



Amsterdam Center for International Law
University of Amsterdam



RESEARCH PAPER SERIES

SHARES Research Paper 58 (2014), ACIL 2014-30

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use of privately contracted armed security personnel
against piracy. Re-emphasizing the primary role and
obligations of flag states**

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Cite as: SHARES Research Paper 58 (2014), ACIL 2014-30,
available at www.sharesproject.nl and [SSRN](https://ssrn.com/abstract=2544999)

Forthcoming in: Molenaar, E.J., Nouwen, S. & Ryngaert, C. (eds.), *What is Wrong with International Law? Liber Amicorum A.H.A. Soons* (Brill, 2015)

The Research Project on Shared Responsibility in International Law (SHARES) is hosted by the [Amsterdam Center for International Law](http://www.amsterdamcenterforinternationallaw.nl) (ACIL) of the University of Amsterdam.

The research leading to this paper has received funding from the European Research Council under the European Union's Seventh Framework Programme (FP7/2007-2013) / ERC grant agreement n° 249499.

RESPONSIBILITY FOR HUMAN RIGHTS VIOLATIONS ARISING FROM THE USE OF PRIVATELY CONTRACTED ARMED SECURITY PERSONNEL AGAINST PIRACY. RE-EMPHASIZING THE PRIMARY ROLE AND OBLIGATIONS OF FLAG STATES

*Jessica N.M. Schechinger**

1. INTRODUCTION

Maritime piracy is an ancient problem that harms, either directly or indirectly, many states and non-state actors alike.¹ There has been a geographical shift in the places where acts of modern piracy² take place. Whereas previously the waters off the coast of Somalia were considered to be the “hot spot”, at present pirate attacks most often occur in Southeast Asia (mainly around Indonesia, Singapore and Malaysia), the Gulf of Guinea (e.g. Nigeria), and the Indian subcontinent.³

The legal framework addressing piracy on the high seas and in the exclusive economic zone⁴ is provided by articles 100-107 and 110(1) of the 1982 United Nations Convention on the Law of the Sea⁵ (LOSC). These provisions reflect customary international law. Article 100 LOSC obliges states to cooperate in repressing piracy. There are various ways in which states comply with this obligation in practice: by deploying navy vessels to patrol certain risk areas, or (regionally) through counter piracy operations such as “Atalanta”⁶ (European Union) and “Ocean Shield”⁷ (North Atlantic Treaty Organization) off the coast of Somalia, or through

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¹ Piracy has e.g. a negative impact on maritime security and international trade (transport of cargo), and has a detrimental effect on insurance prices and the price of goods that are transported by sea.

² N. Ronzitti “The Use of Private Contractors in the Fights against Piracy: Policy Options” in F. Francioni and N. Ronzitti (eds) *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford University Press, Oxford: 2011) 37; also D.J. Nincic “Trends in Modern Piracy: Cycles, Geographical Shifts, and Predicting the Next “Hot Spots”” (2013) 33(2) *SAIS Review of International Affairs* 106.

³ IMB Piracy & Armed Robbery Map 2014 available at <www.icc-ccs.org>; Nincic, *ibid.*, 105-106, 108.

⁴ United Nations Convention on the Law of the Sea (LOSC), 10 December 1982, 1833 UNTS 3, articles 101 and 58(2) LOSC.

⁵ LOSC, *ibid.*

⁶ Operation Atalanta/EU NAVFOR Somalia, information available at <eunavfor.eu>.

⁷ Operation Ocean Shield, information available at <www.mc.nato.int/ops/Pages/OOS.aspx>.

cooperation such as the Malacca Straits Sea Patrols initiative in Asia.⁸ The law on piracy seems in principle adequately equipped to deal with the problem, that is when the applicable rules are properly implemented into domestic law. However, states have not been able to fully repress piracy, and navies have not been able to sufficiently protect commercial vessels against attacks. The chances for a commercial vessel to become the victim of hijacking remain significant. The reality is that a crew on board a vessel cannot successfully repel an attack by heavily armed pirates. Therefore, ship-owners have started to hire Privately Contracted Armed Security Personnel (PCASP) in order to protect vessel, cargo and crew. The task of a flag state to provide security to commercial vessels flying its flag, which can be regarded to be a primary obligation of the flag state,⁹ is increasingly being transferred to ship-owners who are allowed to hire PCASP. As a result, accountability issues may arise with regard to the conduct of PCASP operating at sea.

At the outset, it must be noted that despite some similarities in the legal issues surrounding PCASP¹⁰ and those that have arisen concerning private *military* and *security* companies, questions regarding international accountability of PCASP are of a different nature and are often more complex. PCASP (and private *security* companies in general) differ in several ways from private *military* companies. As Lehnardt put it “PMCs are not ordinary companies”.¹¹ In contrast to private *military* companies that mostly operate in situations of armed conflict, making international humanitarian law applicable, this may not necessarily be the case for private *security* companies, who may operate in such situations, but not necessarily. This chapter focuses solely on PCASP that do *not* operate in an armed conflict. “Private security companies (PSC)”, being the umbrella term that includes private *maritime* security companies that employ PCASP, can provide many services aside from acting as guards on board vessels, including security intelligence; (other) security services; crisis response; and intervention.¹²

⁸ Participating states are Indonesia, Malaysia, Singapore and Thailand, Oceans Beyond Piracy: a project of the One Earth Future Foundation available at <<http://oceansbeyondpiracy.org>>.

