THE FIGHT AGAINST MARITIME PIRACY

- Possibilities of application of private security organizations off the coast of Somalia under national and international regulation
Abstract

Ever since the fall of the Somali government in 1991, the country has been in the state of civil war and in some regions total lawlessness. The creation of different, smaller, autonomous regions has led to fragmentation of the country as a whole and some districts seem to in fact claim sovereignty over their respective territories. While the country has been practically left to fend for itself, politicians, warlords and local clans were fast to proclaim parts of the country as independent regions. Moreover the infrastructure, industries, healthcare and the “gears of country’s machinery” were falling apart along with people who did not have much to start with. Most of the institutions have been disbanded and hopes of a normal future suddenly became very distant for the people of Somalia. Coupled with constantly ongoing armed conflicts within the nation made it even more difficult for the country’s poor. There are few theories as to why piracy had this sudden upspring off the coast of Somalia. One of which is as commonly known that foreign fishing fleets were depleting the Somali fishing stocks, while also pushing the local fishermen away from their usual grounds. Coupled with toxic waste dumping in the territorial and EEZ waters made fishermen to start to arm themselves. There is also a theory that, since Somali weapons embargo, the prices had risen, thus local clans needed more capital in order to fund wars, subsequently creating piracy. After the fall of the government, Somali ex-navy members returned to their clans and later on used their knowledge and skills in order to conduct their operations. The international community through UN and with independent efforts, acting under chapter VII of the UN Charter, has begun to tackle the problem, however with varying effects. Meanwhile the massive release of military personnel and equipment after the end of cold war has led to an immerse rise of another industry, namely the one of private security which is now actively lobbying to provide its services both on land in Somalia as well as to the shipping industry that has been suffering greatly due to piracy.
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<th>Full Form</th>
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<tr>
<td>AMISOM</td>
<td>African Union Mission in Somalia</td>
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<td>CGPCS</td>
<td>Contact Group on Piracy off the Coast of Somalia</td>
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<td>CTF</td>
<td>Combined Task Force</td>
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<td>DOD</td>
<td>Department of Defense</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>EEZ</td>
<td>Exclusive Economic Zone</td>
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<td>EU</td>
<td>European Union</td>
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<td>EUNAVFOR</td>
<td>European Union Naval Force Somalia</td>
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<td>HRL</td>
<td>Human Rights Law</td>
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<td>ICRC</td>
<td>International Committee of Red Cross</td>
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<td>IHL</td>
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<td>IMO</td>
<td>International Maritime Bureau</td>
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<td>International Maritime Organization</td>
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<td>MEJA</td>
<td>Military Extraterritorial Jurisdiction Act</td>
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<td>MSP</td>
<td>Military Service Provider</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>NCM</td>
<td>Nordic Crisis Management</td>
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<td>OAU</td>
<td>Organization of African Unity</td>
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<td>PCASP</td>
<td>Privately Contracted Armed Security Personnel</td>
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<td>PMC</td>
<td>Private Military Company</td>
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<td>PMF</td>
<td>Private Military Force</td>
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<td>PSC</td>
<td>Private Security Company</td>
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<td>PSP</td>
<td>Private Security Provider</td>
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<td>SMTJS</td>
<td>Special Maritime and Territorial Jurisdiction Act</td>
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<tr>
<td>SOMCAN</td>
<td>Somali-Canadian Coast Guard</td>
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<td>TFG</td>
<td>Transitional Federal Government</td>
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<td>TFI</td>
<td>Transitional Federal Institutions</td>
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<td>UCMJ</td>
<td>Uniform Code of Military Justice</td>
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<td>UK</td>
<td>United Kingdom</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNSC</td>
<td>United Nations Security Council</td>
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<td>WFP</td>
<td>World Food Program</td>
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Chapter 1: Introducing the Issue

1.1 Introduction

Maritime Piracy is not a new phenomenon, the earliest references date back to as far as fourteenth century B.C., according to some sources, basically as far back as the beginning of the shipping commerce. But probably the most notorious and mentioned period in the history of piracy is the 16th to 18th century involving many of the European countries, as well as the US and Caribbean colonies. The piracy of today, however, differs from the romanticized epoch one can see in movies and read about in books. Recent piracy is common to a few areas in the world, so called piracy hotspots, which include Malacca Strait, Bight of Benin and the most recent and the fastest growing one in both number of attacks and reach is the one around the Gulf of Aden, the horn of Africa and the parts of Indian Ocean. While piracy in the Malacca Strait is being dealt by joint cooperation between Singapore’s, Malaysian and Indonesian governments, as well as Nigeria is dealing with the piracy in the bight on its own, Somalia with absence of a competent, to deal with the specified problem, government has had a lot of adversity in dealing with piracy which is deeply rooted inland.

From being simple fishermen in Somalia some went to becoming advanced criminal gangs with the sole intent to capture ships, take it’s crews hostage and demand ransom payments for release. Their reach increased from just territorial waters in Somalia to high seas of Indian Ocean. In 2009, there was a peak of pirate attacks in the area. According to the report from International Maritime Organization (IMO)

1 http://www.ne.se/lang/sj%C3%B6r%C3%B6veri
4 ICC International Maritime Bureau, Piracy and Armed Robbery Against Ships, Annual Report, 1 Jan. – 31 Dec. 2009, available at : http://www2.mfa.gr/softlib/%CE%95%CF%84%CE%AE%CF%83%CE%B9%CE%B1%20%CE%B1%CE%BD%CE%B1%CF%86%CE%BF%CF%81%CE%AC%20%CE%B3%CE%B9%CE%B1%20%CE%84%CE%BF%20%CE%B9%CE%B1%20%CE%84%CE%BF%20%CE%85%20International%20Maritime%20Bureau%20%CE%B3%CE%B9%CE%B1%20%CE%84%CE%B7%CE%BD%20%CE%A0%CE%B5%CE%B9%CF%81%CE%B1%CF%84%CE%B5%CE%AF%CE%B1.pdf
5 International Maritime Organization is the United Nations specialized agency with responsibility for the safety and security of shipping and prevention of maritime pollution by ships. http://www.imo.org/Pages/home.aspx
in 2009 alone there were 251 piratical attacks with 867 hostages taken. At the same time shipping industry had to raise its prices due to uncertainty and risks involved when transferring goods through the Red Sea. Insurance companies have been forced to pay large sums in ransom to the pirates, which raised insurance premiums. One of the largest ransoms to date paid for a single ship and its crew was the ransom for the Ukrainian ship Faina, which was carrying military technology, with the sum of $3,2 million. Even though there is some military presence consisting of couple of dozen EU, NATO and other state’s warships, there seems to be no decrease in the activity of pirates, but rather a high increase, since drawbacks for being a pirate seem to be very low.

1.2 Background

Previously mentioned facts have led to the fact that insurance and shipping companies have started to think of ways to deal with the problem on their own and since they felt that the state navies failed to protect them, the “simplest” solution would be to hire one of their own, which has been known to work throughout the history.

Privateering has been invented almost at the same time as the “golden epoch” of piracy, as mentioned above, which basically means that government allowed private merchant ships to capture pirates for the share of the loot. The method was greatly effective in fight against maritime robbery as well as warfare (US independence war) even though the line between a privateer and a pirate could seem to be very thin and there are a lot of known cases of privateers crossing the line to piracy. Although privateering on high seas was eventually forbidden, by most nations, private security as a branch never ceased to exist.

9 Dana M. Parsons Protecting the booty: Creating a regulatory framework to govern increased use of private security companies in the fight against pirates. Copyright (c) 2010 Tulane Maritime Law Journal; Dana M. Parsons p 21
Most recently, Private Security Companies (PSC), were rather widely involved in a few international armed conflicts, such as in Iraq, Afghanistan etc. ¹¹ Their role has become progressively more important in modern warfare to now include everything from simple maintenance to complex military tasks. ¹² Ever since withdrawal of troops from Iraq, more and more military personnel has become unemployed, which makes working for a PSC a lucrative option, therefore increasing the size and number of active PSCs. Worth bring up is the fact that the demand for private military has been constantly on increase as well. This brings us back to the fact that shipping industry has become more than willing to hire PSCs for security protection off the coast of Somalia.

This essay will examine and describe current situation in Somalia, reinvention of piracy off it’s coast and the state of lawlessness that allows for it to prosper. Furthermore it will describe the possibility of private military combating pirates or otherwise protecting ships in the Gulf of Aden. Important question will be the more and more demanded, by international community, attempts at regulation of so called “gray” area of international law for PSCs, which at the moment remains more or less untouched. Emphasis will be put on questions of responsibility, accountability and possibilities of deployment of such service both from the state and private perspective.

For the purpose of this essay, PSCs can be defined as any company that provides military, naval, security, logistics, intelligence, training and supply services.

¹¹ Amanda Tarzwell, In search for accountability: Attributing the Conduct of Private Security Contractors to the United States under the Doctrine of State Responsibility, Oregon review of international law Vol. 11, 179 p. 185
¹² Supra note 11 p. 185
1.3 Purpose and issue

The recent attacks of piracy occurring in one of the world’s biggest shipping lanes, namely the Gulf of Aden, has lead to a certain unrest in international community as well as within the shipping industry, thus raising insurance premium costs and subsequently affecting world trade. Many states have deployed their navies, through a number of operations in order to combat piracy off the coast of Somalia. Even though at times their efforts have been effective, the sole number of pirate attacks is overwhelmingly larger than the capacity of international operations navies can handle. Meanwhile, another actor has emerged in the field of protection and security and is now looking to offer its services to the shipping industry, namely private security companies. In the last twenty or so years their numbers have increased drastically, mainly due to changes in the world’s politics and with the recent armed conflicts their role has become gradually more important. The international regulation of the services provided by such companies as well as the regulation of their conduct did, on the other hand, not evolve as fast as the industry itself. The international community has therefore been stressed for a regulation related to the use of PSCs, while shipping industry has already begun using their services. The essay will try to combine two relatively big subjects, namely Somali piracy and the use of private security forces as measures of deterring or otherwise combating piracy, that are however different will be interwoven together for the purpose of the research. Furthermore, in order to achieve this object, the essay will show how PSCs have been used up to date in both armed conflicts, through history and within the Somalia itself. Additionally, since there is no established international regulation on the topic, the essay will research legal documents applicable to PSC regulation on national levels of some of the most frequent users of such services in order to show the already existing domestic framework and how it is applied in the absence of international of possible prosecution under international law.

The intention of this essay is, accordingly, to investigate the possibilities of the use of PSCs in the context of providing security in and off the coast of Somalia. Since Somalia is considered a failed state, with no effective government and no coastguard to deter pirate activity, hence the need for outside involvement in forms of private companies. One thing must not be forgotten, the fight against piracy takes place on water as much as on land.
Consequently the first question reads as follows:

*Is it possible under existing and proposed international law to apply private security measures in the fight against Somali piracy?*

Following:

*What are the legal requirements for the use and regulation of PSCs in order to protect the shipping industry or otherwise combat piracy under domestic and international regulation?*

In order to establish the previous two questions, the essay will need to examine:

*What has been done, so far, by the international community in order to combat piracy and what are the results?*

### 1.4 Method and materials

In order to achieve the purposes of the essay the doctrinal study was conducted on the relevant materials with the application of judicial study. The principal sources have been specific scholarly articles on the subject of piracy and private security companies. In addition to that, relevant international regulations, in form of conventions, domestic legislation, resolutions and frameworks on recommended proposals, were applied. The most books on the subject consist, unfortunately, of the same type of articles edited by different professors. Some newspaper-articles were used along with statistical data, taken often from different international organizations. Even though some of used proposing documents are not in force, they were still relevant for the research.

There have been some difficulties during the process, though primary concerning the scholarly articles that have been used for the research of the essay. Many of the articles concerning the same subject often cite each other back and forth, making it difficult to find the original source. Furthermore, many scholarly articles were written by researchers with no legal background or education and while differently formulated, many state the same thing.

Another issue that was encountered during the research is the fact that a great deal of materials are written by American scholars, thus often describe the subject from
an American legal tradition’s point of view, while the numbers of articles written by Europeans were only a handful. That notion may have affected our work during the essay and that is one of the reasons for why American domestic legislation has been brought up. There is also a reason for why U.S. and U.K. domestic legislation has been investigated, namely due to the fact that these are the states with most use of services, as well as the biggest number of registered, active PSCs, which in turn gave better information and data on the use of services on the one hand and existence of regulation on the other. A lot of proposed regulation, specifically on the international level, was used as analogous proposals, since there are no specific applicable rules.

**Limitations**

This essay deals with the necessary materials in order to achieve the objects of the purpose. However, there are few subjects that, while connected to the issue, are not treated in this essay. Firstly, while the issue of piracy could be seen as a consequence of Somali state failure, the efforts in place to improve the situation in the country are not included. The arrest, detention and prosecution of pirates are the issues that this essay mentions very briefly. Maritime terrorism is another issue that is mentioned only for the purpose of separating it from piracy and is not dealt with in a deeper sense. The same applies for mercenaries; the essay does not attempt to treat the specific topic.

