

PIRATES, BLACKWATER AND MARITIME SECURITY: THE RISE OF PRIVATE NAVIES IN RESPONSE TO MODERN PIRACY

*Michael L Mineau**

I. INTRODUCTION

This essay examines the controversial rise of private security companies (PSCs) available for hire to maritime shipping companies in response to the troubling increase in piratical attacks over the past 15 years in dangerous shipping routes, such as the Gulf of Aden and the Straits of Malacca. This introduction briefly highlights current trends in modern piracy, the scope of piracy and its impact on the maritime shipping industry, and the consequential growth of the market for maritime private security as a potential solution to the problem. Section II identifies the major maritime PSCs that have begun providing services in the Straights of Malacca and off the Horn of Africa. Section III assesses the legal and practical concerns that critics have with the use of maritime PSCs. The legal issues of liability and jurisdiction are analyzed in Section IV. Finally, Section V concludes with the presentation of several possible solutions to the legal and practical issues that currently surround the use of PSCs to defend against piracy and several potential benefits of using PSCs.

2008 was a shocking year statistically. According to the International Maritime Bureau (IMB) Piracy Reporting Centre (PRC), an independent arm of the International Chamber of Commerce (ICC), there were more hijacked vessels and hostages taken in 2008 than in any other year since the PRC began reporting on worldwide piracy statistics in 1992.¹ In 2008, there were 293 total

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¹ ICC Commercial Crime Services, *IMB Reports Unprecedented Rise in Maritime Hijackings* (Jan. 16 2009), available at http://www.icc-ccs.org/index.php?option=com_content&view=article&id=332:imb-reports-unprecedented-rise-in-maritime-hijackings&catid=60:news&Itemid=51 (last visited May 2, 2009).

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attacks against ships - up 11% from the 263 total attacks against ships in 2007.² The categorical breakdown of the 2008 numbers is equally concerning - 49 vessels were hijacked, 889 crew members were taken hostage, 46 vessels were fired upon, 11 crew members were killed, and 21 crew members went missing.³

While many maritime nations have deployed coalition warships as part of a NATO flotilla to parts of the Gulf of Aden to address the problem of piracy there, the Associated Press (AP) reported in October 2008 that “the growing interest among merchant fleets to hire their own firepower is encouraged by the U.S. Navy and represents a new and potentially lucrative market for security firms scaling back operations in Iraq.”⁴ Even with the increased presence of the coalition warships patrolling the waters off the Horn of Africa, the U.S. Navy admits that the limited coalition fleet can only patrol a small percentage of the 2.5 million square miles of waters off the Horn of Africa.⁵ Lt. Nate Christensen of the U.S. 5th Fleet actually expressed to the AP his support of the use of PSCs by shipping companies: “This is a great trend. . . We would encourage shipping companies to take proactive measures to help ensure their own safety.”⁶ Over 20,000 vessels pass through the Gulf of Aden each year.⁷

While there are a host of legitimate legal and policy concerns surrounding the use of maritime PSCs, the commercial shipping industry may soon be relying more on PSCs to ensure safe passage through dangerous waters than on the promise of further international state action.⁸ Because the international liner shipping industry is such a vital part of worldwide transportation, it is not surprising that many shipping and marine insurance

² *Id.*

³ *Id.*

⁴ Katharine Houreld, *After Iraq, Security Firms Join Somalia Piracy Fight: Pirate Coast of Africa Offers New Frontier for Security Firms Looking Beyond Iraq*, The Associated Press via USA TODAY (Oct. 26, 2008), available at http://www.usatoday.com/news/world/2008-10-26-2583935117_x.htm (last visited March 23, 2010).

⁵ *Id.*

⁶ *Id.*

⁷ *International Piracy on the High Seas: Hearing Before the H. Subcomm. on Coast Guard and Maritime Transportation*, 111th Cong. (Feb. 4, 2009) [hereinafter WSC Hearing] (statement of Christopher Koch, President & CEO of the World Shipping Council).