⁹ C. Spearin “Private Military and Security Companies v. International Naval Endeavours v. Somali Pirates – A Security Studies Perspective” (2012) 10 *Journal of International Criminal Justice* 836. The historic practice of “reciprocity between navies and merchant marines” developed into custom, meaning that navies of flag states protected merchant ships flying its flag, and that in return the navies got funded by money from taxes paid by the merchant ships, Spearin, at 833. Also M. Zwanenburg “Military Vessel Protection Detachments: the Experience of the Netherlands” (2012) 51 *Military Law and the Law of War Review* 102.

¹⁰ E.g. A. Priddy and S. Casey-Maslen “Counter-piracy Operations by Private Maritime Security Contractors – Key Legal Issues and Challenges” (2012) 10 *Journal of International Criminal Justice* 839-956.

¹¹ C. Lehnardt “Individual Liability of Private Military Personnel under International Criminal Law” (2008) 19 *European Journal of International Law* 1026.

¹² L.B. Struwe “Private Security Companies (PSCs) as a Piracy Countermeasure” (2012) 35 *Studies in Conflict and Terrorism* 590.

Several differences arise between the phenomenon of PCASP in the piracy context at sea, and the classic situation where a PSC operates on land (either in an armed conflict setting or not). More actors (both states and non-state actors), nationalities and jurisdictions are involved when private security personnel operates on the high seas.¹³ States that are involved include the flag state; coastal state(s); state(s) of nationality of the individual employees; and the state under whose laws the company employing PCASP operates. Non-state actors include PCASP; the company employing PCASP; the ship-owner; and the master of the vessel. All of these actors have relevant rights and obligations. Matters are often complicated due to the possibility of overlapping jurisdictions for the prescription and/or the enforcement of rules (e.g. if a merchant vessel enters the territorial sea of a coastal state). Another particularity with regard to PCASP operating on vessels at sea, concerns the role of the master of the vessel (who is in charge of the safety of the vessel and the safety of life at sea), and his relationship to PCASP. In contrast to the situation of having a vessel protection detachment (VPD) on board, a master could be held responsible under domestic criminal and civil law for the use of force by PCASP (although neither having control over PCASP, nor being trained for this task), or for having firearms on board in case a state does not allow this.¹⁴ The factual scenarios, applicable laws and the resulting accountability issue that arise from operating on the high seas may also differ from those on land.

International law seeking to regulate the certification, deployment, use of force, accountability, and oversight of PCASP on vessels (and companies that employ them) is currently either non-existent, or at best, in the process of being developed. Therefore, it can be said that international law is inadequately developed and tailored to deal with the issue at hand. Accountability issues that have arisen over the conduct of PCASP operating at sea have received little attention in literature, nor are they addressed in any international regulatory framework, possibly leading to the conclusion that the international law applicable in this respect is flawed. Notwithstanding this, some soft law regulations, voluntary principles, and codes of conduct for the umbrella category of private security service providers do exist.¹⁵ However, since these are not legally binding they “cannot be considered as complete solutions

¹³ The terminology is also different (“host state”, “contracting state”, “home state”) are all terms that are not part of the vocabulary used in the law of the sea context.

¹⁴ Thanks to Peter van der Kruit for pointing this out.

¹⁵ E.g. International Code of Conduct for Private Security Service Providers available at <www.icoc-psp.org/>.

for the problems concerning PMSCs”.¹⁶ The lack of specific rules applicable to PCASP means that general norms of international law will govern these scenarios, most notably the lawful use of force in self-defense. The issue of accountability of private security companies in general is timely, and the need to specifically regulate PCASP operating at sea is more widely acknowledged.¹⁷

The focus of this chapter is on the role and obligations of flag states. Although there are other actors that have obligations concerning the issue at hand, who might be held responsible/accountable under international law for their acts or omissions,¹⁸ due to space limitations, this chapter only addresses flag states. Flag states may choose to provide their commercial vessels with a naval escort,¹⁹ or may allow a VPD, which is a unit consisting of either military or law enforcement personnel of the state, to be deployed on board a vessel.²⁰ Furthermore, flag states have the choice to either prohibit the use of PCASP on board ships flying their flag completely; to condition the use of PCASP on their vessels; or, to freely allow PCASP on board their ships. The position and policies of both (flag) states and international organizations concerning the use of PCASP vary significantly.²¹ Some flag states allow arms to be taken on board on a case by case basis, while others prohibit armed security personnel to be on board of vessels flying their flag, as in the case of the Netherlands.²² The International Maritime Organization (IMO) considers the use of private armed security to be a concern of the flag state.²³ This relatively novel issue of the use of PCASP was not explicitly addressed in the LOSC or the law of international responsibility. Despite its controversy, the use of PCASP by ship-owners is gaining acceptance, and state practice of flag states seems to be moving towards allowing private armed security on board their vessels.²⁴

¹⁶ United Nations Office of the High Commissioner for Human Rights, News, UN expert group calls for robust international regulation of private military and security companies (4 November 2013) available at <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13940&>>.

¹⁷ Ronzitti, note 2 at 37, 51; Priddy and Casey-Maslen, note 10 at 840.

