
Defending individual ships from pirates

Questions of State responsibility and immunity

DOUGLAS GUILFOYLE*

1 Introduction

Somali and, increasingly, West African piracy has captured international attention since 2008. A significant international law literature has followed, largely focused on the multinational naval deployment in the Gulf of Aden and Indian Ocean which is engaged in efforts to deter, prosecute and imprison pirates.¹ This neglects a key development: State and industry efforts to defend individual ships. The naval deployments, given limited resources, have focused on area protection: stationing ships to ‘picket’ areas of ocean or to protect vessels within a recommended transit corridor.² Obviously, this approach cannot guarantee the security of any one vessel.

The shipping industry has concluded that the best way to secure any given vessel against pirate attack is to ‘harden’ that individual vessel as a target. Initially, such measures consisted primarily of Best Management Practices, recommendations for the passive or non-lethal defence of vessels through measures such as barriers to boarding, converted fire-hose water-cannons and secure ‘citadels’.³ The more controversial development, discussed here, has been the turn to armed security. This may take two forms, both of which may implicate State responsibility.

* In 2009–13 the author worked closely with the legal issues working group of the Contact Group on Piracy off the Coast of Somalia.

¹ A useful survey can be found in Tullio Treves, ‘Piracy and the International Law of the Sea’ in Douglas Guilfoyle (ed.), *Modern Piracy: Legal Challenges and Responses* (London: Elgar, 2013), ch. 6, n. 1.

² House of Commons Foreign Affairs Committee, ‘Tenth Report – Piracy off the Coast of Somalia’, HC 1318 (5 January 2012), Evidence Annexe, Ev 14, available at www.parliament.uk/business/committees (hereinafter House of Commons Report).

³ ‘Best Management Practices for Protection against Somalia Based Piracy (Version 4 – August 2011)’, annexed to IMO Doc. MSC.1/Circ.1339 (14 September 2011).

First, many in the industry have called for the deployment of marines, typically from the flag State's armed forces, aboard commercial vessels in Vessel Protection Detachments (VPDs).⁴ The presumption was that such VPDs would clearly enjoy both authority to use force and sovereign immunity before national courts in the event of mistaken uses of force. However, the *Enrica Lexie* incident of February 2012, in which two Italian marines serving in a VPD allegedly killed two Indian fishermen, demonstrates that the questions involved are more complex. At time of writing, the case remains before Indian courts (although one marine has returned to Italy for medical treatment).

Secondly, recognising that military assets are finite, there has been a turn by an initially reluctant industry towards using Privately Contracted Armed Security Personnel (PCASP).⁵ Novel questions arise regarding: (a) the duties of States to regulate the use of PCASP aboard their flag vessels where they are aware that such use is occurring; and (b) the consequences for States (if any) which may flow from permitting the use of PCASP. In particular, when may inadequate regulation and control of the use of force by PCASP become internationally wrongful? Further questions arise about the extent to which corporations, such as Private Maritime Security Companies (PMSCs) engaged in the employment and supply of PCASP, can commit international wrongs and whether States can be complicit in those wrongs.⁶ These questions are addressed after a brief consideration of the international law applicable to the use of force against pirates.

2 Using force in countering piracy

This section does not review the rules governing the use of force in maritime policing operations in detail. It is sufficient to note that when a State attempts to capture a vessel and those aboard for law enforcement purposes, the use of force should be necessary (that is, used as a last resort) and proportionate.⁷ The more pertinent question here is the

⁴ House of Commons Report, para 25.

⁵ On early reluctance, see e.g. 'Statement on International Piracy by Giles Noakes Chief Maritime Security Officer of BIMCO before the United States House of Representatives Committee on Transportation and Infrastructure Subcommittee on Coast Guard and Maritime Transportation' (February 2009), available at www.marad.dot.gov/documents/HOA_Testimony-Giles%20Noakes-BIMCO.pdf.

⁶ e.g. Robert McCorquodale and Penelope Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law', *Modern Law Review*, 70 (2007), 599.

⁷ *M/V 'Saiga' (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, Judgment, ITLOS Reports (1999), 65, para. 155. Treaties sometimes use the term 'reasonable' rather than

difference between government counter-piracy operations and individual self-defence against pirates.

The UN Convention on the Law of the Sea 1982 (UNCLOS)⁸ provides that warships or 'other duly authorized ships or aircraft clearly marked and identifiable as being on government service' (Article 107) have the right to 'seize a pirate ship . . . or a ship . . . under the control of pirates, and arrest' persons aboard (Article 105). This power is *not* exercisable by VPDs aboard private vessels, unless such vessels are both 'authorised' to conduct such operations and 'marked' as on 'government service'. What powers at international law does a VPD have, then, to repel pirates? They have the same power as private individuals: self-defence. The International Law Commission stated that the concept of 'seizure' of pirate craft (commenting on the equivalent provision in what became Article 19 of the Convention on the High Seas 1958⁹): '[c]learly . . . does not apply in the case of a merchant ship which has repulsed . . . [a pirate] attack . . . and, in exercising its right of self-defence, overpowers the pirate ship and subsequently hands it over to a warship' or coastal State authorities.¹⁰ The presence of a State VPD or State-licensed but privately retained PCASP aboard a merchant vessel should not change this position. The important point is that self-defence by those aboard a merchant vessel against pirate attack is not an exercise of sovereign authority. The applicability of the basic right of individual self-defence on the high seas might be considered to follow from either a general principle of law common to all legal systems¹¹ or a simple application of the flag State's criminal law.

