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Gunslingers on the High Seas: A Call for Regulation

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I. INTRODUCTION

Until only very recently, commercial vessels travelling through waters posing the greatest risk of pirate attacks typically relied on the world's navies to protect them. Indeed, the world community has spent more than a billion dollars in each of the last several years to support naval fleets that patrol pirate-infested waters with the goal of repressing piracy.¹ The vastness of the area in which pirates now operate, however, has meant that those navies simply cannot keep every ship safe.² Despite the presence of the world's navies, in 2011 alone pirates staged 439 violent attacks and held 802 crew members hostage.³ The rewards they reaped for doing so are great: the average ransom paid to pirates in 2011 was \$4.97 million.⁴

Calls to fill this apparent security gap left open by the limitations of the naval fleets has resulted in a relatively new phenomenon: since about mid-2011, flag states⁵ have increasingly authorized their shippers to hire private armed guards to protect them against acts of maritime piracy. And, shippers have been doing so. Estimates indicate that in 2011, the percentage of ships employing armed guards rose from approximately 10% to 50%.⁶ Primarily, the guards are hired out by the 200 to 300 private maritime security companies (PMSCs)⁷ that have rushed in to capitalize on

¹ Anna Bowden & Shikha Basnet, *The Economic Cost of Somali Piracy 2011*, at 27 (One Earth Future Foundation, Working Paper), available at http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011.pdf.

² David C. Ake, *Defense Official: More Private Security Needed Aboard Ships to Combat Piracy*, NATIONAL DEFENCE MAGAZINE, June 16, 2011, available at <http://www.nationaldefensemagazine.org/blog/Lists/Posts/Post.aspx?ID=447> (stating that there are not enough navies in the world to provide protection to every ship travelling through the 2.9 million nautical miles of ocean in which pirates operate). See also Bowden & Basnet, *supra* note 1, at 8 (stating that in the past four years, pirates have expanded their operations from the Gulf of Aden well into the larger Indian Ocean).

³ See Int'l Chamber of Commerce International Maritime Bureau Report, Jan. 1–Dec. 13, 2011, *Piracy and Armed Robbery Against Ships*, at 5-6, 11 (2011) [hereinafter ICC–IMB 2011 Report].

⁴ Bowden & Basnet, *supra* note 1, at 11.

⁵ Ships fly the flag of a single state and are subject to the jurisdiction of that state on the high seas and must follow its licensing rules and regulations. See generally United Nations Convention on the Law of the Sea, arts. 91 and 92, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁶ SMALL ARMS SURVEY 2012, A PROJECT OF THE GRADUATE INSTITUTE OF INTERNATIONAL AND DEVELOPMENT STUDIES, GENEVA, 206 (Cambridge University Press, 2012); Bowden & Basnet, *supra* note 1, at 17.

⁷ I use the label “private maritime security companies” to describe these firms because it is the label adopted by the International Maritime Organization (IMO). The IMO is the United Nations’ specialized agency responsible for, among other things, improving

the apparent security gap.⁸ There is no official central registry identifying the security personnel employed on commercial ships. But, as many as 2700 private armed guards may have been operating in the Indian Ocean during 2011.⁹

The obvious benefit of permitting private armed guards to aid the world's navies in the fight against piracy is that they may save a ship and crew from attack. An oft-cited anecdote suggests that no ship carrying armed guards has been successfully pirated.¹⁰ On the other hand, permitting private citizens to engage in activities that have thus far been reserved for state military personnel poses risks. Military personnel—like those participating in the United Nations-sanctioned anti-piracy missions—are trained to operate on the high seas and to follow a chain of command.¹¹ They are also subject to military discipline or other state laws should they commit abuses. Private armed guards are an entirely different matter. These private citizens may not be trained in maritime operations or understand or be prepared to abide by the various state laws that govern the use or transport of weapons as they travel from one location to the next.¹² Furthermore, no coordinated set of guidelines currently regulates the use of private armed guards on ships, and states for the most part seem to want to

maritime safety. Many other, but synonymous, labels exist to describe the firms that provide armed guards to escort ships travelling through areas posing a high risk of pirate attacks. For example, some commentators use the label “private armed security guards.” FOREIGN AFFAIRS COMMITTEE, PIRACY OFF THE COAST OF SOMALIA, REPORT, 2010–12, H.C. 1318, at ¶ 26 (U.K.) [hereinafter FOREIGN AFFAIRS COMMITTEE 2012 REPORT]. Others use the label “private military security companies.” James Brown, *Pirates and Privateers: Managing the Indian Ocean's Private Security Boom*, LOWY INSTITUTE FOR INTERNATIONAL POLICY, Sept. 12, 2012, available at <http://www.lowyinstitute.org/publications/pirates-and-privateers-managing-indian-oceans-private-security-boom>.

⁸ Sandra I. Erwin, *Security Firms Divided Over How to Succeed in the Anti-Piracy Business*, NATIONAL DEFENSE MAGAZINE, Aug. 2012, available at <http://www.nationaldefensemagazine.org/archive/2012/August/Pages/SecurityFirmsDividedOverHowtoSucceedintheAnti-PiracyBusiness.aspx>.

⁹ Brown, *supra* note 7, at 4.

¹⁰ SMALL ARMS SURVEY 2012, *supra* note 6, at 206.

¹¹ See discussion *infra* at II.B.

¹² See, e.g., IMO, *Interim Guidance to Shipowners, Ship Operators, and Shipmasters on the use of Privately Contracted Armed Security Personnel (PCASP) on Board Ships in the High Risk Area*, IMO Doc. MSC.1/Circ. 1405 (May 23, 2011), at Annex ¶ 1 (noting the issue of identifying reliable armed security), ¶ 3.3 (noting the issue of command authority), ¶ 3.4 (noting the issues concerning weapons carriage), and ¶ 3.5 (discussing the need for clear rules on the use of force); IMO, *Interim Guidance for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, IMO Doc. MSC.1/Circ. 1406 (May 23, 2011), at Annex, ¶ 3 (noting concerns about the possible escalation of violence).

play no role vetting potential guards or setting accreditation standards for guards that ships hire to protect them while travelling through pirate-infested waters.¹³ Thus, while it may be that these private guards can keep ships safe from attack, there are no assurances that will do so in a way that does not escalate violence, involve unlawful use of force, endanger innocent seafarers, or cause international incidents.

States should not be permitted to include private citizens in the fight against piracy without first ensuring that those guards will abide by governing laws and norms and be held accountable should they fail to do so. Yet, as discussed in more detail, only some states appear to be providing any guidance regarding the use of armed guards, and even that guidance could be more detailed.¹⁴ This Article argues that states need to do more. At the very least, it urges states to agree on vetting and monitoring procedures to make certain that any guards who are hired by shippers are well trained and prepared to safely transport, store, and use weapons. States are responsible for the fight against piracy, and if they want to include private contractors in that fight, then they should act responsibly and regulate and monitor the guards' conduct. Otherwise, in a world where each state is creating its own rules or even no rules at all, the likely outcome is chaotic and violent seas—and perhaps the next “Blackwater moment.”¹⁵

In fact, those “Blackwater moments” may already be upon us: reports indicate that “some overzealous or untrained guards are shooting indiscriminately, killing pirates and sometimes innocent fishermen before verifying the threat.”¹⁶ A March 2011 encounter between private armed guards aboard the bulk cargo vessel, the *Avocet*, and alleged pirates in the Gulf of Aden helps illustrate this point. Footage apparently leaked without authorization shows PMSC personnel firing more than one hundred shots at an approaching skiff after an order to fire “warning shots.”¹⁷ The firing continues even after the skiff crashes into the *Avocet* at the hands of the

¹³ See discussion *infra* at V.A.

¹⁴ Part IV, *infra*, discusses the increase in the number of states authorizing the use of armed security personnel and provides details about some state laws and guidance in that regard.

¹⁵ Michelle Wiese Bockmann and Alan Katz, *Shooting to Kill Pirates Risks Blackwater Moment*, BLOOMBERG, May 8, 2012 (referencing the 2007 incident where security guards employed by Blackwater Worldwide allegedly shot and killed civilians in Baghdad). See also Katharine Houreld, *Private guards kill Somali pirate for first time*, UT SAN DIEGO, March 24, 2010 (referencing concerns that jittery private guards could accidentally open fire on ordinary Somali fishermen).

¹⁶ Bockman and Katz, *supra* note 15.

¹⁷ *Id.* The video can be viewed by a link from the same article.

skiff's injured or dead driver. The PMSC has defended the actions of its personnel as lawful, stating that the guards feared for their lives. Others in the maritime industry, though, have concluded that the video demonstrates that the guards used excessive force to respond to the alleged attack. They suggest that the guards never fired actual warning shots and that the rapid and sustained rate of gunfire was not an acceptable response to the threat.¹⁸ One worry of the maritime security industry is that other similar incidents are not being reported or investigated for fear of liability or otherwise.¹⁹

One can rationally argue that only states and their navies should be responsible for protecting the world's ships and crews against pirate attacks. Yet, the reality seems to be that at present, all roles in the fight against piracy will not be played only by state navies and United Nations-sanctioned military operations: private armed guards will also be allowed to play a role. This Article accepts the need to adapt to this new reality of increasing privatization of what were once tasks assigned only to states and their militaries.²⁰ At the same time, it urges states as a whole to accept some responsibility for making sure that the private guards who are authorized to use guns to fight pirates in international waters only operate under a clear and coordinated set of laws and guidelines.

This Article continues in Part II with a brief discussion of the problem of modern maritime piracy and the international community's efforts to combat it using naval patrols. Part III provides some background on private armed guards and the types of services they provide. It also outlines some of the risks associated with permitting shippers to hire armed security personnel to provide individualized protection against pirate attacks and describes the maritime industry's evolving stance on the issue. Part IV explores and compares some of the different approaches states have used to address and regulate the use of armed guards in the fight against piracy.

¹⁸ *Id.*

¹⁹ *Id.*; Michelle Wiese Bockman, *Ships With Armed Guards Seen Not Reporting Somali Pirate Strikes*, BLOOMBERG, Oct. 23, 2012.

²⁰ Although employing private armed guards in the fight against piracy is a new phenomenon, states have been using private individuals and firms to supply a wide range of military and security services since the early 1990s. See Jackson Nyamuya Maogoto, *Private Military companies & International Law: Building New Ladders of Legal Accountability & Responsibility*, 11 CARDOZO J. CONFLICT RESOL. 99, 105 (2009). Probably most familiar to readers is the role private military employees played in the recent wars in Afghanistan and Iraq. Indeed, records indicate that as of March 2010, at least 60 different privatized military firms were providing personnel from 30 different countries to support operations in Iraq. Huma T. Yasin, *Playing Catch-Up: Proposing The Creation Of Status-Based Regulations To Bring Private Military Contractor Firms Within The Purview Of International And Domestic Law*, 25 EMORY INT'L L. REV. 411, 415 (2011).

Part V addresses some of the deficiencies in the current approaches and suggests some standards or practices that all states should agree on to help mitigate the risks associated with having a host of private guards wielding weapons on the world's oceans.

II. THE PROBLEM OF MODERN MARITIME PIRACY

A. *The Nature of Modern Maritime Piracy*

Maritime piracy presently plays a prominent role on the global stage. For the past several years, reports of violent attacks on ships and hefty ransom payments to secure the safe release of captain and crew have become a regular feature of the world's daily news.²¹ Although not all of those attacks are linked to Somalia, the emergence of Somali piracy on a grand scale beginning in about the mid-2000s helps explain the increased global threat posed by maritime piracy.²² The International Maritime Bureau (IMB) Piracy Reporting Centre has reported that worldwide pirate attacks between January 2007 and December 2011 numbered 1,850 in total.²³ Attacks during 2009, 2010, and 2011 numbered more than 400 each

²¹ See, e.g., *Hijacked Vietnamese cargo ship expected to be ransomed for \$5 mln*, TALK VIETNAM, Oct. 25, 2012, available at <http://talkvietnam.com/2012/10/hijacked-vietnamese-cargo-ship-expected-to-be-ransomed-for-5-mln/> (reporting on the January 2012 capture of a Vietnamese cargo ship 520 miles off the coast of Oman); *Somali pirates capture supertanker, \$150M of oil*, USA TODAY, Feb. 10, 2011, http://usatoday30.usatoday.com/news/world/2011-02-09-pirates-hijack-supertanker_N.htm (reporting that in February 2011, pirates captured the Greek supertanker *MV Irene* and its two million barrels of oil while the tanker was travelling 900 miles off the coast of Somalia); *Somali Pirates Release Greek-Owned VLCC, Hijack German Cargo Ship the Next Day*, THE MARITIME EXECUTIVE, Apr. 11, 2011, available at <http://www.maritime-executive.com/article/somali-pirates-release-greek-owned-vlcc-mv-irene-sl> (reporting that in April 2011 pirates attacked the *MV Susan K*, a German cargo ship, while it was travelling 35 miles off the coast of Oman); *Somali pirates hijack Russian China-bound oil tanker*, BBC NEWS, May 5, 2010, available at http://usatoday30.usatoday.com/news/world/2011-02-09-pirates-hijack-supertanker_N.htm (reporting that in May 2010 pirates attacked a 96,000 ton oil tanker 560 miles off the Somali coast); Xan Rice & Lee Glendinning, *Pirates anchor hijacked supertanker off Somali coast*, THE GUARDIAN, Nov. 18, 2008, available at <http://www.guardian.co.uk/world/2008/nov/18/somalia-oil> (reporting on the 2008 capture of a Saudi supertanker 450 miles off the coast of Kenya).

²² See, e.g., Jack Lang, Special Adviser on Legal Issues Related to Piracy off the Coast of Somalia, *Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia*, ¶ 12, U.N., Doc. S/2011/30 (Jan. 24, 2011) [hereinafter *Lang Report*] (referencing the increase in Somali piracy in 2005 after a tsunami led to further instability in the country).

²³ See ICC-IMB 2011 Report, *supra* note 3, at 5-6 (providing graphical break-downs of piracy attacks between January 2007 and December 2011). The IMB includes in its annual

year—an amount that exceeds the total reported attacks in 2007 by more than 50 percent.²⁴ The year 2012 started off with some promise that the total number of yearly attacks would be less than in the several prior years,²⁵ but it is not yet time for celebration. Between January and September 2012, 458 seafarers were taken hostage—as compared to 172 during the same time period in 2007.²⁶ Six seafarers were killed by pirates in the first nine months of 2012.²⁷ These are startling numbers even if they are lower than in some prior years. As a recent United Nations Secretary-General Report warns: “Although there are signs of progress, they can easily be reversed.”²⁸

Even if the number of attacks is down, piracy still poses a significant threat to the safe passage of vessels travelling through shared sea lanes. Pirates are sophisticated criminals who use violence to mount their attacks.²⁹ The IMB reports that guns were used in 93 of the attacks which

report acts of piracy and acts of armed robbery against ships, as well as attempts of the same. The IMB’s definition of piracy includes illegal acts of violence against a ship travelling on the high seas or any act of inciting the same. *Id.* at 3. Its definition of armed robbery against ships includes acts of violence—or any act of inciting an act of violence—against a ship located “within a State’s internal waters, archipelagic waters and territorial sea.” *Id.*

²⁴ *Id.* at 5-6 (showing 263 actual and attempted attacks in 2007 as compared to 445 in 2011).

²⁵ See Int’l Chamber of Commerce International Maritime Bureau Report, Jan. 1–Sept. 30, 2012, *Piracy and Armed Robbery Against Ships*, at 5-6 (2012) [hereinafter ICC–IMB 3rd Quarter 2012 Report] (showing a total of 233 actual and attempted attacks for the first three quarters of 2012). As is the case with prior years, the actual number of attacks may be greater than the number reported since the general belief is that shipping companies may underreport to avoid insurance premium increases. See Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT’L L. 436, 440-41 (2010). In fact, the results of a study by the British House of Commons Transport Committee indicated that between twenty-five and fifty percent of maritime piracy crimes may go unreported. James Kraska & Brian Wilson, *The Pirates of the Gulf of Aden: The Coalition Is the Strategy*, 45 STAN. J. INT’L L. 243, 257 (2009).

²⁶ ICC–IMB 3rd Quarter 2012 Report, *supra* note 25, at 11.

²⁷ *Id.*

²⁸ U.N. Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 2020 (2011)*, ¶ 74, U.N. Doc. S/2012/783 (Oct. 22, 2012) [hereinafter *S/2012/783 Report*].