¹⁸ See the section on shared responsibility below.

¹⁹ China and India for example “prioritise individual escorts through the Gulf of Aden for their own merchant ships”, Advisory Council on International Affairs, Combating piracy at sea: a reassessment of public and private responsibilities, Advisory Report No. 72 (December 2010) available at <[www.aiv-advies.nl/ContentSuite/upload/aiv/doc/webversie_AIV_72_ENG\(2\).pdf](http://www.aiv-advies.nl/ContentSuite/upload/aiv/doc/webversie_AIV_72_ENG(2).pdf)> (AIV Report) 40.

²⁰ See the section on the practice of the Netherlands as a flag state below.

²¹ See Oceans Beyond Piracy, note 8.

²² See note 20.

²³ See <www.imo.org>. The IMO provided (revised) interim recommendations for flag states concerning Somalia based piracy, MSC.1/Circ.1406/Rev.2 of 25 May 2012.

²⁴ B. Van Ginkel, F.-P. Van Der Putten and W. Molenaar “State or Private Protection against Maritime Piracy? – A Dutch Perspective” (19 February 2013) Netherlands Institute of International Relations Clingendael available at <www.clingendael.nl> (Clingendael Report) at 21-22.

In the next section, problems arising from the use of PCASP in the maritime context will be discussed. After that, the concept of shared accountability will be briefly dealt with. Central to the subsections that follow are the rights and obligations of flag states, under both international human rights law and the law of the sea. The possibility of (flag) state responsibility, and the practice of the Netherlands as a case study will subsequently be discussed. The chapter will end with some concluding remarks on whether international law is flawed in this context.

2. PROBLEMS ARISING FROM THE USE OF PCASP AT SEA

In terms of numbers, according to Spearin, there are “several hundred PMSC personnel at sea in the Gulf of Aden or beyond at any given moment”.²⁵ In the Indian Ocean there are reportedly over 140 companies providing armed protection to vessels, employing a minimum of 2,700 armed guards.²⁶ The following quote strikingly illustrates the problem:

Fear of pirate attacks is creating more violent and chaotic seas, where some overzealous or untrained guards are shooting indiscriminately, killing pirates and sometimes innocent fishermen before verifying the threat, according to more than two dozen interviews with lawyers, ship owner groups, insurance underwriters and maritime security companies.²⁷

The use of PCASP is not considered to be unlawful under international law, *per se*.²⁸ However, the use of PCASP to protect international trade at sea can be rather problematic in practice, particularly when it comes to questions of accountability for human rights violations. Human rights violations resulting from the use of force by PCASP are not merely of a theoretical nature. Incidents have occurred where small vessels, of the type used by both fishermen and pirates, have been found empty, or containing dead bodies.²⁹ In the remainder of this chapter, the issue of accountability for a violation by PCASP of the right to life of potential victims such as the master of the vessel; crew members; hostages taken by pirates; innocent fishermen;

²⁵ Spearin, note 9 at 824.

²⁶ M. Tondini “Some Legal and Non-Legal Reflections on the Use of Armed Protection Teams on Board Merchant Vessels: An Introduction to the Topic” (2012) 51 *Military Law and the Law of War Review* 10.

²⁷ M. Wiese Bockmann and A. Katz, Bloomberg, Shooting to Kill Pirates Risks Blackwater Moment 9 May 2012 available at <<http://www.bloomberg.com/news/2012-05-08/shooting-to-kill-pirates-risks-blackwater-moment.html>>.

²⁸ In the past, “[b]etween the eighteenth and nineteenth centuries, shipowners used to equip their vessels with light armaments to counter piracy”, Ronzitti, note 2, at 43. In the Dutch Golden Age (see the section on the practice of the Netherlands as a flag state below), guarded men escorted (convoying) most Dutch East India Company merchant ships for protection.

²⁹ Interview with a researcher and expert from the Clingendael Institute (in Dutch, 20 February 2012) available at <http://www.eenvandaag.nl/buitenland/oorlog-tegen-terreur/44809/clingendael_beveiligers_op_koopvaardijschepen>.

and pirates will be dealt with.³⁰ Clearly, there are certain gaps in the protection of individuals against human rights infringements by PCASP on the high seas. Incidents where PCASP may have committed human rights violations have only led to an “investigation” in one case, although no one has been held accountable.³¹

First, PCASP on board commercial vessels may violate the right to life by either injuring or (unlawfully) killing an individual *on board* the commercial vessel they are located, which is often equated with the territory of a flag state,³² and is subject to its exclusive jurisdiction on the high seas.³³ Second, violations of the right to life can take place not on a commercial vessel itself, but *on the high seas*, where no state has territorial sovereignty (articles 87 and 89 LOSC), and in principle no state has exclusive (territorial) jurisdiction. This is the case when a commercial vessel shoots at a pirate vessel to repel an attack.

An individual may be injured or killed on the high seas by PCASP in the course of an attack,³⁴ by accident, and/or by misjudging a situation.³⁵ As to the latter, Tondini notes that

the waters off the Horn of Africa teem with fishermen, smugglers, traffickers and irregular migrants. As they are all possibly armed against the risk of pirate attacks, fishermen may be confused for pirates.³⁶

³⁰ See especially the section on human rights obligations below.