**1.6 Layout**

Chapter 2 will describe the historical and political background in Somalia that has led to upraise of piracy. In addition to that the definition and codification under International law will be presented in the chapter. Chapter 3 will present and discuss the response by the International Community and the effects it hand in the fight against piracy. The means to combat piracy by measures of private security will be offered in Chapter 4, along with discussion and proposals to international regulation as well as applicability of already existing national and flag state regulation. Continuous analysis will be conducted throughout the abovementioned chapters. A thorough analysis of the situation and applicability of previously mentioned frameworks will be discussed in the final Chapter and closed with the concluding opinion.
Chapter 2: Somali Piracy

2.1 Modern Somali history

In 1969 Mohammed Said Barre took over the power and created Somali Democratic Republic and ruled until 1991 when the government collapsed and a civil war broke out.\textsuperscript{13} Since then, the country has been divided into few regions with no effective control over the whole territory, instead local governments as for instance Puntland, Somaliland etc. The only, internationally recognized, government is the Transitional-Federal Government (TFG) of Somalia. However, it has been struggling with both resources and personnel in order to gain control and as for now only controls a part of capital Mogadishu. Somalia has been ever since the war considered a failed state\textsuperscript{14} with no effective judicial and executive branch.

With no government to rule, the fishing waters of Somalia could not be protected from other states` illegal activities such as toxic waste dumping and plundering of the fishing stocks. To prevent this, local fishermen started to arm themselves in order to protect their fishing waters from outside involvement and being pushed away themselves from their own fishing territories.\textsuperscript{15} It did not take long until they realized that plundering or otherwise hijacking World Food Program (WFP) ships provided a substantial reward for almost non-existing risk. Since then piracy has developed into a complex criminal operation and now takes place on both territorial waters and high seas with advanced gear and weapons.\textsuperscript{16} Pirates have been known to deploy their skiffs\textsuperscript{17} from the so called mother ships, which allow them to operate far out on the high seas. According to some theories, piracy is being led by both warlords and corrupt politicians in some cases as well as other criminal groups.\textsuperscript{18}

\textsuperscript{13} U.S. Department of State, Office of the Coordinator for Counterterrorism, Country Reports on Terrorism 2005, (April 2006), p. 55
\textsuperscript{15}Supra note 3 p. 560
\textsuperscript{17}Small boat with a high-powered engine, commonly used by pirates
2.2 Piracy defined

There is one commonly recognized definition of piracy in international law today. It was implemented in 1958 United Nation (UN) Convention on the High Seas. Later on the definition of piracy has come to be included in the 1982 UN Convention on the Law of the Sea (UNCLOS) and mainly specified in articles 101-107 and 110. Piracy is defined as follows:

“(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”

While the definition of piracy is accepted by the international community, the problem remains that in many states it is still unregulated or is not a criminal offence under national legislation.

Maritime piracy should, however, be separated from maritime terrorism. The main difference, obviously, is the purpose of the hijacking or detention, which in case of piracy must be done for private ends and not political. In later case it counts as

21 Art. 101 UNCLOS
23 Supra note 22, p. 143
maritime terrorism, in which context there is no possibility of negotiating or ransoming, as states usually have policies of non-negotiation with terrorists.\textsuperscript{24}

As defined in article 101 of UNCLOS, in order for an act to be counted as piracy, it must take place on the high seas.\textsuperscript{25} Similar acts in territorial waters are generally recognized as armed robbery at sea\textsuperscript{26} and are usually a matter of jurisdiction of the coastal state. It is defined by the International Maritime Organization in the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships\textsuperscript{27}, as follows:

\begin{quote}
(a) any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of "piracy", committed for private ends and directed against a ship or against persons or property on board such ship, within a State’s internal waters, archipelagic waters and territorial sea;

(b) any act of inciting or of intentionally facilitating an act described above.\textsuperscript{28}
\end{quote}

The requirement of an act, in order for it to be considered as piracy under provisions of UNCLOS, specifically to be outside the jurisdiction of any state, otherwise armed robbery against ships, has created some uncertainty for states trying to apply the law in order to combat piracy off the coast of Somalia, since warships are normally not allowed to enter territorial waters of another state without permission. On the other hand, scholars have been discussing the fact that, a state that is unable or unwilling to deal with the problem on their own, should not be able to decline assistance provided by other states.\textsuperscript{29} This is supported by the fact that Somali state of lawlessness, currently unable to uphold the law, makes the requirement on lack of jurisdiction an obsolete discussion. Furthermore, this topic will be described in following chapter through UN resolutions.

\textsuperscript{24} Supra note 22, p. 143
\textsuperscript{25} Article 101 (a)(i) UNCLOS
\textsuperscript{26} International Maritime Organization, Resolution A.1025(26), Adopted on 2 Dec. 2009, Annex, p. 4 §2.2
\textsuperscript{27} Ibid.
\textsuperscript{28} Ibid., p. 4 § 2.2
\textsuperscript{29} Peter Lehr, Violence at sea, Piracy in the Age of Global Terrorism, (2007) p. 177
While there are states and organizations involved in combating piracy, a difficulty arises, in the process of recognition of suspected pirates.\textsuperscript{30} It is commonly known that both regular fishermen and pirates use the same type of boats, it is however less known that both parties are usually in possession of the same type of weapons but for different purposes. Obviously, fishermen use it for personal security, which makes it difficult for patrolling forces to separate one from another.\textsuperscript{31} Under international law, one becomes a pirate only when caught in actual attempt to hijack or otherwise board another ship without permission.\textsuperscript{32} This creates only a little window of time for the coalition forces to effectively disrupt a pirate attack, approximately between fifteen to thirty minutes from first sight to actual succession of a hijacking.\textsuperscript{33}

Under international legislation the above mentioned situation is regulated through art. 103 of the UNCLOS as follows:

“A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.”\textsuperscript{34}

Because of this definition and due to previous discussion there is a risk that the above mentioned article will be ineffective because in reality it is rather difficult to distinguish an armed pirate who intends to hijack a merchant ship and a fisherman who is armed for personal protection. Although, ship’s crew taking over the ship it works on, otherwise known as mutiny\textsuperscript{35}, does not constitute an act of piracy under

\textsuperscript{30} Supra note 8, p. 421
\textsuperscript{31} Ibid.
\textsuperscript{32} Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (SUA Convention) adopted on 10 March, entered into force March 1, 1992, done in Rome, Art 3.1 (1) “1. Any person commits an offence if that person unlawfully and intentionally: 1. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;”
\textsuperscript{34} Art. 103 UNCLOS
\textsuperscript{35} “Mutiny - ...Conspiracy to overthrow an authority to which a crew of a ship obeys...”, http://www.ne.se/lang/myteri, Nationalencyklopedin, 2012-05-17.
international law. The requirements of the UNCLOS provisions are clearly stated on that matter that a pirate attack must be committed from one ship to another\textsuperscript{36}.

\subsection*{2.3 Universal jurisdiction}

Piracy is a crime punishable under international law and since pirates are considered enemies of all human kind\textsuperscript{37}, universal jurisdiction is applicable.\textsuperscript{38} By definition it encompasses the right of any state to be able to detain board and seize any ship suspected of piratical activities or attempting to, except for ships under exclusive jurisdiction of the flag state\textsuperscript{39}. As provided in article 100 of UNCLOS:

\begin{quote}
"All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."\textsuperscript{40}
\end{quote}

However, the fact of exclusive jurisdiction of the flag state and high seas requirement can be discussed, since in the context of Somali situation currently not being able to effectively control its own jurisdictional premises, makes the statement obsolete.\textsuperscript{41} State participants must however ask the TFG for permission to enter its waters under existing international regulation. Moving on, universal jurisdiction also includes the ability for states to detain people suspected of piracy and prosecute them in their own courts in accordance with their national legislation. Article 105 of the UNCLOS states as follows:

\begin{quote}
"On the high seas, or in any other place outside the jurisdiction of any
\end{quote}

\textsuperscript{36} Art 101 (a) (i) UNCLOS
\textsuperscript{37} Pia Zara Thadhani, \textit{Regulating Corporate Human Rights Abuses: Is Unocal the Answer?} 42 Wm. & Mary L. Rev. 619 (2000) p. 624 available at: \url{http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1439&context=wmlr&sei-redir=1&referer=http%3A%2F%2Fwww.google.se%2Furl%3Fsa%3Dh%26smtb%3D1%26sclient%3Dff-mt%26source%3Dhp%26ct%3Dclnk%26client%3Dhp%26)&&hl%3Den%26prntos%3D5%26newwindow%3D1%26biw%3D1024%26bih%3D641%26ei%3DIc6wT5XqN-bT4QTBy43OCQ%26usg%3DAFQjCNEcD2giv9zfisIDWXa3s-8v2aodig#search=%22pirates%20enemy%20all%20mankind%20jus%20cogens%22}
\textsuperscript{39} Art. 92 UNCLOS
\textsuperscript{40} Art. 100 UNCLOS
\textsuperscript{41} Supra note 29, p. 165
While considering the aforesaid, the states may exercise their right to universal jurisdiction, but are however not obliged to.\textsuperscript{43} This merely contradicts the provisions of art. 100 of UNCLOS and in a way creates legal uncertainty for states combating piracy. Another aspect worth mentioning is that piracy, under some national legislation still remains unregulated, which means that some states cannot, obviously, prosecute suspects, which resulted in a \textit{“capture and release”} action, where pirates are captured, interrogated, disarmed and later released on a boat with enough supplies only to make it back to shore.\textsuperscript{44}

Although as stated in art. 105, a navy ship may board a ship or aircraft taken by pirates it is however, not recommended, since it can result in the loss of civilian lives and/or damage to cargo and the vessel.

Another important aspect is how the international community stands in the question of what can be counted as government authorization. In art 107 of UNCLOS it is stipulated that only government authorized ships are allowed to combat and seize pirates. The article reads as follows:

\begin{quote}
“A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”\textsuperscript{45}
\end{quote}

\begin{flushright}
\textsuperscript{42} Art. 105 UNCLOS \\
\textsuperscript{43} Roger O’Keefe, \textit{Universal jurisdiction; clarifying the basic concept}, JICJ 2 (2004), 735-760 p 748 Available at \url{http://jicj.oxfordjournals.org/content/2/3/735.full.pdf} \\
\textsuperscript{45} Art. 107 UNCLOS
\end{flushright}
As this essay will be discussing furthermore in later chapters is whether a PSC can be seen as a state agent authorized to combat pirates or if such an action would be seen as a crime under international law? As further discussion will show much will depend on who it is that employs the PSC for the assignment whether they are allowed to engage pirates or if it will be considered a crime due to non-authorization.

Chapter 3: Combating Piracy with International Measures

3.1 International Response to the issue of piracy

The issue of piracy, in modern history context, is not very new. Since 1998 South-Asian governments have been trying to deal with the subject in question, and one can say they have been fairly successful in disrupting and otherwise combating piracy.\(^46\) As mentioned earlier, the circumstances in Somalia are rather different from Malacca Strait, since there is no effective judiciary and enforcement system in place.\(^47\)

First occurrences of Somali piracy date back to 2001, the issue was first brought by the International Maritime Organization (IMO) to the United Nations Security Council (UNSC) in 2004.\(^48\) At the time, pirates in Somalia were quite unsophisticated, and their main objective was to basically board a ship and take everything of value one could take with on a small boat back, such as money and personal belongings.\(^49\) Since then, pirates have become more refined and nowadays the main objective is to board and actually hijack a ship in order to later ransom it and its crew for large sums of money.\(^50\) The international community has been rather passive through 2004-07 and only limited its response to protecting WFP ships. In 2007 the IMO urged the states to act on the issue of piracy, given that the amount of attacks off the coast of Somalia has largely outnumbered the figure of

\(^{46}\) Supra note 38, p. 2
\(^{49}\) Supra note 29, pp. 16-17
incidents in Malacca Strait.\textsuperscript{51} IMO urged the only internationally recognized government of Somalia, namely the TFG of Somalia, to grant permission for states to enter its territorial waters in pursuit of pirates.\textsuperscript{52}