'proportionate': Art. 22(1)(f), Agreement for the Implementation of Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, adopted 4 August 1995, entered into force 11 November 2001), 2167 UNTS 88; Art. 22, Agreement concerning Cooperation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area (San José, adopted 10 April 2003, entered into force 18 September 2008) available at www.state.gov/s/l/2005/87198.htm; Art. 8bis(9), Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (London, adopted 14 October 2005, entered into force 28 July 2010), IMO Doc. LEG/CONF.15/21.

⁸ UN Convention on the Law of the Sea (Montego Bay, adopted 10 December 1982, entered into force 16 November 1994), 1833 UNTS 3.

⁹ The Geneva High Seas Convention (HSC) (Geneva, adopted 29 April 1958, entered into force 30 September 1962), 450 UNTS 11.

¹⁰ Commentaries to the ILC Articles concerning the Law of the Sea, *ILC Yearbook*, 2 (1956), 283.

¹¹ Art. 38(1)(c), Statute of the International Court of Justice, *American Journal of International Law Supplement*, 39 (1945), 215.

3 Vessel Protection Detachments and counter-piracy: questions of State responsibility and immunity

States including France, Spain, Israel and Italy have provided VPDs to some vessels flying their flags and transiting the so-called 'High Risk Area' for piracy (essentially the Gulf of Aden and Indian Ocean).¹² For example, French tuna trawlers operating out of the Seychelles have carried embarked marines since 2009.¹³ Controversy can occur, however, when VPDs use force – especially if acting in mistaken self-defence.

The most controversial such case is the *Enrica Lexie* incident of 15 February 2012 in which two Italian marines allegedly fired upon a vessel mistaken for a pirate craft, killing two Indian fishermen.¹⁴ The incident occurred outside India's territorial waters, but the *Enrica Lexie* subsequently entered port and the marines were arrested. There is no doubt that, as a unit of Italy's armed forces, the VPD was a State organ and Italy is responsible for its actions.¹⁵ If the use of force in mistaken self-defence is an international wrong, Italy must obviously make reparation. Italy has already directly compensated the families of the dead fishermen,¹⁶ but may further owe India satisfaction for mistakenly firing upon its fishing vessel.¹⁷

While the deaths are clearly attributable to the Italian State, the more difficult questions have been the jurisdiction of Indian courts and the immunity of Italian marines from that jurisdiction. The potential bases of Indian jurisdiction are straightforward. First, India could clearly rely on passive personality jurisdiction¹⁸ or – by analogy with the territorial effects doctrine – jurisdiction over acts causing effects on its flag vessel.¹⁹ India also invoked the Convention for the Suppression of Unlawful Acts

¹² House of Commons Report, Ev 14.

¹³ 'French Marines Repel New Pirate Attack on Trawlers', *AFP*, 13 October 2009, available at www.google.com/hostednews/afp/article/ALeqM5jCiyLdxWAsMNAzPu-HCg5VCH7OuQ.

¹⁴ 'Italy Challenges India in Supreme Court over Fishermen's Deaths', *Reuters*, 29 August 2012, <http://timesofindia.indiatimes.com/india/Italy-challenges-India-in-Supreme-Court-over-fishermens-deaths/articleshow/15955783.cms>.

¹⁵ Art. 4 Articles on Responsibility of States for Internationally Wrongful Acts (Articles on State Responsibility), UN Doc. A/56/83 (2001).

¹⁶ *Ibid.*, Art. 36 Articles on State Responsibility. Compare the duty of compensation in Art. 110(3) UNCLOS (though it is questionable if this duty applies directly where a State is not exercising its Art. 105 powers).

¹⁷ 'Saiga' (No. 2), para. 176.

¹⁸ Malcolm N. Shaw, *International Law*, 6th edn (Cambridge University Press, 2008), 644–6.

¹⁹ *SS Lotus case (France v. Turkey)*, Judgment, 7 September 1927, PCIJ Series A, No. 10 (1927), 23.

against the Safety of Maritime Navigation 1988 (SUA Convention),²⁰ which obliges it to prosecute an ‘act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship’,²¹ and which upholds India’s jurisdiction over such offences committed ‘against or on board a ship flying [its] flag.’²² However, Italy sought to rely on Article 97(1) UNCLOS, providing:

In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal . . . responsibility of the master or of any other person in the service of the ship, no penal . . . proceedings may be instituted . . . except before the judicial . . . authorities either of the flag State or of the State of which such person is a national.²³

While VPD members are arguably ‘in the service of the ship’, it is difficult to consider that firing upon another vessel is an ‘incident of navigation’. The term ‘incident of navigation’ probably extends to cover ‘maritime casualties’ as defined in Article 221(2) UNCLOS, including:

[any] collision of vessels, stranding or other incident of navigation, or other occurrence on board a vessel or external to it resulting in material damage or imminent threat of material damage to a vessel or cargo.²⁴