²⁹ *Lang Report*, *supra* note 22, at ¶ 13 (stating that piracy has “become an organized, lucrative and attractive criminal activity undertaken for heinous ends”); LAUREN PLOCH, ET. AL, CONG. RESEARCH SERV., R40528, PIRACY OFF THE HORN OF AFRICA 9 (April 27, 2011) [hereinafter PLOCH 2011] (noting that “some Somali pirate groups have developed sophisticated operational capabilities and have acquired weaponry, equipment, and funds that make them on par with or more effective than the local forces arrayed against them”).

occurred during the first nine months of 2012³⁰ and that most attacks by Somali pirates now involve the use of weapons.³¹ Somali pirates are able to operate hundreds of nautical miles out to sea where they use larger fishing vessels—known as “motherships” (often acquired by acts of piracy)—from which to mount their attacks.³² From these motherships, the pirates use small maneuverable skiffs powered with large outboard motors.³³ With the help of AK-47 rifles and rocket propelled grenade launchers, today’s pirates have successfully attacked some of the world’s largest supertankers.³⁴

But, pirate attacks do not just harm individuals travelling on the ships that are captured. Piracy threatens the world economy and global trade more generally since 90% of the world’s goods move by sea.³⁵ When pirates attack ships carrying supplies like oil, they threaten world energy supplies.³⁶ Piracy also threatens the delivery of humanitarian assistance to the Horn of Africa.³⁷ Somali piracy is a particular threat since 40% of world trade passes through the Indian Ocean, the Gulf of Aden, and the Arabian Sea.³⁸ While Somali pirates at one time operated within a concentrated geographical area in the waters off the coast of Somalia and the Gulf of Aden, they have more recently expanded their reach further into the Indian Ocean.³⁹

Moreover, the increasingly hefty ransoms paid to guarantee the release of innocent seafarers necessarily provide an incentive for pirates to

³⁰ ICC-IMB 3rd Quarter 2012 Report, *supra* note 25, at 11.

³¹ *Id.* at 21.

³² See LAUREN PLOCH, ET. AL, CONG. RESEARCH SERV., R40528, PIRACY OFF THE HORN OF AFRICA 11 (April 19, 2010) [hereinafter PLOCH 2010].

³³ *Id.*

³⁴ *Somali pirates capture supertanker, \$150M of oil*, USA TODAY, Feb. 10, 2011, available at http://usatoday30.usatoday.com/news/world/2011-02-09-pirates-hijack-supertanker_N.htm (reporting the capture of the Greek supertanker *MV Irene*); *Somali Pirates Release Greek-Owned VLCC, Hijack German Cargo Ship the Next Day*, THE MARITIME EXECUTIVE, Apr. 11, 2011, available at <http://www.maritime-executive.com/article/somali-pirates-release-greek-owned-vlcc-mv-irene-sl> (reporting the capture of the *MV Susan K*, a German cargo ship).

³⁵ FOREIGN AFFAIRS COMMITTEE 2012 REPORT, *supra* note 7, at 15.

³⁶ For example, in 2011, pirates seized the *Irene SL*, a tanker carrying two million barrels of Kuwaiti oil to the United States. John Stewart, *Somali Pirates: Steep Rise in Attacks*, NEWS-INSURANCES, Mar. 28, 2011, available at <http://www.newsinsurances.co.uk/somali-pirates-steep-rise-in-attacks/0169475872>.

³⁷ About ninety-five percent of humanitarian aid provided by the World Food Program is transported by sea. See U.N. Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 1846 (2008)*, ¶ 25, U.N. Doc. S/2009/146 (Mar. 16, 2009).

³⁸ FOREIGN AFFAIRS COMMITTEE 2012 REPORT, *supra* note 7, at 15.

³⁹ See Bowden & Basnet, *supra* note 1, at 8.

continue their illegal and violent activities. Pirates apparently received about \$170 million in ransom payments during 2011—a huge increase from the total of \$110 million they received in 2010. In fact, the ransoms paid to pirates “have increased sevenfold in the last five years”: average ransoms increased from about \$600,000 in 2007 to about \$5 million in 2011.⁴⁰

B. The International Community’s Coordinated Naval Efforts to Combat the Threat of Modern Maritime Piracy

That maritime piracy remains a significant threat does not mean that the international community has not engaged in some coordinated efforts to combat it. In 2007, some countries began providing naval escorts to the World Food Program ships delivering humanitarian aid.⁴¹ Since then, those naval escorts have accompanied about 150 vessels carrying essential humanitarian assistance.⁴² Beginning in late 2008, countries also began contributing naval resources to more generally conduct counter-piracy operations. Multi-national naval forces (Combined Task Forces 150, 151, and 152), involving 27 different states, operate around the Gulf of Aden, the Arabian Sea, and the Indian Ocean with the stated aim of deterring, disrupting, and suppressing acts of piracy.⁴³ These forces have been joined by others, such as the European Union’s combined naval force (Atalanta).⁴⁴ The Council of the European Union has authorized the Atalanta to continue operating until December 2014 and allowed it to expand the reach of its activities to the coast of Somalia and its internal waters.⁴⁵ NATO has also sent ships on anti-piracy missions to the Horn of Africa.⁴⁶ Other states,

⁴⁰ FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at 55-56. Some ransoms recently paid to Somali pirates have been significantly higher. In fact, in February 2011, pirates were paid about \$13.5 million in ransom to release the *MV Irene*, a supertanker carrying 2 million barrels of Kuwaiti oil destined for the United States and estimated to be worth \$200 million. Bowden & Basnet, *supra* note 1, at 11.

⁴¹ See, e.g., European Security and Defence Assembly [ESDA], Assembly of Western European Union, *Report: The Role of the European Union in Combating Piracy*, at 8, ESDA Doc. No. A/2037 (June 4, 2009) [hereinafter *Report: The Role of the European Union in Combating Piracy*]; ROGER MIDDLETON, PIRACY IN SOMALIA: THREATENING GLOBAL TRADE, FEEDING LOCAL WARS 7 (2008), available at http://www.chathamhouse.org/files/12203_1008piracysomalia.pdf. In March 2010, China offered to deploy naval forces to assist European Union forces that were escorting World Food Program ships. PLOCH 2010, *supra* note 32 at 16.

⁴² See, e.g., S/2012/783 Report, *supra* note 28, at ¶ 34.

⁴³ See, e.g., FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 44.

⁴⁴ See, e.g., *id.* at ¶ 44. See also Peter Chalk, *Piracy Off the Horn of Africa: Scope, Dimensions, Causes and Responses*, BROWN J. WORLD AFF., Spring/Summer 2010, at 98.

⁴⁵ See, e.g., S/2012/783 Report, *supra* note 28, at ¶ 34.

⁴⁶ See, e.g., *id.* at ¶ 35; Chalk, *supra* note 44, at 98; PLOCH 2010, *supra* note 32, at 24.

including Russia, China, India, South Korea, Japan, Malaysia, and Singapore, have complemented these multi-national operations by sending their own ships to patrol in the waters off the Somali coast.⁴⁷ In total, between 10 and 16 naval ships conduct anti-piracy missions in the Gulf of Aden and Indian Ocean on any given day.⁴⁸

Since 2008, the United Nations Security Council has backed these coordinated naval efforts to counter piracy with a number of resolutions authorizing military action against Somali pirates at sea and on Somali territory.⁴⁹ In Resolution 1816, adopted on June 2, 2008, the Security Council authorized coalition navies cooperating with the Transitional Federal Government (TFG) for Somalia to enter the territorial waters of Somalia and use “all necessary means to repress acts of piracy and armed robbery” for an initial period of six months.⁵⁰ That authorization was extended for one year under Security Council Resolution 1846, dated December 2, 2008.⁵¹ By Resolution 1851, on December 16, 2008, the Security Council authorized even broader military action to combat piracy, allowing states to use land-based operations in Somalia to fight piracy.⁵² On November 30, 2009, the Security Council further extended the scope of allowable anti-piracy operations in Somalia’s territorial waters for another 12 months.⁵³ Recent Security Council resolutions urge states to continue contributing to the naval forces that patrol the pirate-infested waters off the coast of Somalia.⁵⁴

All of these coordinated naval efforts have likely contributed to the present reduction in the total number of reported attacks and attempted attacks.⁵⁵ In fact, naval forces apparently “thwarted 126 attacks in 2008, 176 in 2009 and 127 in 2010.”⁵⁶ Furthermore, no World Food Program ship has been hijacked since they began receiving escorts from the world’s

⁴⁷ See, e.g., FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 44.

⁴⁸ See Bowden & Basnet, *supra* note 1, at 25.

⁴⁹ See S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res. 1838, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

⁵⁰ See S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

⁵¹ See S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

⁵² See S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

⁵³ See S.C. Res. 1897, U.N. Doc. S/RES/1897, ¶ 7 (Nov. 30, 2009).

⁵⁴ See, e.g., S.C. Res. 1950, U.N. Doc. S/Res/1950, at 4 (Nov. 23, 2010); S.C. Res. 2020, U.N. Doc. S/Res/2020, at 5 (Nov. 22, 2011).

⁵⁵ See, e.g., *S/2012/783 Report*, *supra* note 28, at ¶ 4 (noting that the actions by the naval forces have aided in reducing the number of successful pirate attacks).

⁵⁶ *Lang Report*, *supra* note 22, at ¶ 39.

navies.⁵⁷ Similarly, ships travelling through the Gulf of Aden corridor have not been successfully attacked since naval forces began organizing commercial shipping vessels into transit groups. This process allows the navies to closely watch a designated number of ships to which they can promptly respond should they receive distress calls.⁵⁸ The naval forces have also successfully captured pirates who have attacked or attempted to attack ships at sea. Reports indicate that between January and August 2009 alone, the world's naval forces "encountered" more than 500 pirates, 10 of whom were killed, 282 of whom were disarmed and released, and 235 of whom were transferred for prosecution.⁵⁹

C. The Continuing Threat of Maritime Pirate Attacks Despite The Coordinated Naval Patrols

The threat of maritime piracy, though, persists despite that fact that the international community is spending more than \$1 billion annually to support the various naval patrols.⁶⁰ The world's navies have thwarted some attacks, and the number of attacks may be down somewhat in year 2012, but the threat posed by piracy remains real to individual seafarers and the international community. And, until only this year, the number of pirate attacks was growing in absolute terms, even as the navies patrolled in an effort to help secure the safe passage of ships.⁶¹

Some blame the navies' general "catch and release" policies to help explain the continued prevalence of piracy.⁶² According to some reports,

⁵⁷ FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 49.

⁵⁸ *Id.* at ¶ 50.

⁵⁹ PLOCH 2010, *supra* note 32, at 22.

⁶⁰ See Bowden & Basnet, *supra* note 1, at 27 (estimating that in 2011, nations spent about \$1 billion deploying the various naval patrols conducting anti-piracy missions in the Gulf of Aden and Indian Ocean).

⁶¹ See, e.g., *Lang Report*, *supra* note 22, at ¶ 39 (stating that the number of pirate attacks was increasing year over year notwithstanding the significant anti-piracy naval missions); FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at 3 (stating that the naval operations, among other things, had failed to "contain the growth in the overall number of attacks and the areas in which pirates can operate).

⁶² U.N. Secretary-General, *Report of the Secretary-General on Possible Options To Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia, Including, in Particular, Options for Creating Special Domestic Chambers Possibly with International Components, a Regional Tribunal or an International Tribunal and Corresponding Imprisonment Arrangements, Taking into Account the Work of the Contact Group on Piracy off the Coast of Somalia, the Existing Practice in Establishing International and Mixed Tribunals, and the Time and Resources Necessary To Achieve and Sustain Substantive Results*, ¶ 9, U.N. Doc. S/2010/394 (July 6, 2010) ("In order to be effective, operations apprehending suspects should result in

about 90% of pirates are captured are released, rather than transferred to stand trial for their actions.⁶³ Recent figures indicate that between 2006 and September 2012, about 1,186 suspected pirates have been prosecuted or await prosecution in 21 states.⁶⁴ Yet, this is only a small fraction of the number of pirates who have been captured attacking or attempting to attack ships.⁶⁵

Unless states are prepared to prosecute sufficient numbers of pirates to send a signal that their criminal acts will not be tolerated, they must stop pirates before they are able to mount their attacks.⁶⁶ The anti-piracy naval patrols, however, simply do not have the capacity to secure the safe passage of every transiting ship.⁶⁷ In many cases pirates are able to board and take hostages within fifteen to thirty minutes of being sighted—an amount of time too short for a naval ship to respond unless it is only a few miles away.⁶⁸ Indeed, the world's "naval forces have found it difficult to monitor pirates and to respond swiftly to attacks."⁶⁹ According to the United Kingdom's Major General Howes (Operation Commander of Atalanta), about "83 [ships] would be needed in order to provide response conditions of half an hour."⁷⁰ William Wechsler, the United States Deputy Assistant Secretary of Defense for Counternarcotics and Global Threats, offers a more pessimistic view, suggesting that pirates now operate within an area of approximately 2.9 million nautical miles and that all the navies in the world could not possibly protect such a space.⁷¹

Thus, while naval ships have been successful in thwarting some pirate attacks, at present they do not have the capacity to protect every ship

prosecutions. The risk otherwise is that suspects are released at sea, repatriated, and return to commit further acts of piracy or armed robbery at sea.").

⁶³ See *Lang Report*, *supra* note 22, at ¶¶ 42-43.

⁶⁴ See *S/2012/783 Report*, *supra* note 28, at ¶ 44.

⁶⁵ See *Lang Report*, *supra* note 22, at ¶¶ 42-43.

⁶⁶ See, e.g., FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at 40 (noting that simply returning pirates to sea or to the land may disrupt their activities, but will likely have no long-term deterrent effect).

⁶⁷ See Bowden and Basnet, *supra* note 1, at 25. See also FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 51 (noting that as naval operations have become more successful at ensuring ships safe passage through the Gulf of Aden corridor, pirates have expanded their activities into the larger Indian Ocean).

⁶⁸ See, e.g., PLOCH 2011, *supra* note 29, at 10-11.

⁶⁹ FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 51.

⁷⁰ *Id.*

⁷¹ David C. Ake, *Defense Official: More Private Security Needed Aboard Ships to Combat Piracy*, NATIONAL DEFENCE MAGAZINE (June 16, 2011), <http://www.nationaldefensemagazine.org/blog/Lists/Posts/Post.aspx?ID=447>.

travelling through the Indian Ocean. Moreover, there is reason to believe that states will provide fewer naval resources for counter-piracy efforts in the upcoming years because of budgetary pressures.⁷² This state of affairs has caused some stakeholders in the fight against piracy to focus on the role private armed guards might play in protecting ships, cargo, and crews against attacks.⁷³ The recent increased reliance on armed guards to assist in the fight against maritime piracy and the risks associated with relying on them is discussed in Part III below.

III. USING PRIVATE ARMED GUARDS IN COUNTER-PIRACY OPERATIONS

A. *Shippers Pay for Private Armed Guards to Fill the Security Gap in Naval Counter-Piracy Operations*

The apparent security gap left open by the limitations of the world's navies caused shippers to begin calling for more protection for their ships when travelling through pirate-infested waters. In response, some 200 to 300 PMSCs emerged—the bulk of which were created in 2011.⁷⁴ These companies, which claim to offer some sort of maritime security, now provide armed escorts for 50% or more of the vessels transiting through areas carrying a high risk of pirate activity.⁷⁵ Most companies providing these maritime security services are British or American and are often founded or staffed by retired military personnel, including those who were in Special Forces units.⁷⁶ The cost of hiring private guards is not cheap: a

⁷² Bowden & Basnet, *supra* note 1, at 25.

⁷³ FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 25 (noting that some in the shipping industry have called on states to allow them to pay to have armed military personnel on board their ships when transiting through pirate-infested waters); PLOCH 2011, *supra* note 29, at 36 (noting that some industry representatives have argued for being able to hire armed security teams to ride on their ships so as to deter and respond to pirate attacks).

⁷⁴ Brown, *supra* note 7, at 2, 4; Erwin, *supra* note 8.

⁷⁵ See *Piracy: A Threat to Maritime Security and the Global Economy*, DIIRAD, Nov. 14, 2012, <http://www.diirad.com/news-in-english/4298-piracy-a-threat-to-maritime-security-and-the-global-economy-.html> (estimating that about 60% of ships now hire private guards for protection); *Piracy and private security: Laws and guns*, THE ECONOMIST (Apr. 14, 2012) (estimating that private armed guards patrol the decks of about 40% of the vessels travelling in pirate-infested waters).

⁷⁶ See FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 26 (estimating that 50% of PMSCs are British-owned or operated); *Piracy and private security: Laws and guns* (stating that most companies are British and started by Special Forces retirees); Brown, *supra* note 7, at 5 (stating that most PMSCs are British or American).