3.2 Relevant United Nations Security Council (UNSC) Resolutions

To meet the newly growing problem of piracy off the coast of Somalia the TFG asked UNSC for help in dealing with the problem. The UNSC, acting under chapter VII of the UN Charter\textsuperscript{53}, adopted in 2008 the first resolution regarding the problem, namely resolution 1816 (2008)\textsuperscript{54}. It set out the relevant provisions of the UNCLOS (arts. 100, 101, 105) to be used as legal grounds for combating piracy, as well as encourage member states to participate in fight against piracy. It also called upon states to “use all means necessary” in the repression and disruption of piratical activity off the coast and arguably granted the authority for participants to treat Somali territorial waters as high seas. It was valid for six months and as stipulated by the UNSC it was not to be seen as international customary law.\textsuperscript{55} This was the first resolution of its kind that actually allowed high seas regulations to be applied on territorial waters of a state.\textsuperscript{56} Resolution 1838 (2008)\textsuperscript{57} reaffirmed the provisions of the aforementioned resolution as well as it extended the mandate period of the operation for another year. The next in line resolution, resolution 1846 (2008)\textsuperscript{58}, urged the states to adopt piracy under national criminal legislation and by doing so establish jurisdiction and prosecuting pirates under the 1988 Convention for the Suppression of Unlawful Acts against the Safety of the Maritime Navigation (SUA Convention). The resolution 1851 (2008)\textsuperscript{59} went a step further, allowing cooperating

\begin{itemize}
\item \textsuperscript{54} UNSC Resolution 1816 (2008), available at: http://www.un.org/News/Press/docs/2008/sc9344.doc.htm
\item \textsuperscript{55} Ibid.
\item \textsuperscript{56} Supra note 9, p. 7
\item \textsuperscript{57} UNSC Resolution 1838 (2008), available at: http://www.un.org/News/Press/docs/2008/sc9467.doc.htm
\item \textsuperscript{58} UNSC Resolution 1846 (2008), available at: http://www.un.org/News/Press/docs/2008/sc9514.doc.htm
\item \textsuperscript{59} UNSC Resolution 1851 (2008), available at: http://www.un.org/News/Press/docs/2008/sc9541.doc.htm
\end{itemize}
states to pursue pirates not only in territorial waters, but also onshore. It also urged states and international organizations (EU, NATO) to take “all necessary means to suppress piracy”. Since pursuit of pirates was allowed onto land, the resolution stipulated that relevant International Humanitarian Law must be applied. The resolution also prolonged the operational time-period by another twelve month. Moving on to the most recent, relevant resolution, 2020 (2011), the Security Council expressed grave concern about the ongoing issues in the fight against piracy and its expansion in both size and reach. Recalling that while all the international involvement on the seas, the issue still lies within the Somali territory and that the efforts should also be directed towards the progress and development of the nation in order to achieve a long-term solution. It also noted that international support to the TFG of Somalia and the Transitional Federal Institutions (TFI) should be continued with. The UNSC also noted the efforts put in by the IMO and Djibouti Code of Conduct participating states and their trust funds as well as Contact Group on Piracy off the Coast of Somalia (CGPCS). It also commended the governments of Kenya, the Seychelles and Tanzania and a few others, in their efforts and support in helping to prosecute suspected pirates. The resolution also extended the time-period by another year.

### 3.3 International Operations

Following the UNSC resolutions, acting under chapter VII of the UN Charter, the international response has come to include a couple of operations on both regional and international level. Djibouti Code of Conduct was signed in 2009 between African states with a purpose of implementing UNSC resolutions and cooperating in the ongoing crisis. The Organization of African Unity (OAU) launched the AMISOM program which however, focused more on the stabilization of the

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60 Supra note 22, p. 142
62 Id.
64 Contact Group on Piracy off the Coast of Somalia, [http://www.thecgpcs.org/about.do?action=background](http://www.thecgpcs.org/about.do?action=background)
65 [http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx](http://www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx)
situation within territory Somalia, forming and training Somali military forces as well as creating a secure environment for institutions to operate in, rather than off the coast.

This part, on the other hand, will focus more on operations created to combat piracy offshore such as including European and coalition forces.

In December 2008, as a result of all abovementioned resolutions and under UNSC mandate, European Union (EU) has launched its first naval operation, European Naval Force Somalia (EUNAVFOR) – Operation Atalanta\(^{68}\). As of this moment, around four to seven vessels constantly patrol the waters in the Gulf and around the Horn, with primary purpose to protect WFP and AMISOM ships, protect other vulnerable shipping along with monitoring the fishing activities and prevent toxic-waste dumping.\(^{69}\) North Atlantic Treaty Organization (NATO) forces are present in the area, as well, with similar tasks through Operation Ocean Shield\(^{70}\), part of which is also the support of the regional coast guard. Task Force 151 was established in support of other missions and with a specific anti-piracy mandate\(^{71}\). A fairly new organization was deployed after its establishment in response to the resolutions, the Contact Group on Piracy off the Coast of Somalia (CGPCS), which through four working groups has been coordinating effort of the involved states and organizations, including coordination of military efforts, capacity building, establishing the rule of law and other judicial aspect, arrest, detention, prosecution of pirates in Somalia, finding lawyers, informing the public and shipping industry of piracy-related issues.\(^{72}\)

Since 2004 there has been a serious of changes throughout the Somali piracy, unfortunately it did not lead to its reduction.\(^{73}\) Even though the problem has been brought up to international attention, it did not mean the end of it. However, through this given notice, the resolutions by the UNSC, IMO, and other organizations, the world has begun to tackle the problem. Around seventeen states


\(^{70}\) NATO Operation Ocean Shield, [http://www.manw.nato.int/page_operation_ocean_shield.aspx](http://www.manw.nato.int/page_operation_ocean_shield.aspx)


\(^{72}\) Ibid.

participate now in a few major multinational operations with the purpose of both eradiating piracy and creating security and rule of law in Somalia through a comprehensive approach. The states have been given the legal grounds and possibilities to handle the problem, the willingness, however, has been left to desire for more. The relevant resolutions by the UNSC along with provisions of SUA and UNCLOS have given the legal capacity and necessary instruments to suppress the problem. Even though the operations seem to be fairly successful in disrupting piratical activities off the coast, the statistics on attempted and successful attacks do not seem to decline.\textsuperscript{74} The reason for that, obviously, is that piracy has become a much bigger nuisance than originally anticipated and along with the low risks involved for pirates if captured, makes it a profitable low-risk opportunity.\textsuperscript{75}

Along with major legal uncertainties, as regarding detention and transportation of suspects from the time of capture to prosecution, under European Convention on Human Rights\textsuperscript{76} (ECHR), specifically article 5\textsuperscript{77}, as well as non-refoulement principle\textsuperscript{78} and the general unwillingness of states to prosecute pirates under their domestic legislation\textsuperscript{79} – thus giving the pirates possibilities to apply for asylum, makes it difficult for some states to effectively deter piracy in the region. The mission of the task forces, worth mentioning, is that of a police force, rather than military, and acts more as a coast guard. The successful prosecutions of suspects, nevertheless, have been ongoing with more and more neighboring states participating. Even with the existence of universal jurisdiction when prosecuting pirates, states are not obliged to. This differs, without a doubt, from the language used by the resolutions that urge states to “\textit{use all means necessary to suppress piracy}”. Pirates are prosecuted in the Seychelles, Kenya, Netherlands and US, with more states joining as we speak.\textsuperscript{80} Positive steps must be taken towards resolving jurisdictional issues and creation of rule of law in the State, known for the lack of it. Prosecuting pirates in Somalia would create the intended effect and help straighten transitional and local authorities both for domestic standing and outwards. In order

\begin{itemize}
\item\textsuperscript{74} IMB Piracy and Armed Robbery Map 2012, \url{http://www.icc-ccs.org/piracy-reporting-centre/live-piracy-map}
\item\textsuperscript{75} Supra note 38, p. 1
\item\textsuperscript{76} The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), adopted on 4 Dec. 1950 in Rome, entered into force on 3 Sept. 1953, available at: \url{http://www.hri.org/docs/ECHR50.html}
\item\textsuperscript{77} Art. 5 ECHR, “Right to Liberty and Security of Person…”
\item\textsuperscript{78} Art. 33, Prohibition of Expulsion of Refugees (Refoulement), 1951 Convention on the Status of Refugees, signed on 29 Jul. 1951 in Geneva, entered into force on 22 Apr. 1954, available at: \url{http://www.unhcr.org/3b66c2aa10.html}
\item\textsuperscript{79} Supra note 29, pp. 166-171
\item\textsuperscript{80} Supra note 50, p. 411
\end{itemize}
to accomplish that, the judiciary system must become more reliable and apply laws implemented and not contradicting international legislation and appropriate Human Rights treaties. The executive and legislative authorities must become more sufficient as well.

The efforts to date have, however, been insufficient to satisfy the demand for security by the shipping industry. Hence the uprise of the market for Private Security Companies, now looking at the open seas market off the coast of Somalia and opportunities to come. The question of legality is not an easy one, since there are no clear international legislation governing the use of the same PSC’s by the private shipping industries. The debate has become even bigger since the international community noticed the mishaps of these companies in war efforts in Iraq, such as Academia, former X E and Blackwater. The following chapter will focus solely on the possibility of such forces to be able to take on the given problem in the context of comparison to both land and naval plans and the regulation of the “gray area”.

**Chapter 4: Private Measures as Means in the Fight Against Piracy**

4.1 Privateering

The use of PSCs is not a new phenomenon, for centuries nations have been using contractors to fight wars. First records of the equivalent of private military date all the way back to 2047 B.C. and Mesopotamian times of King Shulgi of Ur, where outside forces analogue to mercenaries were hired. Ever since, private armies were fighting wars in the name of other lords for one specific purpose, namely personal profit.

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During the late Middle Ages and a few centuries forward a new type of mercenaries developed, the privateers\textsuperscript{83}, in order to combat piracy or other states navies and merchant ships. Privateering could basically be explained as government authorized piracy, through letters of marque, private owners of ships could be charted to combat but mostly plunder and loot the weaker merchant ships of their enemies, thus disrupting trade and consequently the economy.\textsuperscript{84} Letters of marque\textsuperscript{85}, or equivalent (licenses in the UK), were always issued by the respective governments to a specific captain of a ship with specific rules regulating the conduct by which the captain and the crew of a ship had to act upon. At first, these letters were mainly used during wartime, for instance in 13\textsuperscript{th} century England, when King Henry III issued licenses to attack all French vessels at sea.\textsuperscript{86} This kind of privateering, in short, practically developed into piracy, plundering ships no matter affiliation.\textsuperscript{87} Subsequently, letters of marque, developed into a new form of “self law”, where the bearer of the letter had been wrongly injured by a subject of another state, which failed to remedy, and thus the person that was injured could acquire the letter in order to regain the goods until “satisfied” without being labeled as a robber or a pirate.\textsuperscript{88} During the French English war and later on English Spanish war, privateering was used extensively by the governments as means of warfare, through the method mentioned earlier. It was also broadly applied throughout the US Independence War.\textsuperscript{89} However, it was not uncommon that privateers would eventually switch sides and either work for other governments or become full scale pirates raging the seas for weaker prey. The most known example of that was Captain William Kidd who first was contracted as a privateer and later hanged for being a pirate.\textsuperscript{90} In 1856 the European countries prohibited the use of privateers through the Paris Declaration.\textsuperscript{91} The United States, however, never signed the declaration and letters of marque as a concept remained in the US Constitution.\textsuperscript{92}

This chapter will focus on the definition of modern times Private Security, other than mercenaries, their use through recent conflicts as well as existing regulation.

\textsuperscript{83} Supra note 8, p. 412
\textsuperscript{84} Ibid.
\textsuperscript{85} Ibid., p. 412
\textsuperscript{86} Ibid., p. 423
\textsuperscript{87} Id.
\textsuperscript{88} Id., see also George Tucker, \textit{Blackstone’s Commentaries}, 1803, p. 258
\textsuperscript{89} Id., p. 428
\textsuperscript{90} Id., p. 431
\textsuperscript{91} Paris Declaration Respecting Maritime Law, signed on 16 Apr, 1856
\textsuperscript{92} Supra note 8, pp. 428-429
It will also describe the possibilities of their use for the protection of Maritime Navigation against piracy through the Gulf of Aden, the Horn of Africa and Red Sea as well as recent updates in regulatory framework and legal aspects.

4.2 Private Security: definitions

Although Private Security Companies are being used extensively throughout the world in different operations, there are, however, no clear definition for the entire branch of industry. For the purpose of this paper, the definition will cover both the term PSCs among other names commonly used to entitle such companies, including PMC (Private Military Companies), PMF (Private Military Forces), PSP (Private Security Providers), MSP (Military Security Providers), etc. The existence of such an array of different terms in use could be attributed to different range of services provided by companies, including everything from maintenance, military training, support, protection to more complex operations, although usually not involving direct participation in armed conflicts, however possible.