⁸ See James H. Hohenstein, *Private Security Companies at Sea: Unseen and Unregulated*, International Bar Association, Maritime and Aviation Law Section, Maritime and Transportation Law Committee, Session: Piracy and Crimes at Sea including Pollution Liability (Oct. 18, 2007), available at

<http://74.125.95.132/search?q=cache:laOhlUkZ3JQJ:www.ebalawyers.com.au/system/files/download/o81/SIN87.pdf+%22private+security%22+sea+piracy&cd=7&hl=en&ct=clnk&gl=us> (last visited May 3, 2009).

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companies are considering the costs and benefits of the use of PSCs.⁹ As Christopher Koch, President and CEO of the World Shipping Council (WSC), emphasized to the House Subcommittee on Coast Guard and Maritime Transportation in a February 2009 hearing on piracy, “liner shipping is the heart of a global transportation system that connects American companies and consumers with the world.”¹⁰ The liner shipping sector of the maritime shipping industry, which transports more than half of the \$1.8 trillion in U.S. ocean-borne commerce each year, has been identified by the U.S. Department of Homeland Security as part of the nation’s “critical infrastructure.”¹¹ In U.S. ports each day, over 50,000 container loads of imports and exports are handled, involving nearly 175 countries.¹² According to Koch, “liner shipping generates more than one million American jobs and \$38 billion in annual wages.”¹³

The recent explosion of media coverage on piratical attacks in the Gulf of Aden has likely dispelled many public misconceptions about modern piracy. However, the WSC has made a concerted effort to educate its liner shipping company members about the militant weapons and tactics that modern pirates are using to approach targeted commercial vessels, board and hijack those vessels, and take crew members hostage.¹⁴

Piratical attacks usually occur at dusk or dawn, when visibility is low.¹⁵ Vessels operating at lower speeds - at or below 15 knots - are at the highest risk of piratical attacks, because high-speed pirate skiffs deployed from mother ships often can reach speeds of up to 25 knots.¹⁶ “Pirates employ machine guns, rifles and rocket propelled grenades (RPGs) and attempt to slow or stop target ships by firing on them so the pirates can then use grappling hooks and portable ladders to get on board.”¹⁷ Protection and indemnity (P&I) clubs, which are cooperative marine insurance organizations that collectively insure against third party losses, often are left with no choice but to make large ransom payments to pirates in exchange for the safe return of hijacked vessels, crew, and cargoes.¹⁸

The market for maritime PSCs as a potential solution to the problem of

⁹ See *International: Private Firm May Have Anti-piracy Role*, Oxford Analytica (Dec. 4, 2008), available at <http://www.oxan.com/display.aspx?ItemID=DB147444> (last visited May 3, 2009).

¹⁰ WSC Hearing, *supra* note 7.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *See id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

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piracy seems to have grown out of a climate of necessity and desperation. The next section identifies the major private contractors that have responded to this demand for a more cost-effective, comprehensive, and viable solution to the problem of modern piracy that has placed such an enormous strain on the commercial shipping and marine insurance industries.

II. MAJOR MARITIME PSCS

Although any information about specific contracts between shipping companies and maritime PSCs is highly secretive and difficult to obtain, many of the major PSCs have recently been advertising their services to shipping companies and the general public.

XE Corporation (formerly “Blackwater Worldwide”¹⁹), which has endured a considerable amount of public scrutiny after being investigated for its role in a number of civilian shootings in Iraq, is one of the major companies that have entered the maritime private security market to assist vessels in defending against piracy at sea.²⁰ In October 2008, Blackwater unveiled its new 183-foot vessel, the McArthur, announcing to shipping companies that it would be available for hire to provide escort services and defense from piratical attacks.²¹ The McArthur, a former decommissioned National Oceanic and Atmospheric Administration (NOAA) research vessel, was purchased by Blackwater in 2006 and refurbished into the high-tech security vessel it is today.²² Some of the advanced features of the McArthur include:

state-of-the-art navigation systems, full Global Maritime Distress and Safety System communications, SEATEL broadband satellite communications, dedicated command and control battlefield air support, helicopter decks, a hospital, multiple support vessel capabilities, and a crew of 45 highly

¹⁹ Blackwater Worldwide changed its name to XE (pronounced like the letter “Z”) in early 2009. *See US security firm mired in Iraq controversy changes its name: Blackwater Worldwide renamed XE as company tries to salvage its tarnished brand*, The Associated Press via THE GUARDIAN UK (Feb. 13, 2009), available at <http://www.guardian.co.uk/world/2009/feb/13/blackwater-changes-name-xe> (last visited May 3, 2009). Note that throughout this essay, the names “Blackwater Worldwide,” “Blackwater” and “XE” are used interchangeably and should be construed as such.