PMSC's services to secure a safe passage can range anywhere from \$15,000 to \$100,000, depending on the number and quality of the guards employed, the ship's size and vulnerability, and the length of the trip.⁷⁷ On the other hand, the expense may be warranted. Apparently as of mid-2012, no commercial ship carrying armed guards has been hijacked by pirates.⁷⁸ Moreover, some insurance companies offer significant discounts to vessels employing armed security when travelling through areas posing a high risk of pirate attacks.⁷⁹

PMSCs provide armed guards in one of two ways: using ship borne armed protection teams or armed convoy escort vessels.⁸⁰ Ship borne armed protection teams are typically comprised of anywhere from between three to ten guards who have prior naval or military training.⁸¹ These guards will often embark with "body armour, medical kits, satellite communications, night-vision equipment and weapons."⁸² There is no standard type of weapon employed by PMSCs, and a decision on what weapons to provide their personnel may vary from firm to firm and also depend on the nature of the voyage. Thus, armed guards may be equipped with pistols, shotguns, or even machine guns and sniper rifles.⁸³ So that they can provide security in the waters most prone to pirate attacks, these protection teams will usually embark from ports near the Gulf of Aden and disembark some days later in southern Sri Lanka.⁸⁴

A difficulty ship owners and operators must address when seeking to place armed guards on their ships relates to the boarding of weapons. Shippers carrying arms must comply with the flag state laws⁸⁵ and the laws

⁷⁷ Christopher Spearin, *Private Military and Security Companies v. International Naval Endeavours v. Somali Pirates: A Security Studies Perspective*, 10 J. OF INT'L CRIM. JUSTICE 823, 828 (2010).

⁷⁸ Ince & Co., *Shipping: Piracy—Issues Arising from the Use of Armed Guards*, 2012 available at <http://incelaw.com/misc/Piracy-issues-arising-from-the-use-of-armed-guards/Piracy-Issues-arising-from-the-use-of-armed-guards>.

⁷⁹ *Ship Insurers Offers Discount for Armed Guards on Ship*, SHIPPING HERALD: THE MARITIME PORTAL, Oct. 24, 2011, available at <http://www.shippingherald.com/Admin/ArticleDetail/ArticleDetailsInsurance/tabid/121/ArticleID/1366/Ship-Insurers-Offers-Discount-for-Armed-Guards-on-Ship.aspx> (reporting that some insurance companies offer premium reductions of up to 35% for ships with armed guards, a resulting savings of thousands of dollars for some high-value ships).

⁸⁰ Spearin, *supra* note 77, at 827.

⁸¹ Spearin, *supra* note 77, at 827; Brown, *supra* note 7, at 6.

⁸² Brown, *supra* note 7, at 6.

⁸³ SMALL ARMS SURVEY 2012, *supra* note 6, at 208.

⁸⁴ *Id.*

⁸⁵ As noted above, ships fly the flag of a single state, which is ordinarily the state of the

of the state where they are incorporated. They must also comply with the laws of coastal states through which they transit.⁸⁶ Allowing for transparency in PMSC arms procurement and transport, some coastal states reportedly permit PMSCs to store their weapons in their ports and sign them on and off the ships they are assigned to protect.⁸⁷ Other states, however, have strict laws forbidding foreign weaponry in their territories,⁸⁸ while some only allow certain types of weapons.⁸⁹ One outcome of what is a complex web of legal requirements relating to the carriage and transport of arms is that some PMSCs are dumping weapons at sea to avoid violating arms regulations when calling at ports or disembarking at a final destination.⁹⁰ Another way that PMSCs avoid coastal state regulations is by stocking “floating armories” on the high seas.⁹¹ This arrangement allows their personnel to embark on the ship without weapons, but obtain the required weapons once outside of territorial waters.⁹²

On the other hand, some coastal states have embraced the profit opportunity associated with the recent rise of the PMSC industry and shippers’ interest in securing armed protection when travelling through pirate-infested waters. For example, Djibouti is reportedly selling annual permits to PMSCs for \$150,000 or more to allow them to operate from its ports with weapons.⁹³ Djibouti also has a program whereby PMSCs can pay to rent and embark government-owned weapons—including fully automatic weapons. Sri Lanka runs a similar program from its port in Galle, allowing PMSCs to rent government-owned weapons—again

ship’s owners. However, in some cases ships fly “flags of convenience,” which describes the practice of registering under a sovereign state different from the ship’s owners. Flags of convenience jurisdictions are “open registry” states and typically allow ship owners to enjoy lower taxes and less stringent regulations than might the ship’s home state. International Transport Workers’ Federation, FOC Countries, <http://www.itfglobal.org/flags-convenience/sub-page.cfm>. “Closed registry states,” like the United States, by contrast, impose relatively strict registry and licensing criteria. Michael A. Becker, *The Shifting Public Order of the Oceans: Freedom of Navigation and the Interdiction of Ships at Sea*, 46 HARV. INT’L L.J. 131, 142 (2005).

⁸⁶ SMALL ARMS SURVEY 2012, *supra* note 6, at 208.

⁸⁷ *Id.* at 209.

⁸⁸ Carolin Liss notes in this regard that it is almost impossible for a private security company to obtain permission for their employees to carry weapons in Singapore. Carolin Liss, *The Privatisation of Maritime Security—Maritime Security in Southeast Asia: Between a rock and a hard place?*, Asia Research Centre, Working Paper No. 141 (Feb. 2007).

⁸⁹ SMALL ARMS SURVEY 2012, *supra* note 6, at 209.

⁹⁰ *Id.* at 210.

⁹¹ Brown, *supra* note 7, at 6.

⁹² Brown, *supra* note 7, at 6.

⁹³ SMALL ARMS SURVEY 2012, *supra* note 6, at 210.

including fully automatic weapons. PMSCs wishing to rent the weapons must also agree to embark a retired or off-duty Sri Lankan military officer to monitor the use of weapons on board the ship.⁹⁴ Yemen has taken a different approach and is reportedly renting out its own military personnel to escort ships travelling through the Gulf of Aden.⁹⁵

Armed convoy escort vessels are another option offered by some PMSCs to their private clients seeking individualized counter-piracy services. PMSCs offering this service generally rely on small vessels armed with small crews to conduct these escorts.⁹⁶ Some companies, though, have grander plans. For example, reports indicate that the private company, Typhon, will offer the services of three large boats, each fitted with machine guns and manned with 40 guards carrying rifles.⁹⁷ Both the smaller and larger escort vessels operate by accompanying the client's ship on its travels and challenging any suspicious boats that attempt to approach so as to deter any potential attacks.⁹⁸ One advantage for ship owners choosing to employ armed convoy escort vessels is that they seemingly avoid the difficulties and legal issues associated with carrying weapons on board since the escort vessels operate separately from the client's ship.⁹⁹

In addition to PMSCs, however, some governments hire out their naval or military personnel to provide security for commercial ships travelling through the Indian Ocean.¹⁰⁰ Known as vessel protection detachments, or VPDs, these privately hired military teams also offer armed protection against pirate attacks. For example, the Netherlands does not permit its shipping companies to employ PMSCs, citing concerns that allowing private guards would undermine the state's monopoly on the use of force. Accordingly, in 2011, it began offering VPDs to its shippers, the cost of which is mostly borne by the private shipping company.¹⁰¹ Several

⁹⁴ *Id.*

⁹⁵ *Id.* at 210-11.

⁹⁶ Spearin, *supra* note 77, at 828.

⁹⁷ Martin Plaut, *Private patrol boats to tackle Somali pirates*, BBC WORLD SERVICE AFRICA, May 30, 2012, available at <http://www.bbc.co.uk/news/world-africa-18209357>.

⁹⁸ Brown, *supra* note 7, at 7.

⁹⁹ *Id.*

¹⁰⁰ Brown, *supra* note 7, at 8.

¹⁰¹ Justin Stares, *The international community has 'failed' to tackle piracy*, DEFENCE MANAGEMENT JOURNAL, Feb. 28, 2012, available at

http://www.defencemanagement.com/feature_story.asp?id=18807. Apparently, however, the costs of hiring VPDs so exceeds the cost of hiring private armed guards employed with PMSCs that some Dutch shippers simply skirt the law and hire private guards from PMSCs. *Id.* See also *Dutch Shipowner to Flag Out Over Ban On Armed Guards*, Nov. 15, 2011, INTERMANAGER, <http://www.intermanager.org/2011/11/dutch-shipowner-to-flag-out->

other states, including France, Spain, Israel, and Italy have also hired out their military personnel to guard merchant vessels flying the state's flag.¹⁰²

Indeed, the fact that Italy hired out some of its marines to help guard the Italian ship *MV Enrica Lexie* as it was travelling from Singapore to Egypt in early 2012 has become international news. Two of those Italian marines were arrested by India for having shot two Indian fishermen the marines believed to be pirates. The marines were thereafter detained and arrested on manslaughter charges despite Italy's argument that they enjoy absolute sovereign immunity from foreign prosecution as agents of the Italian state.¹⁰³ Nevertheless, some in the shipping industry express a preference for VPDs over hiring guards employed with PMSCs, in part because they believe that state military personnel will necessarily be properly trained and responsive to authority.¹⁰⁴ Some apparently also believe that military personnel can more easily move weapons through ports and that they have more certain legal status than private contractors to protect them against foreign prosecutions should their actions cause any injury or death.¹⁰⁵ Of course, the *Enrica Lexie* incident should serve as a warning that even military personnel hired out as part of VPDs have no certain status entitling them to immunity from foreign arrest and prosecution.

over-ban-on-armed-guards/ (reporting that one Dutch ship owner planned to register his ships in another state because Dutch laws forbid hiring armed guards from PMSCs). In July 2012, the Dutch Minister of Defence announced that the government was reducing the cost to shippers of hiring these VPDs. *Defence organization makes security for merchant shipping cheaper*, July 13, 2012, available at http://www.defensie.nl/english/latest/news/2012/07/13/48197582/Defence_organisation_makes_security_for_merchant_shipping_cheaper

¹⁰² FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 25.

¹⁰³ See, e.g., Amrutha Gayathri, *Enrica Lexie: Italy Urges India to Release Detained Marines*, INTERNATIONAL BUSINESS TIMES, March 12, 2012, <http://www.ibtimes.com/enrica-lexie-italy-urges-india-release-detained-marines-423740>; *India allows Italian ship Enrica Lexie to leave*, BBC NEWS, May 2, 2012, <http://www.bbc.co.uk/news/world-asia-india-17920840>.

¹⁰⁴ FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 25.

¹⁰⁵ See, e.g., *Piracy Against United States-Flag Vessels: Lessons Learned: Hearing Before the Subcomm. on Coast Guard & Mar. Transp. Of the H. Comm. on Transp. & Infrastructure*, 111th Cong. 2 (2009) (statement of Arthur J. Volkle, Jr., Vice President of American Cargo Transport, Inc.), available at http://www.marad.dot.gov/documents/Testimony-Arthur_Volkle,Jr-American_Cargo_Transport.pdf [hereinafter Volkle Statement] (“Military security avoids regulatory shortfalls, liability concerns, and international reluctance to permit armed merchant vessels into their ports.”).

B. The Risks and Difficulties Associated with Allowing Shippers to Hire Private Armed Guards

The present situation in which shippers are hiring private armed guards to provide them with anti-piracy protection is somewhat surprising given that only a few years ago industry organizations and states were generally opposed to the idea of private armed guards, preferring to allow only naval fleets to provide anti-piracy protection.¹⁰⁶ One main argument against using armed guards on commercial ships emphasizes the risk of escalating violence.¹⁰⁷ Piracy has already become more violent over the last several years, and if pirates know that ships are prepared to use lethal weapons to repel attacks, pirates may respond more forcefully.¹⁰⁸ The United Kingdom's Dr. McCafferty, Head of Counter-Terrorism and UK Operational Policy at the Ministry of Defense, explained that the presence of armed guards on ships may not only lead to an escalation of violence but may also "just encourage pirates, in acts of desperation, to arm themselves more."¹⁰⁹ Other commentators are willing to assume that having armed security on board may actually deter pirates from striking that particular ship so as to avoid a potentially deadly fight. However, they point out that other ships without such protection may then be especially and unfairly vulnerable to pirate attacks.¹¹⁰

Ship owners that hire private armed guards also face the additional complication of having to comply with flag and port state regulations on the carriage and transport of weapons.¹¹¹ For example, South Africa recently announced that it will not allow ships travelling through its waters to carry private armed guards; only military personnel will be allowed to provide protection on ships.¹¹² In the Seychelles, police apparently board commercial ships and lock the weapons armory. In Mauritius, ships must release any weapons on board to the local police to be stored.¹¹³ Some commentators, in fact, have described the need to comply with varying and

¹⁰⁶ FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 26.

¹⁰⁷ *See, e.g., id.* at ¶ 27.

¹⁰⁸ Arabella Thorp, *Preventing and prosecuting piracy at sea: legal issues*, HOUSE OF COMMONS LIBRARY, Feb. 28, 2012, at 11, available at <http://www.parliament.uk/briefing-papers/SN06237>.

¹⁰⁹ FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 27.

¹¹⁰ *Id.* at ¶ 28.

¹¹¹ *Id.* at ¶ 41; Volkle Statement, *supra* note 105, at 4.

¹¹² Aislinn Laing, *South Africa wrecks UK anti-piracy plan*, DAILY TELEGRAPH, Apr. 23, 2012, available at 2012 WLNR 85235202.

¹¹³ Mark Lowe, *Floating Armouries*, MARITIME SECURITY REVIEW, March 13, 2012, available at <http://www.marsecreview.com/2012/03/floating-armouries/>.

shifting state weapons laws as one of the greatest burdens faced by ships seeking to use armed security personnel to protect their ships—and the reason why some private security companies are stocking “floating armories” on the high seas.¹¹⁴ Yet, such “floating armories” operate in a legal gray area without any international or national regulations governing their use, resulting in concerns that the companies using them are not applying minimum safety standards when storing arms and ammunition.¹¹⁵ Estimates as of mid-2012 indicate that approximately 18 vessels were operating as “floating armories” on the high seas,¹¹⁶ carrying approximately 7,000 weapons.¹¹⁷

There are additional reasons to be wary of wholly embracing private armed guards as the potential solution to the maritime piracy problem. Although guards may be able to repel attacks, concerns have been raised about “cowboy” security companies engaging in illegal activities.¹¹⁸ The evidence suggests, for example, that the PMSCs are operating the “floating armories” and thereby causing potential threats to lives, peace, and security.¹¹⁹ By contrast, when the Netherlands hires out its VPDs, it makes arrangements for the legal transport of weapons: for example, Singapore has agreed that the Netherlands’ VPDs may store weapons in Singapore’s port.¹²⁰

Others argue that untrained guards operating on the high seas are

¹¹⁴ Ince & Co., *supra* note 78; Katherine Houreld, *AP Newsbreak: Piracy fighters using floating armories*, BLOOMBERG BUSINESSWEEK, March 22, 2012, available at <http://www.businessweek.com/ap/2012-03/D9TLKOV00.htm>.

¹¹⁵ Letter dated 11 July 2012 from the Chair of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council, Annex 5.4, ¶ 10, U.N. Doc. S/2012/544 (July 13, 2012) [hereinafter U.N. Doc. S/2012/544].

¹¹⁶ *Id.* at Annex 5.4, ¶ 9.

¹¹⁷ *Id.* at ¶ 73.

¹¹⁸ FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 39. See also Nikki Gee, *Should armed guards defend ships against piracy*, THE MOVER, June 27, 2011, <http://www.themover.co.uk/international-news/2011/06/27/should-armed-guards-defend-ships-against-piracy> (quoting a representative of Royal United Services Institute for Defence and Security as questioning the trustworthiness of some private security companies); Alice Priddy & Stuart Casey-Maslen, *Counter-piracy Operations by Private Maritime Security Contractors: Key Legal Issues and Challenges*, 10 J. OF INT’L CRIM. JUSTICE 839, 842 (2012) (noting the issue of whether all PMSCs are of the same professional caliber).

¹¹⁹ U.N. Doc. S/2012/544, *supra* note 115, at ¶ 74.

¹²⁰ *Singapore supports antipiracy mission in Gulf of Aden*, March 8, 2012, available at http://www.defensie.nl/english/latest/news/2012/03/08/48193981/Singapore_supports_anti_piracy_mission_in_Gulf_of_Aden.

shooting indiscriminately and unnecessarily killing pirates and innocent fishermen.¹²¹ Indeed, the belief that government military personnel are well-trained and prepared to act lawfully or face the necessary consequences is one reason why some industry representatives and states have shown a preference for using them in the fight against piracy.¹²² After all, as Admiral Baumgartner pointed out in his testimony before Congress, when one brings armed guards upon a vessel, one must make sure they are fully qualified to use their weapons and that they have a “well thought-out, well-coordinated and rehearsed practice method” of using them.¹²³ Yet, not all private guards are necessarily well-trained, and in any event, private guards are not operating under a military chain of command or subject to military discipline when hired to protect an individual ship.