Security Companies differ from common military forces mostly through their corporate structure of a standard private firm and lack of military chain of command, which is the only fact such firms have in common with regular businesses, they are in no way normal commercial service providers.93 Their tasks have often come to include participation in missions located in warzones or otherwise peace keeping operations in post-conflict areas, etc. and involve both the risk of injuries, loss of life as well as taking one. It has been speculated that while in armed conflicts, PSCs are regarded as unlawful combatants and therefore not covered by the provisions of Third Geneva Convention94 as prisoners of war, a theory that can however be discussed depending on the employer.95

Historically, when speaking of PSCs one cannot precede without mentioning mercenaries, a term that modern private security has come to distance themselves from. The general public perception of private military has nonetheless been leaning

94 Convention (III) Relative to the Treatment of Prisoners of War, adopted in 1928 in Geneva, came into force in 1949
towards the later one. International community has been known to attribute the hindering of self-determination of some emerging states, especially in Africa, due to mercenary participation as well as successful overthrowing of governments. For centuries mercenaries were widely used and came to replace the regular standing armies of many states. It was only recently that the actual states became the sole legal authority with a monopoly on armed forces. There are few theories that explain the abolition of the utilization of mercenaries, although it is commonly recognized that they undermine governments, one theory states that while some states are contented to use mercenaries, their home states were reluctant to the idea of being held accountable for their actions. The use of mercenaries is nowadays prohibited, but the term is specified through Additional Protocol I of the Geneva Convention, article 47 (2) and has come to include:

“A mercenary is any person who:
(a) is specially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; and
(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.”

97 Ibid.
98 Supra note 82, p. 441
100 Protocol 1, Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict, “signed on June 8 1977 in Geneva
101 Ibid., art 47 (2)
International Community seems to accept the use of PSCs, since they do not fulfill all the criteria mentioned in the article. Even if PSC employees can and in fact do fulfill some of the abovementioned criteria, the definitions are cumulative and insofar the industry has managed to avoid the entire definition. This fact makes the term PSC go unregulated on international level, thus creating legal loopholes to operate in. Even on national level, PSCs remain generally unregulated, with exception of some states such as South Africa, which by the way has one of the world’s broadest regulation of foreign armed forces. This in turn, has created a demand on codifying private security which, amongst other things, led to creation of for instance Montreux Document or UN Draft Convention on military forces and Security Companies documents, that however not binding but do in fact regulate use of private security sufficiently. These documents will be discussed later on in this chapter, there are though speculations that it will be impossible do regulate the use of PSCs on international level until it is fully regulated on domestic. Some scholars argue that the main difference between PSCs and mercenaries is the fact that “...they have a continuing corporate existence and will wish to maintain a reputation as respectable organizations.”

4.3 Private Security Companies in Modern Conflicts

The modern rise of PSCs began in the early 1990’s when the Soviet Union collapsed. A mixture of huge supply of weapons, unemployed professionals and a high

102 Supra note 82, p. 426
107 Supra note 93, §35
demand from newly created weak states, which were in a need for protection, made the private security market very lucrative.\textsuperscript{108}

Blackwater Worldwide is one of the world most renowned security companies. Even though their publicity has not been just all that good, they have been involved in some of the world’s recent conflicts. In 2007 a group of Blackwater contractors traveled in a convoy in Nisour Square, in Iraq, protecting diplomatic agents, when apparently a threat arose and they opened fire against on civilian targets moving towards them, killing both the passenger and the driver of a car. Subsequently, 17 civilians were killed and 24 injured at a square when the shooting broke out. Following the investigation showed that it was the contractors who had unlawfully opened fire against at least 14 unarmed civilians.\textsuperscript{109} Due to immunity from Iraqi legislation the contractors could not be held accountable for their actions in Iraq.\textsuperscript{110} Even though Iraqi officials condemned this kind of behavior and wanted Blackwater personnel out of the country, their employees were back on duty three days after.

This is just one of the recent mishaps attributable to PSCs and it becomes rather understandable why the public has been reluctant to the idea of private security in conflicts. On the other hand as it will be shown later on, the use of PSCs in different situations has had very positive results and at times been very effective tool in creating safe environments. The fact however is that while the problem of regulation remains, the demand for such services has risen to unimaginable heights.

During the US invasion of Iraq, the use of private contractors has been recorded at all time high level, which was made in order to stimulate the private sector and at the end of the war came to a ration of 1 to 4.\textsuperscript{111} Security sector in Iraq, Afghanistan wars provided almost every possible aspect of modern warfare, except for actual military operations, they supplied the food, maintenance, housing, material and mechanics transports, convoys and camp guarding, training and advisory services and even in some cases actual protection of military targets requiring them to be armed with lethal weapons. Blackwater, however, is not the only PSC with similar

\textsuperscript{108} Supra note 82 p. 432
\textsuperscript{110} Supra note 11 p. 180
\textsuperscript{111} Supra note 82 p. 415
accidents attributable to them, Aegis Defense, Zapata Engineering amongst many others have had their fair share of problems.\textsuperscript{112}

4.4 Relevant Domestic Legislation

According to professor Nigel White\textsuperscript{113} effective regulation of PSCs cannot be regulated by UN sponsored committee on an international level or other international authorities. His proposal is rather that different national domestic law should govern Private security companies and their activities.\textsuperscript{114} For this purpose the essay will investigate the legislation of the countries with the most use of PSCs and the largest number of active companies associated with such services, namely the United States and United Kingdom legislation in order to show how the conduct of security firms has been regulated so far.

4.4.1 U.S. Military Extraterritorial Jurisdiction Act (MEJA)

The truth of the matter is that there is no clear regulation in international law concerning PSCs committing human right violations in armed conflicts.\textsuperscript{115} It is on the other hand commonly known that states have regulation on military behavior in armed conflicts. Which leads us to the fact that a country can be accountable for an act committed by a PSC contractor, domestic law can be used in order to prosecute the offender. The recently revised Uniform Code of Military Justice (UCMJ)\textsuperscript{116} has come to nowadays include both military and accompanying forces and together with Military Extra Territorial Jurisdiction Act (MEJA)\textsuperscript{117} creates a rather comprehensive framework for regulation of activities. Article §3261 is of special importance in this context and reads as follows:

\textit{“§ 3261. Criminal offenses committed by certain members of the Armed Forces and by persons employed by or accompanying the Armed Forces outside the United States.”}

\begin{flushleft}
\textsuperscript{112}Supra note 11 p. 183  \\
\textsuperscript{113}Professor in Public international law at Nottingham University  \\
\textsuperscript{114}Supra note 106, p.143  \\
\textsuperscript{115}Supra note 8 pp. 415-416  \\
\textsuperscript{116}Uniform Code of Military Justice, 10 U.S. Code, §§801 – 946 (2006)  \\
\end{flushleft}
(a) Whoever engages in conduct outside the United States, that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

“(1) while employed by or accompanying the Armed Forces outside the United States; or
“(2) while a member of the Armed Forces subject to chapter 47 of title 10 (the Uniform Code of Military Justice), shall be punished as provided for that offense.

(b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated....”

Discussions have been raised whether PSCs can be seen as members of the armed forces since they are part of U.S. State Department in the specific context. In 2008 a few Blackwater personnel were prosecuted under MEJA but the defendants argued that the act did not have jurisdiction over the matter, since they were not employed by the Department of Defense. In order for a defendant to be prosecuted under MEJA four elements must be met: 1) the offence must be punishable more than a year. 2) The conduct must occur outside the United States. 3) The offence must be committed by a member of the U.S. Armed Forces or a person accompanying the Armed Forces. And 4) the conduct must occur within the scope of special maritime and territorial jurisdiction of the United States. As a result the court found that the defendants conduct could not fall within the jurisdiction of MEJA since it was not clear if their actions could be attributed to the armed forces.

118 §3261 MEJA
119 Supra note 82 p. 429f
To deal with the so called loophole in the legislation the U.S. Congress in 2004 amended the contents of MEJA to include jurisdiction on anyone “employed by any Federal agency or any provisional authority to extent such employment to supporting the missions of the Department of Defense overseas.” This concludes that as long as the contractor is an American national the regulation of the Act has jurisdiction over the issue.

4.4.2 Special Maritime and Territorial Jurisdiction Statute

The legislation in SMTJ is quite narrow and covers only offences that are conducted by or against U.S. nationals. A problem that could occur is that if one would try to use the statute in court to prosecute a PSC contractor is that even if the PSC based out of U.S., the contractor who works for it may very well not be. Therefore offences conducted by service providers who are not U.S. nationals but work for an American company cannot be prosecuted according to the statute because the circumstances would fall outside the jurisdiction.

4.4.3 Uniform Code of Military Justice (UCMJ)

The UCMJ was amended in 2006. It differs from SMTJ in the way that it is possible to prosecute persons who are serving with or accompanying armed forces in the field. Still, there has been no successful prosecution of PSC contractors through using the UCMJ.

Keeping in mind the different legislations mentioned above it could be argued that MEJA would be the best solution to regulate PSCs from the U.S. point of view, especially with the amendment of 2004 making it even more effective against misconduct from PSC part.

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120 Id.
122 Supra note 82, pp. 428-430
123 Ibid. p. 430
124 Id.
125 Id.
4.4.4 British Domestic Legislation

The British domestic legislation governing PSCs is somewhat different than that of the U.S. The first British legislation regarding the subject of PSCs came out in 1870 with the Foreign Enlistment Act\textsuperscript{126} which in section 4 reads as follows:

“If any person, without the license of Her Majesty, being a British subject, within or without Her Majesty’s dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty, and in this Act referred to as a friendly state, or whether a British subject or not within Her Majesty’s dominions, induces any other person to accept or agree to accept any commission or engagement in the military or naval service of any such foreign state as aforesaid,—
He shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment, or either of such punishments, at the discretion of the court before which the offender is convicted; . . .”\textsuperscript{127}

The Enlistment Act, nowadays is however not applicable, since relevant provisions have been supplemented by parts of the Terrorism Act\textsuperscript{128} and Anti-Terrorism, Crime and Security Act\textsuperscript{129}. Furthermore, in the view of the PSCs as service providers, the Acts focus more on the prohibition on foreign enlistment and training services for the purpose of participating in armed conflicts or terrorist acts or conduct that otherwise would contradict UK foreign policy.\textsuperscript{130} Modern day regulation, nonetheless, only allows PSC participation where UK is involved and the assignment cannot contradict British interests.\textsuperscript{131}

\textsuperscript{126} Foreign Enlistment Act 1870, Parliament of the United Kingdom, adopted (royal assent) in 1870
\textsuperscript{127} Foreign Enlistment Act 1870, \textit{Illegal Enlistment}, Section 4 http://www.legislation.gov.uk/ukpga/Vict/33-34/90/section/4, 2012-04.22 at 15:02
\textsuperscript{129} Ibid.
\textsuperscript{130} Supra note 128, p. 660
\textsuperscript{131} Id.
In 2002, British Government came out with a proposition on regulation of PSC conduct in foreign nations.\(^{132}\) The so called Green Paper is a general term covering all the proposals made by British Parliament and when adopted is renamed White Paper. The Green Paper on “Private Military Companies” is a document developed by the British Foreign and Commonwealth Office and includes proposed regulatory framework for PSC operational conduct abroad.

The regulation of PSC activity on international level has been, as mentioned before, a concern for states for the last two hundred years and UK has not been an exception. There is, nevertheless, a low risk of re-experiencing the difficulties that emerged in 17\(^{th}\) and 18\(^{th}\) centuries, when private armies threatened state sovereignty if they were to act freely.\(^{133}\) According to statements of British government, the best option would be to regulate private security through domestic legislation.

One of the options proposed, is a self-regulatory approach for PSCs\(^{134}\), but the Green Paper, however, also mentions the difficulties such an approach would have. On the other hand, the benefits of such would be that a type of industry association could be created with PSCs as members and with sufficient representation from members a Code of Conduct could be drawn out which every associate should follow.\(^{135}\) According to U.K. Government self-regulatory approach would be a good solution for companies that are established solely for one purpose, namely private security and military activities. Furthermore the government also mentions that the Code of Conduct in the specific circumstances would protect private security companies from damaging British interests abroad. The Green Paper also mentions difficulties that might rise as consequences of it developed from self-regulatory proposition, which stipulates that such conduct could lead to a blackening of actions if it is proven that a certain conduct may be contrary to the best interests of the British Government. Needless to point out that a monitoring procedure should be put in place by the state.\(^{136}\) Consequently the very foundational idea with a self-

\(^{132}\) Supra note 93, general

\(^{133}\) Supra note 128, p. 659

\(^{134}\) A. Grayson Irvin, *Rethinking the role and regulation of private military companies what the United States and the United Kingdom can learn from shared experiences in the war on terror*, GA. J. Int’l & Comp. L. Vol. 39:445 p. 454

\(^{135}\) Supra note 93 § 75

\(^{136}\) Id.
regulatory conduct would then fall if governments do not trust the organization to effectively control the conditions.