Nothing in this wording *prima facie* encompasses death or injury to natural persons – though this was undoubtedly the intended effect. The inspiration for Article 97, the 1952 Brussels Convention rules on criminal jurisdiction over collisions, was originally introduced in response to Turkey’s prosecution of a French national for negligent navigation occasioning a fatal high seas collision (as famously litigated in the *Lotus*

²⁰ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Rome, adopted 10 March 1988, entered into force on 1 March 1992), 1678 UNTS 221. On its invocation, see Duncan Hollis, ‘The Case of *Enrica Lexie: Lotus Redux?*’, *Opinio Juris* Blog, 17 June 2012, available at <http://opiniojuris.org/2012/06/17/the-case-of-enrica-lexie-lotus-redux/>; and note the Indian implementing legislation: Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act 2002 (Act No. 69 of 2002).

²¹ Art. 3(1)(b) SUA Convention. ²² *Ibid.*, Art. 6(1)(a) SUA Convention.

²³ Emphasis added. Earlier provisions to the same effect are found in Arts. 1 and 2 International Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in matters of Collisions and Other Incidents of Navigation (Brussels, adopted 10 May 1952, entered into force 21 November 1959), 233 UNTS 439; Art. 11(1) Convention on the High Seas (Geneva, adopted 29 April 1958, entered into force 30 September 1962), 450 UNTS 11; on its history see Robin R. Churchill and Alan Vaughan Lowe, *The Law of the Sea*, 3rd edn (Manchester University Press, 1999), 208.

²⁴ Satya Nandan, Shabtai Rosenne, and Neal Grandy (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, 3rd edn (Dordrecht: Martinus Nijhoff, 1995), 168.

case).²⁵ However, the terms ‘collision’ and ‘incident of navigation’ appear to focus closely on the steering and management of the ship itself as an object capable of causing death or injury. Extending the provision to cover intentional acts by the crew in projecting force beyond the ship would appear a broad reading unsupported by the plain language.

If Indian courts therefore have jurisdiction, the question becomes one of functional immunity. Cases involving the shooting of nationals by foreign armed forces are invariably controversial, and the State practice is diverse. Identifying the relevant context is important. Different rules may apply to cases where foreign State organs are present by invitation in a State’s territory (in which case their official acts will be held immune)²⁶ and those cases where they enter uninvited or commit espionage.²⁷ One 2011 case in the UK held that functional immunity cannot apply where a State official commits illegal acts within another State’s territory.²⁸ However, the present scenario does not clearly fit such categories: the marines physically remained within Italian jurisdiction though their acts occasioned consequences within Indian jurisdiction. An analogy might be made with perimeter guard cases, dealing with the customary international law status of foreign bases. For example, in *In re Gilbert* a United States soldier had shot dead a Brazilian citizen who had repeatedly attempted to enter a US base. The Brazilian courts upheld immunity on the basis that the ‘marine committed the offence in the exercise of his specific duty as a sentry’.²⁹ In a seemingly contrary case, *Japan v. Girard*, a Japanese court held (strictly, *obiter*) that a marine surrendered to Japanese justice after shooting a local woman for scavenging on an artillery range would have enjoyed no immunity.³⁰ The case turned, however, on a finding that the defendant acted to gratify his own sadistic whims by luring the deceased to a point where he was authorised to shoot her. Such flagrant abuse of authority was seen as severing the connection between his act and his State function. Similarly, in the present

²⁵ See above n. 23; *Lotus* case, 4.

²⁶ *Schooner Exchange v. McFaddon*, 11 US (7 Cranch) 116 (1813); *Wright v. Cantrell* (Supreme Court of New South Wales, 1943) 12 International Law Reports, 133.

²⁷ As in the *Rainbow Warrior* incident (although notably France never directly invoked State immunity), see *Ruling of 6 July 1986 of the United Nations Secretary-General*, Reports of International Arbitral Awards, vol. XIX, 213.

²⁸ *Khurts Bat v. The Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin).

²⁹ *In re Gilbert* (Brazil, Supreme Federal Court, 1944) 13 International Law Reports, 86, 88.

³⁰ *Japan v. Girard* (Maebashi District Court, 1957) 26 International Law Reports, 203, 207.

case Indian courts have to date rejected any plea of immunity, a state High Court holding:

[t]he shooting was ‘cruel’ and ‘brutal’ and hence it can be inferred that . . . [the naval guards acted] . . . on their own.³¹

The reasoning involved, denying immunity to objectively sovereign acts by reference to the actor’s subjective motives, is dubious unless there is clear evidence of substantial departure from the scope of official duties.³²

The Indian Supreme Court entertained an interlocutory appeal on jurisdiction in the case, delivering its judgment in January 2013.³³ The judgment holds that India may assert jurisdiction and that Article 97(1) UNCLOS is not applicable. The result is correct, but the Supreme Court’s reasoning that Article 97(1) cannot cover criminal acts is almost certainly wrong.³⁴ It also, rather peculiarly, held that India could claim jurisdiction on the basis that while the relevant events occurred outside India’s territorial sea they occurred within its contiguous zone and that the Indian Penal Code therefore applied as UNCLOS allows full criminal law enforcement jurisdiction in that zone out to 24 nautical miles from a State’s baselines.³⁵ Quite simply, it does not.³⁶ The holding is puzzling as the Supreme Court otherwise acknowledged that beyond the territorial sea a coastal State enjoys only limited sovereign rights.³⁷ Most peculiarly, the Supreme Court did not directly confront the ‘degree of immunity’

³¹ ‘Fishermen’s Killing: Kerala High Court Dismisses Italy’s Plea, Says Indian Courts Can Try Naval Guards’, *Times of India* (29 May 2012), available at http://articles.timesofindia.indiatimes.com/2012-05-29/india/31886910.1_kollam-court-indian-courts-indian-fishermen.

³² Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press, 2009), 318. On the ‘substantial departure’ standard see e.g. *Facilities and Areas and the Status of United States Armed Forces in Korea Agreement* (Agreed Minute re Article XXII) 9 July 1966, 17 UST 1677 and 1816; and *Protocol to Amend Article XVII of the Administrative Agreement under Article III of the Security Treaty between the USA and Japan* (Agreed Minute re Paragraph 3), 29 September 1953, 4 UST 1847 and 1851.

³³ *Republic of Italy and others v. Union of India and others*, Writ Petition (Civil) No. 135 of 2012, Supreme Court of India, 18 January 2013, available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=39941>.

³⁴ *Ibid.*, para. 95.

³⁵ *Ibid.*, para. 100. The reasoning in the separate opinion of Chelameswar J is far more nuanced on point.

³⁶ Art. 33(1) UNCLOS provides only authority to punish or prevent ‘infringement of [the coastal State’s] customs, fiscal, immigration or sanitary laws and regulations *within its territory or territorial sea*’ (emphasis added). It does not extend the applicability of national criminal law to events occurring *only* in the contiguous zone.

³⁷ *Republic of Italy and others v. Union of India*, para. 99.

enjoyed by a State's armed forces for events occurring within a foreign State's jurisdiction.³⁸ It did, however, expressly state that questions of immunity could be re-agitated at the trial in the light of the evidence adduced.³⁹ The Supreme Court may, therefore, have implicitly accepted the submission that there was a dispute as to whether the marines' acts were not inherently sovereign acts (acts *jure imperii*) but rather were acts any person can perform (acts *jure gestionis*).⁴⁰ This would make the existence of immunity dependent on the trial court's characterisation of the facts. At the time of writing, the case had not yet come to trial.

One reason State immunity case law tends to become a wilderness of single instances is a lack of analytical clarity. Much municipal case law has regrettably tended to focus 'more upon the act than the actor' in determining which acts benefit from immunity.⁴¹ However, this assumes all acts can neatly be divided into acts *jure imperii* or acts *jure gestionis*, a division for which there is no generally accepted test.⁴² The deployment of marines as a VPD is clearly an act of sovereign authority, but defending a private vessel from pirates is an act any person could perform. As Crawford has pointed out, rather than searching for an elusive dividing line between sovereign and ordinary acts, it would be more logical (as numerous contemporary treaties and national statutes do)⁴³ to treat state immunity as applying to all organs of state by virtue of their status as such (*ratione personae*) and then to define the acknowledged exceptions.⁴⁴ On this approach, the Italian VPD would be immune from Indian criminal jurisdiction until a relevant exception could be identified. One might think the issue could be resolved by the 'territorial tort' principle. For example, under section 5(a) of the UK State Immunity Act a foreign state 'is not immune as respects proceedings in respect of . . . death or personal injury . . . caused by an act or omission in the United Kingdom'; however, this provision has no application to criminal cases.⁴⁵ Similarly, the UN Convention on Jurisdictional Immunities of States and their Property,

³⁸ Though see *ibid.*, para. 98 (raising but not answering the question).

³⁹ *Ibid.*, para. 102. ⁴⁰ *Ibid.*, para. 70.

⁴¹ Hazel Fox, *The Law of State Immunity*, 2nd edn (Oxford University Press, 2008), 6.

⁴² James Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions', *British Yearbook of International Law*, 54 (1983), 75–118.

⁴³ European Convention on State Immunity (Basel, 6 May 1952, entered into force 11 June 1976), ILM, (1972) 11, 470; United Nations Convention on Jurisdictional Immunities of States and their Property, annexed to UNGA Res. 59/38, 2 December 2004 (not yet in force); State Immunity Act (United Kingdom) 1978, Chapter 33, ILM, (1978) 17, 1123; Foreign States Immunities Act 1985 (Australia) (No. 196 of 1985), ILM, (1986) 25, 715; State Immunity Act 1982 (Canada), 1980–3, c. 95; ILM, (1982) 21, 798.

⁴⁴ Crawford, 'International Law and Foreign Sovereigns', 91. ⁴⁵ See above n. 43.

despite containing a similar principle in Article 12, is understood to have no application in criminal cases.⁴⁶ The point, therefore, remains controversial.