Another problem, however, is that no international standard governs the lawful use of force that guards may use to repel a pirate attack. Generally speaking, because PMSC personnel are private citizens, they may only use lethal force to stop a pirate attack in self-defense or defense of others.¹²⁴ Guards will have to look to flag state law and the law of the territories in which they are operating in order to determine precisely what conduct by alleged pirates will suffice to trigger the right to respond with lethal force and what steps guards must take, if any, before responding with such force.¹²⁵ Any use of excessive and unauthorized force will subject the guards to potential criminal and civil liability—in the flag state and in the state territory where they used force.¹²⁶ Thus, at present, even if the guards

¹²¹ Bockmann and Katz, *Shooting to Kill Pirates Risks Blackwater Moment*, *supra* note 15.

¹²² FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 25; Volkle Statement, *supra* note 105, at 4.

¹²³ *House Comm. on Transportation and Infrastructure, Subcomm. on Coast Guard and Maritime Transportation Holds a Hearing on International Piracy on the High Seas*, 111th Cong. (Feb. 4, 2009) (statement of Admiral William D. Baumgartner).

¹²⁴ Priddy & Casey-Maslen, *supra* note 118, at 844-45.

¹²⁵ See FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 34 (stating that private armed security would have to comply with United Kingdom laws on the use of force if sailing on a ship flagged by the country).

¹²⁶ General principles of international law also likely allow a state to exercise jurisdiction over crimes committed on the high seas that began on a ship flagged by another state but concluded on the state’s own flagged ship. See Joseph William Davids, *Jurisdiction and Diplomacy on the High Seas: India vs. Italy*, THE {NEW} INTERNATIONAL LAW, Feb. 29, 2012, available at <http://thenewinternationallaw.wordpress.com/2012/02/29/jurisdiction-and-diplomacy-on-the-high-seas-india-vs-italy/> (noting that Italy disputes India’s right to exercise jurisdiction over the *Enrica Lexie* Italian marines if the shooting occurred on the high seas, but suggesting that under international law, the “objective” territorial principle allows a state to exercise jurisdiction over crimes occurring on the high seas that began on one flagged ship but ended on the state’s flagged ship). See also Douglas Guilfoyle, *Shooting fisherman mistaken for pirates: jurisdiction, immunity, and State responsibility*,

are correct that any use of force was proper under the laws of the flag state, the territorial state could conclude that those same actions violated its laws.

It is true that states sometimes waive their rights to assert jurisdiction over particular actors and conduct by way of grants of immunity. In the context of the fight against maritime piracy such immunity probably only applies, however, to military personnel acting in the course of their official duties.¹²⁷ For example, states often enter into Status of Forces Agreements (SOFAs), which are treaties between states that typically grant the state sending military personnel into another state's territory primary concurrent jurisdiction over offenses committed by its personnel while acting in the line of duty.¹²⁸ But, PMSC personnel are essentially private citizens and therefore entitled to special immunity from foreign suits should they use excessive force to repel what they believe is a pirate attack.¹²⁹

Even so, the outcome of the *Enrica Lexie* shooting incident shows that when military personnel are hired out in their private capacity, they too may not be granted immunity from another state's exercise of criminal jurisdiction over their activities. That shooting involved trained Italian marines who were part of a government-offered VPD, but whom the Indian government claims killed innocent fishermen without provocation.¹³⁰ On the question of jurisdiction, the Italian government has argued that the marines are entitled to functional immunity from foreign prosecution because they were acting as an organ of the Italian state and because the shooting occurred in international waters.¹³¹ The Indian government has rejected that argument, asserting instead that it has jurisdiction over the shooting offense because the marines shot Indians on an Indian boat. The Italian government recently settled civil charges brought on behalf of the

EJIL: TALK!, March 2, 2012, available at <http://www.ejiltalk.org/shooting-fishermen-mistaken-for-pirates-jurisdiction-immunity-and-state-responsibility/> (explaining that as a general principle of international law that an "offence commenced on a vessel of flag State A which has fatal consequences aboard the vessel of flag State B can be subject to the criminal law of both A and B").

¹²⁷ Guilfoyle, *supra* note 126.

¹²⁸ David Scheffer, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. OF CRIM. L. & CRIMINOLOGY 983, 1013 (2008); Richard J. Erickson, *Status of Forces Agreements: A Sharing of Sovereign Prerogative*, 37 AIR FORCE L. REV. 137, 137 (1994).

¹²⁹ Priddy & Casey-Maslen, *supra* note 118, at 844-46.

¹³⁰ Alan Katz, *Brother Shot Dead Fishing Tests Armed Guards' Accountability*, BLOOMBERG, Nov. 29, 2012, available at <http://www.bloomberg.com/news/2012-11-29/brother-shot-dead-fishing-tests-armed-guards-accountability.html>.

¹³¹ Gayathri, *supra* note 103.

dead fisherman—for reported sums of \$180,000 each.¹³² As of mid-December 2012, however, criminal charges against the two marines remained pending.¹³³ Accordingly, the *Enrica Lexie* incident demonstrates that not all states will necessarily conclude that military personnel hired to provide private protection for a commercial vessel will be immune from prosecution for violating the state’s criminal laws.

Finally, adding private armed guards to a ship that is under the control of a captain responsible for the safety of the ship and crew can create additional issues about when and how the use of force is authorized and who may be liable for any excessive use of force.¹³⁴ On the one hand, the armed guards are tasked with repelling pirate attacks and likely believe that a decision on whether to use lethal force should rest with the security team.¹³⁵ On the other hand, international regulations and longstanding practice rest ultimate authority for the safety of life at sea with the ship’s captain.¹³⁶ And, there is reason to believe many captains would not be comfortable ceding such authority, a point made by Captain Phillips whose ship, the *Maersk Alabama*, was attacked by pirates. Before the Senate Foreign Relations Committee, he stated: “I am not comfortable giving up command authority to others . . . including the commander of a protection force. In the heat of an attack, there can be only one final decision maker.”¹³⁷ Yet, if command authority is not agreed on clearly and in advance, chaos could ensue if pirates attack, and finger pointing and attempts to shift blame will likely follow any assertions that force exceeded what was necessary.

¹³² Katz, *supra* note 130.

¹³³ *Enrica Lexie case: Italy summons Indian Envoy*, SIFYNEWS, Dec. 14, 2012, available at <http://www.sify.com/news/enrica-lexie-case-italy-summons-indian-envoy-news-international-mmoqPsjhbei.html>.

¹³⁴ Ince & Co., *supra* note 78, at 3.

¹³⁵ *Id.* at 2.

¹³⁶ According to the IMO’s International Convention for the Safety of Life at Sea (SOLAS), Regulation 34-1, “[t]he owner, the charterer, the company operating the ship as defined in Regulation 1X/1, or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master’s professional judgment, is necessary for the safety of life at sea and protection of the marine environment. M.S.C. Res. 153(78), Annex 3, Rep. of the Int’l Mar. Org., May 20, 2004, available at <http://www.unhcr.org/refworld/pdfid/432aca724.pdf>. This same idea is reiterated in the International Ship and Port Facility Security Code (ISPS), which was implemented in 2004 as part of a new SOLAS chapter to enhance maritime security. The ISPS requires that the captain have the ultimate responsibility for the safety and security of the ship.

¹³⁷ Statement of Captain Richard Phillips, Master *Maersk Alabama*, To the Senate Committee on Foreign Relations, April 20, 2009, available at http://www.marad.dot.gov/documents/Capt_PhillipsTestimony_4-30-09.pdf.

C. The Maritime Industry's Evolving Stance on Private Armed Guards

For many of the reasons discussed above, until 2011 the maritime industry generally opposed the use of private armed guards on ships.¹³⁸ Naval forces were charged with providing the bulk of anti-piracy protection, and individual ships were encouraged to assist in deterring piratical acts by following the industry's "best management practices"—a set of guidelines outlining a host of primarily passive defensive measures.¹³⁹ For example, the guidelines cautioned ships to install, among other things, alarms, motion detectors, and closed circuit televisions, so as to be warned of imminent attacks. The guidelines also counseled ships on the use of non-lethal defensive tools, such as high power fire hoses and razor wire barriers, they could use to repel pirates trying to board a ship. In addition, suggested best management practices prompted ships to register with international and regional monitoring agencies so that navies and other government-sponsored counter-piracy teams would be able to provide assistance if needed.¹⁴⁰

The fact that the world's navies were apparently unable to protect every ship from experiencing an act of piracy, however, resulted in shippers calling for the right to hire private armed guards to accompany them when travelling through pirate-infested waters. Those calls were essentially heeded in early 2011 when the International Chamber of Shipping (ICS), which represents national ship owners' associations from over 30 countries, announced that it had changed its previous stance opposing the use of armed guards on ships. Instead, it concluded that whether to allow armed security to participate in the fight against maritime piracy should be a

¹³⁸ See, e.g., IMO, *Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships*, IMO Doc. MSC.1/Circ. 1333 (June 26, 2009), at ¶ 4 (noting concerns about having to comply with state laws on weapons carriage and the risks associated with having weapons around flammable or dangerous cargo) and ¶ 7 (discussing the risks of escalating violence if weapons are allowed on board ships).

¹³⁹ See, e.g., IMO, *Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia*, IMO Doc. MSC.1/Circ. 1335 (Sept. 29, 2009), at Annex 2 (BMP2) ¶ 2.b.vii (stating that ships could hire private security, but that "the use of armed guards is not recommended"); IMO, *Best Management Practices to Deter Piracy off the Coast of Somalia and in the Arabian Sea Area developed by the Industry*, IMO Doc. MSC.1/Circ. 1337 (revoking and replacing Circular 1335) (Aug. 4, 2010), at Annex 2 (BMP3) ¶ 6.11 (same).

¹⁴⁰ See, e.g., MSC.1/Circ. 1335, *supra* note 139, at 3-9; MSC.1/Circ. 1337, *supra* note 139, at 11-38. See also FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 24 (generally describing some best management practice guidelines); *Lang Report*, *supra* note 22, at ¶ 34 (same).

matter for flag states to decide.¹⁴¹ The ICS chairman explained:

ICS has had to acknowledge that the decision to engage armed guards, whether military or private, is a decision to be made by the ship operator after due consideration of all of the risks, and subject to the approval of the vessel's flag state and insurers. The consensus view amongst shipping industry associations remains that, in normal circumstances, private armed guards are not recommended, and are a clear second best to military personnel. However, in view of the current crisis in the Indian Ocean—with over 700 seafarers held hostage and, most recently, a seafarer being executed—ship operators must be able to retain all possible options available to deter attacks and defend their crews against piracy. Many shipping companies have concluded that arming ships is a necessary alternative to avoiding the Indian Ocean completely, which would have a hugely damaging impact on the movement of world trade.¹⁴²

The IMO followed the ICS by issuing a series of Circulars beginning in May 2011 that cautiously endorsed a regime whereby flag states would be able to decide whether and under what circumstances armed security personnel should be allowed on their ships.¹⁴³ In its guidance, the IMO emphasized that the use of private armed security should not be considered an alternative to best management practices and other more passive measures to defend against pirate attacks.¹⁴⁴ It also emphasized the need to minimize the risks associated with placing armed guards on ships through the use of clear flag state policies. In particular, the IMO encouraged flag states to develop and employ (1) a process for authorizing ship owners' use of private guards; (2) mechanisms for ensuring accountability with the terms and conditions under which any authorization to hire guards would be granted; (3) information about the lawful carriage and use of firearms by private guards; (4) guidance on command authority as between the captain and any armed security; and (5) reporting and

¹⁴¹ ICS changes position on using armed guards to protect ships against pirates, MARINELOG, Feb. 15, 2011, available at http://www.marinelog.com/index.php?option=com_content&view=article&id=505:2011feb000152&catid=1:latest-news&Itemid=107.

¹⁴² *Id.*

¹⁴³ See IMO Doc. MSC.1/Circ. 1405, *supra* note 12; IMO Doc. MSC.1/Circ. 1406, *supra* note 12.

¹⁴⁴ IMO Doc. MSC.1/Circ. 1405, at Annex.

recordkeeping requirements.¹⁴⁵ By September 2011, shipping industry representatives had drafted an updated version of the best management practices (BMP4) similarly acknowledging that whether to use armed guards on “merchant vessels is a matter for individual ship operators to decide following their own voyage risk assessment and approval of respective Flag States.”¹⁴⁶

In May 2012, in an effort to enrich existing advice, the IMO also issued interim guidance to PMSCs.¹⁴⁷ That guidance, among other things, encourages PMSCs to acknowledge the need to operate according to flag state and other applicable laws.¹⁴⁸ It recommends that firms only hire out personnel who are trained to operate in a maritime context and that the firms carry adequate insurance to cover any claims that might arise as a result of their employees’ conduct.¹⁴⁹ The guidance cautions that personnel acting as armed guards must abide by flag state and other laws regarding the carriage and use of firearms and to also recognize that laws regarding the use of lethal force vary from state to state.¹⁵⁰ In addition, the guidance further recommends that PMSCs respect that the captain is in control of the ship.¹⁵¹

IV. PRIVATE ARMED GUARDS ON SHIPS: A COMPARISON OF SOME FLAG STATE APPROACHES

As the above discussion indicates, whether to allow private armed guards on ships to assist in the fight against maritime piracy is a complex

¹⁴⁵ IMO Doc. MSC.1/Circ. 1406, *supra* note 12, at Annex. The IMO’s updated recommendations are contained in IMO, *Revised Interim Guidance for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, IMO Doc. MSC.1/Circ. 1406, Rev. 2 (May 25, 2012).

¹⁴⁶ IMO, *Piracy and Armed Robbery Against Ships in Waters Off the Coast of Somalia: Best Management Practices for Protection against Somalia Based Piracy*, IMO Doc. MSC.1/Circ. 1339 (revoking and replacing Circular 1337 from 2010 and known as “BMP 4”) (Sept. 14, 2011), at Annex 2 (BMP4) ¶ 8.15. The BMP4 are notably different from earlier best management practices guidelines which stated that “the use of armed guards is not recommended.” IMO Doc. MSC.1/Circ. 1335, *supra* note 139, at Annex 2 (BMP2) ¶ 2.b.vii (stating that ships could hire private security, but that “the use of armed guards is not recommended”); IMO Doc. MSC.1/Circ. 1337, *supra* note 139, at Annex 2 (BMP3) ¶ 6.11 (same).

¹⁴⁷ IMO, *Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, IMO Doc. MSC.1/Circ. 1443 (May 25, 2012).

¹⁴⁸ *Id.* at ¶ 1.3.

¹⁴⁹ *Id.* at ¶¶ 1.5, 3.4, and 5.6.

¹⁵⁰ *Id.* at ¶¶ 3.3 and 5.13.

¹⁵¹ *Id.* at ¶ 5.6.

question. It is also one on which flag states differ as to their answers. Even after the ICS and IMO withdrew their objections to armed guards in 2011, some states have remained opposed to the idea.¹⁵² Indonesia, for instance, has stated that it will consistently oppose proposals to allow recruiting private armed security guards on ships because of, among other things, the absence of national and international legal instruments governing their hiring and conduct.¹⁵³ As noted above, the Netherlands' policy only allows the country's flagged ships to be protected by military personnel that it hires out to commercial shippers.¹⁵⁴

Many states, though, have recently changed their laws or are considering changing them to allow their shippers to hire private armed guards.¹⁵⁵ The United Kingdom is a good example of a state that recently reversed its stance on the issue. Apparently in only July 2011, the government strongly discouraged the use of private armed guards and instead backed the naval patrols and the use of best management practices on board ships. On October 30, 2011, however, the Prime Minister announced that Britain will allow its shippers to hire private security forces.¹⁵⁶ The Written Ministerial Statement that followed in December explained that guards will be allowed under "exceptional circumstances," and only when the ship is travelling in the areas posing the highest risk of pirate attacks.¹⁵⁷ Other states, including Cyprus,¹⁵⁸ Denmark,¹⁵⁹ and Greece,¹⁶⁰ have also changed their laws since 2011 to allow for armed

¹⁵² See International Chamber of Shipping, *Comparison of Flag State Laws on Armed Guards and Arms on Board*, available at <http://www.ics-shipping.org/ICS-ECSA%20Private%20Armed%20Guards%20Flag%20State%20Laws%20June%202012.pdf> [hereinafter *ICS Flag State Comparison*].

¹⁵³ Ridwan Max Sijabat, *RI says no to private armed guards aboard vessels*, THE JAKARTA POST, June 13, 2012.