More benefits could be seen in the fact that if British government wants a service from one or several of the providers that are a member of the association, certain standard would be guaranteed knowing that specific PSCs follow the Code of Conduct. This would help the Government to know that a certain type of respectability is conducted when services are given and a standard of behavior would be established.¹³⁷

To this date, Great Britain yet has not been forced to face a situation where British PSC contractors had to be prosecuted for violations of human rights abroad. Nevertheless, the British Government has announced that British PSCs are responsible for their own employees. That standing of policy was made clear when a British contractor, in February 2011, named Danny Fitzsimons was sentenced to life in prison by an Iraqi court for shooting two fellow contractors and an Iraqi guard.¹³⁸

4.5 The use of PSCs in Somalia

The notion of piracy off the coast of Somalia became publicly noticed in late 2007, however, private security companies have been operating there long before that. Ever since the fall of dictatorship and outbreak of anarchy in the state, there has been a need of foreign assistance.¹³⁹ However, since international community failed to effectively resolve the situation, speaking of UN and US troops, the problems remained unattended. Political authorities, namely the TFG, Puntland and Somaliland governments, were left to deal with the issues by themselves. Needless to say, there was a rather strong demand for security in forms of coastguards and military training. All of the abovementioned political entities had at some point hired outside security companies to deal with the issue of piracy and illegal fishing, the results, even if some were effective at a point, did not create any long-term stability in the state. This chapter will discuss early (2000 -) use of private security

¹³⁷ Id.
¹³⁸ Supra note 134, pp. 454-455
¹³⁹ Supra note 14, p. 585
in Somalia and the effects it had on the situation in the country with the impact on piracy.

### 4.5.1 PSCs in Puntland

In 2000, the autonomous region of Puntland hired a private security firm from the UK, called Hart Security\(^{140}\) with the main purpose of protecting Puntland`s rich fishing grounds from foreign exploitation and as well as to help regional coast guard with training and support and was to be financed through the sale of fishing licenses.\(^{141}\) Hart was at beginning fairly successive in performing its tasks as piracy along with illegal fishing activities actually declined.\(^{142}\) However, the company eventually faced a serious of issues that drew their roots all the way to Puntland`s political sphere.\(^{143}\) First off, since Puntland was not an internationally recognized state, the fishing companies made a serious of protests regarding Puntlands right to actually regard the waters off it`s coast along with fishing stocks as their property, thus the sovereignty was challenged, stipulating that even though the region had its own administrative authorities, they could not in fact claim the sovereign right to resources. Hart in its turn hired an UK based legal firm, that actually helped to turn argumentation in their favor and the region, supposedly, received a substantial compensation.\(^{144}\) Nevertheless, the political situation in Puntland, consisting of local clan members constantly arguing over power, would eventually end Harts successful efforts. Since the functioning of the government was depending on a rather fragile clan balance, it was only a matter of time before that balance would end. Even though Hart took a careful approach to the issue, the company did eventually encountered obstacles in form of pirates with connection to local politicians and clans, which could not be “touched”.\(^{145}\) The breaking point came when an armed conflict broke out and Hart decided to pull its resources from the country. Although, after the conflict ended, the company tried to get back to Puntland, mainly because their contract did not yet expire, the political pressure from clan leaders did eventually result in the termination of the contract.\(^{146}\) Hart`s

\(^{140}\) [http://www.hartsecurity.com/](http://www.hartsecurity.com/)


\(^{142}\) Supra note 14, p. 587

\(^{143}\) Ibid.

\(^{144}\) Id., pp. 587-588

\(^{145}\) Id., p. 588

\(^{146}\) Id.
successors, a Yemen based company with ties to regional clans, SOMCAN had some success until they tried to renew fishing licenses and tried to collect additional payments from local fishermen, which made the company relatively unpopular amongst local population.\textsuperscript{147} At one point SOMCAN actually was accused of having connections to pirates and even committing such offences themselves.\textsuperscript{148} Eventually, with the shift of local politics and government consistence, from a clan favoring SOMCAN to one in the opposition, the contract was terminated once again. The firm that was given a contract next, the Saudi company called Al Hababi Marine Services, had arguably been able to have some success in disrupting illegal fishing, but as it was discovered later, the president of Puntland had strong ties as well as several members of the council were shareholders in the company, which created a strong dislike throughout the government.\textsuperscript{149}

4.5.2 PSCs in TFG

After the formation of the Somalia TFG in 2004\textsuperscript{150} the government, due to its weakness, sought for a private security company to help with maritime security.\textsuperscript{151} The first company that begun its lobbying for the TFG was an American based Top Cat Maritime company, that however, did not have a lot of security providing experience before, since they specialized in building high-speed boats for the U.S. government authorities.\textsuperscript{152} The company promised help in training the troops, establishment of bases and said to provide boats and helicopters, however the application company’s boats for Somali waters was debated by the TFG. It was suggested that the company would be founded through the sell of fishing licenses.\textsuperscript{153} In later stages of the negotiation of the contract, the TFG wanted to inspect Top Cat facilities, but was declined and the negotiations were terminated.\textsuperscript{154} Sometime after, the company approached the TFG again, this time stating that it had found other ways of funding, which was through U.S. funds, which U.S.
Embassy denied. A contract was, nonetheless formulated but because of Top Cat’s inexperience a underestimation of the tasks required to accomplish, the contract fell through.

The next-in-line short-lived company, to replace Top Cat Maritime, was the Northridge Service Group, which signed the $77 million contract with the TFG with the same idea of acquiring the founding from abroad. The PSC asked both U.S. officials as well as a Chinese oil company, but was declined. Even though the contract was in place, Northridge never actually managed to even begin with the plans the preparations.

Following the forming of Islamic Courts within the Somali territory, concerns were raised by both the TFG as well as by international community as to the need of assistance in keeping security within the region. A number of companies begun lobbying for the contract, but since all of them failed in securing proper funding, no contract could be signed.

Subsequently, the US government, fearing that the Islamic Courts were harboring and aiding Al-Qaeda, hired a PSC for the support of the TFG in order to help secure most vital places. DynCorp, otherwise one of the main contractors of the U.S. D.o.D. was hired to help peacekeeping forces with logistics support and although it was supposed to remain neutral, it supported the TFG, since it was the only internationally recognized government in Somalia.

4.5.3 PSC in Somaliland

Somaliland is characterized by the strongest administrative and democratic system in the whole of Somalia, it is also the region that holds one of Somalia’s biggest port cities, namely Berbera. Somaliland employed the Norwegian Nordic Crises Management company for the purposes of developing secure environment for the

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155 Id.
156 http://northbridgeservices.org/
157 Supra note 14, p. 592
158 Ibid.
159 Id.
160 Supra note 14, p. 593
161 Ibid.
162 Supra note 8, p. 449
Berbera port as well as bringing it up to international standards, thus reducing insurance costs for shipping companies. NCM’s efforts are funded solely through Norwegian Agency for Development Cooperation. The company provided advisors and was also asked to evaluate Somaliland’s future coastguard requirements. Thus, the services that the company provides differ from those of PSCs in other regions of Somalia. However, the contract has been rather important for the region’s trade cooperation with Ethiopia and other countries in the way that it reduced insurance premiums for big shipping companies that otherwise would avoid entering the port.

4.5.4 The Subject of Land Based PSCs in Somalia

Obviously, the success of the PSCs in Somalia differs from region to region; they play an important role by helping local authorities with security issues. Some scholars also debate that while it is true that PSCs in weak states can help with local institution building as well as creating legality, they can also decrease the influence of local governments and erode state power. Needless to say, it differs from case to case as shown in the example of Nordic Crises Management, which actually helped Somaliland with its own enhancement of power. One important fact must be kept in mind, the local governments, with exception of the TFG, do not actually have sovereign rights over their territories and resources, which can cause conflicts in the unstable region with involvement of PSCs. Since the TFG is the only internationally recognized government in Somalia, they are the only one that can claim sovereignty over the waters and resources in Somalia. The issue rises as to the actual possibility of it in practical terms. In theory, the PSCs in the different regions cannot legally uphold the claimed sovereignty of the regions in terms of international law and thus cannot protect the resources or territorial waters or for that purpose apply the international regulations of UNCLOS on the territorial waters and Exclusive Economical Zone (EEZ). Another argument touches the actual efforts of firms in the context of fragile clan politics in some parts of Somalia. Affiliation with one of the clans can cause misunderstandings as to the actual

164 Supra note 14, p. 594
165 Ibid.
166 Id.
167 Id.
168 Supra note 14, p. 585
169 Supra note 20, Part II Section 2, Part V UNCLOS
170 Supra note 14, p. 596
legality of the firm as well as it can cast a shadow on the transparency of the whole operation and cause distrust among local population.

Even though this chapter focused more on PSCs within the region, it nonetheless shows the possibilities for private companies to operate in Somalia and taken away the politics would actually be successful in removing one of the root causes of piracy, thus reducing piracy itself. A more difficult task, on the other hand, is the actual participation of PSCs in the protection of ships passing through the Gulf, which is what next chapter will try to describe.

4.6 Private Security at Sea

With the continuing escalation of violence at sea and since states are unable to protect the Gulf properly, the shipping firms now have turned to private security companies to hire protection for their ships.\textsuperscript{171} Even though the industry at the current moment has already been using private security, both armed with regular and non-lethal weapons, the international law does not in fact regulate PSC equipment onboard merchant ships as well as their conduct. According to some, the mere fact of having armed guards onboard is illegal according to international law, while others argue the opposite, and there is a third group stating that the problem of piracy cannot be solved that way. It is therefore needed to point out that the use of PSCs onboard a merchant ship or otherwise on one of their own is not done for the purposes of solving the piracy issue, but rather for the protection of the industry and for that purpose only. Meanwhile the international community remains without answers to ever-growing problem of regulation.

On the other hand, IMO has given out specific recommendations regarding PSC conduct while onboard and under attack, which is Best Management Practices for Protection against Somalia Based Piracy\textsuperscript{172}. The document is not binding, but is only in place to give advice for the shippers. The organization generally discourages


\textsuperscript{172} IMO Piracy And Armed Robbery Against Ships In Waters Off The Coast Of Somalia, \textit{Best Management Practices for Protection against Somalia Based Piracy}, MSC.1/Circ.1339 14 September 2011, available at: \url{http://www.imo.org/MediaCentre/HotTopics/piracy/Documents/1339.pdf}
the use of private armed security personal to guard merchant ships. However, if absolutely necessary, the possibility of it still remains under rules of flag states. One argument in support of that statement is that it could endanger the ship, its cargo and its crew members if armed guards were to be present on the ship in case of a hijacking-attempt. Even though at the moment it might be seen as the only solution and at times has proven to be effective, the risk of crewmembers getting killed would increase tremendously if armed guards were to try to wear off an attack with firearms. Pirates are much more likely to actually shoot back when fired upon by guards and are much more likely to use unnecessary violence, a situation that might just not happen if there were unarmed guards present on the vessel.

The Best Management Practices document contains an exhaustive list of advices and recommendations on how to operate while passing through the Gulf and gives suggestions on the conduct of the crew and, if present, security personnel. Specifically in section 8 of the guidelines, the practice describes adequate manner of conduct and it is fairly obvious that the document strives for passive countermeasures and the use of unarmed guards on the vessel. In case of an actual boarding it recommends that the crew and security should offer no resistance to the pirates. A discussion that can derive from this is the actual necessity of security personnel onboard if they are not able to do anything to deter an attack. This can however be explained by the contract that the shipping company signs with a PSC and the concrete obligations that the personnel has in specific situations.

Depending on what exactly is stated in the contract affects the rules by which PSCs operate onboard. This in turn, could be the effect of which kind of cargo the ship is carrying. For instance if a ship is carrying flammable cargo, it might not be a good idea to have armed guards onboard at all, this would only increase the preexisting risks of injury and loss of life. Another point of view regarding the situation is that it could be constitute a breach of contract if the security personal would resist when

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174 Ibid. § 2.2
175 Supra note 171, p. 7
176 Ibid.
177 Supra note 172, Section 8, Ship Protection Measures, p. 23
178 Ibid. Section 10, If Pirates Take Control, p. 45 § 10.3
pirates board the ship. The object for the security personal might also be to only try to hinder a pirate-attack, but if the pirates actually board the ship, they are to put down their weapons and quit resisting, since the situation changed and is not covered by the contract anymore. One could say that this may in a way spark some demand for retaliation by the pirates that are already onboard, but were previously shot at by the guards.