²⁰ *See* Houreld, *supra* note 4.

²¹ Jerry Seper, *Blackwater Joins Fight Against Sea Piracy*, The WASH. TIMES (Dec. 4, 2008), available at <http://www.washingtontimes.com/news/2008/dec/04/blackwater-joins-fight-against-sea-piracy/> (last visited May 3, 2009).

²² *Id.*

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trained personnel.²³

According to Anne Tyrrell, a Blackwater spokesperson, the company has received over 70 requests from commercial shipping and marine insurance companies for more information about the McArthur and Blackwater's services.²⁴

Blackwater spokespeople directly attribute recent increases in shipping costs to the increase of piratical attacks off the Horn of Africa.²⁵ The severe risk of piracy in that region has also translated into a tenfold increase in marine insurance premiums for ships transiting the Gulf of Aden.²⁶ Some marine insurance firms have offered to reduce premium costs by as much as 40 percent for any vessels hiring private security.²⁷

One of the largest and most established maritime PSCs, Background Asia Risk Solutions, was the first maritime PSC to open for operations in Singapore²⁸ after Lloyd's of London labeled the Straits of Malacca a "war-risk zone" in 2005.²⁹ Background Asia Risk Solutions is one of a number of PSCs that are routinely hired to provide escort services and chartered patrol boats to accompany large cargo vessels and tankers through the dangerous Strait.³⁰ PSCs operating in the region also have advertised the ability to deploy security forces from helicopters to recover hijacked vessels and oil rigs.³¹

Background Asia Risk Solutions charges approximately \$100,000 per escort mission - a figure much lower than the average ransom payment in the area of \$120,000 for the safe return of a kidnapped vessel's master.³² Many of the security personnel that Background Asia Risk Solutions hires are former military and law enforcement personnel from the United States and Britain.³³

HollowPoint Protective Services, which is based out of Mississippi, is

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Houreld, *supra* note 4.

²⁷ *Id.*

²⁸ *Private Navies Combat Malacca Strait Pirates: Waterway Now So Dangerous For Shipping, Lloyd's Classifies Major Seaway As Warzone*, WorldNetDaily (Jul. 31, 2005), available at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=45535 (last visited May 3, 2009).

²⁹ Andrew Marshall, *Waterway To the World: Modern trade, ancient traditions and lawless habits collide in the planet's most crucial choke point: the Malacca Strait*, TIMEasia (Jul. 31, 2006), available at <http://www.time.com/time/asia/2006/journey/strait2.html> (last visited May 3, 2009).

³⁰ *Private Navies Combat Malacca Strait Pirates*, *supra* note 28.

³¹ *Id.*

³² *Id.*

³³ *Id.*

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another maritime PSC that began advertising its services in the Gulf of Aden³⁴ following the shocking September 2008 hijacking of the Ukrainian MV Faina by Somali pirates.³⁵ The MV Faina was carrying 33 tanks, in addition to other highly valuable cargo.³⁶ The CEO of HollowPoint, John Harris, has received several recent requests from shipping companies for more information about the company's security capabilities off the Horn of Africa.³⁷ "We'll get your crew and cargo back to you, whether through negotiations or through sending a team in," Harris told the AP in 2008.³⁸

In January 2009, a sister company of HollowPoint, HP Terra-Marine International, secured a licensing agreement with Yemen to operate out of several of that state's ports.³⁹ As a result, HP Terra-Marine has been able to use Yemen's ports to transport its security forces by boat to safely and efficiently load and off-load its security personnel onboard its client's vessels.⁴⁰ When pressed by *Anderimar Shipping News* on whether HollowPoint has already provided private security operations to shipping company clients in the Gulf of Aden, John Harris would neither confirm nor deny any specifics about HollowPoint's services provided to date.⁴¹ "Due to security demands and operational integrity we are not at liberty to discuss specifics of said attacks," Harris remarked.⁴² However, the HollowPoint CEO stressed the high level of training and experience of its skilled security forces, adding that HollowPoint's "longevity in the protection and security industry is due to our success at what we do."⁴³

