*, *supra* note 2 (depicting a firefight where the pirates did not fire one shot at the armed guards).

27. See Urmila Venugopalan, *How To Fight Piracy (and How Not To)*, CNN WORLD (Sept. 27, 2012, 1:55 PM), <http://globalpublicsquare.blogs.cnn.com/2012/09/27/how-to-fight-piracy-and-how-not-to/> (discussing the need for greater regulation of PMSCs from flag states).

28. See James Brown, *Pirates and Privateers: Managing the Indian Ocean’s Private Security Boom*, LOWY INST. FOR INT’L POLY (Sept. 12, 2012), <http://www.lowyinstitute.org/publications/pirates-and-privateers-managing-indian-oceans-private-security-boom> (noting that “[g]overnment policy, international organisations and international law” have not evolved quickly enough to respond to the increase in the shipping industry’s use of PMSCs).

29. See *id.* (citing MARITIME PRIVATE SECURITY: MARKET RESPONSES TO PIRACY, TERRORISM, AND WATERBORNE SECURITY RISKS IN THE 21ST CENTURY 6 (Claude Berube et al. eds., 2012)) (noting that anecdotal reports suggest that “perhaps half” of civilian ships in the Gulf of Aden are utilizing PCASP on board). The author notes that the 26 percent statistic originated from a study of German ships that declared the use of PCASP. *Id.* at n.23. In contrast, the 50 percent statistic is the result of “[o]ther sources” that “provide scant evidence.” *Id.*

30. See Isenberg, *supra* note 19 (discussing the growing concern among the “public, government and industry” that this armed force needs to be regulated).

31. See Sekimizu, *supra* note 13 (“This High-level segment was designed to discuss the current policy issue of private armed guards . . .”).

32. See *id.* (“As a truly global industry with many stakeholders, shipping benefits from harmonization of procedures, adoption of common minimum standards and clarity with respect to national legal regimes.”).

background of the men who resort to piracy to make a living. This Note then considers the international community's and shipowners' responses to the reemergence of piracy and concludes that the budgetary limits of Western navies will force shipowners to use private contractors for protection well into the future. Following this discussion, this Note briefly addresses the rise of private maritime security by examining the methods and backgrounds of PCASP.

Part III of this Note analyzes the United Nations Convention on the Law of the Sea (UNCLOS) and its applicability to PCASP combating piracy. Since UNCLOS is rather limited in addressing this issue, this Note then examines the implications of the IMO's guidance to PMSCs, shipowners, and flag states regarding the use of private contractors to protect ships from pirates. Part III then compares the relative strengths and weaknesses of the various rules for the use of force (RUF) guidelines promulgated by the United States and Norway. Ultimately, this Note concludes that Norway has the most comprehensive and stringent RUF for PCASP.

Part IV begins with an explanation of why the United States must revise its current RUF for PCASP. This Note recommends that the United States Coast Guard (USCG) publish legally binding RUF guidelines for U.S.-based PCASP modeled after Norway's regulations. These guidelines will restrict PCASP's use of force to what is strictly necessary. This Note also recommends that all PMSCs receive outside certification by an international organization. This certification will ensure that U.S.-flagged vessels only employ competent and professional PCASP. Norway's regulatory regime will serve as the primary framework for Part IV's proposal with an analysis of the advantages and disadvantages of this solution. Ultimately, the proposed regulatory framework ensures that U.S.-based PCASP act with a respect for human rights and international law when protecting merchant vessels at sea.

## II. THE REEMERGENCE OF PIRACY

### *A. Modern-Day Piracy: Blackbeard's New Business Model*

UNCLOS defines piracy as "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 . . . on the high seas . . ." <sup>33</sup> This definition has near universal acceptance in the international community, even among nations that have not adopted

---

33. United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.



UNCLOS.<sup>34</sup> For example, the United States is not a party to UNCLOS, but the Fourth Circuit, in *United States v. Dire*, held that UNCLOS properly defined piracy “as customary international law” and interpreted the United States’ definition of piracy, in 18 U.S.C.A. § 1651, in accordance with UNCLOS’s definition.<sup>35</sup> The court reasoned that Congress’s intent was to ensure piracy was a universal jurisdiction crime that evolved with the law of nations.<sup>36</sup> Thus, UNCLOS—as customary international law—defines piracy for the United States and most other nations in the world.<sup>37</sup>

Modern-day piracy tends to be limited to certain parts of the world referred to as high-risk areas (HRAs).<sup>38</sup> These HRAs—depicted in Appendix I—cover four million square kilometers and affect maritime routes that are “critical to global commerce.”<sup>39</sup> The Gulf of Aden, Indian Ocean, and Arabian Sea are notable HRAs with pirates hailing from nearby coastal nations, such as Somalia and Yemen.<sup>40</sup> The combination of poverty, weak governments, and maritime commerce in these areas enables piracy to flourish.<sup>41</sup> For example, piracy in Somalia is an outgrowth of the country’s instability and the

---

34. See *United States v. Dire*, 680 F.3d 446, 459, 461–62 (4th Cir. 2012). The Fourth Circuit noted that UNCLOS has 162 States Party of the 192 member states of the United Nations. *Id.* at 459. Furthermore, the court found that “UNCLOS’s definition of general piracy has a normcreating character . . . that is binding on even those nations that are not a party to the Convention.” *Id.* at 462.

35. *Id.* at 459, 468–69 (citing 18 U.S.C. § 1651 (2012)) (holding that the lower court properly defined piracy in accordance with UNCLOS). For a discussion of why the United States is not a party to UNCLOS, see *infra* Part III.A.

36. *Id.* at 469.

37. *Id.* (quoting S.C. Res. 2020, ¶ 7, U.N. Doc. S/RES/2020 (Nov. 22, 2011)) (“Resolution 2020 reaffirmed ‘that international law, as reflected in the [UNCLOS], sets out the legal framework applicable to combating piracy and armed robbery at sea.’”).

38. See BMP4: BEST MANAGEMENT PRACTICES FOR PROTECTION AGAINST SOMALIA BASED PIRACY: SUGGESTED PLANNING AND OPERATIONAL PRACTICES FOR SHIP OPERATORS AND MASTERS OF SHIPS TRANSITING THE HIGH RISK AREA 4 (Witherby Publ’g Grp. Ltd., 4th ed. 2011) [hereinafter BMP4] (defining the HRAs as places “where pirate activity and/or attacks have taken place”).

39. See James Brown, *Piracy and the Private Security Boom*, THE INTERPRETER: LOWY INST. FOR INT’L POL’Y (Sept. 12, 2012, 10:45 AM), <http://www.lowyinterpreter.org/post/2012/09/12/Piracy-and-the-private-security-boom.aspx> (“The high-risk area for piracy sits astride maritime trade routes critical to global commerce.”); Venugopalan, *supra* note 27 (noting that pirate activity covers an area “one and a half times the size of mainland Europe”); see *infra* Appendix I.

40. See Venugopalan, *supra* note 27 (arguing that international naval forces combating Somali-based piracy have forced the pirates beyond “the Gulf of Aden and into the Arabian Sea and Indian Ocean”); see *infra* Appendix I.

41. See Radio Interview by Carrie Johnson with John Campbell, Former Ambassador to Nigeria, NAT’L PUB. RADIO (Mar. 16, 2011), available at <http://www.npr.org/2011/03/16/134585495/U-S-Courts-Dust-Off-High-Seas-Piracy-Laws> (discussing the problem of piracy off the coast of Somalia).

relative immunity Somali authorities grant senior pirate leaders.<sup>42</sup> Somali individuals have a life expectancy of approximately 50 years and an average yearly income of \$600, incentivizing young Somali males to become pirates as a way of providing for their families.<sup>43</sup> Somali pirate leader Shamun Indhabur noted in a 2008 interview with reporter Rod Nordland, “[W]hen evil is the only solution, you do evil.”<sup>44</sup> Therefore, countries like Somalia provide a perfect recipe of socioeconomic and governmental failures that enable piracy to thrive in its coastal waters.<sup>45</sup>

Pirates’ methods for seizing merchant vessels are crude but effective. They approach ships in small, motorized skiffs armed with AK-47s and rocket-propelled grenades.<sup>46</sup> The pirates use ladders or ropes to board ships and then quickly move to the command center—the bridge—to gain control of the vessel.<sup>47</sup> Attacks typically last thirty minutes, but the kidnapped members of the crew can face around five months of involuntary detention on the Somali mainland.<sup>48</sup> In fact, the appeal of piracy is not the cargo on board the ships, but rather the millions of dollars in ransoms that can be extorted from shipowners for kidnapped crews.<sup>49</sup> In 2011 alone,

---

42. See *Somali Pirate Kingpins Enjoy “Impunity”: U.N. Experts*, REUTERS (July 18, 2012, 4:47 AM), <http://www.reuters.com/article/2012/07/18/us-somalia-un-piracy-idUSBRE86GOZN20120718> [hereinafter *Pirate Kingpins*] (reporting that a Somalia-focused UN Monitoring Group claimed that Somali authorities were protecting senior pirate leaders from arrest and prosecution).

43. *The World Factbook*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last visited Dec. 20, 2013) (estimating the total population’s life expectancy at birth at 50.8 years and the per capita GDP at \$600 dollars); see John Hackwood, *Civilian Contractors: Life of a Ship Anti-Piracy Operator—Eight Weeks on the High Seas*, ISENBERG INST. OF STRATEGIC SATIRE (Mar. 20, 2012), <http://iisonline.net/?p=316> (“If I lived [in Somalia] I would probably be a pirate too, they have families to feed just like everyone else.”). See generally Douglas A. McIntyre, *Somali Pirates Are Getting Rich: A Look at the Profit Margins*, TIME BUSINESS & MONEY (Apr. 15, 2009), <http://content.time.com/time/business/article/0,8599,1891386,00.html> (“The pirate business is not going away. It is too profitable.”).

44. Nordland, *supra* note 1; see James Kraska & Brian Wilson, *Piracy Repression, Partnering and the Law*, 40 J. MAR. L. & COM. 43, 44 (2009) (discussing Somalia’s socioeconomic conditions as a cause of piracy in the region).

45. See *supra* notes 38–44 and accompanying text.

46. See BMP4, *supra* note 38, at 9–10 (describing skiffs as small, open boats capable of speeds up to twenty-five knots and noting that pirates use small arms weapons and rocket-propelled grenades).

47. *Id.* at 10.

48. See Brown, *Pirates and Privateers*, *supra* note 28 (noting that 158 days is the average detention of a captured ship and crew).

49. See Hackwood, *supra* note 43 (arguing that Somali pirates do not kill hostages because “a dead crew isn’t good for the subsequent ransom dealings with the ship’s owners”).

pirates netted \$146 million in ransoms.<sup>50</sup> The pirates use Somali investors, negotiators, and currency specialists to facilitate the payment of ransoms.<sup>51</sup> Once a ransom is paid, pirates almost always return the hostages physically unharmed, which gives their position credibility during a negotiation.<sup>52</sup> The Somali pirates arguably view themselves as “businessmen” profiting from the lack of security on board these merchant vessels.<sup>53</sup>

### B. Shipowners in a War Zone: The Costs of Piracy and the Benefits of PCASP

Shipowners' response to piracy in the HRAs has been to employ PCASP for security.<sup>54</sup> This decision is justifiable under basic cost-benefit analysis. Although only 1 percent of the world's ships traverse the Somali coast, this is equal to over 33,000 vessels, and current estimates place the cost of piracy to the shipping industry at around \$5 billion.<sup>55</sup> This astronomical cost is driven partly by rising insurance premiums for ships operating in the HRAs.<sup>56</sup> Many insurance companies classify the HRAs as “war-risk zone[s]” and have increased insurance premiums to reflect the dangers posed by

---

50. Brown, *Pirates and Privateers*, *supra* note 28 (describing the piracy model as highly profitable with a total of \$146 million secured in ransoms in 2011); *see also* Richard, *supra* note 2, at 419 (noting that “Somali pirates took in between \$30 and \$150 million in ransom payments in 2008”).

51. *See* Brown, *Pirates and Privateers*, *supra* note 28. Mr. Brown describes the Somali pirates as “highly sophisticated” and notes that they use both currency specialists and investors to facilitate their activities. *Id.*

52. *See* Hackwood, *supra* note 43 (claiming that if captured by pirates one can expect “an uncomfortable stay in a Puntland port” but noting that Somali pirates view the crew “as their most valuable asset”).