4 PCASP: questions of State responsibility

4.1 State responsibility for non-State actors: the ordinary principles

The International Maritime Organisation (IMO) has, since 2009, issued 'interim' guidance to flag States and shipowners on the use of PCASP to protect vessels from pirate attack in the High Risk Area.⁴⁷ The embarkation of PCASP is increasingly common with up to 15–25 per cent of all vessels transits through the High Risk Area now carrying them.⁴⁸ This State practice clearly indicates that the use of PCASP does not per se violate international law.⁴⁹ PCASP have also proved extraordinarily effective; so far, no vessel with embarked PCASP has been taken by pirates.⁵⁰ However, as the *Enrica Lexie* incident shows, having armed persons defend a vessel can have tragic consequences. When, then, might flag States incur responsibility if PCASP are embarked upon their vessels?

First, the use of PCASP may *indirectly* implicate the responsibility of a flag State. States are generally not directly responsible for the acts of individuals unless they are State agents or an exceptional rule applies.⁵¹ However, States may come under a duty to mitigate the risk that activities within their jurisdiction pose to other States (and their nationals). A State must take all 'necessary steps immediately' to prevent or mitigate injury to other States arising from dangers within its jurisdiction.⁵² This suggests that when States know their flag vessels are using PCASP they are subject to an international duty to take necessary steps to mitigate any

⁴⁶ UNGA Res. 59/38, 2 December 2004, para. 2.

⁴⁷ See most recently revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of PCASP on Board Ships in the High Risk Area, IMO Doc. MSC.1/Circ.1405/Rev.2 (25 May 2012); Revised Interim Recommendations 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 (25 May 2012).

⁴⁸ House of Commons Report, para. 26.

⁴⁹ Although the issuing of IMO Recommendations on PCASP is 'not intended to endorse or institutionalize their use' (see IMO documents cited above in n. 47).

⁵⁰ House of Commons Report, para. 29. Though this may be more a question of 'luck rather than design': Sarah Percy, 'Private Security Companies: Regulating the Last War', *International Review of the Red Cross*, 94 (2012), 941, 957.

⁵¹ See generally, Arts. 4–11 Articles on State Responsibility.

⁵² *Corfu Channel case (UK v. Albania)* (Merits), Judgment, 9 April 1949, ICJ Reports (1949), 4, paras. 22–3.

risk to other States (and their nationals) arising from that use. Such a duty would not involve strict liability; at most it would be a standard of 'due diligence', the content of which depends upon relevant treaty obligations owed other States.⁵³ In exercising rights of freedom of navigation on the high seas States must, under UNCLOS, 'have due regard for the interests of other States in their exercise of the freedom of the high seas'.⁵⁴ This obligation alone could sustain a finding that a due diligence obligation exists regarding activities conducted aboard a vessel under a flag State's jurisdiction. Further, under the Convention every State must also 'effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag'.⁵⁵ The term 'administrative, technical and social matters' is not defined elsewhere in the Convention.⁵⁶ It obviously extends, however, at least to such matters as are expressly provided for in the Convention concerning construction and seaworthiness, the crewing of vessels, and matters regarding communication and avoidance of collisions.⁵⁷ It should also be interpreted to include criminal jurisdiction generally, as a flag State must be able to effectively discipline seafarers in criminal cases involving 'incidents of navigation' (discussed above).⁵⁸

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

What would such a minimum regime look like? Percy notes that private security companies in general are 'poorly regulated' because 'they

⁵³ See, albeit in different contexts, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Reports (2010), 14, para. 197; *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area*, Advisory Opinion, Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, 1 February 2011, paras. 110–16; *Asian Agricultural Products Ltd v. Sri Lanka*, Case No. ARB 87/3, (1991) 30 ILM 580.

⁵⁴ Art. 87(2) UNCLOS; cf. Art. 2 HSC (which refers to 'reasonable regard').

⁵⁵ Art. 94(1) UNCLOS; Art. 5(1) HSC.

⁵⁶ It was intended to recall 'suggestions made by the International Labour Office at the [1956] Preparatory Technical Maritime Conference': UNCLOS I, *Official Records IV* (1958), 10 and 61.

⁵⁷ Art. 94(3) UNCLOS. ⁵⁸ Art. 97(1) UNCLOS.

are inherently difficult to regulate.⁵⁹ At the international level, regulatory efforts tend to find difficulty in securing agreement on effective measures; and ‘domestic regulation alone could never regulate an industry that operates almost entirely abroad.’⁶⁰ Further, the fast pace of industry change has meant that regulation tends to be backward-looking rather than focused on present challenges.⁶¹ One might think such concerns were lessened where the activities in question, while still extraterritorial, are *not* extra-jurisdictional. Flag States should be in a relatively good position to regulate maritime PCASP through their direct jurisdictional control over their vessels on the high seas. Whether this theoretical advantage is borne out in practice depends, of course, on the nature of regulation and the capacity of the flag State. A principal forum for regulatory efforts regarding maritime PCASP has been the IMO.