Another maritime PSC which has been rapidly expanding operations in the Gulf of Aden is Drum Cussac, which earned its reputation in the maritime community by providing security services to luxury yachts, including the

³⁴ Houreld, *supra* note 4.

³⁵ *International: Private Firm May Have Anti-piracy Role*, *supra* note 9.

³⁶ *Id.*

³⁷ Houreld, *supra* note 4.

³⁸ *Id.*

³⁹ *HollowPoint Protective Services, LLC Secures Agreement to Operate Marine Security From Yemen*, *The MAR. EXEC.* (Feb. 5, 2009), available at <http://www.maritime-executive.com/pressrelease/hollowpoint-protective-services-llc-through-its-sister-company-secures-operational-agreements-operate-marine-security-yemen-2009-02-05/> (last visited May 3, 2009).

⁴⁰ *Id.*

⁴¹ See "*Ships Need Armed Guards*," *Says Security Firm Chief*, *Mar. Global Net* (Oct. 20, 2008), available at <http://www.mgn.com/news/dailystorydetails.cfm?storyid=9283&type=2> (last visited May 3, 2009).

⁴² *Id.*

⁴³ *Id.*

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French yacht *Le Ponant* which was hijacked in April 2008.⁴⁴ Drum Cussac's business doubled over the course of 2008 as bulk carriers and oil tankers began contacting the company to hire armed guards to provide onboard security to merchant vessels transiting the Gulf of Aden.⁴⁵

Olive Group, a PSC based out of London, which has previously been responsible for providing security services to Shell Corporation in Iraq, also entered the maritime PSC market in 2008.⁴⁶ Olive Group is now offering to provide security to vessels transiting the Gulf of Aden region.⁴⁷ Crispian Cuss, the Olive Group security consultant, has suggested that armed security personnel onboard vessels act as a deterrent to potential hijackers.⁴⁸ He said, "No client's ship has been approached by pirates while we've been on them."⁴⁹

Hart Security is another maritime PSC that announced a recent partnership with Swinglehurst Ltd., a marine insurance provider, to provide comprehensive "all round protection on voyages in the Gulf of Aden."⁵⁰ Under this agreement, ship-owners who have contracted with Hart to provide security in the Gulf of Aden are now entitled to War Risk Coverage on any pirate attacks against their vessels.⁵¹ Including piracy within the meaning of War Risk Cover greatly reduces insurance rates.⁵²

The expansion and shift in focus of many security contractors to respond to the global threat of piracy signals an emerging market for these services in the private sector. The next section identifies some of the major legal and practical concerns with employing the use of maritime PSCs.

III. LEGAL AND PRACTICAL CONCERNS WITH EMPLOYING MARITIME PSCS

In the February 2009 piracy hearing before the House Subcommittee on Coast Guard and Maritime Transportation, the WSC report indicates in a footnote that shipping companies typically do not hire private security

⁴⁴ Houreld, *supra* note 4.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Press Release, Hart Security, *Protected Gulf of Aden Voyages* (Oct. 6, 2008), available at <http://www.hartsecurity.com/news.asp?rel=1109> (last visited May 3, 2009).

⁵¹ *Id.*

⁵² *Id.*

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contractors to defend against piratical attacks.⁵³ The note then lists a host of reasons why PSCs are not hired to provide maritime security.⁵⁴ The first concern presented is that the use of firearms could escalate situations, resulting in loss of life.⁵⁵ While this proposition might be nothing more than mere speculation at this stage, it gives rise to several other important questions. If ship-owners are looking to increase security onboard their vessels by arming someone, it might be better to rely on highly-trained professional contractors to provide armed security than on arming inexperienced crew members not trained in the array of skills that PSC personnel have. In the event of a piratical attack on an unarmed cargo vessel, the arrival of a coalition warship ordering the pirates to stand down might escalate a situation more than would the presence of a handful of highly-trained and well-equipped private contractors. However, these questions remain unsettled and highly controversial. No clear answer exists to the question of whether the presence of armed security personnel would tend to escalate situations or act as a deterrent. The use of arms and liability are further discussed in Section IV.