53. *See* Brown, *Pirates and Privateers*, *supra* note 28 (discussing the success of the “piracy business model” and noting that profits from piracy have actually driven a housing boom in Somalia); Hackwood, *supra* note 43 (describing the pirates as businessmen).

54. *See* *Laws and Guns*, *supra* note 19 (stating that PCASP serve on approximately 40 percent of merchant vessels in the HRAs); Sekimizu, *supra* note 13 (reporting that naval forces estimate that approximately 25 percent of ships in the HRAs are carrying firearms but qualifying that percentage by noting that many ships are not declaring the use of PCASP).

55. *See* Dana M. Parsons, *Protecting the Booty: Creating a Regulatory Framework to Govern Increased Use of Private Security Companies in the Fight Against Pirates*, 35 TUL. MAR. L.J. 153, 155–56 (2010) (noting that piracy “has cost commercial shippers millions”); Richard, *supra* note 2, at 421 (“Although Somali piracy only affects one percent of worldwide shipping, over 33,000 vessels annually transit the Gulf of Aden.”); Shanker, *supra* note 19 (reporting that commercial shipping officials claim that piracy adds \$5 billion a year to its expenses); *see also* *Pirate Kingpins*, *supra* note 42 (reporting that piracy costs the world economy approximately \$7 billion).

56. *See* Brown, *Pirates and Privateers*, *supra* note 28 (arguing that one of the key factors that drove shipping companies to employ PCASP was “the rising costs of insurance”); Shanker, *supra* note 19 (noting that insurance expenses represent a portion of the \$5 billion cost of piracy to the shipping industry).

piracy.<sup>57</sup> Underwriters, however, reduce insurance premiums for shipping companies that utilize PCASP.<sup>58</sup> Other nontrivial costs associated with successful pirate hijackings include the millions of dollars in ransoms that shipping companies must pay as well as the lost chartering income.<sup>59</sup> In contrast, a four-man PCASP team costs an average of \$45,000 to provide security for a ship through an HRA.<sup>60</sup> Moreover, pirates have not successfully hijacked a ship employing PCASP.<sup>61</sup> Consequently, armed private contractors present a fiscally sound solution to the problem of piracy for shipowners.<sup>62</sup>

Since shipowners have begun to use the services of PCASP, piratical attacks have significantly declined off the horn of Africa.<sup>63</sup> Commentators credit both the international community's military response as well as shipowners' use of PCASP.<sup>64</sup> However, PCASP will likely bear the burden of combating piracy in the future.<sup>65</sup> Many European governments are facing budget cuts that will limit their counterpiracy activities in the HRAs.<sup>66</sup> The size of the HRAs also

57. See Brown, *Pirates and Privateers*, *supra* note 28 ("Since 2008 the Lloyd's Joint War Committee, a coordinating body of Lloyds London underwriters, has designated Indian Ocean piracy regions as a 'war-risk zone', increasing insurance premiums for ships that transit.").

58. *Id.*

59. See *id.* (noting that the average ransom for a kidnapped crew is \$4.58 million and "[s]hipping companies lose millions in foregone chartering income while their ship is held to ransom").

60. *Laws and Guns*, *supra* note 19.

61. See *supra* note 19 and accompanying text.

62. See Venugopalan, *supra* note 27 (noting that PCASP are a "prudent investment" for the shipping industry).

63. Shanker, *supra* note 19 (reporting that data released by the U.S. Navy shows a significant decline in acts of piracy off the coast of Somalia in 2012). Compare *Drop in Piracy*, *supra* note 14 (reporting seventy total incidents in Somalia as of September 2012), with Shanker, *supra* note 19 (reporting 222 piratical attacks of which 34 were successful in 2011 and 239 piratical attacks of which 68 were successful in 2010 off the coast of Somalia).

64. See, e.g., BMP4, *supra* note 38, at 3 ("The presence of Naval/Military forces in the Gulf of Aden . . . has significantly reduced the incidence of piracy attack [sic] in this area."); Shanker, *supra* note 19 (noting that the decrease in attacks witnessed in 2012 is attributable to both "aggressive patrolling by international forces" and PCASP); Venugopalan, *supra* note 27 (crediting international navies for the reduction in piracy off the coast of Somalia in 2012 as well as PCASP); cf. Brown, *Pirates and Privateers*, *supra* note 28 (noting that it is unclear why hijackings have dropped in 2012 but crediting PMSCs as a possible reason).

65. See Brown, *Pirates and Privateers*, *supra* note 28 (noting that both European and U.S. navies are facing "resource constraints" that will limit their counterpiracy operations in the future).

66. See *id.* ("European navies particularly are concerned about the impact of ongoing piracy operations on their defence budgets, and have either reduced their counter-piracy commitments or are looking to do so."); Venugopalan, *supra* note 27 (arguing that "fiscal austerity and budget constraints" will make it near impossible for the international naval community to effectively combat piracy).

makes it difficult for national militaries to protect the many commercial vessels traversing those waters.<sup>67</sup> The reality of countries' budget cuts coupled with the efficacy of PCASP at preventing piratical attacks means that shipowners will continue to turn to private security contractors for protection.<sup>68</sup>

Piracy on the high seas presents a profitable business opportunity for PMSCs.<sup>69</sup> Maritime security is currently a billion dollar per year industry that has over 140 companies employing approximately 2,700 armed guards.<sup>70</sup> Since 2000, security contractors have attempted to suppress modern-day piracy in the HRAs.<sup>71</sup> PMSCs, including Hart and Trident Group, pride themselves on providing experienced contractors to defend merchant vessels.<sup>72</sup> The industry is experiencing high annual revenue growth likely as a result of the large contracts PMSCs are signing with commercial shipping companies.<sup>73</sup> A typical PCASP team consists of three to six men armed with AK-47s and machine guns.<sup>74</sup> The armed contractors have an assortment of sophisticated equipment including night vision goggles, medical kits, satellite communications, and body armor.<sup>75</sup> Many of these contractors have prior private security experience in

---

67. See Shapiro, *supra* note 19 (stating that international naval forces have a difficult time protecting commercial vessels from piracy in such a large area); Brown, *Pirates and Privateers*, *supra* note 28 (comparing the international community's counterpiracy efforts to that of "a police car patrolling an area the size of France").

68. See *supra* notes 19, 63–67 and accompanying text.

69. See Isenberg, *supra* note 19 (referring to the PMSC industry as a "[b]loom [m]arket" where "there is good money to be made").

70. See *id.* (noting that PMSC operations in the Gulf of Aden alone net a billion dollars a year); Venugopalan, *supra* note 27 (reporting that the Lowy Institute estimates the recent formation of 140 PMSC companies employing approximately 2,700 armed guards to meet the shipping industry's demand for security on the high seas).

71. See Richard, *supra* note 2, at 443–44 (discussing the different PMSCs the Puntland government has employed). The Somali government utilized Hart between 2000 and 2001 "to protect Puntland's maritime resources against illegal foreign fishing by providing training as well as on-ship support to the local Coast Guard." *Id.* at 443. Thus, merchant vessels are not the only market for PMSCs' services.

72. See *When You Face Risk, You Need Hart*, HART, <http://www.hartsecurity.com/group-profile> (last visited Dec. 20, 2013) [hereinafter HART] ("On the seas you will find Hart maritime security operatives protecting commercial vessels as they pass through pirated waters . . ."); *Maritime Security and Training—Trident Group*, TRIDENT GROUP, <http://www.gotridentgroup.com> (last visited Dec. 20, 2013) [hereinafter TRIDENT] ("The Trident Group is recognized as the US Market Leader in Anti-Piracy & Maritime Security Operations World-Wide."). For a more in depth discussion of maritime PMSCs, see Michael L. Mineau, *Pirates, Blackwater and Maritime Security: The Rise of Private Navies in Response to Modern Piracy*, 9 J. INT'L BUS. & L. 63, 66–69 (2010) (discussing various maritime PMSCs).

73. See Brown, *Pirates and Privateers*, *supra* note 28 ("Maritime PMSCs are experiencing high annual revenue growth in counter-piracy and are signing larger contracts.").

74. *Id.*

75. *Id.*

both Iraq and Afghanistan.<sup>76</sup> At \$500 to \$1,000 per day, there is a significant financial incentive to serve as an armed contractor—if one has the necessary expertise, background, and courage.<sup>77</sup> As long as piracy remains a danger on the high seas, PMSCs will find the commercial shipping industry a viable market for their security services.<sup>78</sup>

### III. AN ANALYSIS OF THE INTERNATIONAL AND DOMESTIC REGULATORY REGIMES FOR PCASP

#### A. UNCLOS

UNCLOS provides a “comprehensive regime of law and order” that establishes basic rules for nations’ uses of the ocean and its resources.<sup>79</sup> After more than a decade of detailed and intense international discussions, UNCLOS codified the existing rules of the sea and was adopted on December 12, 1982, in Jamaica.<sup>80</sup> The treaty has 162 States Party and serves as the global regime for addressing ocean-related issues.<sup>81</sup> The goal of the treaty was to create “an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction.”<sup>82</sup> UNCLOS, however, is limited in that it only governs those nations that decide to join it.<sup>83</sup>

The United States is not a party to UNCLOS due primarily to its concern with the treaty’s seabed-mining provisions.<sup>84</sup> The United States has signed the treaty, but the Senate has not ratified it.<sup>85</sup> The major U.S. criticisms of UNCLOS include (1) subjecting the United States to the authority of an international body; (2) requiring U.S. corporations “to pay royalties for resource exploitation”; and (3)

76. Isenberg, *supra* note 19.

77. See Brown, *Pirates and Privateers*, *supra* note 28 (noting that individual contractors can earn \$500 per day, while PMSCs can charge up to \$1000 per day for a contractor).

78. See *supra* notes 69–77 and accompanying text.

79. *30 Years Since Law of the Sea Convention Opened for Signature*, NEWS & MEDIA UNITED NATIONS RADIO 4:25 (Mar. 12, 2012), <http://www.unmultimedia.org/radio/english/2012/03/30-years-since-law-of-the-sea-convention-opened-for-signature/> (interviewing Under-Secretary-General Patricia O’Brien, UN legal counsel, about the importance of UNCLOS).

80. *Id.* at 0:26, 2:33 (noting that UNCLOS did not enter into force until November 16, 1994).

81. *Id.* at 3:34, 3:51.

82. *Id.* at 2:10 (quoting Mr. Avrid Pardo, Malta’s Ambassador to the United Nations, on November 1, 1967).

83. See *id.* at 9:27 (noting that UNCLOS is a “club that one must join”).

84. See *United States v. Dire*, 680 F.3d 446, 459 (4th Cir. 2012) (citing *United States v. Hasan*, 747 F. Supp. 2d 599, 619 (E.D.Va. 2010)).

85. Kristina Wong & Sean Lenggell, *DeMint: Law of the Sea Treaty Now Dead*, THE WASHINGTON TIMES (July 16, 2012), <http://www.washingtontimes.com/news/2012/jul/16/demint-says-law-sea-treaty-now-dead/?page=all>.

forcing the United States to comply with comprehensive environmental regulations.<sup>86</sup> In the summer of 2012, thirty-four senators were staunchly against UNCLOS, which makes reaching the sixty-seven votes required to ratify the treaty impossible.<sup>87</sup> Then-Senator John Kerry, when serving as the chairman of the Senate Foreign Relations Committee, however, stated that the votes against UNCLOS only represent a “snapshot of where our politics are in this instant.”<sup>88</sup> He remains optimistic that the Senate will eventually ratify UNCLOS.<sup>89</sup> Ratification would enable the United States to protect its mining rights from interference with other countries as well as provide U.S. businesses with certainty and stability when operating on the high seas.<sup>90</sup>

Irrespective of whether the United States ratifies UNCLOS in the future, the treaty does not adequately address the issue of piracy or shipowners’ use of PCASP at sea. Although an act of piracy violates international law under UNCLOS, pirates are typically prosecuted in domestic jurisdictions.<sup>91</sup> Consequently, successful prosecutions of pirates require domestic jurisdictions to have a statute that criminalizes piracy.<sup>92</sup> Because there is currently no international tribunal prosecuting pirates, the crime flourishes in domestic jurisdictions that do not actively punish pirates.<sup>93</sup>

---

86. *See id.* (listing critiques of UNCLOS).

87. *See id.* (noting that UNCLOS “has 34 senators opposed to it and thus lacks the Senate votes needed for U.S. ratification”).