¹⁵⁴ Stares, *supra* note 96.

¹⁵⁵ See, e.g., Brown, *supra* note 7, at 6 (reporting that since 2011, India, Liberia, Panama, Greece, Norway, Cyprus, Denmark, France, Egypt, and the Philippines have changed their laws to allow for private armed security on board their ships and that several other countries are considering changing their laws).

¹⁵⁶ FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 31.

¹⁵⁷ *Id.* at ¶ 32.

¹⁵⁸ *ICS Flag State Comparison*, *supra* note 152 (reporting that Cyprus had passed a bill allowing for armed guards). See also *Ships need armed guards*, CYPRUS MAIL, May 18, 2012, available at WLNR 10509635 (stating that Cyprus lawmakers are discussing a bill to allow private armed guards on board Cyprus-flagged ships).

¹⁵⁹ Danish Maritime Authority, *Policies and strategies, Piracy*, available at <http://www.dma.dk/Policy/Sider/Piracy.aspx> (stating that Denmark now allows ships to employ armed guards under some circumstances).

¹⁶⁰ *Greek parliament ratifies legislation introducing armed guards aboard vessels*, SHIPPING HERALD: THE MARITIME PORTAL, March 15, 2012,

security on board their flagged ships. In June 2011, Norway announced a new framework for the use of armed security personnel on its ships.¹⁶¹ Belgium,¹⁶² France,¹⁶³ Germany,¹⁶⁴ and Japan,¹⁶⁵ are among the states that have indicated they are considering implementing new laws to permit private armed guards to aid in the fight against maritime piracy.

But, under what circumstances are states allowing these private actors to participate in a fight that was only recently reserved for military personnel operating as part of a United Nations-sanctioned mission? Are states regulating, licensing, or monitoring these private actors who will wield guns on the world's shared oceans? Are they regulating how these private actors carry and transport weapons or specifying from where the guards may obtain their weapons? Are states providing these private actors with any special guidance on the use of force or on who may authorize its use? Even if individual states are regulating or providing guidance on any of these matters, are state policies coordinated and uniform? After all, the fight against piracy occurs in an international arena. Shouldn't all states want to ensure that the private citizens engaging in actions once reserved for military personnel are subjected to some training and monitoring?

Below this Article examines the laws and guidance of five different

<http://www.shippingherald.com/Admin/ArticleDetail/tabid/94/ArticleID/3481/Greek-Parliament-ratifies-legislation-introducing-armed-guards-aboard-vessels.aspx>.

¹⁶¹ See *National Regulations on the Use of Armed Guards*, available at

<https://extranet.skuld.com/Insight/Piracy/Armed-Guards/National-regulations-on-the-use-of-armed-guards/>.

¹⁶² *Belgium moves to regulate vessels' private armed guards*, LLOYD'S LIST, May 18, 2012, available at <http://www.lloydslist.com/ll/sector/ports-and-logistics/article398587.ece>.

¹⁶³ Up until 2012, France only allowed its ships to be guarded by military teams provided by the French state. But, under pressure from ship owners, France is drafting a law to allow them to employ guards from PMSCs. ICS *Flag State Comparison*, *supra* note 152; Valerie Gabard, *Privately Contracted Armed Security Personnel and Counter-Piracy: Is France at a turning point?*, COMMUNIS HOSTIS OMNIUM, April 17, 2012, available at <http://piracy-law.com/2012/04/17/privately-contracted-armed-security-personnel-and-counter-piracy-is-france-at-a-turning-point/>.

¹⁶⁴ See *Germany seeks EU support of plan to combat piracy*, EDMONTON JOURNAL, Aug. 24, 2011, available at 2011 WLNR 16728233 (reporting that the German government was considering changing its laws to allow its ships to carry private armed security personnel in areas that pose a high risk of pirate attacks); ICS *Flag State Comparison*, *supra* note 152 (stating that the German government has drafted a bill to allow ships to hire private armed guards to serve on commercial ships under certain circumstances).

¹⁶⁵ *Antipiracy bill drafted to let private armed guards defend ships*, IISSONLINE, (February 4, 2013), <http://iissonline.net/antipiracy-bill-drafted-to-let-private-armed-guards-defend-ships/> (reporting that Japan has a new draft law to allow its ships to carry private armed security guards under some circumstances).

states as relates to hiring armed guards to protect ships against pirate attacks in an effort to obtain some answers to these questions. The first section identifies the states chosen for inclusion in the study and their general approaches towards regulating the use of private armed guards on ships travelling through pirate-infested waters. The remaining sections compare and synthesize various aspects of the states' laws and guidance in order to facilitate a discussion about whether the current approaches are sufficient to mitigate some of the risks associated with allowing private citizens to participate in the fight against piracy.

A. Overview: States Included in the Study and Their General Approaches in Regulating the Use of Private Armed Guards

This Article uses the laws and guidance of (1) the United States, (2) the United Kingdom, (3) Denmark, (4) Norway, and (5) Singapore to explore some approaches that states have taken to regulate the use of private armed guards on their ships. There are several reasons for focusing on these five states. First, these states all have strong shipping interests. This may explain, in part, why they have all authorized the use of armed guards. In addition, including these states in the study means that we can compare how states with strong shipping interests have approached the issue of private armed guards. Second, including the United States and the United Kingdom in the study is important as both are states from which a number of PMSCs hail—meaning that both should have a relatively great interest in regulating PMSC conduct.¹⁶⁶ Third, and in any event, these states take different approaches to how they authorize the use of private armed guards, thus facilitating a later comparison of approaches and a discussion of some of the strengths and weaknesses of various approaches. Finally, and as a practical matter, information about these states' laws and guidance is available in English, thereby obviating the need to translate from another language.

While each of these states has authorized the use of private armed guards on board their commercial ships while travelling through pirate-infested waters, the timing and nature of their commitment to the idea differs in some respects. For example, the United States' commitment to the idea of private armed guards seems relatively long-standing and also quite strongly held. The United States has authorized personnel on commercial ships to use force to defend against maritime pirate attacks for

¹⁶⁶ Erwin, *supra* note 8 (stating that about half of the PMSCs providing maritime security services are based in the United Kingdom); Brown, *supra* note 7, at 5 (stating that most contractors are British or American).

more than one hundred years. According to 33 U.S.C. § 383, which is entitled “Resistance of pirates by merchant vessels,” the commander and crew of any merchant vessels owned in whole or part by a United States citizen may defend against any attack by another private armed vessel.¹⁶⁷ How much or what kind of force civilians may use to repel pirate attacks is a topic that is addressed by reference to general law in the area, rather than by any specific language in Section 383. To provide more exact guidance on the topic in the piracy context, in 2009 the United States Coast Guard and the Department of Homeland Security jointly issued a Port Security Advisory entitled *Guidance on Self-defense and Defense of Others by U.S. Flagged Commercial Vessels Operating in High Risk Waters*.¹⁶⁸ That 2009 Self-Defense Advisory “restates existing law” and clarifies the rules to be followed by all vessel personnel, including private security guards, when defending against pirate attacks.¹⁶⁹

Recent March 2012 remarks by Andrew Shapiro, Assistant Secretary of the Bureau of Political-Military Affairs, further demonstrate the United States’ commitment to using private armed guards on board its flagged commercial ships to assist in the fight against maritime piracy. Mr. Shapiro explained that the United States permits its commercial vessels to carry private armed security teams. Because of the seriousness of the threat posed by maritime piracy to the safety of international ships, crews, and cargo, the United States has also encouraged other countries to follow suit. Mr. Shapiro recognized that employing armed guards may involve some complicated issues. But, he played down concerns of “cowboy” guards, saying that the evidence showed that most private armed guards act responsibly, only firing warning shots after using non-lethal methods, such as flares or loudspeakers, to scare pirates away. Regarding weapons carriage and transport, he stated that the United States has worked, and will continue to work, with other states to facilitate the legal movement of

¹⁶⁷ 33 U.S.C. § 383 (2012) (originally enacted in 1819).

¹⁶⁸ US Coast Guard and the Department of Homeland Security, *Guidance on Self-Defense or Defense of Others by U.S. Flagged Commercial Vessels Operating In High Risk Waters*, Port Security Advisory (3-09), June 18, 2009 [hereinafter Port Security Advisory 3-09]. Port Security Advisory 3-09 specifically states that it anticipates its guidance to apply to contracted security personnel who will serve as guards on a United States vessel or who will provide a security escort to a United States vessel while stationed on an accompanying vessel that is flagged by the United States, but that is not a government vessel (such as a navy ship). *Id.* at 1, n.1.

¹⁶⁹ Port Security Advisory 3-09, *supra* note 168, at 1 (stating that the guidance does not establish new standards regarding the right to use self-defense or to defend others, but instead provides examples to illustrate how defense principles might apply in the maritime piracy context).

arms.¹⁷⁰

The United Kingdom and Denmark, by contrast, only recently in 2011 changed their previous stances to allow their shippers to employ private armed guards. As mentioned above, on October 30, 2011, Prime Minister David Cameron announced the United Kingdom's decision to authorize the use of private armed guards under some circumstances.¹⁷¹ In announcing the change, the Prime Minister referred to the extent of hijackings for ransom around the Horn of Africa as a "stain" on the world that needed to be tackled.¹⁷² In December 2011, the government followed with a Written Ministerial Statement outlining the new policy in more detail.¹⁷³ That Statement explained that private armed guards would only be permitted under "exceptional circumstances," defined as where (1) the ship is transiting in the high seas in a specific area posing a high risk of pirate attacks;¹⁷⁴ (2) the ship is following the latest IMO best management practices but has concluded they are insufficient to protect it against a pirate attack; and (3) the use of armed guards is likely to reduce the risks to the lives of those travelling on board.¹⁷⁵ Together with the Statement, the government published its initial *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*. That initial Interim Guidance was subsequently amended in June 2012. Like the previous guidance, it sets out the government's policy on the use of armed guards on board UK-flagged ships and the rules regarding the use of force, command responsibility, and the carriage and transport of arms.¹⁷⁶

¹⁷⁰ *Expanding Private Sector Partnerships Against Piracy*, Remarks to the U.S. Chamber of Commerce by Andrew J. Shapiro, Asst. Sec'y, Bureau of Political-Military Affairs, available at <http://www.state.gov/t/pm/rls/rm/185697.htm>.

¹⁷¹ FOREIGN AFFAIRS COMMITTEE REPORT 2012, *supra* note 7, at ¶ 31; *Tackling Piracy: U.K. Government Response*, Speech of Foreign Office Minister Henry Bellingham, Oct. 11, 2011, available at <https://www.gov.uk/government/speeches/tackling-piracy-uk-government-response?view=Speech&id=668575182>.

¹⁷² Thomas Penny, *U.K. Ships Allowed Armed Guards Against Piracy, Cameron Says*, BLOOMBERG, Oct. 30, 2011, <http://www.bloomberg.com/news/2011-10-30/u-k-ships-to-carry-armed-guards-against-pirates-cameron-says.html>.

¹⁷³ Mike Penning, MP, Parliamentary Under-Secretary of State for Transport, *Written statement: The use of private armed guards on board UK registered ships under exceptional circumstances to defend against piracy*, Dec. 6, 2011 available at <https://www.gov.uk/government/speeches/the-use-of-private-armed-guards-on-board-uk-registered-ships-under-exceptional-circumstances-to-defend-against-piracy> [hereinafter Penning Statement].

¹⁷⁴ The "high risk area" is defined as "an area bounded by Suez and the Straits of Hormuz to the North." Penning Statement, *supra* note 196, at 2.

¹⁷⁵ *Id.* at 2.

¹⁷⁶ Department of Transport, *Interim Guidance to UK Flagged Shipping on the Use of*

The Danish government only yielded to shippers' requests to be allowed to hire armed guards to provide individualized protection in May 2011.¹⁷⁷ Prior to that time, the government had been strongly against allowing private armed guards on board ships flying the Danish flag. Its basic objections centered on concerns about granting civilians the permission to use weapons in self-defense and the fear that pirates would only escalate the violence they used to perpetrate their attacks if they knew that ships were carrying armed guards. However, recognizing the increasing difficulty the world's navies have patrolling against pirate activities that are now occurring in an expanded geographical range, the government changed its policy. Nevertheless, the Danish government rejected shippers' requests to employ current military personnel as guards on their ships, stating that using scarce government resources would not be cost effective and also counter to the interest in encouraging international cooperation to deter maritime piracy—rather than a regime whereby each state protects only its own shippers.¹⁷⁸

Although it has no general law permitting armed defense of its ships against pirate attacks, Norway has since 2007 authorized the captain of a Norwegian ship to take actions in order to defend the ship, including by using private armed guards on board.¹⁷⁹ In July 2011, the government amended its regulations on ship security and arms carriage to more specifically address the problem of maritime piracy by regulating ships' usage of armed security when travelling in waters known to pose a high risk of pirate attacks.¹⁸⁰ The government's subsequently issued Provisional

Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances, Version 1.1 (Nov. 2011, Updated June 2012), available at <http://assets.dft.gov.uk/publications/use-of-armed-guards-to-defend-against-piracy/use-of-armed-guards-to-defend-against-piracy.pdf> [hereinafter June 2012 Interim Guidance].

¹⁷⁷ Ministry of Foreign Affairs, Ministry of Justice, Ministry of Defence, Ministry of Economic and Business Affairs, *Strategy for the Danish Counter-Piracy Effort 2011-2014*, at 25, available at http://um.dk/~media/UM/English-site/Documents/Politics-and-diplomacy/Pirateristrategi_2011_ENG_WEB.PDF [hereinafter Danish Strategy].

¹⁷⁸ *Id.* at 24.

¹⁷⁹ See *ICS Flag State Comparison*, *supra* note 152. See also *Norway Clarifies Ruling on Armed Guard Use*, July 1, 2011, available at <http://www.intermanager.org/2011/07/norway-clarifies-ruling-on-armed-guard-use/> (stating that Norway's 2007 law addressed ship security, but not the then-unknown threat posed by maritime piracy).

¹⁸⁰ Regulations concerning amendments to the Regulations of 22 June 2004 No. 972 concerning protective security measures on board ships and mobile offshore drilling units, available at http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/Regulations_concerning_amendments_to_the_Regulation_of_22_June_2004_nr.972.pdf. The new regulations are now entitled Regulations of 22 June 2004 No. 972 concerning security,

Guidelines offer explanatory comments to aid shippers in understanding the new regulations.¹⁸¹ According to those comments, the new regulations do not encourage the use of private armed security guards, but are intended instead to regulate the selection and use of such guards so that the highest possible professional and ethical standards are followed when their services are used on Norwegian-flagged vessels.¹⁸²

Finally, Singapore does not ban the use of private armed guards on its ships, but at the same time, its endorsement of their use appears cautious.¹⁸³ In its Shipping Circular dated September 18, 2012,¹⁸⁴ Singapore advises that the use of armed guards should not be considered an alternative to the effective employment of best management practices or other more passive defensive measures to guard against maritime piracy. It also notes that the decision of whether to hire such armed security personnel is a matter for ship owners and operators. Nevertheless, it warns that the decision should be made “after a thorough risk assessment and after ensuring all other practical means of self protection have been employed.” Singapore refers ship owners and operators to the IMO’s Circular for a list of the factors and considerations that should guide any such risk assessment.¹⁸⁵

The sections that follow explore and compare several specific aspects of the laws and guidance of these five states as relates to the various risks that have been previously identified as being associated with permitting private guards to aid in the fight against piracy.

anti-terrorism and anti-piracy measures and the use of force on board ships and mobile offshore drilling units [hereinafter Norway Amended Regulations].

¹⁸¹ *Provisional guidelines—use of armed guards on board Norwegian ships, available at* http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/Provisional_guidelines_The_use_of_armed_guards_onboard_Norwegian_ships.pdf [hereinafter Provisional Guidelines].

¹⁸² Provisional Guidelines, *supra* note 181, at 1. Recent figures indicate that about 30% of Norwegian vessels operating off the coast of Somalia have employed armed personnel from PMSCs to protect them against maritime piracy. Valeria Criscione, *Norway responds to increased piracy attacks*, Oct. 8, 2012, *available at* <http://www.nortrade.com/sectors/articles/norway-responds-to-increased-piracy-attacks/>.

¹⁸³ See ICS *Flag State Comparison*, *supra* note 152.

¹⁸⁴ Maritime and Port Authority of Singapore Shipping Circular No. 15 of 2012, Sept. 18, 2012, ¶ 2, *available at* <http://www.mpa.gov.sg/sites/pdf/sc15-12.pdf>. Shipping Circular No. 15 replaces a similar Shipping Circular No. 11 which was issued in June 2011. Maritime and Port Authority of Singapore Shipping Circular No. 11 of 2011, June 10, 2011, *available at* http://www.mpa.gov.sg/sites/circulars_and_notices/pdfs/shipping_circulars/sc_no_11_of_2011.pdf.