³¹ BBC News, “Pirate” dies as ship’s guards repel attack off Somalia 24 March 2010 available at <<http://news.bbc.co.uk/2/hi/africa/8584604.stm>>: “this is thought to be the first time private security guards have killed a pirate in defence of a ship”. This incident involved private security guards on board a ship registered in Panama. A Spanish frigate, part of the EU naval force, took custody of the pirate’s body and investigated the cause of death. There was no investigation into the use of force by PCASP. Also E. Papastavridis “Piracy” in P.A. Nollkaemper and I. Plakokefalos (eds) *The Practice of Shared Responsibility in International Law* (Cambridge University Press, Cambridge: 2015 *forthcoming*), section 1. To the authors’ knowledge this is the only reported incident involving PCASP.

³² “Traditionally, ships on the high seas are viewed as an extension of the territory of the flag state”, *Hirsi Jamaa and others v. Italy*, ECtHR, judgment of 23 February 2012, appl. no. 27765/09, 76.

³³ Article 92(1) LOSC, note however that there are a few exceptions. See the section on obligations under the law of the sea below. Also *S.S. “Lotus” (France v. Turkey)*, PCIJ, judgment of 7 September 1927, judgment no. 9, series A, no. 10, ICGJ 248, 25: “vessels on the high seas are subject to no authority except that of the State whose flag they fly”.

³⁴ See notes 27 and 29; see also a helmet camera video showing PCASP shooting in March 2011, which likely resulted in injury or death, Private security guards shoot Somali pirates available at <http://www.liveleak.com/view?i=5e2_1333668975>. No investigation by the flag state followed however, Priddy and Casey-Maslen, note 10 at 843-844.

³⁵ A “known” incident (although strictly speaking in the VPD context) falling into this category is the *Enrica Lexie* case, involving an Italian oil tanker with Italian marines on board who misjudged a situation, and subsequently killed two Indian fishermen off the coast of India. V. Eboli and J.P. Pierini “Coastal State Jurisdiction over Vessel Protection Detachments and Immunity Issues: The *Enrica Lexie* Case” (2012) 51 *Military Law and the Law of War Review* 117-148. Also, D. Guilfoyle (ed) *Modern Piracy: Legal Challenges and Responses* (Edward Elgar Publishing, Cheltenham: 2013) 163-171, especially at 163-165, on the HMS *Cumberland* and INS *Tabar* incidents, involving the use of force during counter piracy operations by naval vessels that resulted in the death of (innocent) individuals.

³⁶ Tondini, note 26 at 9.

He further notes that “[r]eportedly, a good number of Indian dhows and Kenyan and Yemini fishermen have being fired upon by merchant vessels”.³⁷ Another example of when life may be lost by accident or by misjudging a situation is when a vessel carries both pirates and fishermen, that the pirates have taken hostage (which is not uncommon), which can result in the death or injury of one or more of the fishermen in case action is taken by PCASP against this vessel. Although violations towards individuals that are located *on the same vessel* as the PCASP are possible, the more likely scenario is that harm is inflicted upon an individual *on the high seas*, being either a pirate or innocent fisherman. The distinction of who might be the victim of a human rights violation by the use of force by PCASP should not matter, because “even pirates have their own rights”.³⁸

3. SHARED RESPONSIBILITY

In an increasing number of situations, multiple actors are in some way involved in conduct that results in a harmful outcome. Responsibility for the harm caused may in such a situation be shared by various, or all, of the actors involved.³⁹ The current scenario of a violation by PCASP of the right to life of an individual may amount to a situation of “shared responsibility”. Nollkaemper and Jacobs observe that

the increased role of private actors in international relations engenders additional questions of shared responsibility. The practice of states delegating power to private entities (the use of private military contractors, for example).⁴⁰

The concept of “shared responsibility”, as developed by Nollkaemper and Jacobs, refers to a situation in which multiple actors (which can be a combination of states, international organizations, and/or non-state actors, such as individuals and multinational corporations) are responsible *ex post facto* under international law for a contribution (either act or omission) to a particular harmful outcome.⁴¹ The term “shared accountability” is used for situations where “a multiplicity of actors is held to account for conduct in contravention of international norms, but

³⁷ Ibid.

³⁸ Ibid., 11.

³⁹ P.A. Nollkaemper “Introduction” in P.A. Nollkaemper and I. Plakokefalos (eds) *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge University Press, Cambridge: 2014 *forthcoming*).

⁴⁰ P.A. Nollkaemper and D. Jacobs “Shared Responsibility in International Law: A Conceptual Framework” (2013) 34 *Michigan Journal of International Law* 375.

⁴¹ Ibid., 365-369. “Harmful outcome” includes material or non-material damage.

where this does not necessarily involve international responsibility for internationally wrongful acts in its formal meaning”, referring to non-state actors that may be subjected to obligations under international law, but who do not incur responsibility under current public international law (e.g. individuals and corporations).⁴²

In the context of PCASP, where there is interaction between states and private actors, the concepts of shared accountability and shared responsibility give rise to interesting questions. In principle, all of the actors involved in the use of PCASP can incur responsibility or accountability under international law. However, it must be admitted that holding non-state actors responsible under international law is more *de lege ferenda* than *de lege lata*.⁴³ More specific questions that can be identified in this context are, for example, whether individuals⁴⁴ are bound by the right to life, or whether the (often multinational) security companies⁴⁵ that employ them are bound by certain human rights obligations.⁴⁶ In order for shared responsibility to be assumed, flag states must be bound by obligations, which will be dealt with in the next section.