In May 2012 the IMO issued Revised Interim Recommendations for Flag States regarding the use of Privately Contracted Armed Security Personnel in the High Risk Area.⁶² These recommendations run only to two pages. Essentially, the IMO Recommendations note that the permissibility of PCASP aboard vessels ‘is a matter for flag States’, which may individually ‘determine if and under which conditions [their use] will be authorized.’⁶³ Flag States are encouraged to consider whether PCASP ‘would be an appropriate measure’ in the High Risk Area,⁶⁴ taking into account ‘the possible escalation of violence which could result from the use of firearms.’⁶⁵ Notably, flag States should also ‘require the parties concerned to comply with all relevant requirements of flag, port and coastal States’ as a vessel carrying PCASP may need to take those personnel (and their weapons) through a variety of jurisdictions.⁶⁶ If a flag State then decides to permit PCASP, the IMO recommends that any policy governing their use include consideration of:⁶⁷

1. ‘the minimum criteria or minimum requirements with which PCASP should comply’, taking into account the relevant IMO guidance to shipowners on PCASP⁶⁸
2. ‘a process for authorizing the use of [those] PCASP’ which meet with the flag State criteria

⁵⁹ Sarah Percy, *Regulating the Private Security Industry* (London: International Institute for Strategic Studies, 2006), 63.

⁶⁰ *Ibid.* ⁶¹ Percy, ‘Private Security Companies’, 957. ⁶² Above n. 47.

⁶³ *Ibid.*, para. 2. ⁶⁴ *Ibid.*, para. 5.1. ⁶⁵ *Ibid.*, para. 3. ⁶⁶ *Ibid.*, para. 4.

⁶⁷ *Ibid.*, para. 5.2 with sub-subparagraphs as indicated.

⁶⁸ See Interim Guidance to Shipowners.

3. 'a process by which shipowners, ship operators or shipping companies may be authorized to use PCASP'
4. 'the terms and conditions under which the authorization is granted and the accountability for compliance associated with that authorization'
5. 'references to any directly applicable national legislation pertaining to the carriage and use of firearms by PCASP . . . and the relationship of PCASP with the Master while on board'
6. 'reporting and record-keeping requirements'.

The reference to the IMO Guidance to Shipowners does incorporate some further detail (as noted below).⁶⁹ Nonetheless, this IMO list of relevant considerations for flag States does more to highlight than to dispel the potential difficulties. First, while PCASP will have to comply with any flag State firearms regulation, the relevant port State laws will also apply. Where port States are hostile to weapons being carried aboard foreign ships, this may require that certain ports be avoided, or that weapons are 'bonded' aboard the vessel, or deposited at a government-run 'floating armoury',⁷⁰ or simply thrown overboard.⁷¹ Secondly, there is the question of the 'relationship of PCASP with the Master'. The IMO Interim Guidance to Shipowners further recommend that a 'documented [PCASP] command and control structure should provide . . . a clear statement recognizing that at all times the Master remains in command and retains the overriding authority on board'.⁷² Under international law, ultimate authority for decisions regarding safety aboard a merchant vessel rests with the master. For example, Regulation 8(a) of Chapter XI-2 of the SOLAS Convention provides: 'The master shall not be constrained by the Company, the charterer or any other person from taking or executing any decision which, in the professional judgement of the master, is necessary to maintain the safety and security of the ship.' The final, and perhaps most significant, difficulty in regulating the use of force by PCASP is in 'reporting and record-keeping requirements' and ensuring 'accountability for compliance' with relevant standards. The most important issue here is, obviously, standards governing the use of force and post-shooting incident inquiries. There may be real problems in conducting an adequate review of shooting incidents occurring far from the flag State's territory, let alone mounting a criminal investigation.

⁶⁹ *Ibid.*, especially paras. 5.6–5.19.

⁷⁰ 'Sri Lanka Launches Floating Armoury', *Lloyd's List* (26 September 2012), available at www.lss-sapu.com/index.php/piracynews/view/1027.

⁷¹ House of Commons Report, para. 41. ⁷² See above n. 47, para. 5.9.1.

Nonetheless, a flag State which fails to take adequate measures to prevent such abuses before the fact (through establishing an adequate regulatory framework) or to investigate them afterwards may incur responsibility towards the State whose nationals are injured. As regards the establishment of an adequate regulatory framework, Percy notes that the complexity of regulating the private security industry has tempted States generally to rely on industry self-regulation, such as the voluntary International Code of Conduct for Private Security Service Providers (ICoC) initiative convened by the Swiss government and the Geneva Centre for the Democratic Control of Armed Forces.⁷³ An International Standards Organisation (ISO) certification for PCASP is also being developed in consultation with the industry.⁷⁴ A completely ‘hands-off’ approach by States, simply relying on such third-party certification, would probably not satisfy due diligence obligations. Nonetheless, instruments such as the ICoC may provide evidence of the internationally accepted minimum standards for the conduct of PCASP on issues such as the use of force. Incorporating such third-party standards into national regulations would, however, likely be desirable.

States may already have national laws applicable to PCASP activities, even if they were not designed for such a purpose. For example, UK law does not require direct government approval of a decision to use PCASP, simply the submission of a ‘counter-piracy plan’.⁷⁵ However, aboard a UK-flagged vessel a person in possession of a firearm will likely require a certificate under the Firearms Act 1968;⁷⁶ and any UK national ‘supplying’ or ‘delivering’ weapons across an international border will require a relevant trade licence (unless covered by an employer licence).⁷⁷ While this latter law was designed to regulate arms traders, it (unintentionally)

⁷³ Percy, ‘Private Security Companies’, 953–4. See further the ICoC website available at www.icoc-psp.org; and note the Security Association for the Maritime Industry (a self-regulation body), available at www.seasecurity.org/.