¹⁸⁵ Shipping Circular No. 15, *supra* note 184, at ¶ 4.

B. Laws and Guidance to Regulate the PMSC Industry or Vet Guards

One risk associated with using private armed guards in the fight against piracy is that not all will be well-trained and prepared to act in a lawful and proper manner when defending ships against attacks. To the extent that states want to guard against such risks, one step they might take is to regulate the PMSC industry or in some way vet the guards that their shippers are permitted to hire. A review of the laws and guidance of the five states that are the subject of this study, however, indicates that these states at least are not willing to undertake such tasks. For the most part, these states have gone on record and cautioned shippers to be diligent when hiring guards, but have otherwise made clear that they are not in the business of passing on the competence of the guards their shippers hire.

For example, the United States warns shippers that any security personnel hired by US-flagged ships must be fluent in English and must also meet certain training requirements enabling them to effectively defend the vessel and crew while in high risk waters and in accordance with the approved protection plan for the vessel.¹⁸⁶ In addition, it cautions that any security personnel should be trained on the use of any firearms they are carrying, weapons safety, and what constitutes the lawful use of force in self-defense and defense of others.¹⁸⁷

The United Kingdom only allows shippers to hire armed guards if they file with the government a counter-piracy plan indicating why this extra level of protection beyond following best management practices is necessary.¹⁸⁸ And, it reminds shippers that the presence of armed security personnel could lead to an escalation of violence.¹⁸⁹ Nevertheless, the government notes that it has no accreditation process for PMSCs and warns shippers to be “extra vigilant” in selecting the company from which to hire security personnel.¹⁹⁰ The only other protection against the possibility of untrained, “cowboy” guards operating on the high seas is the government’s outline of the types of due diligence shippers should undertake when

¹⁸⁶ US Coast Guard and the Department of Homeland Security, *Minimum Guidelines For Contracted Security Services*, Port Security Advisory (5-09) (Rev 1), July 24, 2009 [hereinafter Port Security Advisory 5-09 Rev 1], at 2 (referencing the training requirements in 33 C.F.R. 104.220).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at ¶ 2.9.

¹⁸⁹ June 2012 Interim Guidance, *supra* note 176, at ¶ 2.7.

¹⁹⁰ *Id.* at ¶ 1.8.

selecting a PMSC.¹⁹¹

The new Danish counter-piracy strategy gives shippers the possibility of applying for a firearms certificate to use armed security on board Danish ships as long as perceived necessary based on the general threat assessment for the area “and as long as the specifics of the case, also in terms of compliance with Best Management Practices, do not otherwise speak against it.”¹⁹² According to the government, the intention is to make the application process as flexible as possible, while at the same time “ensuring that no available personal data on the guards gives cause for concern when issuing a firearms certificate.”¹⁹³ The information available in English shows that shippers must provide the government with various items of information in order to obtain the firearms certificate. They must identify the PMSC and specific guards they intend to hire and provide the guards’ certificates of criminal record and information on their training and experience in arms operation and copies of any valid arms’ licenses.¹⁹⁴ In addition, shippers must identify the specific weapons that will be brought on board the vessel and whether the arms will be carried out of and into Denmark.¹⁹⁵ Nevertheless, Denmark does not require the guards its shippers hire to pass any vetting process.¹⁹⁶

Similar to the United Kingdom, Norway requires its shippers to conduct a risk assessment of passive and active unarmed measures and consult with the ship’s captain before deciding to hire armed guards.¹⁹⁷ In addition, any shipper deciding to hire armed security to protect its ships must provide certain documentation to the Norwegian Maritime Directorate outlining the reasons why more passive defensive measures will not be adequate; the suitability and qualifications of the security firm and the particular guards to be hired; and the procedures for safely handling and storing firearms and ammunition.¹⁹⁸ The documentation is designed to make companies employ due diligence in selecting a security firm and provide the government with some necessary information should it later

¹⁹¹ *Id.* at ¶¶ 3.1-3.15.

¹⁹² Danish Strategy, *supra* note 177, at 25.

¹⁹³ *Id.*

¹⁹⁴ *Information that should accompany a shipping company’s application for using armed civilian guards on board Danish ships*, Justits Ministeriet, available at <http://www.dma.dk/SiteCollectionDocuments/CMR/Piracy/pirateri-JM%20vejledning.pdf>.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Provisional Guidelines, *supra* note 181, at 2; Norway Amended Regulations, *supra* note 180, at § 20.

¹⁹⁸ Norway Amended Regulations, *supra* note 180, at § 20.

need to investigate any alleged unlawful use of force.¹⁹⁹ The government, however, specifically states that it is under no duty to conduct a quality check on security firms and will only disqualify a security company if it has received specific and credible information showing that the firm is clearly unsuitable.²⁰⁰

Finally, Singapore simply refers its shippers to the non-binding guidance contained in the various IMO Circulars, including one that details some due diligence shippers should engage in before hiring a PMSC company.²⁰¹

C. Laws and Guidance on the Use of Force

Another concern raised in connection with allowing private guards to participate in the fight against piracy is that they may not be aware of or be willing to comply with applicable rules regarding the appropriate use of force. As described below, the evidence indicates that some states are providing some information about when guards may use deadly force. On the other hand, the comparison of state laws also shows that states are not uniform in their guidance and that some guidance is more detailed than others. In addition, one theme that is apparent from this comparison is that states are aware that guards may be subject to the laws of different jurisdictions depending on where and under what circumstances they are called upon to defend against a pirate attack. Also apparent is that states are not willing to opine on the laws of other states and the circumstances under which guards may find themselves criminally or civilly liable for using force that another state may deem excessive.

The guidance provided by the United States in this regard is illustrative. It provides that ship personnel may use deadly force in self-defense or defense of others only when an individual has a “reasonable belief that the person or persons to whom the deadly force would be directed poses an imminent danger of death or great bodily harm.”²⁰² Whether an imminent danger exists requires a fact-specific inquiry focusing on whether the attacker has the means and opportunity to do an act that may cause great bodily injury or death to others. Means and opportunity to perform a deadly act exist when an attacker has or has apparent access to a weapon that can be used against others and makes a movement which could

¹⁹⁹ Provisional Guidelines, *supra* note 181, at 8.

²⁰⁰ *Id.* at 10.

²⁰¹ Shipping Circular No. 15, *supra* note 184, at ¶¶ 5-6.

²⁰² Port Security Advisory 3-09, *supra* note 168, at 3.

cause another to believe the attacker is threatening great bodily harm—for example, pointing a weapon.²⁰³ More specifically, the United States’ 2009 Self-Defense Advisory states that deadly force may be used when individuals without legal authority fire at, attempt to fire at, or attempt an armed boarding of a United States vessel carrying embarked individuals.²⁰⁴ The 2009 Self-Defense Advisory’s guiding principles recognize that the captain has command authority over the vessel and that any use of force “is subject to the direction of the vessel master.”²⁰⁵ Before employing force, the ship’s captain should consider all of the circumstances and resort to deadly force only where there is evidence of imminent danger of death or great bodily harm.”²⁰⁶

In the Coast Guard Authorization Act of 2010, the United States has also taken what appears to be the unique step amongst the states in this study of immunizing from liability for monetary damages those persons who defend a United States vessel against an act of maritime piracy while complying with the self-defense rules outlined above.²⁰⁷ At the same time, the United States makes clear that it can only immunize persons from liability under United States law—meaning that individuals could still face liability for their conduct in other jurisdictions. It nevertheless states in the text of the new Act that the United States will work through the International Maritime Organization in an effort to persuade other states to enact limitations on liability similar to those established by the provisions of the Coast Guard Authorization Act of 2010.²⁰⁸

By its June 2012 Interim Guidance, the United Kingdom also provides some guidance on what constitutes the appropriate level of force that may be used to defend against a pirate attack. In general, one could characterize the country’s approach as a cautious one. The United Kingdom specifies that guards may use force, including lethal force, in self-defense or in defense of others as long as the amount of force used “is proportionate

²⁰³ *Id.* at 2.

²⁰⁴ *Id.* at 2.

²⁰⁵ *Id.* at 3.

²⁰⁶ *Id.* at 4.

²⁰⁷ See Coast Guard Authorization Act of 2010, P.L. 111-281, 2010 H.R. 3619, section 912, codified at 46 U.S.C. § 8107(a) (stating that immunity shall apply to those who use force in accordance with the standard rules for the use of force in self-defense of vessels as prescribed by the Secretary of the Coast Guard). The prescribed standard rules are those outlined in the 2009 Advisory. See Department of Homeland Security and Coast Guard, *Notice of policy: Self-Defense of Vessels of the United States*, 76 Fed. Register 39411-01, available at 2011 WL 2618115.

²⁰⁸ 46 U.S.C. § 8107(b).

and reasonable in the circumstances as the defendant genuinely believed them to be.”²⁰⁹ A guard need not wait for the aggressor to strike the first blow if the person believes that a threat of bodily harm is imminent.²¹⁰ On the other hand, the Guidance explains that security teams should be seeking to disrupt any attempted boarding of the vessel “using the minimum force necessary.”²¹¹ In addition, any escalation in force should be graduated, and security personnel should not “needlessly escalate a situation.” Indeed, the Guidance warns that any measures to show the ability to use force, such as by making firearms visible or firing warning shots, should be carried out “so as not to be taken as acts of aggression.”²¹² As to using reasonable and proportionate force to prevent a crime more generally, the United Kingdom’s June 2012 Interim Guidance explains that piracy is a crime that can be defended against. It also notes, though, that the defense is only available to respond to crimes “in progress.” “If armed guards sighted a pirate skiff (i.e. a skiff obviously equipped to undertake acts of piracy), but there was nothing to indicate that the skiff was actively undertaking an act of piracy, it would be illegal for armed guards to use force against them.”²¹³

Like the United States’ policy, the United Kingdom’s policy recognizes the captain’s command authority over the vessel and over any decision to use force.²¹⁴ The June 2012 Interim Guidance states that the security team has to advise the captain of any responses available to counter any threat should the ship or crew be in danger of an attack. Thereafter, the captain “will be responsible for determining and exhausting all available options before recommending potential armed intervention to overcome a piracy threat.”²¹⁵ At the same time, the Guidance recognizes that there may be situations where the crew has “insufficient time” to seek the approval of the captain “before a course of action is taken.” In such cases, the security team must inform the captain about the course of action taken “as soon as possible afterwards and explain their reasoning for acting as they did.”²¹⁶ In the event of an altercation with pirates, the United Kingdom advises that the

²⁰⁹ June 2012 Interim Guidance, *supra* note 176, at ¶¶ 5.6., 8.9. The June 2012 Interim Guidance explains that in England and Wales, “whether a person used reasonable force will be assessed in the context of the circumstances as the accused genuinely believed them to be (even if he or she was mistaken as to the true circumstances).” *Id.* at 28 n.11.

²¹⁰ *Id.* at ¶ 8.12.

²¹¹ *Id.* at ¶ 8.3.

²¹² *Id.* at ¶ 8.5.

²¹³ *Id.* at ¶ 8.13.

²¹⁴ *Id.* at ¶ 5.1.

²¹⁵ *Id.* at ¶ 5.4.

²¹⁶ *Id.* at ¶ 5.5.

captain and security team should both make detailed reports of any incidents to the relevant international institutions.²¹⁷

Unlike the United States, the United Kingdom does not have a law specifically immunizing from civil monetary liability those who adhere to the legal standards regarding the lawful use of force in self-defense and defense of others in defending against pirate attacks. On the contrary, the June 2012 Interim Guidance explains that although having complied with “rules on the use of force may serve to reduce the risk of armed guards acting unlawfully,” should criminal charges be brought, “it would be for the enforcement agencies and then the court to decide whether the force used in the particular case was lawful.”²¹⁸ Moreover, the government offers no guidance on the laws of other countries, except to note that security personnel could be liable under laws of other jurisdictions for unlawful use of force depending, for example, on where the acts took place.²¹⁹ In the event of a pirate attack or for every incident where firearms are discharged, the ship’s master and the security team must complete a detailed written report which is to then be sent to various relevant national or international bodies.²²⁰

Norway’s guidance on the use of force by armed guards can also be described as cautious in approach. In Norway, the use of force by individuals—including private armed security guards—is limited to cases “of necessity or self-defence, i.e., cases in which there is no other way out and in which the requirements of necessity, reasonableness and proportionality are observed in connection with the use of force.”²²¹ But, Norway advises that the use of force should be avoided whenever possible; should only be employed after other less radical measures have been attempted; and is allowed only against a threat that is “direct, immediate, significant and otherwise unavoidable.”²²² Furthermore, firing shots at a person to render him harmless may only occur after other more gentle means have been employed or where no alternative has any chance of success.²²³

²¹⁷ *Id.* at ¶¶ 9.1-9.2

²¹⁸ *Id.* at ¶ 8.6.

²¹⁹ *Id.* at ¶ 8.8.

²²⁰ *Id.* at ¶¶ 9.1.-9.7.

²²¹ Provisional Guidelines, *supra* note 181, at 2.

²²² Norway Amended Regulations, *supra* note 180, at § 17(2); Provisional Guidelines, *supra* note 181, at 12.

²²³ Provisional Guidelines, *supra* note 181, at 13; Norway Amended Regulations, *supra* note 180, at § 24(4).

In Norway, the decision of whether to authorize the use of force also rests with the ship's captain.²²⁴ Any use of firearms must be approved by the captain in each individual case and, if circumstances permit, only after attackers are warned by means of light and sound signals and warning shots.²²⁵ While any such use of force must be "reasonably proportionate in view of the scope of the threat and the conditions otherwise,"²²⁶ Norway notes that the captain has significant discretion "when faced with an unclear and apparently precarious situation." In fact, even when pirate vessels are 2000 meters away, the captain may reasonably conclude that a pirate attack is immediate and may require the use of force to repel.²²⁷ The captain is also charged with the task of having to report to the appropriate government entity any use of firearms to repel a pirate attack, including that which results in injury or death.²²⁸

Persons employing force will only be immune from criminal prosecution under Norwegian law if any use of force is not excessive.²²⁹ Because individuals must in every case independently determine whether their use of a firearm is lawful in a particular case, individuals may be criminally liable for excessive use of force even if acting in accordance with the captain's authorization. Because the shipper and the captain are responsible for establishing conditions under which force may be used, in some cases both may also be liable in the event an individual marksman's use of force is excessive. On the other hand, if the marksman acts contrary to the captain's instructions, the marksman will likely be the only subject of any criminal prosecution.²³⁰ Norway's Provisional Guidelines further provide that in some special cases, criminal liability may even attach to the security firm from which any guard using excessive force was hired.²³¹

As to Denmark and Singapore, neither provides any specific guidance on the appropriate level of force that guards may use to repel

²²⁴ Norway Amended Regulations, *supra* note 180, at § 17(1).

²²⁵ Provisional Guidelines, *supra* note 181, at 12-13; Norway Amended Regulations, *supra* note 180, at § 24(3). On the other hand, the Provisional Guidelines also explain that the ship's captain need not specifically approve each use of firearms and may instead rely on standing orders in some cases, such as in the case of a night watch. Provisional Guidelines at 12.

²²⁶ Provisional Guidelines, *supra* note 181, at 3; Norway Amended Regulations, *supra* note 180, at § 17(2).

²²⁷ Provisional Guidelines, *supra* note 181, at 12.

²²⁸ *Id.* at 13-14.

²²⁹ Norway Amended Regulations, *supra* note 180, at § 17(3); Provisional Guidelines, *supra* note 181, at 5.

²³⁰ Provisional Guidelines, *supra* note 181, at 13.

²³¹ Provisional Guidelines, *supra* note 181, at 6.

pirate attacks. Denmark does refer shippers to the various IMO Circulars on the use of private armed security guards.²³² Singapore's Shipping Circular notes that while the crew and any private security personnel may lawfully bear arms, "they will still be liable under Singapore's laws if they use their arms on board the ship without lawful excuse, as a person on board is not exempted from criminal liability in respect of any offence that he commits on the ship."²³³ Otherwise, the Shipping Circular refers shippers to the remaining guidance contained in the IMO's Circular, which it notes contains advice on the command relationship between the captain and any security team, the rules regarding the use of force, the management of arms and ammunition, and the need for proper recordkeeping.²³⁴

D. Laws and Guidance on Weapons Carriage

Using armed guards in the fight against maritime piracy also poses risks associated with weapons carriage and transport. The need to comply with varying state laws can be a burden, but has also created a situation where PMSCs are stocking floating armories on the high seas—a situation which could create significant problems if those arms are not properly safeguarded. Again, however, the comparison of state laws and guidance shows that states are taking different approaches to dealing with the potential issues relating to weapons carriage and transport. Moreover, the comparison suggests that states are not regulating in a comprehensive fashion so as to obviate any dangers associated with, for example, the existence of floating armories or the fact that guards can rent any number of automatic weapons in foreign ports.