4. OBLIGATIONS OF FLAG STATES

4.1 Obligations under the law of the sea

In general, a flag state has the same obligations as any other state. However, the LOSC regime places specific obligations on this special category of states, which can be seen as duty-focused. According to article 91(1) of the LOSC, each state

shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship.

⁴² Ibid., 369.

⁴³ C. Ryngaert and J. d’Aspremont “Draft 3rd report” International Law Association Committee on non-state actors (Washington Conference 2014) available at <www.ila-hq.org>. On corporations (including PMSC) see 11-17 and 21-22.

⁴⁴ In the PMC context e.g. Lehnardt, note 11, at 1015-1034.

⁴⁵ In the PMC context e.g. C. Ryngaert “Litigating Abuses Committed by Private Military Companies” (2008) 19 *European Journal of International Law* 1035-1053.

⁴⁶ The notion that corporations should also respect human rights has been recognized, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’, Report by John Ruggie, UN Doc. A/HRC/17/31 of 21 March 2011.

Article 92(1) provides that a ship “shall sail under the flag of one State only and (...) shall be subject to its exclusive jurisdiction on the high seas”. The *exclusive* jurisdiction of the flag state on the high seas includes prescriptive, enforcement and adjudicatory jurisdiction.⁴⁷ A consequence that flows from this right is that a flag state is under an obligation to enact legislation, and enforce its laws.

In principle, the flag state can extend its jurisdiction to the vessels flying its flag, and to the individuals on board. According to international law, vessels are usually not considered to be part of the territory of a flag state. However, vessels are often equated with territory, and states can provide in their domestic law for their vessels to be part of the state’s territory.⁴⁸

Article 94 of the LOSC specifies the obligations of flag states in a non-exhaustive list. Article 94(1) provides that every flag state “shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”. In the remainder of this article, duties are included to take the necessary measures to ensure that ships flying its flag are safe; to maintain a shipping register; to ensure that the crew is properly qualified; and to hold an inquiry “into every maritime casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships”.⁴⁹ For example, Dutch domestic law covers the flag state principle in Article 3 of the Criminal Code, giving the Netherlands criminal jurisdiction over an offense that has been committed by a foreign national or a Dutch national outside its land territory, on board a ship that is registered in the Netherlands.⁵⁰

Flag states have a further obligation to make sure that their vessels are not being used for criminal activities. The *exclusive* jurisdiction of the flag state on the high seas (article 92(1) LOSC) comes with the corresponding primary obligation to maintain security and safety at sea, to “safeguard a minimum *ordre public* in the oceans”.⁵¹ Aside from the obligations arising out

⁴⁷ E.g. D. König “Flag of Ships” in *Max Planck Encyclopedia of Public International Law* available at <<http://opil.ouplaw.com/home/EPIL>> paras. 17, 25.

⁴⁸ Zwanenburg, note 9 at 103-104.

⁴⁹ Article 94(7) LOSC.

⁵⁰ A.H.A. Soons and J.N.M. Schechinger, CIL Research Project on International Maritime Crimes: The Netherlands Country Report (January 2011) available at <<http://cil.nus.edu.sg/wp/wp-content/uploads/2010/10/Country-Report-Netherlands.pdf>> 12.

⁵¹ Papastavridis, note 31 at section 2; also R.R. Churchill and A.V. Lowe *The Law of the Sea* 3rd (Manchester University Press, Manchester: 1999) 257.

of article 94(1) LOSC, this also means that a flag state is under a due diligence obligation to *monitor* that its vessels are not used to harm other actors using the seas.⁵²

4.2 Human rights obligations

Flag states are bound by international human rights law obligations. Incidents involving PCASP can be said to take place within the “normal” jurisdictional sphere of the application of human rights obligations. It can be argued that a flag state has *exclusive* prescriptive, enforcement and adjudicatory jurisdiction, that is control, over a vessel and the people on board when it is sailing on the high seas. Therefore, PCASP may fall within the jurisdiction of the flag state and human rights abuses are brought within the purview of human rights treaties that the state concerned is a party to. A flag state must ensure⁵³ the right to life of all individuals that are within its territory, or are subject to its jurisdiction.

Under human rights law, both negative and positive obligations exist. Positive obligations under human rights law include the obligation to enact legislation in order to prevent breaches from occurring. In case a breach of human rights law occurs, a flag state is under the duty to investigate this violation *ex post facto*, and to prosecute and punish the perpetrator(s) when appropriate. The right to life is guaranteed in e.g. the International Covenant on Civil and Political Rights (ICCPR),⁵⁴ regional conventions (e.g. American Convention on Human Rights,⁵⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR,⁵⁶ African Charter on Human and Peoples’ Rights),⁵⁷ and is a norm of customary international law. This right imposes an obligation on a (flag) state to have a legislative framework in place to regulate private actors,⁵⁸ arguably including the certification, deployment, use of force, accountability, and oversight of PCASP.

⁵² Papastavridis, *ibid*.