⁷⁴ ISO PAS 28007 Procedures for Private Maritime Security Companies.

⁷⁵ Department for Transport (UK), Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances, version 1.1, June 2012, para. 5.6, available at <http://assets.dft.gov.uk/publications/use-of-armed-guards-to-defend-against-piracy>. This contrasts with an earlier policy that the UK government would not authorise the carriage of firearms aboard UK vessels: UK Maritime and Coastguard Agency Marine Guidance Note 298(M) (2005), para. 6.15.1, available at www.dft.gov.uk/mca/298-2.pdf.

⁷⁶ s. 1 Firearms Act 1968 (1968 c. 27).

⁷⁷ Art. 21, Export Control Order 2008 (No. 3231 of 2008). Small firearms are listed as controlled ‘military goods’ in Schedule 2.

also applies, for example, to persons carrying corporate-owned weapons who at the end of a voyage will return them to their employer.⁷⁸ Whether such laws are appropriately adapted for regulating PCASP or PMSCs is another question.

Of course, a State must not only enact PCASP regulations but also take action regarding 'accountability for compliance'. A key question will be accountability for the use of force. The question then arises as to the international standard for the use of force in self-defence by private individuals.⁷⁹ As regards the appropriate standard for the use of force by PCASP the IMO Interim Guidance to Shipowners states that:

PMSC should require their personnel to take all reasonable steps to avoid the use of force . . . In no case should the use of force exceed what is strictly necessary and reasonable in the circumstances. Care should be taken to minimize damage and injury and preserve human life.

PMSC should require that their personnel not use firearms against persons except in self-defence or defence of others.⁸⁰

This language closely tracks the ICoC, which borrows much of its drafting from the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁸¹ The UN Basic Principles are a soft-law instrument adopted by consensus by 127 States at the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders in 1990.⁸² The document is thus not binding but represents persuasive evidence of widespread State consensus (*opinio juris*) as to the applicable law. While the UN Basic Principles apply only to State officials, the replication of these standards in other instruments applicable to private individuals, such as the ICoC and IMO Recommendations, may also suggest that they are increasingly accepted as having broader application. Failure to make adequate efforts to ensure compliance with such basic standards through, *inter alia*, appropriate post-incident investigation might thus incur State responsibility.

⁷⁸ See further the flow chart in the House of Commons Report, Evidence Annexe, Ev 67.

⁷⁹ Cf. Art. 31(1)(c), Rome Statute of the International Criminal Court (Rome, adopted 17 July 1998, entered into force 1 July 2002), 2187 UNTS 90.

⁸⁰ See above n. 47, paras 5.14 and 5.15.

⁸¹ Art. 9, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, UN Doc. A/CONF.144/28/Rev.1 (7 September 1990) ('[l]aw enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, [or] to prevent the perpetration of a particularly serious crime involving grave threat to life . . . [and] only . . . when strictly unavoidable in order to protect life').

⁸² See A/CONF.144/28/Rev.1, 269 (adoption) and 201 and 207 (participating States).

However, this is not to suggest that flag State implementation of international minimum standards suffices. The International Court of Justice and the International Tribunal for the Law of the Sea have defined ‘an obligation to act with due diligence’ as involving:

an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators.⁸³

This makes the obvious point that due diligence involves not only identifying the risks that may be posed by ‘private operators’ and taking appropriate steps (including implementing any relevant international minimum standards) but also monitoring those private operators with an appropriate degree of vigilance. In the present case the IMO Recommendations simply point the way towards States devising effective regulatory systems of their own. They represent little more than a bare minimum supplemented by industry self-regulation. As Percy observes: ‘[w]hether or not the bare minimum is sufficient to regulate an industry that has significant lethal potential is questionable’; and given that this is a sector dealing ‘in lethal force’ one may also question the appropriateness of relying on self-regulation.⁸⁴ Neither formal compliance with the IMO Recommendations nor reliance on self-regulation will likely be enough to discharge any duty of due diligence. The key will be effective monitoring and enforcement. Weaknesses of flag State supervision is an acknowledged reality in matters such as fisheries management, and, if oversight of PCASP is no better, this could be deeply worrying.

4.2 Responsibility for State ‘complicity’ with corporate human rights breaches

Even so, this is a relatively narrow field within which States might incur responsibility. A question arises as to whether a State might also incur responsibility under a broader standard of ‘complicity’ in corporate misconduct. Such an approach could be based on an extension of Article 16

⁸³ *Pulp Mills on the River Uruguay*, para. 197 as quoted in *Activities in the Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Case No. 17, para. 115.

⁸⁴ Percy, ‘Private Security Companies’, 955.

of the ILC Articles on State Responsibility dealing with situations where a State aids or assists another State's internationally wrongful act:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.