While it may prove to be more effective to hire armed personnel capable of deterring an attack, a number of other issues may raise attention. Firstly if, while using armed security, the combat results in death of pirates and/or crewmembers, a number of states may claim jurisdiction over the accident, starting with the flag state of the vessel, the home state of the shipping company or the state in which territorial waters the ship is at that moment. Keeping in mind the general reluctance of states to actually investigate the issue presents in itself a lot of problems. Secondly, while no one can deny the right of self defense, questions can be raised on whether or not the engagement in the shooting was necessary or proportionate. Thirdly, the whole issue starting from in reality recognizing and separating the suspects from actual pirates to apprehension, if possible, arrest and detention, the fact that is as suggested by the UNCLOS articles 105 and 107, only possible for states to go through with. Nonetheless, it can be argued that PSCs may apprehend the suspects in order to later transfer them to a warship or the coastal state, but keeping in mind that the PSCs are not contracted by the state, rather by a private company, which is driven by their own deadlines on cargo delivery; it may present yet another obstacle in terms of transfer and subsequently possible breaches of Human Rights principles. It is therefore suggested by some scholars that such types of regulations should be included in and governed by the terms of contract to avoid misconduct.

180 Ibid.
181 Id., p. 6
182 Supra note 22, p. 144
183 Supra note 179, p. 5
184 Supra note 8, p. 454
185 Supra note 134, pp. 456-457
According to IMO Guidelines special attention should be applied when selecting a PSC, including background checks and previous experience. 186 It also mentions that while drafting a contract, the chain of command and the relation between security personnel and master should be clearly mapped out. 187 The provisions of the document also include guidance on the management of firearms and the use of force. 188 PSCs should use as limited force as possible and “only in self defense or in defense of another crewmember or imminent threat of death or serious injury”. 189 It could be argued that due to recommendations stated in the document, experiences of previous combat or conflict experience for PSCs would limit the available options to choose from for the shipmasters

4.7 Proposals for Regulation of PSCs Under International and/or Maritime Law

The regulation of security companies has been a subject of debate through many organizations and entities. While demands for it have been expressed the task still remains rather difficult one to accomplish. Trying to regulate the industry through conventions would be a desired solution, but in practice a rather difficult one due to the long process of drafting, signing and implementing it. Nevertheless, this chapter will show and discuss the attempt by international community to create legal framework in order to govern the branch, as well as discuss the possibilities of the use of already existing maritime law for the same purpose.

4.7.1 The Montreux Document

The full name is the Montreux Document on Pertinent International Legal Obligations and Good Practices of States related to operations of Private Military and Security Companies during Armed Conflict, 190 and is actually the first international approach to codify and regulate the conduct of PSCs. It is however needed to point out that the document is applicable to regulation of PSC conduct during armed conflicts and while it is not possible to place the protection of vessels under that criterion, the document with its solutions could be analogously applied to regulation of the conduct while onboard of the ships. The optional regulation in

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186 Supra note 173, Annex, § 2, pp. 2-4
187 Ibid. § 3.3, p. 6
188 Id. § 3.4, p. 7
189 Id. § 3.5, pp. 7-8
190 Supra note 104
the Document is mainly directed to states and it is important to note that the Document does not try to govern the security industry.\textsuperscript{191} The Document has been acknowledged by seventeen states so far.\textsuperscript{192}

The Montreux document came up as a result from numerous diplomatic initiatives. The initiative was taken by the Swiss government in collaboration with the International Committee of the Red Cross (ICRC).\textsuperscript{193} The idea was, to try to come up with some optional regulation to the conduct of private security companies operating in conflict- and post-conflict zones. \textsuperscript{194} It is important to note that the Montreux Document offers more guidelines than actual rules and states are not obligated to oversee already existing obligations in order to be able to follow the Documents guidelines.\textsuperscript{195} The document divides states into three different categorize; Contracting States; the state which contracts the security company, Territorial States; the state were companies operation shall be conducted and Home States; the state in which the security company is based.\textsuperscript{196}

The Document is divided into two parts; the first part gives guidelines for the contracting states and how their international legal obligations relate to private security companies. It is thoroughgoing clear in the document that its main objective is to guide states in their international obligations concerning humanitarian law connected to PSCs, mainly how states shall react if the contracted PSC commits violations against international humanitarian law or international human rights law. The document also points out that is important for the contracting states not to contract security companies for tasks that are subsidized solely under government authority.\textsuperscript{197}

Territorial states have an obligation to oversee that PSCs operating in their country do not violate international humanitarian law and international human rights law and if so happens, try to suppress it.\textsuperscript{198} Moreover, the penal sanctions in states

\textsuperscript{191} Supra note 106, p. 134
\textsuperscript{192} The document has been endorsed by: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom, Ukraine, and the United States, http://www.icrc.org/eng/resources/documents/misc/montreux-document-170908.htm
\textsuperscript{193} Supra note 104, Foreword p. 5
\textsuperscript{194} Ibid.
\textsuperscript{195} Id.
\textsuperscript{196} Id., p. 10
\textsuperscript{197} Id., Part One: Pertinent International Legal Obligations Relating to Private Military and Security Companies, § 2, p. 11
\textsuperscript{198} Ibid. § 9, p. 12
domestic regulation that could be used against persons committing severe violation must be approved by states.\textsuperscript{199} However as mentioned earlier, it might be a problem for territorial states suppress violations committed by PSC contractors by domestic legislation because of the fact that contractor may be immune to domestic legislation.\textsuperscript{200} The previous mentioned problem might be solved by the Documents directions to home states, to the other way around provide effective penal sanctions against those contractors who commits grave breaches of international human rights- and humanitarian law. In that way, the Montreux Document covers up the otherwise vast possibility of a loophole to be created and in the long end impunity for contractors.\textsuperscript{201}

Part Two of the Montreux Document provides the “Good practices relating to private military and security companies”.\textsuperscript{202} Just like part one, part two divides the good practices into the three previous mentioned categorize. Examples of good practices for contracting states are to investigate the contemplated PSC background to see if there is any inconvenience in the company’s’ history.\textsuperscript{203} Otherwise the main focus for contracting states is related to contractual obligations and terms of contracts for both sides.\textsuperscript{204} It lays in the contracting states responsibility to provide for criminal jurisdiction in the domestic legislation over crimes under international law.\textsuperscript{205} Furthermore the Document offers contracting states under good practice 14 the ability to end the contract with a security company if the company fails to comply with contractual obligations.\textsuperscript{206}

It could be argued that that kind of policy could have the effect of security companies to seriously look after their employees so they will not commit any violation because it would be bad for business, loss of contract and in the long end no more contract offers. A question that arises from the previous reasoning is what is most important for private security companies and why. Is it important not to violate human rights just because of the possibility not to get any more contracts,

\textsuperscript{199} Id., § 11, p. 13
\textsuperscript{200} Supra note 99, p. 661
\textsuperscript{201} Supra note 106, pp. 148, 149-151
\textsuperscript{202} Supra note 104, Part Two: Good Practices Relating to Private Military and Security Companies, p. 16
\textsuperscript{203} Ibid., § 5 p. 17
\textsuperscript{204} Ibid., § 14, p.
\textsuperscript{205} Ibid.
\textsuperscript{206} Id.
which would lead to no profit? Or is it important not to violate human rights because it affects persons involved. It is probably a combination of both factors. One should not forget that private security companies are mainly profit-driven and one of their loyalties is to money.

According to the Document, in part two § 20, there is a list of accountability measures that the contracting state needs create prior to making a contract with a PSC. A contracted PSC must be governed by mechanisms assuring criminal accountability in case of unlawful conduct. If such a conduct would be detected, paragraph 20 provides a list of instruments explaining how the contracting state should react on such matter. The paragraph provides reference for penalties that could be executed by contracting states against a misbehaving PSC. Examples of penalties can, accordingly to the Document, be: economic penalties, termination/ending of contract, or removing the wrongdoing contractors and taking away their ability to work further with the company.

The most important aspects for territorial states, according to the Document, are the terms of authorization for PSCs on their territory. This is rather significant because one of the key aspects for PSCs operation is to have the authorization from the territorial state. The terms for authorization subscribe for example past conduct of PSCs, lawful acquisition etc.

The home states, on the other hand, are obligated to investigate for what type of services a PSC may or may not be exported. The most important aspect of that is for the home state to make sure that the PSC will not take any direct part in hostilities. It could be argued that one of the lynchpins in PSCs is to the highest extent possible not to be engaged in hostilities and only open fire when fired upon.

\[207\text{Id. } § 20, \text{ p. } 20\]

\[208\text{Ibid.}\]

\[209\text{Id., } § 40, \text{ p. } 23\]
4.7.2 Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies

Created in 2005 the UN Working Group was established as a special procedure under the UN Commission on Human Rights; it supersedes the Special Rapporteur on the use of mercenaries. In 2009 the UN Working Group stated that;

“while it is a good promotional document on existing international humanitarian law, the Montreux Document has nevertheless failed to address the regulatory gap in the responsibility that States have with respect to the conduct of private military and security companies and their employees.”

Due to the above mentioned citation, the Working Group proposed to start to develop a new treaty. Very recently in 2009, the final draft of the Draft International Convention on the Regulation, Oversight and Monitoring Of Private Military and Security Companies came out, although not yet in force the UN Convention might be an important aspect for how PSCs should behave. According to Professor Nigel White, there needs to be both international and national supervision for the regulation of PSCs in order for it to be effective. Furthermore, he states that although there are some similarities between the Document and the Draft Convention there are also major differences, mainly on the subject of how to regulate PSCs activities in armed conflict. White states further, that in order to get a successful regulation of PSCs there need to be a fine balance between supervision, accountability and domestic legislation. The Montreux Document shall not only be seen as an international instrument but also as a base that could be built national legislation upon, but according to White it could be discussed whether de Draft Convention could be better for that purpose.

The purpose of the Draft Convention is to clarify which functions that are solely and for that matters cannot be passed to companies. There was especially one function in mind, namely the right to take direct part in hostilities, which is solely

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210 Supra note 106, p. 136
211 Id.
212 Supra note 105
213 Supra note 106, p. 141
214 Id., p. 137
215 Id.
permitted for states. Although, the Montreux Document does not make an absolute prohibition for PSCs to take part in hostilities, but only if they were pulled into it. As mentioned in the preamble of the Convention, the creation was guided by two UN resolutions from the 1970s, concerning co-operation among states in accordance with the UN Charter and in relation to the latter resolution concerning aggression and the use of force by a state against the sovereignty, territorial integrity and political independence of another state. The convention has a lot in common with the Montreux Document. Article 18 of the draft Convention mainly discusses the same subject as it is dealt with in the Montreux Document. One can almost say that it is a summary of the Montreux Document. Examples proving that theory can be seen in the abovementioned article. Just like in the Montreux Document, the security companies must undertake the domestic legislation of the territorial state where the services are being deployed.

Furthermore, according to White, the Document and the Draft Convention have different views on how PSC contractors shall be viewed legally, the Document advocates PSCs to be seen as civilians, authorized only to carry out duties not monopolized by state authority. One of the most discussed subjects is whether PSC contractors shall be authorized to use force in their operations. Some scholars argue that the use of force only shall be authorized to states. If so, one can argue that the use of PSC contractors would be ineffective. However as will be discussed later on, according to article 8 of the Draft Articles on Responsibility of States for International Wrongful Acts, a group of persons authorized by a state to perform certain conduct should be attributed to the state. Therefore, it could be argued that PSCs contracted and hired by a state should in fact be authorized to use force when they operate on governmental authority. Furthermore it should be safe to say that such PSC contractors should actually be authorized to use force.

216 Supra note 105, Preamble
217 Supra note 105, Art. 18, “State obligations vis-à-vis the personnel of private military and security companies”
218 Supra note 106, p. 138
219 Id.
221 Ibid., Art. 8, Conduct directed or controlled by a State, “The conduct of a person or group of persons shall be considered an act of a State under international law 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 carrying out the conduct.”
when they are hired by a governmental authority as opposite to a PSC that is hired by a private entity, and then without the governmental authorization shall not be permitted. One must also take in consideration in which context PSC should or should not be permitted to use force, a scenario that might occur is a group of unarmed and vulnerable civilians would be engaged by an armed group, if so - many scholars argue that for that purpose, PSC contractors regardless of which entity hired them should be authorized to use force in order to protect the life of the civilians under imminent threat. The previous mentioned scenario has divided many scholars.

Consequently it can be argued the proposed international legislation regarding the regulation on PSCs is quit narrow but somehow alike. An example of this can be seen in article 18 of the Draft Convention, which actually can be seen as a short summary of the Montreux Document, especially the part concerning how PSC contractors shall relate to international and domestic stipulations relating to conduct.

4.7.3 Legality of firearms onboard Merchant Ships in Context of Maritime Security

As mentioned earlier, one of the recent options that become more and more popular for shipping industry is to actually hire guards for protection. While IMO in its previously mentioned guidelines recommends passive, non-lethal methods for protection of the ship, such as fire-hoses or barbed wire, the industry seems to look at options of arming the guards and it is therefore relevant to briefly investigate the use of firearms onboard merchant vessels for the purpose of protection from pirates of the coast of Somalia.