⁵³ This includes the positive obligation to adequately protect an individual’s right from being violated by private actors (horizontal effect). Human Rights Committee, “General Comment 31 [80]”, UN Doc. CCPR/C/21/Rev.1/Add.13 of 26 May 2004, para. 8. In the ECHR context, *Osman v. the United Kingdom*, ECtHR, judgment of 28 October 1998, appl. no. 23452/94, paras. 115-116, and subsequent case law.

⁵⁴ International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171, article 6.

⁵⁵ American Convention on Human Rights “Pact of San José, Costa Rica” (ACHR), 22 November 1969, 1144 UNTS 144, article 4.

⁵⁶ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 4 November 1950, 213 UNTS 221, article 2.

⁵⁷ African (Banjul) Charter on Human and Peoples’ Rights, 27 June 1981, 21 ILM 58 (1982), article 4.

⁵⁸ General Comment 31, note 53 at para. 7.

Under the ICCPR, a state “needs to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant”, without distinction concerning nationality.⁵⁹ This is generally considered to impose a positive obligation on a state to ensure that ICCPR rights are protected, without distinction to all individuals within its territory and subject to its jurisdiction.⁶⁰ A flag state has *de jure* and *de facto* jurisdiction and control over victims (and perpetrators) that are on board its vessel, which is often equated with a flag states’ territory and is regarded as an extension of its (land) territory. Although a ship is neither ‘floating territory’, nor is it part of the territory of a state, a flag state has jurisdiction *as if* its vessel is its territory. A flag state grants its vessels its nationality (article 91 LOSC) which consequently brings with it the obligation to exercise jurisdiction and control over its vessels (articles 92 and 94 LOSC). Because flag states have jurisdiction over their vessels, crimes committed on board can be investigated and prosecuted under domestic law. Arguably, a flag state’s jurisdiction extends to individuals (not necessarily having the nationality of the flag state) that are in the immediate vicinity of the vessel on the high seas wherefrom the harm originated. This is because flag states must maintain order at sea and the *de facto* control flag states have over these individuals.

Although concepts of jurisdiction differ and complicate matters in the present scenario, and it is true that the concept of “flag state jurisdiction” has its own problems – poor flag state control in general, the (often non-existent) “genuine link”, and “flags of convenience”⁶¹ – this does not detract from the obligations flag states have to abide by the human rights standards and to monitor their vessels on the high seas.

In order for the obligation to *investigate* to be triggered, a jurisdictional link must exist. This means that in the case of a flag state, the obligation arises to investigate incidents that have occurred on vessels flying its flag. This is because a flag state has *exclusive* prescriptive, enforcement and adjudicatory jurisdiction concerning PCASP on board, and the wrongful act that originated from the flag state’s vessel. The existence of such an obligation has been confirmed in the case law of the ECHR⁶² and of the Inter-American Court of Human Rights. The latter held in *Velásquez Rodríguez* that the right to life includes a (procedural) obligation

⁵⁹ Article 2(1) ICCPR.

⁶⁰ E.g. General Comment 31, note 53 at para. 10; also articles 1 ECHR and ACHR.

⁶¹ König “Flag of Ships”, note 47; and D. König “Flags of Convenience” available at <<http://opil.ouplaw.com/home/EPIL>>.

⁶² The Court held that the lack of a proper investigation by a state amounts to a violation of the right to life. *Osmanoğlu v. Turkey*, ECtHR, judgment of 24 January 2008, appl. no. 48804/99. The ECtHR built upon its case law on investigation obligations, e.g. *El-Masri v. the Former Yugoslav Republic of Macedonia*, ECtHR, judgment of 13 December 2012, appl. no. 39630/09.

for states to investigate, as they “must prevent, investigate and punish any violation of the rights recognized by the Convention”.⁶³ A breach of the procedural obligation entails a breach of the substantive obligation.

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

4.3 (*Flag*) state responsibility

The above considerations raise the following questions: can a flag state incur responsibility when an individual is injured or killed, as a result of (alleged) wrongdoing by PCASP? Can a flag state be responsible for a violation of the right to life, because it has failed to prevent, regulate or investigate the use of force by these non-state actors on a vessel flying its flag?

Conduct of PCASP which is in violation of the human right to life may trigger state responsibility, but may not be directly attributable to a flag state. Although private actors, including PCASP, have contributed to the harmful outcome, under current international law a flag state may not be held directly responsible for an act or omission of PCASP. By applying the Articles on State Responsibility (ARSIWA)⁶⁴ to the issue under consideration, state responsibility of a flag state can probably only be established on the basis of a breach of the obligations discussed above. It is not likely that PCASP can be considered *de jure* or *de facto* organs of a flag state (articles 4 and 5 ARSIWA). State responsibility based on article 8

⁶³ *Velásquez Rodríguez v. Honduras*, Inter-American Court of Human Rights, judgment of 29 July 1988, Ser. C, no. 4, paras. 166 and 172: “can lead to international responsibility of the State (...) because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention”. See paras. 176-177 on the duty to investigate.

⁶⁴ Articles on the Responsibility of States for Internationally Wrongful Acts, International Law Commission, *Yearbook* 2001/II(2) (ARSIWA). Responsibility is established on the basis of attribution and breach, articles 1 and 2.