88. *Id.*

89. *See id.* (quoting a spokeswoman for Senator John Kerry as saying “[n]o letter or whip count changes the fact that rock-ribbed Republican businesses and the military and every living Republican secretary of state say that this needs to happen, and that’s why it’s a matter of ‘when’ not ‘if for the Law of the Sea’”).

90. *See id.* (discussing the arguments for ratification).

91. Thomas Fedeli, *The Rights and Liabilities of Private Actors: Pirates, Master, and Crew* 5 (One Earth Future Foundation, Working Paper, July 2010), available at <http://oneearthfuture.org/sites/1earthfuture.org/files//documents/publications/Rights-and-Liabilities-Fedeli.pdf> (noting that an act of piracy is a violation of international law, but actual punishment depends on states prosecuting the pirates in domestic courts).

92. *See id.* (“[A]bsent widespread and uniform domestic legislation and enforcement, territorial waters effectively act as safe havens for pirates.”). However, it is possible for states to invoke universal jurisdiction to prosecute pirates. *See id.* at 6–7 (explaining that universal jurisdiction is a powerful tool but noting how states are still limited in their ability to apprehend pirates).

93. *See id.* at 5 (“It is unlikely that an international court will begin trying pirates in the near future . . .”). One of the challenges facing those nations that choose to prosecute pirates is a severe lack of prison capacity. In fact, over 1,000 pirates in 2011 were serving or awaiting a sentence in twenty countries. Organizations are attempting to address the lack of prison capacity, but it depends on support from the international community and Somali authorities. *Working Group 2, CONTACT GROUP ON PIRACY OFF THE COAST OF SOMALIA*, <http://www.thecgpcs.org/work.do?action=workSub2> (last visited Dec. 20, 2013). *But see Dire*, 680 F.3d at 449 (prosecuting five Somali pirates for “imprudently launch[ing] an attack on the USS Nicholas”).

Additionally, UNCLOS provides no rules or standards for PCASP fighting piracy on the high seas.<sup>94</sup> Rather, it “grants a very wide scope for the use of force against piracy by nation states.”<sup>95</sup> Thus, UNCLOS does not adequately address the issue of piracy, which means that nations—such as the United States—must develop separate regulatory regimes to manage shipowners’ growing use of PCASP.

### B. *IMO’s Guidance to PMSCs, Shipowners, and Flag States on PCASP*

In 1948, an international conference established the IMO with the goal of promoting maritime safety.<sup>96</sup> As an agency of the United Nations, the IMO is responsible for safety and security within the shipping industry.<sup>97</sup> This responsibility is particularly daunting considering the fact that over 90 percent of international trade traverses Earth’s waters.<sup>98</sup> The rise of piracy in the Gulf of Aden, coupled with shipowners’ increased use of PCASP, was an important and urgent issue for the IMO.<sup>99</sup> As a result, it developed interim guidance for PMSCs, shipowners, and flag states at its ninetieth session, held from the sixteenth to the twenty-fifth of May 2012.<sup>100</sup> One of the primary motivations for the IMO’s interim guidance was to address the lack of international standards governing shipowners’ use of PCASP.<sup>101</sup> The ultimate goal of its guidance was to harmonize domestic policies for PMSCs across nations operating in the world’s HRAs.<sup>102</sup>

#### 1. IMO’s Interim Guidance to PMSCs

The IMO’s guidance to PMSCs recognizes that flag states have the sole discretion to permit PCASP to operate aboard its merchant

Arguably, however, there have been relatively few prosecutions of pirates compared to the number of piratical attacks.

94. INT’L GRP. OF P & I CLUBS, PROVISIONAL GUIDELINES—USE OF ARMED GUARDS ON BOARD NORWEGIAN SHIPS 2 (2011), available at [http://www.igpandi.org/downloadables/piracy/news/Provisional\\_Guidelines.pdf](http://www.igpandi.org/downloadables/piracy/news/Provisional_Guidelines.pdf) [hereinafter PROVISIONAL GUIDELINES] (“However, the Convention on the Law of the Sea provides no basis for private enforcement.”).

95. *Id.*

96. *Introduction to IMO*, INT’L MARITIME ORG., <http://www.imo.org/About/Pages/Default.aspx> (last visited Dec. 20, 2013).

97. *Id.*

98. *See id.* (noting that the shipping industry “is perhaps the most international of the world’s industries”).

99. *IMO Guidance to PCASP*, *supra* note 17, § 2, Annex § 1.1.

100. *Id.* § 3.

101. *Id.* at Annex § 1.1.

102. *Id.* § 3.



vessels per Article 92 of UNCLOS.<sup>103</sup> The guidance requests, however, that PCASP “have a complete understanding of, and fully comply with, the [flag state’s] applicable laws governing the use of force.”<sup>104</sup> While the IMO recognizes the legal authority of the flag states, it encourages PCASP to use only force that is “strictly necessary and reasonable” in response to a piratical attack.<sup>105</sup> In addition, it recommends that firearms only be used in self-defense or defense of others.<sup>106</sup> Finally, the IMO endorses escalation-of-force procedures for PCASP responding to a piratical attack, which properly encourages a graduated response toward pirates conducting an attack.<sup>107</sup> Trident Group’s actions aboard the *Avocet*—discussed in Part I—egregiously failed to meet these minimum standards advocated by the IMO.<sup>108</sup> The PCASP’s disproportionate use of force neither involved a graduated response to the pirates’ attack nor force that was “strictly necessary.”<sup>109</sup> This failure highlights the importance of flag states, such as the United States, creating and enforcing a policy toward PCASP that limits force in accordance with the IMO’s recommendations.

## 2. IMO’s Interim Guidance for Shipowners, Ship Operators, and Shipmasters

The IMO’s guidance for shipowners exhibits an overarching concern for the use of force by PCASP. In discussing the RUF, the IMO document states:

5.14 PMSC should require their personnel to take all reasonable steps to avoid the use of force. If force is used, it should be in a manner consistent with applicable law. In no case should the use of force exceed what is strictly necessary and reasonable in the circumstances. Care should be taken to minimize damage and injury and preserve human life.

5.15 PMSC should require that their personnel not use firearms against persons except in self-defence or defence of others.<sup>110</sup>

103. *Id.* at Annex § 1.2 (recognizing that flag states have “exclusive jurisdiction on the high seas” per Article 92 of UNCLOS).

104. *Id.* at Annex § 5.15.

105. *Id.* at Annex § 5.15.3.

106. *Id.* at Annex § 5.15.4.

107. *See id.* at Annex § 5.15.2 (“[A]ll reasonable steps should be taken to avoid the use of force and, if force is used, . . . [it] should be used as part of a graduated response plan . . .”).

108. *See supra* notes 2–11 and accompanying text.

109. *IMO Guidance to PCASP, supra* note 17, at Annex § 5.15.3; *see supra* notes 2–11 and accompanying text.

110. Int’l Maritime Org., *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*, Annex §§ 5.14–15, IMO MSC.1/Circ.1405/Rev.2 (May 25, 2012) [hereinafter *IMO Guidance to Shipowners*],

Both 5.14 and 5.15 indicate that one of the IMO's goals is to limit the use of firearms and deadly force by PCASP.<sup>111</sup> However, absent clearly enforceable regulations or laws, shipowners are under immense pressure to acquiesce to PCASP. Despite the IMO's recognition that "at all times the Master remains in command and retains the overriding authority on board," the armed guards protect the ship and its crew.<sup>112</sup> Consequently, shipowners will likely be reluctant to ensure PCASP adhere to even the spirit of these RUF absent legally binding domestic standards, especially when there is considerable room for interpreting what is necessary and reasonable when facing a piratical attack. Arguably, PMSCs' desire to maintain a good reputation in the maritime community will motivate them to respond to attacks proportionately and adhere to restrictive RUF.<sup>113</sup> In fact, PCASP—for the most part—already act professionally and in accordance with company-generated RUF at sea, but regulations are still needed to provide the proper incentives and ensure compliance.<sup>114</sup>

The IMO also encourages shipowners to conduct proper due diligence before hiring PCASP.<sup>115</sup> First, the IMO recommends shipowners perform a comprehensive risk assessment that considers a range of issues—from "ship and crew security," and "liability issues," to "the potential for unforeseen accidents"—before deciding to use PCASP.<sup>116</sup> The IMO then provides shipowners with criteria for selecting and vetting PCASP.<sup>117</sup> It proposes that shipowners ask the PMSC for documentary evidence that demonstrate their employees have (1) no criminal history; (2) relevant experience; and (3) the requisite "medical, physical, and mental fitness" to perform the job.<sup>118</sup> The IMO also encourages shipowners to ensure that PCASP are adequately trained.<sup>119</sup> It refers to PCASP's professional training as

---

available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Guidance/Documents/MSC.1-Circ.1405-Rev2.pdf>.

111. See *id.* (limiting PCASP's use of firearms to self-defense and encouraging the contractors to find ways to avoid force).

112. See *id.* at Annex § 5.9.1 (discussing the recommended "command and control structure").

113. See HART, *supra* note 72 (discussing Hart's values of "integrity, social responsibility, and an ethical approach"); TRIDENT, *supra* note 72 (noting that Trident considers itself "ethical, experienced, capable, [and] professional").

114. See *supra* note 113 and accompanying text (discussing the companies' exceptional worldwide reputations).

115. See *IMO Guidance to Shipowners*, *supra* note 110, at Annex § 4.1 ("As with any other type of contractor, it is important to undertake the usual due diligence . . .").

116. See *id.* at Annex §§ 3.3, 3.3.1, 3.3.4–5 (listing the factors and considerations for conducting a risk assessment regarding the use of PCASP).

117. *Id.* at Annex § 4.4.

118. *Id.* at Annex § 4.5.

119. *Id.* at Annex §§ 4.6–7.

being of “extreme importance” and lists six criteria—including medical knowledge, use of force standards, and communication protocols—for shipowners to use in evaluating a team’s competence to protect a merchant vessel and its crew at sea.<sup>120</sup> These recommendations provide shipowners with a useful reference to ensure that they hire only professional, competent, and ethical PCASP. Yet, absent a domestic policy that demands PCASP meet these basic standards, shipowners retain broad discretion to hire PCASP. One general concern is that a shipowner’s decision focuses primarily on cost and not on competence and adequacy. Flag states are responsible for combating this possibility by prescribing a policy that ensures PCASP meet the necessary standards for employment.

### 3. IMO’s Interim Recommendations for Flag States

The IMO encourages flag states to “have in place a policy on whether or not the use of PCASP will be authorized and, if so, under which conditions.”<sup>121</sup> Yet, many nations fail to adequately regulate PMSCs or prescribe binding RUF for PCASP.<sup>122</sup> The IMO requests that flag states identify minimum requirements for PCASP as well as a process for authorizing their use.<sup>123</sup> Specifically, the guidance proposes that a flag state authorize the use of PCASP under identifiable terms and conditions.<sup>124</sup> The IMO also recommends that these terms and conditions include an accountability provision that encourages compliance.<sup>125</sup> Finally, the IMO asks that the flag state’s policy include “reporting and record-keeping requirements” but fails to list any specific mandates for this provision.<sup>126</sup> Ultimately, the IMO’s goal is for flag states to address the possibility of violence on board its ships whenever a shipowner chooses to employ PCASP for protection.<sup>127</sup>

The IMO guidance encourages admirable principles among PCASP, but these are only recommendations. The IMO acknowledges that its guidance is not legally binding and is not in itself a set of

---

120. *Id.*

121. Int’l Maritime Org., *Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, Annex § 5, IMO MSC.1/Circ.1406/Rev.1 (Sept. 16, 2011) [hereinafter *IMO Guidance to Flag States*], <http://www.imo.org/MediaCentre/HotTopics/piracy/Documents/1406-Rev-1.pdf>.

122. *See infra* Part III.C and notes 252–54 and accompanying text.

123. *IMO Guidance to Flag States*, *supra* note 121, at Annex §§ 5.2.1–.2.

124. *Id.* at Annex § 5.2.4.

125. *Id.*

126. *Id.* at Annex § 5.2.6.