Another concern with the use of PSCs is that many flag states discourage the use of armed guards and also restrict commercial vessels from carrying arms aboard.⁵⁶ Members of the U.S. Navy have expressed their support of the use of private security contractors.⁵⁷ Surprisingly, Somali official Abdulkadir Muse Yusuf, the deputy marine minister of Puntland, has stated that PSCs are “welcome” in Somalia’s waters.⁵⁸ Minister Yusuf even asserts that the presence of PSC personnel might not only deter piracy in Somali waters but also other harmful acts being committed off of Somalia’s coast, such as illegal fishing and waste dumping.⁵⁹

The recent exclusive agreement between HollowPoint’s subsidiary HP Terra-Marine and the government of Yemen⁶⁰ might signal a new era of partnerships between coastal states and private security contractors. By closely regulating and monitoring the operations of PSCs, coastal states can ensure that PSCs maintain the highest standards of professionalism and accountability, while at the same time being able to generate tax revenue from these companies’ operations. By arming PSCs instead of crews, vessel owners also

⁵³ WSC Hearing, *supra* note 7, at n.4.

⁵⁴ *See id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *See* Houreld, *supra* note 4.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See HollowPoint Protective Services, supra* note 39.

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avoid the problem of entering port states with differing regulations on carrying onboard weapons, placing this burden on PSCs.⁶¹

Another argument against the use of PSCs is that many P&I insurers discourage the use of armed guards.⁶² This position is not supported by any citing authority in the WSC report.⁶³ Furthermore, several sources seem to directly contradict this claim. The recent partnership between Hart Security, a PSC, and Swinglehurst Ltd., a marine insurer, to provide War Risk Coverage to vessels protected by Hart Security personnel is one example of the marine insurance industry favoring the use of PSCs.⁶⁴ The move by marine insurers to reduce charges for vessels by up to 40 percent if protected by private security is another example of the insurance industry supporting PSCs at sea.⁶⁵

The WSC report also notes that the possibility of fire, explosion, or sinking of vessels under attack is another argument against employing PSCs.⁶⁶ This concern is legitimate, but if insurers and shipping companies are trying to avoid paying enormous ransoms for the safe return of vessels, crew, and cargo by employing the use of PSCs, then any increased risk of fire, explosion, or sinking can simply be calculated and factored into future insurance premiums.

The concern over hazardous cargo is also cited as a potential reason why the use of PSCs should be discouraged.⁶⁷ This argument does not distinguish between PSC personnel actually aboard the vessels they are protecting and PSC personnel aboard separate escort ships. Many of the PSCs discussed in this essay have been advertising armed escort missions instead of actual onboard security services. The liability issues surrounding the distinction between onboard security and separate escort ships are further discussed in Section IV.

Other concerns that the WSC report raises with respect to the use of PSCs are some of the practical operational concerns, including “command and control, rules of engagement, use of deadly force, weapons security, [and] intra port/ship transfer of weapons and guards.”⁶⁸ These issues could all be addressed through further cooperation between PSCs, port states, and the international maritime community to establish uniform and clear protocol for

⁶¹ See David Isenberg, *Yaargh, Here Be Contractors*, CATO Institute (Oct. 24, 2008), available at http://www.cato.org/pub_display.php?pub_id=9748 (last visited May 3, 2009).

⁶² WSC Hearing, *supra* note 7, at n.4.

⁶³ See WSC Hearing, *supra* note 7.

⁶⁴ See Press Release: *Protected Gulf of Aden Voyages*, *supra* note 50.

⁶⁵ See Houreld, *supra* note 4.

⁶⁶ WSC Hearing, *supra* note 7, at n.4.

⁶⁷ *Id.*

⁶⁸ *Id.*

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PSCs to follow.