ARSIWA is also unlikely since the flag state did not instruct, nor exercised control over the conduct of an individual PCASP employee.

Elaborating on the concept of due diligence, the Seabed Dispute Chamber of the International Tribunal for the Law of the Sea found in its 2011 advisory opinion that due diligence is considered to be “an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result”.⁶⁵ The Chamber also held that “[t]he standard of due diligence has to be more severe for the riskier activities.”⁶⁶ Applying this reasoning to PCASP, which are armed private persons on the high seas that carry out a hazardous activity, it can be argued that the standard of due diligence needs to be set high. However, control of a state over acts of private individuals within its jurisdiction, and the ability to properly enforce its laws, is more limited when it comes to acts that occur on the high seas, particularly given its vast area. A state’s capacity to *de facto* control the conduct of private actors may depend on the maritime zone involved and the resources of a flag state, but in any case differs from what can be expected from a state on land territory. This is important for determining the level of due diligence that can be required from flag states in relation to PCASP. A flag state can hardly be expected to patrol the high seas in order to physically monitor all vessels flying its flag in search of human rights violations. Therefore, the issue is not so much responsibility arising from a failure to *prevent* abuses by PCASP *ex ante*,⁶⁷ but rather more importantly, the responsibility for failing to adequately *investigate* when harm occurred *ex post facto*.

Because it is currently not required to *report* incidents involving human rights violations on the high seas, the scale of the problem involving PCASP is difficult to estimate. The requirement to report (e.g. by the master) possible abuses is arguably part of the due diligence obligations of a flag state.⁶⁸ Given that incidents of human rights abuses at sea are harder to detect than on land, one can assume that more incidents have happened without ever being noticed. By combining a flag state’s obligations under the law of the sea and human rights law, the

⁶⁵ *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area*, Seabed Dispute Chamber of the International Tribunal for the Law of the Sea (ITLOS), advisory opinion of 1 February 2011, case no. 17, 50 ILM 458 (2011), at para. 110; also paras. 117-120.

⁶⁶ *Ibid.*, para. 117.

⁶⁷ Although a flag state may be responsible for failing its positive obligation of safeguarding the right to life, which, as noted, includes a duty to prevent harm being inflicted by a private actor. Consequently, a flag state is required to have a legislative framework in place to regulate the activities of PCASP, and enforce its legislation.

⁶⁸ Some legislation contains this requirement, e.g. the Belgian law on maritime private security companies “Koninklijk besluit tot regeling van de methodes en procedures van toepassing op de activiteiten van toezicht, bescherming en veiligheid aan boord van schepen om te strijden tegen piraterij en tot vaststelling van verscheidene maatregelen die gelden voor de maritieme veiligheidsploegen” (4 September 2013), articles 28-30. Thanks to Cedric Ryngaert for pointing this out.

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

In addition, the (procedural) obligation to *investigate* incidents may give rise to international responsibility for a flag state if it did not launch an investigation although it was required to do so.

5. THE PRACTICE OF A FLAG STATE – THE NETHERLANDS AS A CASE STUDY

The Netherlands has a long maritime history. It has a strong shipping industry and has been a seafaring nation for more than five centuries. During the Dutch Golden Age (17th century) the shipping industry flourished and reportedly no other state had more ships flying its flag on the oceans, truly being a maritime power at that time. At present, the shipping register includes approximately 900 merchant vessels.⁶⁹ In the period between 2009 and 2013, 16 vessels flying the flag of the Kingdom of the Netherlands have been attacked.⁷⁰

Dutch commercial vessels sailing off the coast of Somalia have been wanting to be able to hire private security for years. The policy of the Netherlands⁷¹ has been *not* to allow private (armed) security personnel on board commercial vessels flying its flag. Under Dutch law, security is exclusively provided by VPDs (armed members of the Netherlands' navy).⁷² A report published by the Clingendael Institute in 2013⁷³ proposed to change this, concluding that vessels flying the Dutch flag should be allowed to arrange for armed security personnel on board, thereby reducing their dependence on the Dutch navy. For ship-owners, the alternative of hiring (illegal and often uncertified) private security personnel is less expensive and more

⁶⁹ Vlaggenbrochure: The Netherlands, home to leading maritime companies (June 2012) available at <www.rijksoverheid.nl>. The Dutch maritime cluster consists of ca. 12,000 companies, having an added value of around USD 15 billion per year, at 5, 8.

⁷⁰ ICC International Maritime Bureau, "Piracy and Armed Robber against Ships", Report for the Period, 1 January-31 December 2013, Table 12: Nationalities of ships attacked, January-December: 2009-2013, at 15-16.

⁷¹ The protection of merchant vessels became an issue for the Dutch government in March 2011, kamerstuk 32 706, No. 1. Also, Clingendael Report, note 24, at 13-14; 15-17; 18; and 34.

⁷² For an elaboration on Dutch policy, Zwanenburg, note 9 at 97-116.