127. *See id.* at Annex § 3 (“Flag States should take into account the possible escalation of violence which could result from the use of firearms and carriage of armed personnel on board ships when deciding on their policy.”).

certifiable standards.<sup>128</sup> The document also does not define self-defense or when force is strictly necessary and reasonable.<sup>129</sup> Proper regulation of PCASP requires practical and enforceable standards. It is dependent on flag states, such as the United States, to create and prescribe binding RUF for PCASP—a reality that the IMO guidance acknowledges.<sup>130</sup>

### C. U.S. Regulations for PCASP

On October 15, 2010, Congress authorized funding for the USCG for fiscal year 2011 by enacting the Coast Guard Authorization Act of 2010 (CGAA).<sup>131</sup> Section 912 of the CGAA concerns shipowners' use of force against pirates.<sup>132</sup> Section 912(c) states that

[n]ot later than 180 days after the date of enactment of this act, the secretary of the department in which the coast guard is operating, in consultation with representatives of industry and labor, shall develop standard rules for the use of force for self-defense of vessels of the United States.<sup>133</sup>

Pursuant to this authority, on July 6, 2011, the USCG affirmed that Port Security Advisory (3-09) (PSA 3-09) and 33 U.S.C.A. § 383 provided adequate guidance for the use of force against pirates for U.S.-flagged vessels.<sup>134</sup>

Section 383 authorizes U.S. merchant vessels to defend against piratical attacks, while PSA 3-09 serves as guidance to PCASP and shipowners operating in HRAs.<sup>135</sup> In early 2011, the USCG reviewed

128. *IMO Guidance to PCASP*, *supra* note 17, at Annex § 1.5.

129. *See id.* at Annex §§ 5.15.2–.4 (encouraging the use of firearms and force only in self-defense and when necessary and reasonable, but not defining those terms).

130. *See IMO Guidance to Flag States*, *supra* note 121, at Annex § 5 (noting that flag states need to have a policy in place regarding PCASP).

131. Coast Guard Authorization Act of 2010, Pub. L. No. 111-281, 124 Stat. 2905 (2010). The Coast Guard and Maritime Transportation Act of 2012, Pub. L. No. 112-213, 126 Stat. 1540 (codified in scattered sections of 13 U.S.C., 33 U.S.C., and 46 U.S.C.), passed Congress on December 14, 2012. This act authorized appropriations for the USCG for fiscal years 2013 and 2014. *Id.* § 101. Section 501—Training for use of force against piracy—recommends that a training curriculum be developed for merchants' use of force against pirates. 46 U.S.C. § 51705. Specifically, 46 U.S.C. § 51705(4) states that the curriculum include “standard rules for the use of force for self-defense as developed by the Secretary of the department in which the Coast Guard is operating under section 912(c) of the Coast Guard Authorization Act of 2010.” Since this section references the CGAA of 2010, this Note focuses on the language of that CGAA for its analysis of RUF for PCASP and mariners. The recommendation that a training curriculum be developed in this subsequent CGAA does not change the analysis nor the recommendation of this Note.

132. 46 U.S.C. § 8107 (2012).

133. *Id.*

134. 33 U.S.C. § 383 (2012); Notice of Policy, Self-Defense of Vessels of the United States, 76 Fed. Reg. 39,411 (July 6, 2011).

135. 33 U.S.C. § 383 (2012); Notice of Policy, Self-Defense of Vessels of the United States, 76 Fed. Reg. 39,411–13 (July 6, 2011).

both § 383 and PSA 3-09 to ensure that they provided an “adequate framework” for addressing merchant vessels’ use of force to defend against piratical attacks.<sup>136</sup> The USCG concluded that the current policy was sufficient after reviewing the eleven public comments it received.<sup>137</sup> The comments, however, lacked any meaningful reforms, since many of them supported the current regime and several were beyond the scope of the USCG’s inquiry.<sup>138</sup> For example, three of the comments asked that the United States authorize the use of larger and more sophisticated weaponry by merchants—including machine guns, rocket-propelled grenades, and military-style weapons.<sup>139</sup> Another comment was content that the current regulatory framework “provided sufficient immunity for persons defending vessels.”<sup>140</sup> Notably, no comment recommended a certification process for PCASP involving an international third party nor legally binding RUF as this Note endorses and discusses in Part IV.B–C.<sup>141</sup> Consequently, § 383 and PSA 3-09 continue to serve as the current U.S. policy for addressing merchant vessels use of force against pirates.<sup>142</sup>

1. 33 U.S.C. § 383

Section 383 authorizes merchant vessels to defend against piratical attacks on the high seas.<sup>143</sup> The statute specifies that “[t]he commander and crew of any merchant vessel . . . may oppose and defend against any aggression” by a nonpublic armed vessel.<sup>144</sup> Notably absent from the statute is any mention of privately armed contractors.<sup>145</sup> Although it is possible to consider PCASP as members of the crew for the purposes of § 383, other international and U.S. documents distinguish between PCASP and a ship’s crew. For example, the IMO’s guidance to shipowners notes that prior to employing PCASP a thorough risk assessment should be completed

---

136. Notice of Policy, Self-Defense of Vessels of the United States, 76 Fed. Reg. 39,411 (July 6, 2011).

137. *Id.* at 39,411–12 (“After review of the comments received, the Coast Guard has determined the policy regarding standard rules for the use of force for self-defense or defense of others is sufficient.”).

138. *See id.* at 39,412 (noting that most public comments supported the current policy on RUF).

139. *Id.* at 39,412.

140. *Id.*

141. *Id.*; *see infra* Part IV.B–C.

142. 33 U.S.C. § 383 (2012); Notice of Policy, Self-Defense of Vessels of the United States, 76 Fed. Reg. 39,411–12 (July 6, 2011).

143. 33 U.S.C. § 383 (2012).

144. *Id.*

145. *See id.* (listing the commander and crew as authorized to defend against piratical attacks).

that considers the safety and protection of the crew.<sup>146</sup> The guidance also encourages frequent information flow between PCASP and a ship's crew.<sup>147</sup> The guidance is implicitly acknowledging that a ship's crew is separate from PCASP by using a separate term to describe each. The implicit distinction in these examples demonstrates that a ship's crew is distinct from PCASP. Even the USCG classifies PCASP as a separate entity from a ship's organic crew. In PSA 3-09, the USCG states that "[v]essel masters retain control of and authority over their vessels, crewmembers, and embarked security personnel at all times."<sup>148</sup> Here, the USCG is using different terms for a ship's crew and PCASP. As a result, these distinctions raise serious questions as to whether PCASP are authorized under § 383 to use force to protect a ship and its crew.

## 2. PSA 3-09: Guidance on Self-defense or Defense of Others by U.S.-Flagged Commercial Vessels Operating in High Risk Waters

PSA 3-09 is a comprehensive document that defines some rather illusive terms, such as *self-defense*, *defense of the vessel*, and *imminent danger*.<sup>149</sup> The document discusses when deadly force should be used during a piratical attack and encourages the use of nondeadly force.<sup>150</sup> Specifically, PSA 3-09 recommends deadly force only "when an individual has the reasonable belief that the person or persons to which the deadly force would be directed poses an imminent danger of death or great bodily harm."<sup>151</sup> The document notes further that deadly force is appropriate only in defense of life.<sup>152</sup> Trident Group's use of deadly force against pirates aboard the

---

146. See *IMO Guidance to Shipowners*, *supra* note 110, at Annex § 3.3.1 (distinguishing implicitly between a ship's crew and PCASP).

147. See *id.* at Annex § 5.9.4 (discussing how effective command and control requires "two-way information flow" between "the shipowner, charterer, PCASP, PMSC and the ship's master, officers and crew throughout deployment").

148. Notice of Policy, Self-Defense of Vessels of the United States, 76 Fed. Reg. 39,411, 39,413 (July 6, 2011). Section 912 of the CGAA prevents monetary liability from attaching when "an owner, operator, time charterer, master, mariner, or individual" uses force to defend a U.S.-flagged vessel. This broad definition unequivocally encapsulates PCASP, but because of the inclusion of individual (distinct from mariner). *Id.* at 39,411-13.

149. *Id.* at 39,412-13. For example, the document defines *self-defense* or the *defense of others* as "the act of thwarting an attack upon oneself, another person, or both by using force, up to and including deadly force." *Id.* at 39,412. It classifies *imminent danger* as when "an attacker poses an imminent threat of great bodily harm or death to oneself or others." *Id.*

150. See *id.* at 39,413 ("Nothing in the application of this guidance shall be construed as to necessarily require personnel to meet force with equal or lesser force.").

151. *Id.*

152. *Id.*

*Avocet* egregiously failed to meet these recommendations.<sup>153</sup> The *Avocet*'s PCASP also chose not to employ any of the recommended nondeadly-force tactics provided by PSA 3-09 in its response to the pirates' attack.<sup>154</sup>

Trident Group's misuse of force highlights the key problem with PSA 3-09: no binding RUF. The advisory document acknowledges that it "does not prescribe rules of engagement."<sup>155</sup> Furthermore, the guidance admits that its recommendations should not be interpreted to dictate specific actions during a piratical attack.<sup>156</sup> As a result, commanders, crews, and embarked security personnel retain rather wide discretion to react to an attack as they deem appropriate.<sup>157</sup> The danger of allowing PCASP unrestricted latitude in defending merchant vessels can manifest itself in misuses of force as evidenced by the Trident Group's "defense" of the *Avocet*.<sup>158</sup> Thus, the United States' current policy—despite the USCG's approval—fails to provide the proper framework to ensure that PCASP employ a proportional amount of force against pirates on the high seas.

### 3. PSA 2-09: MARSEC Directive 104-06 and PSA 9-09—Expected Courses of Action Following Attacks by Pirates in the Horn of Africa Region

PSA 2-09 provides guidance on the proper security measures U.S.-flagged vessels should employ when operating in the HRAs.<sup>159</sup> The notice compiles a number of recommendations for shipowners traversing pirate-filled waters.<sup>160</sup> PSA 2-09 reflects the unclassified guidance provided to U.S.-flagged vessels in Maritime Security

153. *Id.* at 39,412–13; *see supra* notes 2–11 and accompanying text.

154. Notice of Policy, Self-Defense of Vessels of the United States, 76 Fed. Reg. 39,411–13 (July 6, 2011); *see supra* notes 2–11 and accompanying text.

155. Notice of Policy, Self-Defense of Vessels of the United States, 76 Fed. Reg. 39,411–12 (July 6, 2011).

156. *Id.* ("This guidance should not be read to mandate specific actions at particular points of time.")

157. *See id.* ("Nothing in this document prevents an individual from acting in self-defense or defense of others."). Arguably, self-defense and defense of others are legal conceptions that PCASP must comply with while protecting a ship at sea. However, self-defense and defense of others—as traditionally understood in the United States—seem rather inapplicable to armed private contractors who traverse the HRAs and battle pirates. Trident Group's actions aboard the *Avocet* underscore this point. Their actions were not in self-defense since the pirates did not fire one shot at them, the ship, or the crew. *See supra* notes 2–11 and accompanying text.

158. *See supra* notes 2–11 and accompanying text.

159. U.S. DEP'T HOMELAND SEC., PORT SECURITY ADVISORY—PIRACY (02-09) (REV 3) (2011), available at <https://homeport.uscg.mil/mycg/portal/ep/contentView.do?contentTypeId=2&%20channelId=-18389&contentId=258446&programId=63715> [hereinafter PSA 2-09].

160. *See id.* (detailing security measures for U.S.-flagged vessels operating in the HRAs).

Directive (MARSEC) 104-06—a document that analyzes “emerging security threats” for U.S. vessels.<sup>161</sup> PSA 2-09 separates its guidance into six sections: (1) “Prior to entering [HRAs]”; (2) “During transits of [HRAs]”; (3) “If anchored in [HRAs]”; (4) “If berthed in [HRAs]”; (5) “If attacked or boarded”; and (6) “Post incident.”<sup>162</sup> These sections provide minimum standards for U.S. vessels operating in the HRAs.<sup>163</sup> Specifically, the postincident section states:

If a vessel is attacked or boarded by pirates, several agencies will require access to the vessel and crew to conduct a series of investigations, including but not limited to the [Federal Bureau of Investigation (FBI)] and USCG. . . . The vessel crew is expected to treat the vessel as a crime scene, preserve any evidence that may be useful to the investigations, and cooperate with investigators.<sup>164</sup>

This section makes it clear that the United States has the authority to investigate any piratical attacks on U.S.-flagged vessels.<sup>165</sup> Similarly, PSA 9-09 outlines a master and crew’s expected courses of action after a piratical attack in the HRAs.<sup>166</sup> This guidance requires vessels to contact the European Union Naval Force as well as the USCG during and after a piratical attack.<sup>167</sup> Thus, the USCG expects U.S. merchants to notify the proper authorities and provide government entities access to a ship following an attack at sea.