In the United States, for instance, shippers and guards must comply with the country's weapons laws, as well as with any applicable port state laws regarding weapons carriage. Most particularly, they must comply with the International Traffic in Arms Regulations (ITAR) which requires individuals and corporations of the United States to obtain a license in order to export or import, among other things, firearms and ammunition.²³⁵ The terms "exporting" and "importing" include any manner of "sending or

²³² See Danish Strategy, *supra* note 177.

²³³ Shipping Circular No. 15, *supra* note 184, at ¶ 3.

²³⁴ *Id.* at ¶¶ 5-6.

²³⁵ See generally 22 C.F.R. §§ 120-130; see also 22 C.F.R. § 121.1 (listing firearms and ammunition as among the articles covered by the ITAR). The ITAR were issued by the Secretary of State pursuant to authority granted by the President pursuant to Executive Order 11958. Section 38 of the Arms Export Control Act, 22 U.S.C. § 2778, authorizes the President to control the export and import of defense articles. See PLOCH 2011, *supra* note 24, at 38.

taking” the prohibited articles out of the United States.²³⁶ Under some circumstances, individuals may qualify for an exemption from ITAR’s licensing requirement, but in that case they will only be allowed to temporarily export up to three non-automatic firearms and 1000 rounds of ammunition.²³⁷

According to a Port Security Advisory jointly issued by the Coast Guard and the Department of Homeland Security in 2010 which is entitled *International Traffic in Arms Regulations (ITAR)*,²³⁸ United States vessel operators may apply for a temporary export license under ITAR should they decide to board firearms. Such licenses are valid for up to four years and may be used for multiple trips to and from the United States. To obtain a temporary license, the shipper must identify the precise firearms and ammunition that would be carried on board the vessel and also list the foreign countries for each port of call the ship will visit during that time period. While the temporary license would allow the shipper to alter the personnel travelling on the vessel, it would not allow the firearms to be transferred to any other vessel.²³⁹ In terms of ITAR’s exemption provision, the 2010 ITAR Advisory explains that for it to apply, the arms must be for the individual applicant’s exclusive personal use. In addition, because the exemption only applies to individuals, it cannot be used by companies that “desire to hire security teams that will not travel with their weapons or where weapons will be transferred from one security team or crew member to another.” In such circumstances, the vessel owner should obtain a temporary license to cover the vessel’s carriage of weaponry.²⁴⁰

The 2010 ITAR Advisory contains additional guidance as well. It notes that United States law places other restrictions on the use of firearms, such as registration and transfer approval requirements, with which vessel owners or individuals must comply.²⁴¹ It also emphasizes that vessel owners and operators, as well as PMSCs, must comply with any weapons carriage or transport laws of foreign states in whose ports they call or through whose waters they pass.²⁴² On the other hand, shippers or individuals may avoid ITAR licensing requirements should they purchase

²³⁶ 22 C.F.R. § 120.17(a).

²³⁷ 22 C.F.R. § 128.18(c).

²³⁸ US Coast Guard and the Department of Homeland Security, *International Traffic in Arms Regulations (ITAR)*, Port Security Advisory (4-09) (Rev 4), Sept. 3, 2010 [hereinafter Port Security Advisory 4-09 Rev 4].

²³⁹ *Id.* at 1-2.

²⁴⁰ *Id.* at 2.

²⁴¹ *Id.* at 3.

²⁴² *Id.*

weapons in a foreign country and stow them while in a foreign port (assuming doing so does not violate the laws of the applicable foreign country). Should they seek to bring those weapons back into the United States, however, they would have to abide by United States weapons importation laws.²⁴³

Like the United States, the United Kingdom also regulates the carriage and transport of weapons by armed guards—but its regulations similarly do not apply if the arms are obtained from outside the country and are not brought back.²⁴⁴ The June 2012 Interim Guidance explains that only members of the security team are permitted to handle firearms on board UK-flagged ships and that no person may possess a prohibited firearm without obtaining the proper licenses.²⁴⁵ The government and its police will conduct background checks on the PMSC and its personnel before granting any license to carry “prohibited firearms” on British ships.²⁴⁶ Laws also govern removing firearms or ammunition from the country.²⁴⁷ Thus, British companies seeking to provide armed guards on ships must now obtain a special export license—called an Open General Trade License—from the country’s Export Control Organisation (ECO).²⁴⁸ The Open General Trade License permits security firms to deliver or transfer arms and ammunition through foreign territories. To obtain the license, the PMSC must, among other things, submit to the government copies of its rules of engagement and its policies on safely storing firearms. It must also maintain records showing proper usage of the license. Failure to comply with licensing requirements can result in withdrawal of the license or possibly even prosecution.²⁴⁹

²⁴³ *Id.*

²⁴⁴ It bears noting England and Wales generally have very strict gun laws, and that even the police do not carry firearms. Home Office Police, *Operational Policing: Police Use of Firearms*, available at

<http://tna.europarchive.org/20100419081706/http://www.police.homeoffice.gov.uk/operational-policing/firearms/index.html>. Individuals may only possess arms if they complete and comply with a rigorous licensing process, and possession of a firearm without a license is a criminal offense. See Metropolitan Police, *Firearms Licensing: Frequently Asked Questions*, available at http://www.met.police.uk/firearms_licensing/faqs.html; Firearms Act 1968, § 5, available at <http://www.legislation.gov.uk/ukpga/1968/27>.

²⁴⁵ June 2012 Interim Guidance, *supra* note 176, at ¶ 6.5.

²⁴⁶ Thorp, *supra* note 108, at 11.

²⁴⁷ June 2012 Interim Guidance, *supra* note 176, at ¶ 6.15.

²⁴⁸ *Id.* at ¶ 6.16. Details about the Open General Trade License may be obtained from <https://www.gov.uk/open-general-trade-control-licences#open-general-trade-control-licence-maritime-anti-piracy>.

²⁴⁹ Open General Trade Control License (Anti-Piracy), Feb. 23, 2012, available at <http://www.bis.gov.uk/assets/biscore/eco/ogels-current/12-628-ogtcl-maritime-anti->

The June 2012 Interim Guidance nevertheless anticipates that British ship owners and operators—as opposed to British PMSCs—will not ordinarily need to export any firearms or ammunition from the United Kingdom. Rather, since shippers may only employ armed security personnel in the high risk area, the expectation is that the security team and their arms and ammunition will likely embark and disembark outside the territory.²⁵⁰ In such cases, the shipper would not need to comply with United Kingdom firearms export laws. Nevertheless, British shippers will still need to comply with the weapons carriage and usage laws of the coastal states through which they travel or be subject to liability for failing to do so in those foreign jurisdictions.²⁵¹

Norway also regulates the use of weapons, including by private security personnel. Individuals must obtain a permit from the chief of police in order to own or hold firearms on Norwegian soil, including on its flagged ships.²⁵² Norwegian-flagged shippers wanting to bring armed guards on board their ships to assist in the fight against maritime piracy are also required to obtain a general firearms permit allowing them to hold prohibited weapons on board.²⁵³ Such permits are valid for up to six months and are not linked to individual firearms or a specific assignment or security firm. Instead, the licenses will more generally allow the shipper to hold otherwise prohibited weapons, including fully automatic guns or single-shot repeating weapons.²⁵⁴ To comply with the license, the shipper must submit to the government and follow a plan to safely store and transport firearms and ammunition in a manner that will keep unauthorized persons from gaining access to them.²⁵⁵ Norway's Provisional Guidelines further caution the shipper to ensure that it can comply with any relevant port laws where its guards will embark or disembark.²⁵⁶

Lastly, Denmark provides little express guidance on arms carriage, other than in its requirements for the arms certificate for which shippers must apply in order to employ armed guards. In that regard, Denmark makes shippers identify the specific weapons the ship seeks to bring on board; the methods for storing those weapons; and whether the arms will be

piracy.pdf 5.

²⁵⁰ June 2012 Interim Guidance, *supra* note 176, at ¶ 6.12.

²⁵¹ *Id.* at ¶¶ 6.8-6.11.

²⁵² Provisional Guidelines, *supra* note 181, at 3.

²⁵³ *Id.* at 6.

²⁵⁴ *Id.* at 7.

²⁵⁵ *Id.* at 9 and 11.

²⁵⁶ *Id.* at 9.

carried out of an into Denmark.²⁵⁷ Singapore appears not to have issued specific guidance on arms carriage, except to refer shippers to the various IMO Circulars on the use of private armed security guards in the fight against maritime piracy.²⁵⁸

V. A CALL FOR MORE COORDINATED REGULATION

As the comparison of state laws and guidance shows, states have taken various approaches towards regulating the use of private armed guards in the fight against maritime piracy. The prior analysis demonstrates that even more needs to be done. States that have not issued any precise guidance regulating the selection of armed guards or advising them on the lawful use and transport of weapons should do so. States that have issued guidance in these respects could be more precise. More importantly, this Article urges states to work together and arrive at one set of clear regulations to govern the use and conduct of private armed guards in the maritime piracy context. Maritime piracy is an international crime, and the fight against it occurs on international waters. Moreover, states are responsible for the fight against piracy. Thus, all states should act responsibly to ensure that the private contractors they allow to use guns to protect ships against piracy act lawfully and properly when doing so.

The best way to ensure that one clear set of regulations governs the use and conduct of armed guards is for states to work together to create an international convention. By that convention, states could agree on the necessary qualifications for any maritime security personnel. They could also agree on the types of weapons guards may use, how they may store and transport them, and under what circumstances they may use those weapons to deter an attack by pirates.

Even without an international convention, states could still do a better job of mitigating the risks associated with using private armed guards. To that end, the sections that follow suggest some standards or practices that all states should adopt or agree on in order to help minimize the risks and practical difficulties associated with employing these private actors. The fact that armed guards may help deter pirate attacks benefits the world community. But, that benefit can be outweighed unless states work together to ensure that shippers' use of armed guards does not unnecessarily escalate violence, involve the unlawful use of force, endanger innocent seafarers, or cause international incidents.

²⁵⁷ Denmark Strategy, *supra* note 177.

²⁵⁸ Shipping Circular No. 15, *supra* note 184.

A. The Regulation and Monitoring of the PMSC Industry Generally

As an initial matter, states should work together to make certain that the PMSC industry is regulated and monitored so that only properly vetted personnel can protect commercial vessels travelling through pirate-infested waters. An overarching concern with allowing private armed guards to supplement the work of the United Nations-sanctioned naval patrols focuses on the possibility that private guards may be woefully undertrained as compared to their government military counterparts and also not subject to the same monitoring mechanisms. But, if states are not actually regulating and monitoring PMSC conduct, the risk that untrained “cowboy” guards will be patrolling the seas is a real one.

The comparison of state laws, however, suggests that for the most part, states do not want to play a role in regulating the PMSC industry or vetting guards. This is not to suggest that states have not made a helpful contribution by issuing some guidelines shippers should follow when conducting due diligence of the various PMSCs they might seek to hire. However, providing non-binding guidance is not the same as subjecting PMSCs to some form of regulation which includes accreditation standards and monitoring to ensure those standards are followed. Giving shippers a list of items to address when conducting due diligence does not necessarily ensure that the shipper will ferret out a disreputable PMSC or one whose guards are not properly trained. Shippers are not necessarily experts in the maritime security industry and will likely rely on the PMSCs’ own marketing materials and statements when choosing a firm. Furthermore, shippers face the competing incentive of wanting to employ a less costly PMSC even if it means the guards they hire out do not have the highest level of qualifications. The fact that some states also require shippers to provide the state with information about the PMSC and its guards is an exercise that should help impress upon shippers the need to hire a reputable firm. That advance information about the PMSCs may also be helpful should the state or others need to investigate any later claim that a guard used unlawful force. Unless PMSCs are more meaningfully vetted by some entity with appropriate expertise, shippers may still wittingly or unwittingly hire armed guards who are not well-trained or prepared to abide by all applicable laws governing the carriage and use of weapons.

Rather than passing the buck to shippers, states need to accept responsibility for insuring that only qualified, trained, and responsible security personnel play a role in the fight against maritime piracy. Indeed,

states bear the overall responsibility to undertake that fight.²⁵⁹ State regulation of PMSC licensing or accreditation standards and a monitoring mechanism to ensure compliance would provide a needed level of protection against the possibility of untrained guards operating on the high seas.²⁶⁰ Nevertheless, states cannot operate in isolation for any such PMSC regulatory scheme to be optimal. All states should agree on a set of standards, otherwise substandard PMSCs will find states with looser standards on whose ships their guards can operate. Absent an agreed-upon international standard, PMSCs will be able to register themselves in a different jurisdiction so as to take advantage of lax laws. These very issues have been raised in the more general context of private military security services. In that context, commentators have noted that unless all states agree on a regulatory system, firms will simply move their operations to a “more hospitable” country where laws will allow them to operate with little or no oversight.²⁶¹

Although getting all states to agree on a regulatory scheme for PMSCs may necessarily require some effort, the payoff is safer seas for all who travel through them—a payoff all states should want to realize. Nor would states need to start with a blank slate in creating such a regulatory scheme. One non-governmental organization, the Security Association for the Maritime Industry (SAMI), has already begun work on an accreditation system for PMSCs. Headquartered in the United Kingdom, SAMI’s stated aim is to “facilitate clear dialogue and a common standards framework in the delivery of maritime security products to the shipping community.”²⁶² PMSCs may choose to join SAMI for a fee, but they must also sign the International Code of Conduct for Private Security Companies—a Swiss initiative which sets out an industry standard based on humanitarian and

²⁵⁹ Most states, in fact, are parties to UNCLOS and have pledged to “cooperate to the fullest extent possible in the repression of piracy.” UNCLOS, *supra* note 5, at art. 100. For a list of state ratifications, see *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and Related Agreements*, U.N. DIVISION FOR OCEAN AFF. & THE LAW OF THE SEA, available at http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm.

²⁶⁰ States like the Netherlands could continue to allow their shippers to only hire VPDs. VPDs are comprised of government military personnel who presumably would meet any training standards agreed upon for PMSCs. Indeed, one reason shippers have urged states to provide them with military armed guards is because of the presumption that on the whole most military personnel are properly trained and prepared to abide by applicable laws.

²⁶¹ Deven R. Desai, *Have Your Cake And Eat It Too: A Proposal For A Layered Approach To Regulating Private Military Companies*, 39 U.S.F. L. REV. 825, 851 (2005).

²⁶² See SAMI Joining Guide December 2012, available at <http://www.seasecurity.org/wp-content/uploads/SAMI-Joining-Guide-Dec-2012.pdf>.

human rights standards.²⁶³ SAMI also recently introduced a Certification Program which involves an independent auditing process members must undertake so as to be recognized as an accredited and reputable security provider.²⁶⁴ That auditing process involves a review of company documentation and an on-site visit whereby SAMI experts examine management and operational logistics, including the management of personnel.²⁶⁵ As of early January 2013, approximately 30 PMSCs had successfully passed the documentation phase of SAMI's certification process.²⁶⁶

SAMI is a good first step towards regulating the PMSC industry, but membership is voluntary which makes it no substitute for uniform and coordinated state regulation. Nevertheless, states could build on the SAMI model and establish a similar certification process for PMSCs. If states investigated SAMI's certification process and concluded that it was sufficiently rigorous, they may be able to agree on a regulatory scheme that allows shippers to only hire SAMI-certified PMSCs. Passing an initial certification process should not constitute the end of the process, however. To make certain that PMSCs continue to deliver quality and reputable services, they would need to be monitored by way of a public reporting mechanism or some external audit procedures. Here again, states could place such a monitoring function in the hands of an institution like SAMI.²⁶⁷ To defer the costs of certification and monitoring, states could implement a fee-based system, much like that used by SAMI for its members.²⁶⁸ In any

²⁶³ See www.seasecurity.org. See also The International Code of Conduct for Private Security Providers, Nov. 9, 2010, ¶ 4, available at http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf.

²⁶⁴ See <http://www.seasecurity.org/sami-certification-for-pmscs/>.

²⁶⁵ *Id.*

²⁶⁶ See <http://www.seasecurity.org/certified-members/>.

²⁶⁷ For a detailed discussion of how one might structure an international framework to regulate the private military security companies that contract with governments to supplement and help support their troops participating in various armed conflicts and also in peacekeeping operations post-conflict, see Peter W. Singer, *War, Profits, and the Vacuum of International Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 521, 544-46 (2004).