One may suggest that the same principle should cover situations where a State assists certain types of *corporate* misconduct breaching human rights or international criminal law. McCorquodale and Simons have argued for just such an approach:

A home state may also be found to be complicit in the extraterritorial activities of corporations... and thus incur international responsibility... While the ILC's Articles deal only with the responsibility of states, they do not exclude the possibility of other actors... incurring responsibility. It is now established that individuals can incur international responsibility for... international crimes. Moreover, it has been convincingly argued that corporations... have obligations under international law not to commit international crimes and therefore can incur international responsibility for complicity in, and commission of... international crimes.⁸⁵

McCorquodale and Simons argue that it follows that a State may incur international responsibility for complicity in corporate acts which 'if committed by that home state would constitute internationally wrongful acts... at least where the [state's] aid or assistance "contributed significantly to that act"'.⁸⁶ The argument remains, however, speculative. Certainly, the ILC Articles do not preclude the individual responsibility of natural persons for international crimes. The idea that corporations can incur 'international responsibility' for international crimes is less well established. Direct criminal responsibility for corporate actors was famously excluded from the jurisdiction of the International Criminal Court. Further, the possible extension of Article 16 to cover complicity in corporate conduct is, at present, at best a suggestion *de lege ferenda* unsupported by State practice.

To the extent the argument is limited to violations of human rights law one may question whether we really need an expanded concept of State complicity at all, given that a different standard of attribution may already

⁸⁵ McCorquodale and Simons, 'Responsibility beyond Borders', 613–14.

⁸⁶ *Ibid.*, 614.

apply. Human rights bodies have long set a lower requirement for State responsibility for the actions of actors who are not State organs than the stringent test articulated by the ICJ.⁸⁷ That is, for the ICJ to find a State responsible for the acts of a non-State entity it requires either:⁸⁸

- (a) the exercise of *actual* or *complete* control by a State over a non-State entity (that control being based on a position of complete dependence of the entity on the State) or
- (b) ‘effective control’ over the particular conduct alleged to give rise to State responsibility. Essentially, there is State responsibility ‘if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State’ in a particular case.⁸⁹

The European Court of Human Rights, by contrast, will find a State responsible for the actions of State-like entities where they are either under the ‘decisive influence’ of a State (as in the *Ilaşcu* case)⁹⁰ or which are *acting within* territory under the ‘effective overall control’ of a State (as in the *Loizidou* case where the governmental acts of the Turkish Republic of Northern Cyprus were held attributable to Turkey).⁹¹ Neither is a particularly stringent standard, and the latter may seem particularly lax. Milanović cogently suggests that cases such as *Loizidou* are not, strictly speaking, about attribution at all.⁹² Rather, they are about the circumstances in which a State has positive duties to secure or ensure human rights in territory under its control, for example the right to life. Thus, during an occupation, a State may incur international responsibility not only for wrongs committed by its own forces but also:

⁸⁷ See generally, Stefan Talmon, ‘Responsibility of Outside Powers for Acts of Secessionist Entities’, *International and Comparative Law Quarterly*, 58 (2009), 493–517, discussing *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgment, 27 June 1986, ICJ Reports (1986), paras. 108–12, 114–16; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007), paras. 241, 388, 391–4, 399; and cf. Marko Milanović, ‘State Responsibility for Genocide: A Follow-Up’, *European Journal of International Law*, 17 (2006), 576–7.

⁸⁸ *Ibid.*, 502. ⁸⁹ Art. 8 Articles on State Responsibility.

⁹⁰ *Ilaşcu and others v. Moldova and Russia*, Application No. 48787/99, ECtHR, 8 July 2004, para. 392.

⁹¹ *Loizidou v. Turkey*, Application No. 40/1993/435/514, ECtHR, 23 February 1995; and see Talmon, ‘Responsibility of Outside Powers for Acts of Secessionist Entities’, 508–11.

⁹² Marko Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press, 2011), 46–52.

for any *lack of vigilance* in preventing violations of human rights... by other actors present in the occupied territory, including rebel groups.⁹³

The suggestion in such cases is clearly that the State has a 'due diligence' obligation to take measures to prevent such violations. If this line of analysis is correct, human rights jurisprudence adds nothing unique to the present discussion. It simply provides a separate foundation for the same conclusion: States have an obligation to exercise due diligence to secure respect for human rights within spaces under their jurisdiction or control. This could readily extend to taking effective measures to minimise the risks of unlawful violence by PCASP or PMSCs operating from flag vessels.

5 Conclusions

We can expect the increasing use of PCASP and VPDs to implicate the law of State responsibility in one of two ways. Where VPDs are deployed as State organs to protect merchant vessels, the controversy will largely be one of State immunity. In such cases a more rational and predictable case law would follow from, as Crawford has suggested, shifting the focus from classifying the impugned act to identifying relevant exceptions to the immunity applicable *prima facie*. Where PCASP are permitted by flag States (or even used despite flag State policy) the question will be one of due diligence. While international standards are emerging,⁹⁴ the real question will be the extent to which States satisfy their duty of vigilance. The history of effective flag State control over vessels on the high seas, sadly, is not particularly encouraging in this regard.

⁹³ *Armed Activities on the Territory of the Congo (Congo v. Uganda)*, Judgment, 19 December 2005, ICJ Reports (2005), para. 179 (emphasis added).

⁹⁴ On calls for the 'establishment of a framework governing the use of PCASP see UN Secretary-General, 'Remarks to Security Council Debate on Maritime Piracy as a Threat to International Peace and Security', 19 November 2012, available at www.un.org/apps/news/infocus/sgspeches/statments_full.asp?statID=1702#.UKuWS4b4KWk.