The legality of having weapons on merchant ships depends on the regulation of each flag state. What means with the flag state is the nation of the flag that the ship sails under. Also, while sailing on the high seas it is the nation of the flag that has jurisdiction over the ship and its crew. A ship may fly a flag of a state different than that of the ship owners and nowadays ships commonly fly “flag of

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222 Supra note 106, p. 139
224 Art. 94 UNCLOS, “Duties of the Flag State”
convenience” which means that the owners may choose to fly a flag of a state which regulation suits the most, usually speaking about reduced operational costs. Returning to the firearms regulation, it depends as stated above on the regulation of each flag state the ship is registered under, since the ship sailing under a nations flag responds exclusively to its jurisdiction while on high seas, accordingly to provisions of article 92 of UNCLOS. It also depends on the area the ship operates in, meaning that while on the high seas exclusive jurisdiction of the flag state is applicable, meanwhile in territorial waters of another state, it is governed by the rules of the coastal state. The last criterion is the type of firearm present on the ship; some states have regulation on specific types of firearms allowed.

In the case of, for instance, United Kingdom and the United States both nations have the issue governed under domestic laws concerning the use of firearms on merchant ships. For example no automatic weapons are to be used and no weapons with a caliber above 50. Furthermore, the nation’s national policy when it comes to the subject of using firearms onboard ships differs greatly. In the United Kingdom the nation’s policy is that it is not recommended to have firearms on board ships while in the United States it is recommended by the port security advisory under the guidance of self-defense or the defense of other vessels on high risk waters. It could be argued that the US national guidance would be for the better while sailing on high risk waters, the only way to feel safe might be to have firearms onboard. Furthermore, having the national approach of the UK might lead to the scenario of ships in desperate need of firearms onboard might not take them with due to the nations policy. Such reasoning might lead to unnecessary danger for the ship and crew if attacked by pirates. As previous mentioned it has been proven to work to have firearms on the ship to wear off pirate-attacks, a worthy example from recent times is the second attempt by pirates to hijack the American merchant ship the Maersk Alabama. When pirates approached the ship the crew used the

225 Art. 92.2 UNCLOS, "Status of Ships"
226 Art. 92.1 UNCLOS, “Status of Ships”
228 Id.
229 Id., p. 8
230 Id.
weapons onboard the ship to fire warning shots. The technique worked and the pirates turned back and did not attempt to take over the ship.232

While speaking on the presence of PSC onboard, most states do not actually restrict it; some do however restrict use of arms. For that purpose one could argue that flag of convenience may be a suitable solution, and while in ports or territorial waters of a state with stricter rules, the weapons could be locked up in specific areas of the ship. A question arises when speaking of the use of non-lethal measures by security onboard ships as to the effectiveness of such techniques. Surely they may at times be effective against pirates with machetes and knives, but could that really be a worthy match against automatic firearms and rocket-propelled grenades?

Because of Kenya’s and Yemen’s strategic location in relation to the Indian Ocean, and the fact that the both states are the closest costal nations to Somalia with effective governments, it would be arguably the most logical states to investigate concerning the regulation of weapons on board ships in and in ports.

The Kenyan government has developed “Kenyan Government Guidelines on the Requirement Related to privately contracted armed security personnel (PCASP), weapons and security related equipment”233. Firstly it mentions that there is a demand for all ships to seek a permit in port for all weapons through Chief Licensing Officer, there also needs to be some proof of consultation with the ships flag state.234 There is also a requirement for a so called standard mandatory armory, examples of which armory are secure doors and locks, fire fighting sprinklers, and a designated weapons handler. If these terms have not been met by the ship the weapons could be confiscated by the port police. The ship could be held in detention until the terms are being met.235 It could be argued that the regulation used in the ports of Kenya is a good and liberal way resolving the regulation concerning firearms and PSC contractors on board.

232 Ibid.
234 Ibid. § 1.1 (a-b)
235 Id. § 1.4
According to a complication\(^{236}\) done by the US Coast Guard Yemen does not allow firearms to be on board ships which lay in port neither do they allow private security personnel on board vessels. Consequently, that is a quit interesting contradiction between the two countries when they are in a similar location and situation regarding the piracy problem. Although the Yemen authorities have solved the non-allowance of PSCs in the way that the Yemen Coast Guard provides escort for merchant ships on Yemen territorial waters. Nevertheless, there is a problem with that solution; the Coast Guard does not have the capacity as needed to escort all merchant ships that need it.

It could be argued that Yemen authorities need to see the help from PSCs as necessary when the Yemen Coast Guard cannot escort as many ship as needed. Furthermore, if the Yemen authorities would allow firearms on board ships, it would ease the work load for the coast guard so they could be more effective.

**4.7.4 Comparison of Responsibility under State and Private Authority**

While regulation of the PSC conduct, hired by private entities, on international level presents a lot of general non binding proposed documents, regulation on the responsibility when under state authority, on the other hand, is clearly regulated through Draft Articles on Responsibility of States for Internationally Wrongful Acts\(^ {237}\), thus making it easier to govern and hold accountable the actions of the PSCs. With that said and even though states have been the biggest costumers of the services provided by PSC so far, in the fight against piracy or otherwise protection of shipping commerce, nations have been rather passive in their actions. That is with one exception, both EUNAVFOR, NATO as well as navies of some states, have been protecting WFP and AMISOM shipping while delivering aid to Somalia. In the context, it could be said that PSC services could be applicable to aforementioned scenarios with arguably same effectiveness as of those from international operations, it is highly doubtful that states would hire PSCs for protection of private shipping industry. One solution could be that the efforts and resources put in by


\(^{237}\) Supra note 220
the shipping industry in the ransom payments or hiring onboard security could be invested in effective coast guard in Somalia, an option that is however far-sighted.

Normally an action conducted by a private person cannot be attributed to any state. The usual interpretation is, according to article 1\textsuperscript{238} of the draft articles, stipulates that states which commit an international wrongful act are also internationally liable for that act. However, it is a bit unclear of when a private security company is acting on behalf of another company. The scenario is common in the combat against piracy, when insurance companies’ hire private security companies to protect their merchant ships against pirate-attacks. Additionally, an international wrongful act is when an action or omission is attributed to the state under international law or consists of a breach of international obligations attributed to the state.\textsuperscript{239} According to Draft articles on Responsibility of States for Internationally Wrongful Acts, there are two articles worth mentioning concerning private entities actions that could be attributed to a state, namely articles seven and eight. The first of them, article seven, mentions actions attributed to the state even when the entity have conducted outside state instructions. It reads as follows;

\textit{“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”}\textsuperscript{240}

According to the commentaries, article seven makes it clear that actions committed by a private entity on an assignment from a state authority are attributed to the state even if actions are in excess from the instructions. Moreover, the commentaries also mention that a state cannot hide behind a fact of not knowing what has occurred and that the action was not agreed upon in the contract between the state and the private entity. The state is still responsible for what has occurred.\textsuperscript{241}

\begin{itemize}
  \item \textsuperscript{238} Ibid., Art. 1. \textit{“Responsibility of a State for its internationally wrongful acts”}: “Every internationally wrongful act of a State entails the international responsibility of that State.”
  \item \textsuperscript{239} Ibid., Art. 2, \textit{“Elements of an internationally wrongful act of a State”}
  \item \textsuperscript{240} Ibid., Art.7, \textit{“Excess of authority or contravention of instructions”}
  \item \textsuperscript{241} Ibid., Commentaries on Art. 7, pp. 45-47
\end{itemize}
As mentioned before, it could be discussed whether an excess action committed by a PSC could be seen as a breach of contract. If a contract is breached by a PSC the state is most likely to terminate the contract. In the long run, a termination could lead to less or lack of assignment contracts for the PSC in question. Consequently lack of contracts is the worst scenario possible for a profit-driven company. Furthermore, article 8 of the Draft Articles stipulates;

“The conduct of a person or group of persons shall be considered an act of a State under international law 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 carrying out the conduct.”242

A common question that rises is whether private security companies’ actions can be attributed to a state. The answer depends much on what entity hired the PSCs services in the first place. According to article 8 of the draft articles PSC activity is attributed to a state if it is the state which contracts the PSC more or less. Additionally a complex situation appears while determining whether a private entity’s conduct can be attributed to the state or not. It is a question of whether the act was carried out under the direction or control by the state. For example, a situation that may appear is when a specific conduct that was not accounted for can be seen as an international wrongful act.243 Nevertheless corporate entities such as private security companies in the specific case are not seen to be under responsibility of states unless they are acting upon governmental authority through for example a contract. Normally, a company’s conducts is seen as a separate issue not attributable to state, unless it is a state which is the outsourcer and therefore responsible for the conduct of its “employees”.244

242 Supra note 220, Art. 8, “Conduct directed or controlled by a State”
243 Ibid., Commentaries on Art. 8, pp. 47-49
244 Ibid.
Chapter 5: Analysis

Somalia has always been known for its reach fishing stocks and its long coast line. During the period of conflicts there was practically no one to guard the resources or its waters, an opportunity that other states willingly exploited by effectively plundering the fishing stocks and polluting the waters off the coast with toxic waste, without concern for the people depending on it. In addition to that, the fishermen were pushed away from their normal fishing waters by the fishing fleets of other states. In attempts to protect the fishing grounds and waters, Somali fishermen started to arm themselves to try to combat the ever increasing illegal fishing and dumping as well as for personal protection. While doing so, they discovered that there was another profit within the reach. Consequently, they started attacking weaker ships to eventually attack WFP and other aid shipping, grabbing everything of value and escaping back to shore. It did not take long until the actual hijackings started and with the large sums of money paid in ransoms piracy became a very profitable option since it presented very low risks. Worth mentioning is that some use very advanced weapons, techniques such as GPS and satellite-phones and some sources say that pirates even have informants.245

While there are clear definitions of piracy in place, specifically provisions of UNCLOS, piracy should not be linked with maritime terrorism or mutiny. There are clear regulations differing from that of piracy, namely that the act must be for political purposes, which piracy cannot be said to have. Although it has been reported that there are some politicians involved in piracy crimes, the purpose still remains as personal monetary gain.

The result is nonetheless one of the biggest obstacles the international trade has experienced in a long time. The fall of the Somali government and outbreak of the conflicts is the starting point, while one could say that the international community, specifically the states involved in the illegal activities off Somali coast, is partly responsible for the creation of piracy, something that the same states along with others are now trying to tackle.

While international involvement, through naval operations, in order to deter piracy has been effective in some cases, the resources put in could not eventually handle

245 Supra note 8, p. 418
the sheer number of attacks, therefore resulting in continuing piracy threat. Arguably, at the beginning of operations, piracy was on decline, but as it became clear that few dozen EUNAVFOR and NATO ships could not physically protect the whole Gulf of Aden, piracy numbers have risen again. Additionally IMO stated that the actual number of pirate attacks might be up to twice as high, but many remain unreported due to fear of shipping delays and lengthy investigations. Even though UNSC with its resolutions, on the basis of UNCLOS, and by cooperating with the TFG of Somalia did create legal operational area for states, the response has been less than satisfactory. The specific provisions of UNCLOS do in fact ask states to cooperate in the question and the resolutions have been put in place to urge states to do everything within their powers to deter piracy, but as seen in practice there has been general unwillingness to participate. Worth mentioning that, the forces currently present in the gulf perform a kind of policing duty and not as much proactive, which is understandable due to the number of ships in use. To summarize the content of the resolutions, the main objective, obviously is the operational mandate for member states and other international organizations, both territorial and chronological. The possibilities of establishing the rule of law, especially through encouragement of states to bring pirates back to Somalia and prosecute them there, is one of the positive steps towards recreation of the nation, something that the resolutions may help with. A more desirable option would be the change in language of the resolutions from just urging to actually demanding states to participate, a fact that however is rather unlikely to happen. Meanwhile the aid to Somalia has reportedly reduced in half.\textsuperscript{246} One inevitable question rises, if the states that are affected the most will do nothing to combat piracy, who will?

Well the answer to that is the shipping industry through PSCs, after all states are not directly affected, but rather through the complexity of economy, while piracy has had the most effect on the industry. It is not a secret that the problem of maritime piracy lays not at sea but inland, the use of PSCs should not be seen as a long-term solution to piracy as an issue, but rather as necessary temporary means of protection from it, the fact that not all parties involved seem to understand.

While there has been a lot of criticism directed towards private security corporations in recent media and due to their widespread involvement in the recent armed conflicts, their part has nonetheless been crucial to success of military

\textsuperscript{246} Supra note 8, p. 422
operations, whether it is the support, logistics or training, their role has been essential. While they did admittedly made some mistakes, which in turn resulted in the loss of life, their expertise and efficiency is becoming more and more demanded. This is supported by the fact that since 2001 they have been present in the territory of Somalia, even though hired by different governments such as Puntland or Somaliland, they all had tasks linked to piracy or providing security of Somali coast. The effectiveness has been known to vary depending on the difficult political situations in the nation, concerning fragile clan-politics and the balance an outside company must maintain in order to keep its operations going. It is a working progress that with a right approach may prove rather effective, but on the other hand may, especially with increased instability, turn out as a fiasco. One of the main concerns has been the possibility of diminishing the powers of local authorities when using PSCs, the fact that has turned out to be the opposite. As shown earlier, private entities have helped with creating the rule of law and at times even create a sort of safe environment for the ports and coastlines. It is rather important that, while maintaining good relationship with local clans and governments, PSCs should not be too close to authorities, since with a change of leadership, they may be as easily discharged. However, PSC may still have an anti piracy role.