Finally, numerous unresolved issues of liability and jurisdiction present challenging questions about what legal regimes currently govern maritime PSCs and the use of force by third-party security forces at sea. These issues are discussed in the next section.

IV. LEGAL ISSUES OF JURISDICTION AND LIABILITY GOVERNING PSCS AND PIRACY

One of the first legal issues raised by the unique situation of armed security contractors defending commercial vessels against acts of piracy is over what laws, if any, govern a PSC's right to carry arms and actively defend client vessels. Traditional notions of self-defense do not seem to adequately cover third-party security personnel, especially if a PSC officer exercises lethal force against a pirate.⁶⁹ Additionally, no international agreements comprehensively regulate the carriage of arms aboard vessels.⁷⁰ When operating on the high seas, the flag state of a vessel retains exclusive jurisdiction over whether the carriage and use of weapons is permitted onboard that vessel.⁷¹ Generally, a vessel operating within a coastal state's territorial waters is governed by the laws of the coastal state.⁷²

Article 101 of the UN Convention of the Law of the Sea (UNCLOS) defines "piracy" as:

- (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; or
 - (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

⁶⁹ See Hohenstein, *supra* note 8.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

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ship or aircraft;

(c) any act inciting or of intentionally facilitating an act described in sub-paragraph (a) or (b).⁷³

Under this definition, only acts committed on the high seas are technically considered acts of piracy.⁷⁴ Acts committed within a coastal state's territorial waters or ports are not encompassed by the UNCLOS definition of piracy.⁷⁵ However, the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (SUA Convention) further prohibits acts of violence against vessels in any waters and requires signatories with jurisdiction over pirates, pirate ships, or piratical attacks to immediately take offenders into custody for questioning or to extradite those offenders to their home states.⁷⁶ The SUA Convention also requires cooperation between member states so that acts of violence against ships do not go unpunished.⁷⁷ Nevertheless, UNCLOS and the SUA Convention only authorize states and governmental forces to respond to piratical attacks through force and to arrest pirate vessels; these conventions do not discuss whether PSCs may carry arms aboard client vessels, escort ships, or whether PSCs may engage pirates either before or after an act of piracy has occurred.

The International Ship and Port Facility Security (ISPS) Code also does not discuss the "engagement or use of PSCs or the use of firearms on board vessels, whether by members of the crew or hired guns, although the ISPS Code recognizes that ships will employ outside contractors to provide security services, especially in port."⁷⁸

The International Maritime Organization (IMO) has strongly discouraged aggressive responses to piracy and the use of arms to defend against piratical attacks,⁷⁹ warning that "[t]he use of firearms requires special training and aptitudes and the risk of accidents with firearms carried on board

⁷³ United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁷⁴ *See id.*

⁷⁵ *See id.*

⁷⁶ *See* Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (SUA Convention), available at http://74.125.47.132/search?q=cache:3wMmZ8FPwqYJ:nti.org/e_research/official_docs/inventory/pdfs/maritime.pdf+sua+convention+nti.org&cd=1&hl=en&ct=clnk&gl=us (last visited May 3, 2009).

⁷⁷ *See id.*

⁷⁸ Hohenstein, *supra* note 8.

⁷⁹ *Id.*

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ship is great.”⁸⁰ Although the above quoted IMO Maritime Security Committee circular was published in 2002 and therefore probably does not fully account for the unique piracy concerns that have developed off of the Horn of Africa in more recent years, it correctly asserts that crew on merchant vessels are not properly trained in the use of advanced weaponry. The quote actually supports the argument that skilled private security personnel, many having elite military training and combat experience, might be the best people to arm. The WSC has urged passive defense tactics such as discharging water from fire hoses, zig-zag maneuvering, and maximizing vessel speed,⁸¹ but these methods of evasion are not always an effective defense. When pirates armed with advanced weapons are determined to hijack a vessel at any cost, no amount of passive evasion will adequately repel them.⁸² “When such a scenario develops while the vessel is underway, no matter the resources of nearby governmental authorities, the only practical (and effective) response is the presence of PSC personnel with the ‘special training and aptitude’ to deal with the threat.”⁸³