One of the benefits of both PSA 2-09 and PSA 9-09’s investigatory and reporting requirements is that it enables U.S. shipowners and PCASP to adapt to new pirate techniques through shared knowledge. The pirates are a decentralized and adaptable group that will change their methods in response to merchants’ use of PCASP.<sup>168</sup> In fact, there are reports that pirates are beginning to buy advanced weapons from Libya.<sup>169</sup> These advanced weapons would

161. See *id.* (noting that this PSA reflects the most up to date MARSEC Directive). MARSEC Directive 104-06 is classified as Sensitive Security Information and is, therefore, not available for public release. However, PSA 2-09 reflects the unclassified sections of MARSEC Directive 104-06. Notice of Availability, U.S. Dep’t of Homeland Sec., Maritime Security Directive 104-06 (Rev 6), Guidelines for U.S. Vessels Operating in High Risk Waters, 77 Fed. Reg. 4573 (Jan. 30, 2012).

162. PSA 2-09, *supra* note 159.

163. See *id.* § 5 (noting that “the following additional security measures must be implemented by vessel operators”).

164. *Id.*

165. *Id.*

166. U.S. DEP’T HOMELAND SEC., PORT SECURITY ADVISORY—PIRACY (09-09) (2009), available at [http://www.marad.dot.gov/documents/Port\\_Security\\_Advisory\\_09-09.pdf](http://www.marad.dot.gov/documents/Port_Security_Advisory_09-09.pdf) [hereinafter PSA 9-09].

167. *Id.*

168. See Shanker, *supra* note 19 (quoting Vice Admiral Mark I. Fox as saying, “The pirates are very adaptable, and they are very flexible”) (internal quotation marks omitted).

169. See Wendell Roelf, *Analyst Says Somali Pirates Have New Weapons from Libya*, REUTERS (Apr. 12, 2012), <http://www.reuters.com/article/2012/04/12/us-africa->



undoubtedly change the nature of the fight at sea because it would offset the pirates' relative lack of sophistication in comparison to the well-trained PCASP. The USCG also recognizes the evolving capabilities of the pirates and states in PSA 2-09 that "[p]irates continue to adapt to piracy counter measures, moving their operations further offshore to find targets of opportunity."<sup>170</sup> These realities underscore the importance of the USCG and FBI's ability to gather and process information related to piratical attacks and then distribute that information to shipowners and PMSCs. This information ensures that PCASP know what types of attacks they are potentially facing from pirates in the HRAs. Ultimately, the information allows PCASP to tailor their security training to the new methods and tactics of the pirates.

PSA 2-09 requires "[n]on-lethal methods for repulsing intruders" as well as "non-lethal means to disrupt, disorient, and deter boarders."<sup>171</sup> Although these requirements encourage nonlethal responses to attacking pirates, the document still fails to prescribe any binding RUF for PCASP.<sup>172</sup> Neither PSA 2-09 nor PSA 9-09 constrains PCASP's use of force to repel pirates in a manner consistent with the IMO's recommendations.<sup>173</sup>

4. PSA 5-09: Minimum Guidelines for Contracted Security Services in High Risk Waters and PSA 6-09—Procedures for Obtaining a Name-Based Terrorism Check for Security Personnel Operating in High Risk Waters

PSA 5-09 and PSA 6-09 discuss the minimum guidelines for PCASP and the procedures for obtaining name-based terrorist checks for PCASP, respectively.<sup>174</sup> Both documents ensure that shipowners only utilize PCASP who pass a security check conducted by the U.S.

---

pirates-idUSBRE83B0HO20120412?goback=%2Egde\_4018080\_member\_115402076 (concluding that Somali pirates have purchased mines and shoulder-held missile launchers from Libya).

170. PSA 2-09, *supra* note 159, § 3.

171. *Id.* § 5.

172. *See id.* (noting that these are mandatory protocols but failing to establish binding RUF).

173. *See supra* Part III.B.

174. U.S. DEP'T HOMELAND SEC., PORT SECURITY ADVISORY—PIRACY (05-09) (REV 1) (2009), available at <https://homeport.uscg.mil/mycg/portal/ep/contentView.do?contentType=2&channelId=18389&contentId=189984&programId=63715> [hereinafter PSA 5-09]; U.S. DEP'T HOMELAND SEC., PORT SECURITY ADVISORY—PIRACY (06-09) (REV 1) (2011), available at <https://homeport.uscg.mil/mycg/portal/ep/contentView.do?contentType=2&channelId=18389&contentId=290042&programId=63715> [hereinafter PSA 6-09].

Department of Homeland Security.<sup>175</sup> PSA 5-09 requires that PCASP “possess the training, understanding, and capability to effectively defend the vessel and crew.”<sup>176</sup> 33 C.F.R. § 104.220, which covers company or vessel personnel with security duties, outlines the specifics of PSA 5-09’s provision and includes general training requirements for private contractors—including that PCASP remain “[k]nowledge[able] of current security threats and patterns.”<sup>177</sup> The guidance lists an assortment of expectations for PCASP but places the responsibility of ensuring compliance with these standards on the shipowner.<sup>178</sup> The guidelines are also devoid of any specific mechanism to ensure that PCASP have met the listed requirements.<sup>179</sup> As this Note proposes in Part IV.C, the United States could benefit from a requirement that PCASP obtain certification from a third-party organization.<sup>180</sup> This outside certification process would ensure that PCASP meet the prescribed standards and expectations outlined in PSA 5-09 and 33 C.F.R. § 104.220.

PSA 6-09 simply describes the procedure for obtaining a security check for a privately armed contractor.<sup>181</sup> This check ensures that shipowners do not employ an individual who poses a security threat to the United States.<sup>182</sup> It also serves as an important screening mechanism for PMSCs, since it ensures that the PMSCs employ properly vetted personnel. The check does not, however, provide a mechanism to verify that the PCASP are well trained or competent enough to perform their mission at sea. As this Note proposes in Part IV.C, proper certification of PCASP requires, among other things, an on-site verification of the team’s operational methods.<sup>183</sup> Absent any type of independent audit of the PCASP’s methods and training, it is difficult to ensure that shipowners only employ PCASP who will abide by a flag state’s laws.

---

175. See PSA 5-09, *supra* note 174, § 1 (noting that PCASP “must possess a [Transportation Worker Identification Credential (TWIC)]”); PSA 6-09, *supra* note 174, § 1 (outlining the procedures for PCASP to obtain a TWIC).

176. PSA 5-09, *supra* note 174, § 7.

177. *Id.* at n.vi (citing training requirements for company or vessel personnel with security duties, 33 C.F.R. § 104.220 (2010)).

178. See *id.* (informing vessels of the requirements for PCASP).

179. *Id.*

180. See discussion *infra* Part IV.C.

181. PSA 6-09, *supra* note 174.

182. See *id.* (“TSA will determine whether or not an individual poses or is suspected of posing a security threat and report positive results to the Coast Guard.”).

183. See discussion *infra* Part IV.C.

### D. Norwegian Regulations for PCASP

Norway effectively manages the employment of private contractors at sea with a detailed and comprehensive regulatory regime.<sup>184</sup> In fact, Norway's regime was one of the catalysts for the IMO's recommendations as previously discussed, *supra* Part III.B.<sup>185</sup> Norway decided to regulate PCASP in order "to ensure that the highest possible professional and ethical standards are followed in connection with the use of such services on vessels registered in Norway."<sup>186</sup> Norway's regulatory framework for PCASP consists of the Regulations of 22 June 2004 No. 972 (Security Regulations), which Norway's Maritime Directorate passed pursuant to its authority under the Act of 16 February 2007 No. 9.<sup>187</sup> Norway's regulatory regime properly manages its shipowners' use of PCASP.

One of the strengths of Norway's regulatory framework for PCASP is that it has a role in a vessel's selection and employment of private contractors.<sup>188</sup> Under § 20 of the Security Regulations, the Norwegian Maritime Directorate must be notified prior to a ship selecting armed guards for protection.<sup>189</sup> The agency requires not only that the vessel describe why armed guards are needed but also provide detailed evidence of the suitability of the PMSC and its guards.<sup>190</sup> The agency also retains authority to deny the use of armed guards aboard a ship if "a specific security company cannot be regarded as suitable for use on Norwegian-registered ships."<sup>191</sup> In contrast to the United States, Norway retains rather broad discretion to approve or disapprove of a shipowners' selection of PMSCs.<sup>192</sup> This discretion forces Norway's shipping companies to perform proper due

184. See PROVISIONAL GUIDELINES, *supra* note 94, at 1 (noting that Norway decided to regulate PCASP to ensure that its ships are adequately protected at sea).

185. See *id.* ("In preparing the guidelines, the IMO has relied on, among others, the standards of . . . DNK.")

186. *Id.*

187. *Id.* Norway also regulates PCASP under the Regulations of 25 June 2009 No. 904 (the Firearms Regulations). The Firearms Regulations concerns "firearms, firearm parts and ammunition" used by PCASP on board Norway's vessels. *Id.* This Article will primarily focus on the use of force on board Norway's ships as it relates to the Security Regulations and the Act of 16 February 2007 No. 9.

188. Norwegian Maritime Directorate, Regulations of 22 June 2004 No. 972 Concerning Security, Anti-Terrorism and Anti-Piracy Measures and the Use of Force on Board Ships and Mobile Offshore Drilling Units (The Security Regulations) Ch. 5, § 20 [hereinafter Security Regulations], available at <http://www.sjofartsdir.no/Global/Ulykker-og-sikkerhet/Pirater%20-%20ISPS%20security/Regulations%20concerning%20amendments%20to%20the%20Regulation%20of%2022%20June%202004%20nr.972.pdf>; PROVISIONAL GUIDELINES, *supra* note 94, at 7–8.

189. Security Regulations, *supra* note 188, at Ch. 5, § 20(2).

190. *Id.*

191. *Id.* at Ch. 5, § 20(4).

192. Compare *id.* at Ch. 5, § 20 (listing selection criteria for Norwegian vessels to employ when choosing a security firm and its guards), with *supra* Part III.C.4.

diligence when selecting a PMSC, in accordance with the IMO's guidance to shipowners as discussed in Part III.B.2.<sup>193</sup> This due diligence ensures that Norwegian merchants only employ PCASP that adhere to high standards of professionalism.<sup>194</sup>

Section 17 of the Security Regulations describes Norway's use of force provisions.<sup>195</sup> This section limits PCASP's use of force to threats that are "direct, immediate, significant and otherwise unavoidable."<sup>196</sup> The provision requires that force be avoided when possible and demands that the use of force be "reasonably proportionate" in relation to the threat.<sup>197</sup> This limiting and narrow language stands in stark contrast to the United States' qualified language in PSA 3-09.<sup>198</sup> The most striking difference between Norway and the United States' framework, however, is found in § 17(3) of the Security Regulations, which provides that "[t]he unlawful use of force may result in criminal liability."<sup>199</sup> This provision provides a strong incentive for PCASP to use reasonable and proportionate force when combating pirates in order to avoid criminal sanctions.<sup>200</sup> Section 17(3) provides Norway's regulatory regime with legitimate authority in contrast to PSA 3-09, which contains a myriad of legal disclaimers.<sup>201</sup>

Another strength of Norway's guidelines is that it demands an escalation of force against a piratical attack.<sup>202</sup> Norway has interpreted its use of force provisions in § 17 of the Security Regulations to mean that "less radical measures must be attempted before force may be employed."<sup>203</sup> Section 24 on the use of firearms further supports Norway's escalation-of-force requirement by noting

---

193. See PROVISIONAL GUIDELINES, *supra* note 94, at 7 (noting that the Security Regulations require companies to perform a "detailed assessment" of PMSCs and that "IMO guidelines should be followed wherever possible").

194. See *id.* at 7 (acknowledging that "[t]here is reason to believe that not all of the security firms have the necessary expertise and credibility required to perform the demanding task of providing armed guard services in high risk areas").

195. Security Regulations, *supra* note 188, at Ch. 4, § 17.

196. *Id.* at Ch. 4, § 17(2).

197. *Id.*

198. Compare *id.* at Ch. 4, § 17 (limiting PCASP's use of force to direct threats and demanding a proportionate response to a piratical attack), with *supra* Part III.C.2 (discussing PSA 3-09's legal disclaimers).

199. Security Regulations, *supra* note 188, at Ch. 4, § 17(3).

200. *Id.* PCASP would likely want to comply with § 17 to avoid punishment under Norway's General Civil Penal Code (Act of 22 May 1902 No. 10).

201. Compare *id.* (noting that "unlawful use of force may result in criminal liability"), with *supra* Part III.C.2 (noting that PSA 3-09 does not "prescribe rules of engagement" and should not be read to dictate certain actions at certain points in time).