⁷³ Clingendael Report, note 24.

quickly available. This has led in practice to ship-owners making use of companies offering protection services, contrary to Dutch law.⁷⁴

The government seems to be moving towards changing its policy in this respect. It considers the protection of merchant vessels a priority, and aims to submit legislation in 2014/2015 allowing for ship-owners to hire private armed security for protection off the coast of Somalia, under certain conditions.⁷⁵ The Netherlands is currently the only country in Europe that does not allow for, or is in the process of allowing, private security personnel on board its vessels that sail in waters off the coast of Somalia. The main reason for this is the strong belief that the use of force is to remain the monopoly of the state. In practice, almost all Dutch vessels that sail off the coast of Somalia, and the entire Indian Ocean area, have either a VPD, or if this is not possible (in violation of Dutch law), armed security personnel on board.⁷⁶

Assuming that PCASP will be allowed under Dutch law in the near future,⁷⁷ how should the Netherlands deal with human rights abuses by PCASP on board its vessels? Presumably, the state will act in a similar manner as if it would involve someone who is part of a VPD that is allegedly involved in human rights abuses of an individual.⁷⁸ Currently, any use of force by a VPD is “reported in the form of an ‘After Action Review’ to the Royal Netherlands Marechaussee” (the “police” for Dutch armed forces), which will then be forwarded with recommendations to the Public Prosecutor.⁷⁹ In the case of PCASP, which are private persons, in contrast to VPD which are organs of the state, the Netherlands should nevertheless enact legislation on how to deal with reported incidents (this presupposes compliance with the obligation to *report* incidents) in order to abide by its obligations under international law. The Netherlands, being a flag state, should be aware of its obligations concerning PCASP on board its vessels (once the Netherlands allows the use of PCASP), since otherwise, state responsibility may arise.

⁷⁴ See e.g. AIV Report, note 19 at 58.

⁷⁵ Rijksoverheid, Kabinet maakt weg vrij voor particuliere beveiliging op koopvaardij schepen 26 April 2013, available at <<http://www.rijksoverheid.nl/nieuws/2013/04/26/kabinet-maakt-weg-vrij-voor-particuliere-beveiliging-op-koopvaardij-schepen.html>>; NOS, KNVR wil vaart achter wet particuliere beveiligers op zee 21 January 2014, audio available at <<http://nos.nl/audio/600210-knvr-wil-vaart-achter-wet-particuliere-beveiligers-op-zee.html>>. However, the Dutch Labour Party (surprisingly) announced being against the plan to allow PCASP on board, therefore there is currently no majority in the House of Representatives, NOS, Reders woest op PvdA 10 April 2014, available at <<http://nos.nl/artikel/634121-reders-woest-op-pvda.html>>.

⁷⁶ Reflagging is also an option. NOS audio, *ibid*.

⁷⁷ This is uncertain at the time of writing, see note 75.

⁷⁸ An example of allegations of human rights abuses by a Dutch marine (not being part of a VPD) being investigated, see B. Dirks, De Volkskrant, Marinier mishandelde 11-jarige Somaliër (17 October 2013) available at <<http://www.volkskrant.nl/vk/nl/2686/Binnenland/article/detail/3528638/2013/10/17/Marinier-mishandelde-11-jarige-Somalier.dhtml>>.

⁷⁹ Zwanenburg, note 9 at 111.

6. CONCLUDING REMARKS

Currently, there is a lack of effective and binding regulation of the use of force, and specific shortcomings in addressing human rights abuses on the high seas by PCASP exist. This leads to the conclusion that international law is flawed in this respect, in that it does not specifically regulate this actor operating at sea. On a positive note, some efforts are being made to develop legally binding instruments to regulate the certification, deployment, use of force, accountability, and oversight of PCASP, which admittedly is a phenomenon of a more recent origin. It is strange that rules on certification, regulation of the use of force of PCASP, and monitoring are lacking, since almost all other tasks and issues that might arise on board a vessel have been addressed at the international level.⁸⁰

While in principle there is nothing wrong with outsourcing security at sea, there is a risk that flag states do nothing in response to, or even turn a blind eye to, human rights violations that may take place as a consequence. Such outsourcing does not absolve flag states from their obligations under international law regarding PCASP, to whom they have *de facto* delegated the task of providing security. Whenever a flag state allows PCASP on board its vessels, it should make use of its exclusive prescriptive, enforcement and adjudicatory jurisdiction on the high seas regarding PCASP activities. Arguably, the combination of obligations arising under the law of the sea and human rights law leads to the conclusion that when a flag state has not enacted legislation to regulate their activities, it is *by default* responsible for failing to exercise the required measure of due diligence in instances where human rights violations were committed by PCASP. In addition, the obligation to *investigate* incidents may give rise to international responsibility for a flag state when it has failed to launch an investigation.

Prior to the enactment of binding and specific rules, or perhaps until a system of shared responsibility including all contributing actors (besides flag states these actors might also comprise other states and non-state actors, as mentioned in the introduction) is established, the current accountability gap may be temporarily filled by re-emphasizing the role and obligations of flag states, which might lead to state responsibility. The question remains, however, what the forum would be where international responsibility of a flag state might be established. For example, will Somalia in the future bring a case against a flag state for failing to prevent Somali citizens (whether pirates or fishermen) from being killed? Will a claim be brought by an individual against a flag state under an international or regional human rights mechanism, or

⁸⁰ Thanks to Peter van der Kruit for pointing this out.

will state responsibility of a flag state be established before a domestic court? It remains to be seen what will happen in the future, but since international law has proven to be adaptive to new challenges, there is hope that the current situation will be effectively dealt with.