The liability governing PSCs varies significantly based on the vessel’s location.⁸⁴ A PSC vessel on the high seas is governed exclusively by the laws of the flag state of that vessel, including the regulation of firearms and PSC personnel on board.⁸⁵ Therefore, any criminal acts committed by PSC personnel on the high seas would be subject to prosecution in the flag state of the vessel carrying the personnel.⁸⁶

When a PSC vessel or a merchant vessel carrying PSC personnel is in port, the vessel “is subject to the laws of the port state.”⁸⁷ There are no comprehensive international agreements that currently address the issue of weapons aboard commercial vessels.⁸⁸ “In general terms, maritime nations recognize the general principle of international comity, i.e., matters of a vessel’s internal management and discipline are not subjects of local concern or law.”⁸⁹ A port state’s authorities typically only become involved in the event of some type of disturbance.⁹⁰ The issue of comity was addressed in the famous

⁸⁰ INT’L. MAR. ORG., *Piracy and Armed Robbery Against Ships*, MSC Circular 623/Rev. 3, Annex, ¶¶ 45, 46 (May 29, 2002).

⁸¹ WSC Hearing, *supra* note 7.

⁸² Hohenstein, *supra* note 8.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *See id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

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Wildenhus' Case, where United States authorities arrested several crewmembers of a Belgian ship after allegedly killing a fellow crew member while the vessel was in a U.S. port.⁹¹ In a writ of habeas corpus, the Belgian government sought release of the crewmembers on grounds that Belgium maintained exclusive jurisdiction over the internal management of the ship under a treaty between the two governments.⁹² The Supreme Court held that, because the "disorder" aboard the Belgian vessel was enough to disturb the "tranquility" and "public repose" of the state of New Jersey, the crew members could only exercise their right of habeas corpus in U.S. courts and could not be released to the Belgian government.⁹³ As the Court stated in its opinion:

Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction.⁹⁴

Therefore, under the holding of this case and the general principles of comity, any potential violent exchange between PSC personnel in port and pirates would likely result in the intervention by authorities of the port state.⁹⁵ Somalia presents a more difficult set of jurisdictional issues however, since, according to the CIA World Factbook, Somalia has "no permanent national government."⁹⁶ Additionally, with statements such as the one by minister Yusuf of the semiautonomous region of Puntland welcoming PSCs into Somali waters,⁹⁷ it is unclear what authorities, if any, could legitimately exercise jurisdiction over PSC personnel in a Somali port.

Even more complicated jurisdictional issues are raised by a vessel navigating an international strait, like the Straits of Malacca.⁹⁸ Whether arms are prohibited aboard a vessel in an international strait depends on whether the vessel is engaged in "transit passage" as opposed to "innocent passage" under

⁹¹ See *Mali, Consul of His Majesty the King of the Belgians v. Keeper of the Common Jail of Hudson County*, New Jersey, 120 U.S. 1 (1887) [hereinafter Wildenhus' Case].

⁹² See *id.*

⁹³ See *id.*

⁹⁴ *Id.*

⁹⁵ See Hohenstein, *supra* note 8.

⁹⁶ CIA World Factbook, Somalia, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last visited May 3, 2009).

⁹⁷ See Houeild, *supra* note 4.

⁹⁸ Hohenstein, *supra* note 8.

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the relevant provisions of UNCLOS.⁹⁹ Ships passing through international straits are generally governed by the “transit passage” provisions of Part III of UNCLOS, which states that:

Ships and aircraft, while exercising the right of transit passage, shall:

- (a) proceed without delay through or over the strait;
- (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (c) refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress;
- (d) comply with other relevant provisions of this Part.¹⁰⁰

However, because Indonesia, Singapore, and Malaysia, the coastal states bordering the Malacca Straits, have all claimed to have sovereignty over the Straits, a legitimate question exists over whether these waters might be construed as the territorial waters of those three states instead of simply an international straight.¹⁰¹ Vessels ordinarily passing through a state’s territorial waters are governed by the “innocent passage” provisions of UNCLOS, which are far more restrictive than the “transit passage” provisions, prohibiting, among other things, “any exercise or practice with weapons of any kind.”¹⁰² Therefore, if navigation through the Malacca Strait is construed under the “innocent passage” provisions of UNCLOS instead of the “transit passage” provisions, then the ban on weapons would theoretically prevent PSCs or armed guards from using or potentially even carrying weapons.¹⁰³ Subjecting a vessel passing through the Malacca Straits to the territorial sovereignty of Indonesia, Singapore, and Malaysia would also subject any PSCs onboard to the laws of

⁹⁹ *See id.*

¹⁰⁰ UNCLOS, *supra* note 73, 1833 U.N.T.S. 397 at art. 39.1.