202. See PROVISIONAL GUIDELINES, *supra* note 94, at 12 (interpreting Norway's regulation that force must be avoided whenever possible to mean that "less radical measures must be attempted before force may be employed").

203. *Id.*

that attacking pirates must be warned by light, sound signals, or warning shots.<sup>204</sup> These sections highlight Norway's overarching commitment to shipowners using PCASP as a last resort and only to supplement other less aggressive onboard security measures.<sup>205</sup>

Similar to the United States, Norway requires any ship that is attacked by pirates and employs force in response to report the incident to the relevant governmental authority.<sup>206</sup> In fact, Norway requires its ships to report any attacks within seventy-two hours to the Norwegian Maritime Directorate.<sup>207</sup> If an attack results in death or personal injury, Norway requires the submission of a report to the Norwegian National Criminal Investigation Service.<sup>208</sup> Norway also recommends that PCASP or shipowners record their confrontations with pirates through sound or video recordings.<sup>209</sup> This information enables Norwegian authorities to analyze PCASP's employment of firearms and conduct a thorough investigation of the incident.<sup>210</sup> The notification requirement in § 18 of Norway's Security Regulations serves the same function as the notification requirement in PSA 2-09 for the United States—enable a thorough and comprehensive investigation by the necessary governmental agencies after a piratical attack.

Despite Norway's rather restrictive regulations for PCASP, it still provides shipowners and private contractors adequate discretion when faced with an imminent piratical attack on the high seas.<sup>211</sup> Norway provides a master with "significant discretion" in determining how to address a threat when facing an unclear and dangerous situation at sea.<sup>212</sup> This provision is important because fighting a decentralized, adaptable group of pirates demands a variety of responses.<sup>213</sup> This caveat, however, demonstrates the ultimate strength of Norway's regulatory regime—balancing the need

---

204. Security Regulations, *supra* note 188, at Ch. 5, § 24(3) ("If the circumstances permit, the attacker(s) shall be warned by means of light and sound signals and the firing of warning shots.").

205. See PROVISIONAL GUIDELINES, *supra* note 94, at 12 (noting that PCASP are "a supplement to other, passive security measures, and not . . . a replacement for them").

206. Security Regulations, *supra* note 188, at Ch. 4, § 18(1).

207. *Id.*

208. *Id.* at Ch. 4, § 18(2).

209. PROVISIONAL GUIDELINES, *supra* note 94, at 13.

210. See *id.* (noting that the reporting requirement has two goals: "one is to provide the Norwegian authorities with information about the use of firearms on board ships registered in Norway; the other is to support any subsequent investigation").

211. See PROVISIONAL GUIDELINES, *supra* note 94, at 12 (noting that a shipmaster may "exercise significant discretion" in the face of uncertainty).

212. *Id.*

213. See *supra* notes 168–70 and accompanying text.

for the use of force against the seriousness of the circumstances.<sup>214</sup> Norway is able to effectively balance these competing forces by adequately regulating the selection and employment of PCASP and by prescribing binding RUF.<sup>215</sup> As a result, Norway ensures that violence is only used as a last resort when confronting pirates at sea.

#### IV. RESOLVING THE UNITED STATES' INADEQUATE REGULATION OF PCASP

##### A. *The Need for Binding RUF in the United States*

The United States must address the absence of any binding RUF for PCASP in order to prevent disproportionate and unreasonable uses of force by private contractors.<sup>216</sup> Arguably, the United States has a moral obligation to address the shortcomings in its regulations because it has officially endorsed the use of PCASP on board its vessels.<sup>217</sup> Both former-Secretary of State Hillary Clinton and Assistant-Secretary Andrew J. Shapiro have encouraged the use of PCASP as an invaluable protective measure for ships and crews.<sup>218</sup> The moral dimension of this responsibility encapsulates a duty to the pirates themselves, since many of them are simple pawns of the major pirate ringleaders in Somalia and Yemen.<sup>219</sup> The pirate "kingpins" reap the rewards of the captured crew's ransom and suffer

214. See PROVISIONAL GUIDELINES, *supra* note 94, at 12 (recognizing that a ship's response to a piratical attack must be "balanced against the seriousness of the situation one faces").

215. See *supra* Part III.D.

216. See, e.g., *supra* notes 2–11 and accompanying text; see also Richard, *supra* note 2, at 415–16 (recommending "additional controls" for private security and noting that "[a]ny use of private actors in anti-piracy operations must involve safeguards against abuse").

217. See Shapiro, *supra* note 19 (noting that the State Department has "recently demarched countries to permit the use of privately contracted armed security personnel on commercial vessels"); Robert Young Pelton, *US to Promote Use of Armed Guards on Vessels*, SOMALIAREPORT (Nov. 4, 2011), <http://www.somaliareport.com/index.php/post/1956> (noting that a State Department memorandum directly from Secretary Clinton encouraged the use of PCASP to deter pirating).

218. See Shapiro, *supra* note 19 (noting that no ship employing PCASP has been hijacked); Pelton, *supra* note 217 (discussing how Secretary Clinton advocated to American diplomats to encourage other countries to permit PCASP on board their merchant vessels); see also Richard, *supra* note 2, at 413–14 (discussing Representative Ron Paul's (R-Tex.) encouragement of private companies to address piracy on the high seas).

219. See *Pirate Kingpins*, *supra* note 42 (quoting U.N. Monitoring Group on Somalia, Letter dated July 12, 2012 from the U.N. Monitoring Group on Somalia to the Security Council, U.N. Doc. S/2012/544 (July 12, 2012)) (internal quotation marks omitted) ("As a result, the international community is investing enormous resources to pursue and punish those at the bottom of the piracy pyramid . . . while virtually guaranteeing impunity for those at the top of the piracy pyramid who bear the greatest responsibility and profit the most . . .").

none of the ill effects of piracy—battling the well-armed, well-trained, and well-equipped PCASP.<sup>220</sup> Moreover, as numerous scholars have argued, employing private security—in any arena—poses significant risks, such as abuses of force or further destabilizing the local community.<sup>221</sup> Thus, the United States must reform its current policy on RUF to ensure that U.S.-flagged ships and PCASP act with a respect for human life when operating on the high seas.

### B. USCG Should Promulgate Binding RUF for PCASP

The United States should create binding RUF for PCASP that impose administrative penalties if violated.<sup>222</sup> In § 383, the United States authorized its shipmasters to use force against piratical attacks.<sup>223</sup> Congress delegated authority to the USCG to promulgate rules regarding the RUF in the CGAA.<sup>224</sup> Consequently, the USCG has administrative authority to publish binding regulations on merchants and PCASP.<sup>225</sup> Under this authority, the United States should adopt binding RUF modeled after Norway's Security Regulations. Specifically, the United States' regulations should limit PCASP's use of force to threats that are "direct, immediate, significant and otherwise unavoidable."<sup>226</sup> Another piece of the regulation should demand "reasonably proportionate" responses to piratical attacks—necessitating a graduated response from PCASP

---

220. See *id.* (noting the relatively limited investigation into the piracy network in Somalia).

221. See Kraska & Wilson, *supra* note 44, at 47–48 ("There is also uncertainty surrounding the rules of engagement and ultimately, how the companies would be held accountable for the excessive use of force. The lack of transparency and public oversight of the operations and business practices of private security companies adds to the discomfort, raising the question of whether vessel security should remain the domain of navies, rather than shift to a profit-motivated private sector."); Parsons, *supra* note 55, at 177–78 ("Despite the potential benefits for shippers in using PSCs on board vessels, there are also many risks."); Richard, *supra* note 2, at 451–64 (discussing the risks of using PMSCs); Grace Rodden & James Walsh III, *The Legal Issues of Private Armed Security on Commercial Ships*, 58 *FED. LAW.*, May 2011, at 30, 33–34 (discussing the international legal community's concerns with using private security contractors).

222. See James H. Hohenstein, *Private Security Companies at Sea: Unseen and Unregulated* 18 (Int'l Bar Ass'n, Mar. & Transp. L. Comm., Oct. 18, 2007), available at <http://www.hklaw.com/files/Publication/01d2d9a5-b99c-4f4e-bbef-1a32f018ef7c/Presentation/PublicationAttachment/e929a6d0-8519-4053-a3e8-ceeda174d8a2/46410.PDF> (recommending that flag states adopt "standard rules of engagement" that include "penalties for infractions").

223. 33 U.S.C. § 383 (2012).

224. Notice of Policy, Self-Defense of Vessels of the United States, 76 *Fed. Reg.* 39,411 (July 6, 2011).

225. See *id.* (noting that the USCG reviewed its policy "for the use of force for self-defense of vessels of the United States" per the CGAA).

226. Security Regulations, *supra* note 188, at Ch. 4, § 17(2).

with deadly force as the last resort.<sup>227</sup> Finally, the regulation must have a section that recognizes that unlawful deviations from the RUF will result in administrative penalties and possible referral of the incident to federal prosecutors.<sup>228</sup> This final provision is the key, since it ensures that the regulations will be followed. The goal of the regulation's sanction provision is to deter misconduct on the high seas. The sanction provision places PCASP on notice that there are possible consequences for intentional, reckless, and negligent uses of force on the high seas, which will incentivize their compliance with the U.S. regulations. Additionally, PMSCs will ensure that their PCASP comply with the RUF to maintain the security company's reputation in the private-contracting community. Thus, in order to hold PCASP accountable for their actions at sea, legal disclaimers—like the ones found in PSA 3-09—must be removed.<sup>229</sup>

These binding RUF not only comply with the IMO's guidance but also set a positive example for other nations struggling with the decision to endorse, prohibit, or regulate PCASP.<sup>230</sup> After promulgating this regulation for PMSCs and PCASP, the United States could take an active role in encouraging other nations to adopt similar guidelines. These recommended RUF comply with the IMO's guidance that contractors utilize force only in situations when it is "strictly necessary and reasonable."<sup>231</sup> Moreover, the recommended RUF fulfills the IMO's request for flag states to publish a policy that addresses minimum standards for PCASP.<sup>232</sup> Additionally, a binding RUF regulation provides clarity to shipmasters and shipowners, which is an express goal of the IMO's guidance to flag states.<sup>233</sup> Most importantly, this regulation meets the United States' moral obligation of ensuring proper protocols are in place for a private security force it actively encourages.<sup>234</sup> If the United States were to adopt binding RUF and create a regulatory framework for PCASP

227. *Id.* The escalation-of-force protocols could be based on best practices in the industry. See generally BMP4, *supra* note 38 (discussing the best practices for defending against piratical attacks off the coast of Somalia). They need not necessarily dictate a specific course of action at a certain time but mandate a graduated response during a piratical attack.

228. Security Regulations, *supra* note 188, at Ch. 4, § 17(3).

229. See *supra* Part III.C.2.

230. See *supra* Part III.B.

231. See *IMO Guidance to PCASP*, *supra* note 17, at Annex §§ 3.8, 5.15.3 (noting that PMSCs should have the operational competence and professional capability to perform their mission at sea).

232. See *IMO Guidance to Flag States*, *supra* note 121, at §§ 5.2–1 (noting that flag states should establish a policy that includes "the minimum criteria or minimum requirements with which PCASP should comply").

233. *Id.* § 3 ("Flag States should provide clarity to Masters . . . with respect to the national policy on carriage of armed security personnel.").

234. See *supra* notes 216–21 and accompanying text.



similar to Norway, then it would signal to other nations the importance of properly regulating armed contractors at sea.

Arguably, binding RUF suffers from some notable shortcomings. One major concern is that exceptions that allow for limited PCASP and shipowner discretion in response to a piratical attack will swallow the rule. For example, PCASP could repeatedly claim that a situation was unclear and deadly force was required immediately. However, investigators should be able to draw distinctions between attacks where PCASP properly employed the RUF and where discretion was needed in a response. Similarly, soldiers must make comparable split-second decisions in combat situations. Military investigators are able to analyze these scenarios and evaluate a soldier's use of the RUF to determine whether he or she acted in accordance with applicable law.<sup>235</sup>

Another critique is that PSA 3-09 simply restates existing law in the area, which is based on self-defense.<sup>236</sup> How can you bind someone's inherent right of self-defense through RUF? There is a distinction, however, between the employment of self-defense—as a legal concept and in actual scenarios—on U.S. soil and at sea.<sup>237</sup> PCASP carry automatic weapons and protect a ship and its cargo in an area that has been characterized as a “war-zone.”<sup>238</sup> These facts stand in stark contrast to the self-defense situations that arise in U.S. communities. PCASP still need discretion when responding to piratical attacks, but binding RUF provides the proper framework to evaluate their response. Applying only the concept of self-defense to PCASP operating at sea ignores the significant issues that arise when pirates and private contractors clash. In the context of the United States' fight against al-Qaeda and the use of drones, President Obama made a particularly relevant comment in his National Security Address at the National Defense University on May 23, 2013:

And yet, as our fight enters a new phase, America's legitimate claim of self-defense cannot be the end of the discussion. To say a military tactic is legal, or even effective, is not to say it is wise or moral in every

---

235. See generally HEADQUARTERS DEPT OF THE ARMY, ARMY REGULATION 15-6: PROCEDURES FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2006) (discussing the “procedures for investigations and boards of officers not specifically authorized by any other directive”).