²⁶⁸ Some evidence indicates that the United Kingdom is working with a trade industry partner—the Security in Complex Environments Group (SCEG)—to establish a regulatory framework to govern its PMSCs. According to the SCEG website, the approach currently under consideration would involve a mixture of self-regulation and external audit. See <http://www.adsgroup.org.uk/pages/19813174.asp>. Germany also seems to be in the process of amending its laws to require PMSCs to meet certain licensing requirements before they can be hired to work on German-flagged ships. *Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Einführung eines Zulassungsverfahrens für*

event, states are already spending billions on the navies who patrol on anti-piracy missions. If they have to contribute additional sums to ensure that the supplemental private forces they permit shippers to hire are qualified and trained to properly and lawfully use and transport weapons, that money will be well spent.

B. Use of Force

Guidance on the lawful use of force is another area where increased coordination would help to mitigate the risks associated with permitting commercial vessels to hire private armed guards to protect them against pirate attacks. Coordinated regulation and monitoring of the PMSC industry should do much to ensure that armed guards are properly trained and prepared to abide by applicable laws. However, if states do not articulate clear rules on the use of force, or even if those rules differ among states, guards may have difficulty knowing what is expected of them. In this international context, guards may be employed by a PMSC that operates in one state; they may be hired by a shipping company flagged in a different state; and they may find themselves repelling an attack against still another state's nationals or in another state's territory.

The analysis of state laws above aids in demonstrating the need for all states to provide clear and concrete guidance on the use of force and to increase the level of uniformity in that guidance where possible. Recall that Denmark and Singapore authorize the use of armed guards, but they do not provide any details on when guards may use lethal force to repel a pirate attack.²⁶⁹ Both countries presumably have general self-defense laws that PMSCs could independently research. This approach, though, leaves a lot of room for error. States are responsible for the fight against piracy, and they are also in the best position to articulate the precise contours of their laws. Leaving it to PMSCs to decipher state laws on the use of force may save the state some time at the outset, but it will not guarantee that state laws are followed or that international incidents are avoided.

The fact that state laws on the use of force are not uniform may also

Bewachungsunternehmen auf Seeschiffen, Oct. 10, 2012, BT 17/10960 (Ger.). According to the proposed laws, a federal agency will be tasked with administering the licensing process, (*Id.* at 7-10) determining whether requirements for licensing are made (*Id.*), and for publishing a list of approved companies. (*Id.* at 14). Like the SAMI framework, both the United Kingdom and German frameworks could also serve as guides for a framework to be adopted by all states to regulate PMSCs.

²⁶⁹ See notes 232-34 and accompanying text.

cause confusion since guards may be required to interpret and comply with different sets of laws and guidance. The United States and the United Kingdom authorize deadly force where guards possess a reasonable belief that lives are in imminent danger.²⁷⁰ Norway's laws seem similar in permitting deadly force in response to a threat that is "direct, immediate, significant and otherwise unavoidable."²⁷¹

Nevertheless, there are reasons to suspect these states may not necessarily reach the same conclusion about whether the use of force in any given instance was lawful. For example, Norway only allows firing shots to render a person harmless after employing more gentle means or where no alternative has any chance of success.²⁷² At the same time, it says that a pirate attack may be immediate and that force may be used to repel an attack even if pirate vessels are 2000 meters away.²⁷³ The guidance issued by the United Kingdom states that guards must "use the minimum force necessary" to disrupt any attempted boarding of the vessel and that as long as there was nothing to indicate a pirate skiff was *actively undertaking an act of piracy*, guards would be wrong in using force against them.²⁷⁴ Can the guidance of both states be reconciled? Would the actions of the guards on the *Avocet* be legal under either set of guidelines? Under Norway's or the United Kingdom's guidance, do the guards need to see the alleged pirates aiming weapons before they are permitted to use lethal force in self-defense?

States not only need to clarify what level of force may be used under certain circumstances, but they also need to clarify other matters relating to the use of force: who may authorize the use of force; whether and to whom notice should be given if force is used; and whether and to whom liability might attach if excessive force is used. State guidance must also be sufficiently detailed so that guards actually know what is expected of them. To simply indicate that the captain is in control of the vessel and must authorize any use of force can leave a lot of room for interpretation—and

²⁷⁰ See Port Security Advisory 3-09, *supra* note 168, at 3 (stating that the United States permits deadly force when an individual has a "reasonable belief" of imminent danger to lives); June 2012 Interim Guidance, *supra* note 176, at ¶¶ 8.9, 8.10, 8.12 (stating that the United Kingdom allows deadly force to defend imminent danger to lives as long as the force is "proportionate and reasonable in the circumstances as the defendant genuinely believed them to be").

²⁷¹ Provisional Guidelines, *supra* note 181, at 12; Norway Amended Regulations, *supra* note 180, at ¶ 17(2).

²⁷² See note 223 and accompanying text.

²⁷³ See note 227 and accompanying text.

²⁷⁴ See note 273 and accompanying text.

for errors. Yet, this is essentially the guidance provided by the United States.²⁷⁵ By contrast, the more specific guidance of the United Kingdom indicates that the security team must advise the captain of available responses to counter any threat and that the security team may only take action after obtaining the captain's approval. The guidance also recognizes that in some circumstances, the team may not have sufficient time to seek approval, but in such cases, they must inform the captain immediately afterwards and explain their reasons for their actions.²⁷⁶

Furthermore, a review of the notice provisions shows that they differ for each of the United States, the United Kingdom, and Norway. Norway, does require notice to its government when force is used to repel an attack.²⁷⁷ The United Kingdom advises that the captain and security team should make detailed reports of any incidents to certain relevant international institutions.²⁷⁸ This seems an area where states *should* agree that broad notice is *required* following an incident since the fight against maritime piracy occurs in the international arena and the international community has an interest in ensuring that any use of force was appropriate.

Finally, the issue of liability is not only one on which states should provide information to their constituencies, but is also one on which they should cooperate to reach some agreements about jurisdictional priorities in case questions arise about whether any guards used excessive force. One question that needs attention is whether military personnel hired out to work as VPDs are entitled to any immunity from foreign prosecution for acts that result in the death or injury of others while conducting anti-piracy missions. It is well-settled that private citizens must comply with the laws of the states in whose territory they appear or risk civil or criminal liability in that foreign jurisdiction.²⁷⁹ Thus, as the United Kingdom has warned, PMSC personnel may find that in addition to the United Kingdom, "other countries may also have a right to assert jurisdiction over a case and apply their own national laws governing the use of force"—depending, for example, on where the offense occurred or the nationality of the victims or perpetrators.²⁸⁰ What though are the rules for state military personnel who have been hired out by the state as part of a VPD? As the *Enrica Lexie* incident demonstrates, not all states will necessarily agree that military

²⁷⁵ See note 205 and accompanying text.

²⁷⁶ June 2012 Interim Guidance, *supra* note 176, at ¶¶ 5.4-5.5.

²⁷⁷ Provisional Guidelines, *supra* note 181, at 13-14.

²⁷⁸ June 2012 Interim Guidance, *supra* note 176, at ¶¶ 9.1-9.2

²⁷⁹ See note 126 and accompanying text.

²⁸⁰ June 2012 Interim Guidance, *supra* note 176, at ¶ 8.8.

hired to work in a private capacity are entitled to any of the same immunities that might be granted to military personnel working on state military missions.²⁸¹ The only way to avoid additional similar diplomatic disagreements about whether immunity applies is for states to agree on clear rules in advance. States have apparently negotiated Status of Forces Agreements for their military personnel. They can take the same or similar precautions if they want to use and obtain immunity for their VPD military personnel.

In any event, even if states do not reach any agreements on immunity for VPD personnel, they should still seek to agree on a process for determining which state will be able to exercise jurisdiction if the use of force results in injury or death. This may not be easy to accomplish since states will have to agree in advance to surrender jurisdiction even before they know the precise factual circumstances of an event. But, why could they not agree to allow the flag state to exercise primary jurisdiction over offenses committed by private guards acting on anti-piracy missions as long as the flag state had procedures for vetting guards and laws to punish for excessive force? With these provisos, the foreign jurisdiction should have some assurances that the guards were not untrained “cowboy” guards. The requirement that the flag state have laws to punish excessive force should provide some assurances that justice will be done—though it will not eliminate the risk that the flag state fact finder may reach a different conclusion as to whether force was excessive under the circumstances. Indeed, such a regime would not be unlike that states negotiate when they enter into SOFAs.²⁸²

It may not be realistic to expect that states will amend their criminal codes so that they all have identical rules on when civilians may use force in self-defense or defense of others. This does not mean that states permitting private armed guards on their ships cannot provide clear and detailed guidance on what is expected of those guards. It also does not mean that states cannot cooperate to agree on uniform rules that govern aspects of the use of force that are unique to the maritime piracy context: such as command authority and notice provisions. States can also minimize the potential for diplomatic disagreements if they agree in advance on how they will resolve jurisdictional disputes should guards use force in a situation where laws in addition to the flag state laws could also apply. The need to avoid chaos on the high seas is good reason for states to provide clear, detailed, and uniform guidance.

²⁸¹ See notes 130-33 and accompanying text.

²⁸² See note 128 and accompanying text.

C. Weapons Carriage

Lastly, it is imperative that states work together to develop clear and concrete rules regarding weapons carriage. Flag states can take the lead here by strictly regulating weapons carriage—including the types of weapons guards can use and how they can obtain them. Yet, as the comparison of state laws and guidance shows, not all states necessarily specifically regulate weapons carriage and some regulations have significant and important gaps in their coverage. Although both the United States and the United Kingdom require special licenses for the export of firearms, both also specifically state in their guidance that their licensing laws may not apply if some guards hired by their shippers obtain weapons in foreign ports and do not bring them back to the flag state.²⁸³ Thus, the regulatory schemes may not prohibit guards who will provide protection on US- and UK-flagged ships from buying or leasing firearms, including automatic weapons, while in some foreign port states. The regulatory schemes also do not seem to specifically prohibit guards from obtaining weapons from the many floating armories operating on the high seas.²⁸⁴ In both cases, however, the state has lost an opportunity to monitor weapons access—thus, potentially putting innocent lives at risk. Floating armories pose the additional risk that if they are not well-guarded, they could be accessed for criminal purposes. However, at present, no national or international regulations govern the use of floating armories.²⁸⁵

Fully regulating weapons carriage requires flag states to decide whether the guards their shippers hire should be allowed access to particular types of weapons: such as fully automatic firearms. If the state concludes that access to such weapons unnecessarily increases the possibility that guards will violate laws on the use of force, then the state should ensure that its regulations permit it to exercise some oversight. In this regard, Denmark appears to have a helpful model on which states might build since it requires its shippers to identify the specific weapons that will be brought on board before the shipper may obtain a firearms certificate.²⁸⁶ Even Denmark's regulations though could be more specific and provide that the shippers and guards are prohibited from obtaining those weapons from a floating armory.

²⁸³ See notes 243, 250-51 and accompanying text.

²⁸⁴ For a discussion of the practice of using floating armories, see notes 91-92 and 114-117 and accompanying text.

²⁸⁵ See note 115 and accompanying text.

²⁸⁶ See note 257 and accompanying text.

The very fact of floating armories raises the additional issue of what to do about the fact that different port states have differing laws regulating the carriage and transport of weapons. After all, PMSCs apparently developed the practice of using floating armories as a way to avoid having to navigate what some have suggested is a complicated legal minefield.²⁸⁷ One way to eliminate the complicated legal minefield of different port state laws would be for all port states to agree to permit armed security personnel to carry certain weapons in their territory for the limited purpose of participating in a sanctioned anti-piracy mission. Some evidence already indicates that port states are willing to cooperate in this regard. Even though Singapore has strict weapons laws, the Netherlands has apparently reached an agreement to allow it to store weapons and ammunition in Singapore's port for usage by its VPDs.²⁸⁸ Although as of late 2011, Egypt banned commercial ships from carrying any weapons in its ports, by early 2012, it changed its laws to allow foreign weapons in its territory as long as the weapons were kept in a sealed container and delivered to Egyptian authorities while the ship was in port or travelling through the Suez Canal.²⁸⁹ Other port states may also be persuaded to change their laws to allow for weapons carriage—particularly if the international community actually agreed to regulate and vet PMSCs so that only trained and reputable guards would be participating in the fight against piracy.

Alternatively, if port states cannot be persuaded to allow security personnel to carry certain weapons in their territories under certain circumstances, then states need to ensure that shippers and PMSCs fully understand and comply with the various port state laws regarding weapons carriage. States should not be able to simply issue general warnings on the need to comply with laws of foreign states through which the vessel

²⁸⁷ See note 114 and accompanying text.

²⁸⁸ See note 120 and accompanying text.

²⁸⁹ In late 2011, Egypt decreed that commercial ships travelling through its waters were prohibited from carrying weapons on board: violations would be punished by arrest of the ship, the captain, and any armed personnel. *Egypt bans weapons on ships transiting its waters*, BANGKOK SHIPOWNERS AND AGENTS ASSOCIATION, Sept. 16, 2011, available at <http://www.thaibsaa.com/news/world-shipping-news/362-egypt-bans-weapons-on-ships-transiting-its-waters.html>. In early 2012, Egypt changed its laws to require vessels to file a declaration 48 hours before arriving at an Egyptian port or transiting through the Suez Canal with details regarding any weapons, ammunition, and guards on board, as well as confirmation that weapons and ammunition will be in a sealed box for delivery to Egyptian authorities until the ship leaves port or exits the Suez Canal. *Egypt—Carriage of Weapons, Ammunition, and Armed Guards—Further Update*, WEST OF ENGLAND, March 14, 2012, available at <http://www.westpandi.com/Publications/News/Egypt---Carriage-of-Weapons-Ammunition-and-Armed-Guards---Further-Update/>.

passes.²⁹⁰ It may be difficult for states to obtain information about different state laws, especially if those laws are sometimes in flux—as they may be given that the use of armed guards conducting anti-piracy missions is a relatively new phenomenon.²⁹¹ On the other hand, the IMO has identified areas that pose the greatest risk of pirate attacks,²⁹² and some states like the United Kingdom, will only permit armed guards to operate on their flagged ships in those identified high risk areas.²⁹³ States authorizing the use of armed guards could at least take the initiative to provide their constituencies with information about the weapons carriage laws of this limited number of states bordering the areas posing the highest threat of pirate attacks.²⁹⁴ Again, states are charged with fighting maritime piracy, and they should take the lead in ensuring that fight is carried out safely and in compliance with all relevant laws—rather than in a way that might encourage guards to rely on floating armories on the high seas.

VI. CONCLUSION

The fight against maritime piracy is a worthy one. Yet, the international community suffers if states permit private armed guards to participate in that fight without also taking steps to guarantee that those private actors will act lawfully and properly. While the military personnel participating in the anti-piracy patrols may not all be perfect all the time, military personnel are generally trained, under an officer's command, and subject to disciplinary proceedings or other potential actions should they fail to act lawfully and properly. At present, however, there are no assurances that any of the private armed guards shippers are hiring are well-trained or prepared to follow orders and abide by applicable laws—or that they will be punished should they fail to act lawfully.

Fighting the international crime of maritime piracy requires international coordination and transparency regarding the rules that will

²⁹⁰ See, e.g., note 251 and accompanying text (discussing the United Kingdom guidance warning states of the need to comply with port and coastal state laws governing weapons carriage).

²⁹¹ Houreld, *supra* note 114 (stating that in early 2012, Egypt, Oman, and Kenya all changed their rules regarding weapons carriage).

²⁹² IMO, Best Management Practices 4 at ¶ 2.4 (defining the “High Risk Area” as “an area bounded by Suez and the Strait of Hormuz to the North, 10S and 78E”).

²⁹³ See June 2012 Interim Guidance, *supra* note 176, at ¶ 1.6.

²⁹⁴ Maps of the “High Risk Area” suggest the following coastal states: India, Pakistan, Iran, Iraq, Kuwait, Bahrain, Qatar, Saudi Arabia, United Arab Emirates, Oman, Yemen, Egypt, Sudan, Eritrea, Djibouti, Ethiopia, Somalia, Kenya, Tanzania, Madagascar, and Mozambique. See Best Management Practices 4, at Index.

govern the use of private armed guards. To continue with a system whereby each state creates its own rules or no rules at all creates the risk of “Blackwater moments.”²⁹⁵ All civilized states should view such a risk as unacceptable and take responsibility for regulating and monitoring the private actors they are authorizing shippers to hire to protect them against pirate attacks.

²⁹⁵ Bockmann and Katz, *Shooting to Kill Pirates Risks Blackwater Moment*, *supra* note 19.