¹⁰¹ *See* Hohenstein, *supra* note 8.

¹⁰² UNCLOS, *supra* note 73, 1833 U.N.T.S. 397 at art. 19.2(c).

¹⁰³ Hohenstein, *supra* note 8.

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those three states, which all have strict laws governing the carriage of weapons.¹⁰⁴

The areas of the world where piracy is most prevalent, such as the Horn of Africa and the Malacca Straits, present some of the most complicated and unresolved jurisdictional issues concerning the use of maritime PSCs. While the international community has not yet resolved some of these tough questions, several possible solutions and some of the potential benefits of using maritime PSCs are discussed in the next section.

V. CONCLUSION

While the idea of vessel owners hiring armed private security forces from a company like Blackwater to defend against piratical attacks remain unpalatable and even unthinkable to many, a market has been created for maritime PSCs due to the inability of the world's coastal states to control the severe problem of piracy. Stabilizing Somalia by establishing a functioning government and empowering its citizens with aid and education is the likely long-term solution to the ultimate problem of piracy currently breeding in Somali coastal towns. However, such an enormous nation-building endeavor will require years of cohesive and cooperative effort by the entire developed world. In the immediate future, shipping companies are faced almost daily with the threat of piratical attacks and the thought of having to negotiate expensive and delicate ransom payments to pirates for the safe return of vessels, crew, and cargo. While employing PSC personnel as armed security onboard liner vessels is not an ideal and permanent solution to the explosion of piratical activity off the coast of Somalia, it is one of many options that vessel owners are currently considering. Maritime PSCs may be able to offer many potential benefits to the shipping and marine insurance industries, as well as to all of the coastal governments of the world. Some potential benefits of using PSCs are: 1) the prevention of loss of life; 2) the prevention of loss of property; 3) that PSC vessels could supplement the limited amount of NATO flotilla warships; 4) a reduction in marine insurance premiums; 5) the possible prevention of future terrorist attacks; 6) added stability to the unstable region of Somalia; 7) that PSCs offer a sophisticated and efficient means of preventing piracy; and 8) the ultimate reduction of the cost of consumer goods that will result with the worldwide reduction of piracy.

Several possible solutions to the legal and practical issues of maritime PSCs might in the future make the use of these companies more viable, legitimate, and even preferred. One option is for flag state to license "sea

¹⁰⁴ *See id.*

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marshals” under some type of uniform international licensing regime, where regulations and standards would govern weapons, engagement, personnel training and qualification, and penalties.¹⁰⁵ Another option is for an international non-government organization or non-profit to closely monitor and regulate PSC activities.¹⁰⁶ A third option, which would probably take at least several years, would be for the United Nations to adopt a comprehensive convention regulating PSCs and defining the areas where they are permitted to operate.¹⁰⁷ As the international community is gradually beginning to consider the potential concerns and benefits with vessel owners using maritime PSCs to provide security in response to piracy, these companies continue to quietly expand their operations, train additional personnel, acquire old ships and refurbish them into high-tech security vessels, and enter into security contracts with many of the world’s largest shipping companies. While legitimate concerns over territorial sovereignty make the use of PSCs problematic, the navies of the world have been ineffective at preventing and combating piracy.¹⁰⁸ Therefore, the use of private security at sea is not only a viable option, but a necessity for many shipping companies routinely facing this threat. Private navies are on the rise, and the international community should respond to this trend by uniting in a cooperative effort to reach some type of acceptable compromise on how PSCs should be regulated.¹⁰⁹

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See id.*