Even though some PSCs actually offer pirate-hunting services, it still remains rather difficult task under international law. Since only states are allowed to combat piracy, in this context only warships or actors identifiable as state agents, identifying PSC ships as such would be difficult, unless they are part of state armed forces hired specifically for that purpose by states. It is clearly stated in the relevant law provisions, specifically article 29247 of UNCLOS and article 8 of Geneva Convention on High Seas248, the requirements for a vessel to be a warship. This requirement makes it legally impossible for private entities to hire PSCs for such services and would most certainly constitute a breach of international law. However, states may hire private forces for such purposes as long as it is clear that the firm was hired by a state which makes it a government agent. The discussion rises as to whether or not international community, speaking in terms of law, is ready for such privatization and the impact it could have on the open seas trade. It is rather

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247 Supra note 20, Art. 29, “Definition of warships”
doubtful that at the present moment, the norms regulating the use of private contractors are sufficient enough to embark on a mission of combating piracy. Given the fact that already dispatched operations, such as EUNAVFOR and SHIELD experience much hardship in the fight against pirates, from following the specific Human Rights provisions to simply identifying pirates from fishermen, private naval forces would consequently face even bigger problems with the task. Take for instance a simple fact that they would probably face times when they would need to stop and search a ship of another state; it becomes rather doubtful that the flag state of the vessel would happily welcome such measures. Since there is no sufficient regulation for PSCs on the international level, it would only create more problems giving them a task of such capacity on the open seas. A question could also be asked, what would differ such private naval forces from the once banned in 1856? With so many international provisions and domestic legislations, such as flag, port, home state rules, to keep in mind there will be difficulties in operating in such environment. The legality of use of firearms onboard, if prohibited by some states, can be solved by flying a flag of convenience of a state with favoring regulation.

Disrupting piracy is however a valid option for private security companies. Although PSCs may not be hired by private entities for pirate combating services, speaking of proactive efforts, they may on the other hand be hired for protective, defensive measures. As mentioned earlier, the IMO Guidance does not recommend use of armed PSCs on vessels, but rather unarmed or with presence of non-lethal weapons or defensive systems. The subject has however both benefits and drawbacks. While having non-lethal systems onboard has a reduced chance of deterring pirate attacks, as well as reduced chance of loss of life or cargo/ship damage, it constitutes a higher risk that pirates would actually succeed in an attack. While PSCs armed with lethal weapons increase risks of injury, ship or cargo damage if pirates choose to respond to fire. It is difficult to argue in future terms, but if enough merchants start using armed personnel onboard, it might very well have the desired effect of pirates not taking the risks to attempt hijackings. The other side of the coin presents the possibility of a full scale conflict escalating on the open seas between pirates and armed PSCs. Due to the fact that every situation is unique, what would be the best option in one situation could be the worst case scenario in another.
Exactly the same conduct can in two similar scenarios have different legal outcomes. A factor that comes in to play is the company’s obligations under contract. The shipping company hiring the PSC may choose to include special clauses in the contract, specifying the conduct of the personnel. That in turn can be used as reassurances against HR or other violations. Depending on how the contract is formulated, opening fire against an approaching pirate vessel usually will not constitute a breach, while at the same time opening fire at pirates that already are on the ship may very well do so, since companies may formulate the contract where PSCs will stand down if pirates reach the ship, in order not to damage the ship or cargo, as well as to avoid injuries. While doing so, PSC personnel may become victims of pirate retaliation soon after. It could be discussed whether contractual obligations could be a sufficient way of regulating PSCs and discourage violations. Nevertheless, offering resistance could by some be seen as a heroic action, but legally, if such conduct is a breach of contract the persons responsible for it could be prosecuted for their actions, effect of which in a long term could lead to a termination of the contract.

There are however different purposes for- and ways in which PSCs may be used in Somalia. As mentioned before, regions in Somalia have already been using security services prior to international community’s involvement in the issue of piracy. Providing support and training of adequate coastguard for ports and territorial waters, would aside from security, increase the influence of pertinent, local institutions and authorities. Operations could be funded through a sufficient system of payment for fishing licenses, thus, at the same time, decreasing the amount of illegal fishing and toxic waste dumping, consequently removing one of the original causes of piracy in Somalia. Controlling the whole coastal area would for the moment be impossible, while better control in coastal towns, specifically harbors, would help decrease piracy as well.

According to some scholars, state navies, do still remain the most efficient and arguably the best solution for disrupting piracy at sea, the fact still remains that there are not satisfactory numbers of warships present in the Gulf to fully protect each and every merchant vessel. This is the main factor contributing to the raise in demand for private protection and if regulated right, could become a successful one.
As was mentioned earlier, there are a number of countries with for the fact sufficient legislation regulating PSC conduct, some of which also happen to be the countries that use such services the most.

Subsequently, while comparing the US approach to regulate PSC conduct with the British approach of self-regulatory conduct in relation PSC operating on ships, the British option for conduct might offer a better solution in the context of deterring pirate attacks. A type of self-regulatory code of conduct would apply where ever needed, speaking in terms of high seas protection, while US regulation presents adversity in terms of territorial jurisdiction. The British government’s proposal of a code of conduct, which could be accepted by interested companies in the private security business, could be a starting point in creation of a specific committee based on self regulatory and corporate principles. It would allow companies to supervise each other and make sure that every company associated with the organization would be up to expected standards of expertise for specific task. It would also allow the committee to have better control over its members in following the HRL and IHL responsibilities, subsequently creating a report system with for example present, at operations, representatives. According to UK government a code of conduct accepted by most respectable security companies could actually be seen as a sort of trademark for guaranteed good practice. On the other hand, there could also be some negative effects of self-regulation, as for instance esprit de corps, which is however known to exist within other military or police forces.

How to regulate private security companies has been a subject of discussion between many scholars lately. Some do also state that there is a general vacuum in the regulation of the PSC conduct, the fact that is however not absolutely correct. There are for a fact domestic regulations in many states, sufficient enough to regulate private security, the existence of so called grey area is attributed mostly to the fact that PSCs, as corporate entities, are not parties to HR and IHL Conventions. Previously mentioned solution with self-regulatory measures would be a satisfactory framework if HR and IHL principles would be included.

It is clear though that PSCs are needed and demanded, and for a fact cannot be banned, accordingly to Peter Singer it would constitute a breach of article 51 Supra note 53, Art. 51.
the UN Charter which stipulates states inherent right to self-defense,\(^\text{250}\) which is logical since more and more countries privatize parts of military or other appurtenant services. One of the ideas on regulation of PSCs on international level in the field is proposed by Peter Singer. It is based on a thought of an international body which could be formed under the UN Special Rapportuer on mercenaries.\(^\text{251}\) The body would consist of international legal experts on the area. Accordingly its primary task would be to inspect the contracts made between governments or private entities and the PSCs.

A threat of cancellation of contract and therefore not being able to get any in the future, would be the most efficient way to keep PSC from committing violations against domestic and/or international law. Since it has been discussed previously in the text, PSCs loyalty to profit can be used in an attempt to regulate and hinder them from committing violations against HR and IHL. The most important aspect of this for PSCs is that of committing violation during an operation would lead to a registration of it in company’s background record. As stated, a bad background record would remove chances of getting future contracts. As opposed to penalties for misconduct, good conduct should on the other hand be encouraged, for example by mentioning in the company’s background record, the number of successful operations and accomplishments, which would subsequently lead to increased reputation. Furthermore, clear conduct practice with rules of engagement and consequences for misbehavior could help companies execute their demeanor in a correct way.

The attempts at regulation of PSCs on international level could not be discussed without mentioning the Montreux Document and Draft Convention on PSCs. The Montreux document, even though accepted by some states, does not in fact provide sufficient regulation for piracy combating purposes.\(^\text{252}\) The reason for that could be the fact that only state forces or agents are allowed participating in pirate-hunting activities. However, the Document provides exceptional general recommendations to regulation of PSCs, even though the document is meant to regulate PSC conduct while in armed conflicts, the provisions of it could be analogously applied to


\(^{251}\) Id.

\(^{252}\) Supra note 95, p. 51
regulate onboard actions. Additionally its focus on, the otherwise unmentioned anywhere else, principles of transparency and accountability, as well as its administrative solutions for upholding the standards and organizational factors, make it a adequate enough regulation for the conduct other then pirate-combating. Just like the Montreux Document, the UN Draft Convention also offers solutions on how to regulate the private security industry. However, the approach of the Convention is somewhat different from that of the Document, specifically that its purpose is to lay out policy on state responsibility in relation to the use of force in the context of PSCs as well as what types of operations states are allowed to privatize. Another main difference is that the UN Draft Convention can only be applied by states. It does not aim to regulate liability for private entities hiring private security. Additionally, the Convention if ratified, offers a set of specific rules that govern the responsibility and not just recommend guides. Furthermore in the Draft Convention, the PSCs have no say; they should just be regulated by their governments. It is clear that the Draft Convention’s text is not just that of recommended practices, but rather obligations that the state parties need to follow. While considering both documents, one fact is certain, the hiring party, whether it is a state or a private company, must exercise due diligence before contracting out a specific task.

There are many examples of self-help vigilante groups that later become criminal gangs and piracy is one of them and even though pirates under international customary law are seen as enemies of human kind, their existence is culturally accepted in Somalia. The fight against piracy is not just that, it is just as much political struggle and is deeply interwove with sovereignty issues and inland problems. A solution to that might be the creation and application of the so called regional piracy charters253, which would arguably be more effective since their mandate lies on the regional level and does not require cooperation of large number of states. However, the general fear that states posses towards additional legal obligations might come in the way. On the other hand, if piracy constitutes breaches of HRL, than states that fail to suppress it or give aid on the basis of that fear, do fail in their positive obligations. The steady flow of arms into Somali territory, even though there is arms embargo in place, allows piracy to prosper. The

253 Timothy Goodman, Leaving the Corsair’s Name to Other Times: How to Enforce the Law of Sea Piracy in the 21st Century, Thorough Regional International Agreements, Case Western Reserve Journal of International Law, Vol. 31:139, 1999, p. 161
PSCs on the other hand, do not have solving the Somali problem as their main purpose, although as mentioned earlier, they can be hired by for instance different Somali regional authorities for exactly that reason.

Meanwhile, more and more governments have come to seriously consider the question of using PSCs onboard for protection of the vessels, and recently, the Swedish government had proposed a law concerning the use of guards onboard which is to be applied through the use of special permits obtained from Rikspolisstyrelsen – the highest and central authority for Swedish police and is due to be passed in January 2013. There is however one striking resemblance, namely to the letters of marque that are specifically only allowed in the US.

5.1 Concluding Opinion

Maritime Piracy off Somali Coast is an issue that lies on the open sea - affecting the free trade, but its roots stretch all the way back to land. While international involvement has partly helped with deterrence, its reach does not unfortunately include the shipping industry. Private security companies do present a valuable option of short term protection against piracy, but at the moment cannot be seen as a solution the whole problem. Nevertheless there are possibilities of analogous regulation through domestic legislations available in many states, the desire is still an international regulation as for instance the Montreux Document or the Draft International Convention mentioned earlier. The Document provides more of an administrative approach on practical issues and proactive steps on regulation and is applicable to PSCs as private entities, while Draft Convention focuses more on accountability of states when hired PSCs commit violations. International law regulating the industry is at the moment not up to date, but with the proposed solutions presenting sufficient measures of accountability for and proactive measures against Human Rights and Humanitarian Law violations, would remove the notion of the legal “gray area”. The use of PSCs, in itself and other than in legal terms, has rather obvious economical benefits, coupled with lack of bureaucracy presents a satisfactory option for the shipping industry.

254 Riksdag & Departement, Säkerhetsföretag ska skydda fartyg från Pirater (Private Security Companies to Protect Vessels from Pirates), available at: http://www.rod.se/privatas%C3%A4kerheitsbolag-ska-skydda-fartyg-fr%C3%A5n-pirater [last accessed May 19 2012]
5.2 Further reading/future study

Since the whole subject is absolutely too comprehensive to conduct in the 10 weeks available for this research, there were some parts that would be interesting to explore in the future. A deeper study of possible accountability of PSCs under IHR and IH laws as well as the applicability of the mentioned international law to the PSC employees in the context of support force in armed conflicts.
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