236. See Notice of Policy, *Self-Defense of Vessels of the United States*, 76 Fed. Reg. 39,411, 39,412 (July 6, 2011) (“This document restates existing law in this area. It does not establish new standards or duties with respect to the right of self-defense or defense of others. The examples provided herein are included merely to illustrate how the outlined principles *could* apply to the issue of piracy.”) (emphasis added).

237. See Brittany E. Pizor, *Lending an “Invisible Hand” to the Navy: Armed Guards as a Free Market Assistance to Defeating Piracy*, 45 CASE W. RES. J. INT'L L. 545, 558–61 (2012) (comparing the self-defense policies of different countries).

238. See *supra* discussion Part II and note 57 and accompanying text.

instance. For the same human progress that gives us the technology to strike half a world away also demands the discipline to constrain that power—or risk abusing it. And that's why, over the last four years, my administration has worked vigorously to establish a framework that governs our use of force against terrorists—insisting upon clear guidelines, oversight and accountability . . . .<sup>239</sup>

If it is important “to establish a framework that governs our use of force against terrorists,” then it is important to do the same for private contractors—whose use the United States encourages—when battling pirates.<sup>240</sup> This quote also demonstrates that self-defense should not be the sole answer since U.S. technology and power typically supersede that of our adversaries.<sup>241</sup> As a result, the concept of self-defense is insufficient for constraining PCASP's use of force at sea.

The regulations may also meet with some resistance from the PMSC community. The security contractors may express concern that these regulations will limit their ability to protect the ship and its crew. However, the regulations could include—similar to Norway—recognition that unknown and precarious situations will afford the shipmaster, crew, and PCASP discretion in its response.<sup>242</sup> There also appear to be some individual contractors who would welcome the adequate regulation of their field, since proper regulation and RUF add a dimension of authority and legitimacy to the private security profession.<sup>243</sup>

Another issue with binding RUF is the inherent difficulty in prosecuting PCASP for misuses of force. Since the crime would occur thousands of miles away from the United States,<sup>244</sup> it would be challenging to conduct a proper and thorough investigation as well as gather eyewitness accounts from the pirates and crew. PSA 2-09, however, requires that shipowners treat the vessel as a crime scene after piratical attacks.<sup>245</sup> It also demands that the USCG and FBI have access to the vessel following an attack.<sup>246</sup> These requirements enable the proper governmental entities to conduct investigations despite the considerable obstacles. It is important to note that these

239. President Barack Obama, Remarks by the President at the National Defense University (May 23, 2012) (transcript available online at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>) [hereinafter President Obama's Speech].

240. *Id.*; see discussion *supra* notes 216–21 and accompanying text.

241. See President Obama's Speech, *supra* note 239 (“And yet, as our fight enters a new phase, America's legitimate claim of self-defense cannot be the end of the discussion.”); see also discussion *supra* Part II.

242. See *supra* Part III.D.

243. See Hackwood, *supra* note 49 (discussing that the “rules of engagement are clear” and describing an escalation of force protocol for dealing with a piratical attack).

244. See *infra* Appendix I.

245. See *supra* Part III.C.3.

246. *Id.*

investigations must address both the pirate side of the attack and the PCASP's response to that attack. Ultimately, the USCG and FBI should ensure that PCASP properly complied with U.S. regulations on the RUF during the attack.

Additionally, altering U.S. regulations for PCASP might incentivize a race to the bottom.<sup>247</sup> This unfortunate outcome is commonplace in an international environment where standards differ substantially across nations.<sup>248</sup> For example, Japan currently prohibits the use of armed guards, while Belgium, the Bahamas, and Isle of Man have rather limited provisions with almost no oversight of PCASP.<sup>249</sup> Some nations, such as Italy and France, endorse the use of military personnel to protect a ship and its crew at sea.<sup>250</sup> Standards for regulating PCASP span the continuum from very restrictive laws (Norway) to almost no regulation (Isle of Man).<sup>251</sup> The diversity of approaches to regulating PCASP demonstrates the important role domestic policy plays in governing ships' use of private contractors.

The ultimate fear is that PMSCs will vacate the United States once the USCG promulgates these regulations and move to nations where PCASP are less strenuously regulated.<sup>252</sup> The United States, however, is a major market for the shipping industry and private maritime security.<sup>253</sup> It is unlikely that the costs of compliance would outweigh the potential benefits of remaining in the United States and providing contracting services to major commercial shipping

---

247. See *Laws and Guns*, *supra* note 19 (noting that an increase in regulation of PMSCs could result in firms "simply mov[ing] to territories with less demanding regimes").

248. See *supra* Part III.B–D.

249. *Comparison of Flag State Laws*, *supra* note 23. Japan has a general prohibition against the use of PCASP. *Id.* It prohibits the possession and use of arms and swords under the Japanese Firearms and Swords Control law. *Id.* Belgium does not have a provision in its national legislation for the use of armed guards, but the Belgian Authority is expected to take steps in the near future to permit the use of PCASP. *Id.* The Bahamas leaves the decision to employ PCASP to the shipowner after considering the advantages and disadvantages of having armed guards on board. *Id.*

250. *Id.* Italy has an agreement between its Defense Ministry and Shipping Association that "10 teams of six military personnel will be available for Italian-registered vessels." *Id.* The French government authorizes PCASP when military protection is not available. *Id.* For a full discussion of Italy's antipiracy efforts, see Francesca Pellegrino, *Historical and Legal Aspects of Piracy and Armed Robbery Against Shipping*, 43 J. MAR. L. & COM. 429, 444–45 (2012).

251. See *Comparison of Flag State Laws*, *supra* note 23 (discussing regulations in the Isle of Man); see *supra* Part III.D.

252. See *Comparison of Flag State Laws*, *supra* note 23 (noting that in the Bahamas and the Isle of Man the decision to use PCASP is up to the shipowner with limited government regulation); *Laws and Guns*, *supra* note 19 (fearing that two tiers may emerge in the maritime security industry—one that is regulated and one that operates by improvisation).

253. See Kraska & Wilson, *supra* note 44, at 43 (noting that "approximately 50,000 vessels pass through the Gulf of Aden each year, transporting cargo that includes 12% of the world's daily oil supply").

companies. Moreover, contractors would not be able to locate in another country and provide services to U.S.-based shipowners without complying with U.S. regulations because they would apply to any PMSC employed by U.S.-flagged vessels.<sup>254</sup> Thus, it is unlikely that PMSCs will vacate the United States because of binding RUF.

### C. Mandated Certification for PMSCs by an International Organization

U.S. regulations for PCASP should also require that all PMSCs provide proper evidence that they have been certified from a suitable international organization.<sup>255</sup> This nonwaivable requirement must acknowledge that the USCG has final approval or disapproval authority of any PMSC selected for use by a U.S.-flagged vessel—akin to Norway's provision in its Security Regulations.<sup>256</sup> This enables the USCG to effectively screen a shipowner's decision to utilize the services of a PMSC.

One example of an organization that conducts PMSC certification is the Security Association for the Maritime Industry (SAMI).<sup>257</sup> This global organization certifies PMSCs through a three-step process.<sup>258</sup> First, SAMI performs a thorough review of the PMSCs' records.<sup>259</sup> Second, SAMI conducts an on-site audit that tests the "implementation, readiness, conduct of operations, personnel management, [and] logistics" of the PMSC.<sup>260</sup> This step involves comparing the PMSCs' performance against SAMI's internationally accepted standards.<sup>261</sup> The last step is an operational site visit to evaluate the PMSCs' operational capabilities in the field.<sup>262</sup> SAMI verifies that a PMSC is reputable by "provid[ing] reassurance, guidance, and minimum quality and standards in the delivery of

254. See *supra* Part III.C.3.

255. See Hohenstein, *supra* note 222, at 18 (recommending that "an international, not-for-profit organization . . . govern and approve PSCs"); see also Pizor, *supra* note 237, at 568 (arguing that "a regulatory board could issue the armed guard with a license to serve as security on a merchant ship").

256. See *supra* Part III.D.

257. See SEC. ASS'N FOR THE MARITIME INDUS., <http://www.seasecurity.org/> (last visited Dec. 20, 2013); LloydsListGroup, *Peter Cook, Secretariat, Security Association for the Maritime Industry*, YOUTUBE (Oct. 21, 2011), <http://www.youtube.com/watch?v=09JGa38qy3I> [hereinafter *Peter Cook Interview*].

258. *Peter Cook Interview*, *supra* note 257, at 2:10; *SAMI Certification for PMSCs*, SEC. ASS'N FOR THE MARITIME INDUS., <http://www.seasecurity.org/sami-certification-for-pmscs/> [hereinafter *SAMI Certification*] (last visited Dec. 20, 2013).

259. See *Peter Cook Interview*, *supra* note 257, at 2:15 (noting that the first-stage of the three-stage process is due diligence); *SAMI Certification* *supra* note 258 (noting that Stage 1 is a due-diligence step).

260. *SAMI Certification*, *supra* note 258.

261. See *id.* ("Stage 2 is the [sic] where the companies [sic] performance will be assessed against the standard.")

262. *Id.*

maritime security.”<sup>263</sup> The standards SAMI espouses provide legitimacy to the PMSCs that wish to provide maritime security services.<sup>264</sup>

Mandatory certification of all PMSCs has notable benefits. First, the USCG will be able to ensure that merchants only use PMSCs that have been vetted by an independent organization that actually observes the PMSCs’ methods in the field. There is ample evidence that many private-contracting companies do not have the necessary expertise and credibility to provide security services to vessels in the HRAs.<sup>265</sup> The certification requirement acts as a filter for merchants to ensure that they only hire suitable PMSCs. Third-party organizations, such as SAMI, facilitate the accreditation process between the private contractor, shipping company, and flag state.<sup>266</sup> This regulation would also meet the IMO’s requirement that PCASP provide documentary evidence of their competencies to provide security on the high seas.<sup>267</sup> It ultimately ensures that PCASP are properly selected, vetted, and trained as the IMO’s guidance encourages.<sup>268</sup> Finally, private organizations that certify PMSCs will save the USCG from having to conduct any type of on-site certification process. The USCG may not have the resources, training, or expertise necessary to conduct this type of certification process.<sup>269</sup> Certifying PMSCs is SAMI’s market niche however, and utilizing their services would save the U.S. government the nontrivial cost of having to provide and train personnel with the skills and knowledge necessary to conduct a complex certification process.<sup>270</sup> Although the U.S. government would be outsourcing an important aspect of

---

263. *Id.*

264. *See id.* (“Through the SAMI Standard the association will provide the maritime industry with a credible measure of competency giving them confidence in the professionalism of the maritime security industry.”).

265. *See* PROVISIONAL GUIDELINES, *supra* note 94, at 7–8 (justifying Norway’s requirement that merchants perform a detailed assessment of PMSCs prior to each assignment).

266. *See Peter Cook Interview, supra* note 257, at 1:42 (discussing SAMI’s role in the PMSC accreditation process).

267. *See IMO Guidance to PCASP, supra* note 17, at Annex § 3.2 (listing “incorporation, management and financial standing” documents as relevant to PMSC due diligence).

268. *See id.* at Annex §§ 4.1–4 (providing recommendations for PCASP selection, vetting, and training); *see also IMO Guidance to Shipowners, supra* note 110, at Annex §§ 4.1–4.7.6 (listing PMSC selection criteria for shipowners).

269. *See Richard, supra* note 2, at 414 (“Governments frequently lack the resources or political will to provide security, training, and technical security equipment necessary for dealing with modern threats, creating opportunities for the private sector.”). There is a chance, of course, that organizations will “rubber stamp” a PMSC for use on board a U.S. flagged-vessel. Proper due diligence by the USCG, however, could overcome this concern.

270. *See generally Peter Cook Interview, supra* note 257 (discussing the certification process for PMSCs).

regulating PMSCs, proven certification companies are in the best position in the industry to evaluate and grade the tactical and technical skills of PCASP.<sup>271</sup> Moreover, the backstop to the regulatory framework is the binding RUF.

Arguably, PSA 5-09 and PSA 6-09 already adequately regulate the selection and vetting of PMSCs for U.S.-flagged vessels.<sup>272</sup> The advisories do ensure that PCASP pass proper background checks and require that PCASP meet certain minimum requirements as detailed in 33 C.F.R. § 104.220.<sup>273</sup> The deficiency, however, is that there is no verification or independent observation of the PCASP's methods in the field. In contrast, SAMI and other-related organizations certify that PCASP are adequately trained to protect a ship at sea.<sup>274</sup> This independent verification of PCASP will ensure that U.S.-flagged vessels only utilize professional and competent private security companies.

## V. CONCLUSION

Although piracy has recently declined off the horn of Africa, it will continue to pose a significant threat to commercial ships traversing the Gulf of Aden and Indian Ocean. Somalia and Yemen provide the perfect combination of socioeconomic and governmental failures that enable piracy to thrive. Additionally, recent reports indicate that piracy is on the rise in other parts of the globe—including Indonesia and Southeast Asia.<sup>275</sup> These realities coupled with shrinking defense budgets mean that PCASP will have a notable role in protecting shipowners in the twenty-first century. Since PCASP will play a substantial role in protecting shipowners, the United States has a moral obligation to properly regulate them at sea. The Trident Group incident demonstrates the danger of allowing private contractors to remain relatively unregulated. To address these issues, the USCG should use its authority under the CGAA to promulgate binding RUF for PCASP.

Regulations for PCASP vary substantially across nations. The Bahamas and Isle of Man have rather limited provisions in place for armed guards, while Italy prefers its vessels to utilize military personnel. The United States has a framework for PCASP's use of force that primarily consists of § 383 and PSA 3-09. This regime,

---

271. See generally *id.* (discussing SAMI's expertise in certifying PMSCs).

272. See *supra* Part III.C.4.

273. PSA 5-09, *supra* note 174, § 7 (citing training requirements for company or vessel personnel with security duties, 33 C.F.R. § 104.220 (2010)).

274. See *supra* notes 257–64 and accompanying text.

275. See *Drop in Piracy*, *supra* note 14 (noting the spike in piracy in Indonesia and Southeast Asia for 2012).

however, suffers from legal disclaimers and a lack of specificity regarding the RUF. In contrast, Norway's RUF are specific and restrictive. Norway's regime enables the Norwegian Maritime Directorate to adequately supervise and control the employment of PCASP on board its nation's vessels.

This Note proposes that the United States adopt binding RUF for PCASP modeled on Norway's Security Regulations. Under its statutory authority, the USCG should promulgate regulations that (1) dictate binding RUF for PCASP and (2) require mandatory certification of PMSCs by an international, private organization. PCASP fill a significant gap for shipowners who need to be protected at sea but can no longer depend on an international community that is facing widespread military budget cuts. These men and women perform a necessary job that involves putting their lives at risk on a daily basis for the protection of a ship and its crew. This Note is not meant to disparage their profession or minimize their sacrifices. Rather, this Note's proposed solution would incentivize the proper behavior by armed contractors at sea and ensure that they act with a respect for human rights while protecting U.S. vessels.

*Sean Patrick Mahard*<sup>276</sup>

---

276. Candidate for Doctor of Jurisprudence 2014, Vanderbilt Law School; B.S. 2007, University of Virginia. Captain, U.S. Army, participating in the Funded Legal Education Program. I would like to thank Commander David O'Connell, Lieutenant Colonel Jeffrey Thurnher, and the *Vanderbilt Journal of Transnational Law* for their insights, edits, and comments. I would also like to thank my wife, Jennifer, and son, Jonathan, for their love and support. The views expressed in this Note are my own and do not necessarily reflect the official policy or position of the Department of Defense, the U.S. government, or the U.S. Army.

Appendix I<sup>277</sup>



277. THE ECONOMIST, [http://media.economist.com/sites/default/files/imagecache/290-width/images/print-edition/20120414\\_IRM919.png](http://media.economist.com/sites/default/files/imagecache/290-width/images/print-edition/20120414_IRM919.png) (last visited Jan. 5, 2014).



\*\*\*

# VANDERBILT JOURNAL of TRANSNATIONAL LAW



The *Vanderbilt Journal of Transnational Law (Journal)* (USPS 128-610) is published five times a year (Jan., Mar., May, Oct., Nov.) as part of the International Legal Studies Program by the Vanderbilt Law School, 131 21st Avenue South, Room 047, Nashville, TN 37203. The *Journal* examines legal events and trends that transcend national boundaries. Since its foundation in 1967, the *Journal* has published numerous articles by eminent legal scholars in the fields of public and private international law, admiralty, comparative law, and domestic law of transnational significance. Designed to serve the interests of both the practitioner and the theoretician, the *Journal* is distributed worldwide.

The preferred and most efficient means of submission is through ExpressO at <http://law.bepress.com/expresso/>. However, other modes of submission are accepted in print or by e-mail attachment.

Footnotes must conform with *The Bluebook: A Uniform System of Citation* (most recent edition), and authors should be prepared to supply any cited sources upon request. Authors must include a direct e-mail address and phone number at which they can be reached throughout the review period.

Subscriptions beginning with Volume 47 are \$33.00 per year (domestic), \$35.00 per year (foreign); individual issues are \$10.00 domestic and \$11.00 foreign. Orders for subscriptions or single issues may enclose payment or request billing and should include the subscriber's complete mailing address. Subscriptions will be renewed automatically unless notification to the contrary is received by the *Journal*. Orders for issues from volumes prior to and including Volume 16 should be addressed to: William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York, 14209.

Please send all inquiries relating to subscriptions, advertising, or publication to: Program Coordinator, Vanderbilt Journal of Transnational Law, Vanderbilt Law School, 131 21st Avenue South, Nashville, Tennessee 37203, Phone: (615) 322-2284, Facsimile: (615) 322-2354, email address: [faye.johnson@law.vanderbilt.edu](mailto:faye.johnson@law.vanderbilt.edu)

Class "Periodicals" postage is paid at Nashville, Tennessee and additional mailing offices. POSTMASTER: Send address changes to Program Coordinator, Vanderbilt Journal of Transnational Law, Vanderbilt Law School, 131 21st Avenue South, Room 047, Nashville, Tennessee, 37203.

The *Journal* is indexed in *Contents of Current Legal Periodicals*, *Current Law Index*, *Index to Legal Periodicals*, and *Index to Foreign Legal Periodicals*.

Cite as: VAND. J. TRANSNAT'L L.

---

### Nondiscrimination Statement

In compliance with federal law, including the provisions of Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendment of 1972, Sections 503 and 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act (ADA) of 1990, the ADA Amendments Act of 2008, Executive Order 11246, the Uniformed Services Employment and Reemployment Rights Act, as amended, and the Genetic Information Nondiscrimination Act of 2008, Vanderbilt University does not discriminate against individuals on the basis of their race, sex, religion, color, national or ethnic origin, age, disability, military service, or genetic information in its administration of educational policies, programs, or activities; admissions policies; scholarship and loan programs; athletic or other university-administered programs; or employment. In addition, the university does not discriminate against individuals on the basis of their sexual orientation, gender identity, or gender expression consistent with the university's nondiscrimination policy. Inquiries or complaints should be directed to the Equal Opportunity, Affirmative Action, and Disability Services Department, Baker Building, PMB 401809, Nashville, TN 37240-1809. Telephone (615) 322-4705 (V/TDD); FAX (615) 343-4969.

VANDERBILT JOURNAL  
OF TRANSNATIONAL LAW



We are pleased to announce the 2014–2015 Editorial Board for the  
*Vanderbilt Journal of Transnational Law*

**BOARD OF EDITORS  
2014–2015**

LELAND P. FROST  
*Editor in Chief*

DAVID WILLIAM ROBERTS  
*Executive Managing Editor*

CAROLINE E. RICKARD  
*Executive Articles Editor*

LYDIA MARJORIE ANSERMET  
*Executive Authorities Editor*

EMILY M. RICKARD  
*Executive Student Writing  
Editor*

ERIN E. SISSON  
*Executive Article  
Selection Editor*

BRETT ALAN REAMER  
*Executive Authorities Editor*

ALANDIS KYLE BRASSEL  
*Executive Development Editor*

KATHERINE E. WEST  
*Executive Authorities Editor*

LAURA H. FEEZOR  
*Executive Development Editor*

CLAYTON J. ANKNEY  
SHAWN MICHAEL DONOVAN  
ELLE GENEVA KERN  
REDMOND TUNNEY MCGRATH  
LISA P. OGUST  
NICHOLAS JOHN PETER MEROS  
JACOB A. STAFFORD  
MICHELLE R. ZAVISLAN  
*Article Editors*

VIDHI AŠHOK SANGHAVI  
*Notes Development Editor*

ZACHARY A. HEBERT  
CHARLES C. MCLAURIN  
*Development Editors*

SCOTT M. CHURCH  
E. PATRICK KAVANAUGH V  
NOAH J. MASON  
*Student Writing Editors*

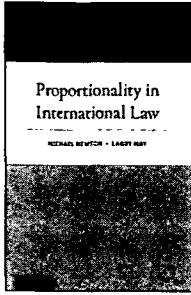
MARGAUX TAYLOR DASTUGUE  
MONIQUE A. HANNAM  
*Authorities Editors*

BATOUL S.A. HUSAIN  
SARAJANE STEVENS MCMAHON  
*Authorities Editors*

JAVON AUBREY PAYTON  
EMILY K. SELF  
*Authorities Editors*

*Sean P. Mahard*  
*Editor-in-Chief*  
2013–2014

OXFORD UNIVERSITY PRESS



**Proportionality in International Law**

Available in Hardcover

2014 | ISBN: 978-0-19-935503-7

LIST PRICE: \$95.00 | PROMO OFFER: \$76.00

"Proportionality is a doctrine that every serious student of military force needs to study and understand. Its dynamics and tensions are remarkably consistent even as the specific details are so varied. Newton and May captured those issues superbly. Their organized and well-reasoned analysis gives this book an impressive depth of application and insight. Their conclusion that proportionality during armed conflicts is a unique usage highlights one of the enduring conundrums of our era. This book fills the current void with intellectual consistency. It contains an interdisciplinary discussion that will help practitioners apply the doctrine of proportionality in a manner consistent with the concerns of military commanders, and that also preserves lives."

— Justice Richard Goldstone, Former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, Constitutional Court of South Africa (ret'd)

Proportionality is intimately linked to the overarching concepts of self-defense, lawful force, and the controlled application of violence. It is one of the most visible facets of humanitarian law designed to reduce unnecessary human suffering and avoid excessive damage to property, and the natural environment. However, its application has come under renewed scrutiny and sustained controversy as a result of wars against non-state actors and from the extensive use of drones, human shields, cyber war techniques, and counterinsurgency tactics.

*Proportionality in International Law* critically assesses the law of proportionality in normative terms combining abstract philosophical and legal analysis with highly emotive contemporary combat cases. The principle of proportionality permits actions that are logically linked to the intended goal, and thus defines the permissible boundaries for the initiation and conduct of modern wars. The case studies discussed in this book are predominantly from the perspective of those who make decisions in the midst of armed conflict, bringing analytic rigor to the debates as well as sensitivity to facts on the ground. The authors analyze modern usages of proportionality across a wide range of contexts enabling a more complete comprehension of the values that it preserves. This book contrasts the applications of proportionality in both *jus ad bellum* (the law and morality of resort to force) and within *jus in bello* (the doctrines applicable for using force in the midst of conflicts). *Proportionality in International Law* provides the reader with a unique interdisciplinary approach, offering practitioners and policymakers alike greater clarity over how proportionality should be understood in theory and in practice.

**ABOUT THE AUTHORS**

Michael Newton is Professor of the Practice of Law at Vanderbilt University Law School.

Larry May is the W. Alton Jones Professor of Philosophy, Professor of Law, and Professor of Political Science at Vanderbilt University.

**ORDER TODAY!**

Visit [www.oup.com/us](http://www.oup.com/us)  
and use promo code 32450

OXFORD  
UNIVERSITY PRESS



198 Madison Avenue  
New York, NY 10016  
[www.oup.com/us](http://www.oup.com/us)