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DISSERTATION

***PIRACY AND PRIVATELY CONTRACTED ARMED SECURITY PERSONNEL: A
COMPARATIVE ANALYSIS OF THE GLOBAL RESPONSE TO THE DEPLOYMENT OF
ARMED GUARDS ON BOARD MERCHANT VESSELS AND SOUTH AFRICA'S POLICY
AS A PORT AND COASTAL STATE***

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Signed at Durban on this ____ day of December 2014

Gareth John Courtois

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In loving memory of Valerie Bouwhuis (“Gogo”) – you will always be with me in my heart and soul and I dedicate my efforts and hard work for this dissertation to you.

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Abstract

This study examines the policies adopted by flag and port states to govern the use of armed guards on board merchant vessels. The International Maritime Organisation and a number of member states' responses to the use of armed guards on board ships are discussed. The focus of this study is the South African policy on privately contracted armed security personnel intending to embark or disembark in a South African port with arms and ammunition. The question of whether South Africa allows armed guards in its territory is addressed, as well as the requirements and conditions attached to such permission. The dissertation concludes by recommending that the Regulations to the South African Firearms Control Act 60 of 2000 should be amended in order to give effect to and streamline the permit process for foreign security firms.

Key words: armed guards – maritime piracy - vessels - South Africa - firearms permit

LIST OF ABBREVIATIONS

BIMCO	-	The Baltic and International Maritime Council
BMP	-	Best Management Practices
C&E Act	-	Customs and Excise Act 91 of 1964
CFR	-	Central Firearms Registry
DFO	-	Designated Firearms Officer
FCA	-	Firearms Control Act 60 of 2000
ICS	-	International Chamber of Shipping
IMO	-	International Maritime Organisation
NCACA	-	National Conventional Arms Control Act 41 of 2002
P&I Clubs	-	Protection and Indemnity Clubs
PCASP	-	Privately Contracted Armed Security Personnel
PMSC	-	Private Maritime Security Company
SAPS	-	South African Police Service
SOLAS	-	International Convention for the Safety of Life at Sea 1974
UNCLOS	-	United Nations Convention on the Law of the Sea 1982
UN	-	United Nations
UNSC	-	United Nations Security Council
VPD	-	Vessel Protection Detachment

CHAPTER ONE

BACKGROUND TO THE STUDY

1.1 Introduction

The resurgence of pirate attacks off the Horn of Africa (namely, Somalia) recorded during 2006 affected world trade.¹ Shipowners were left defenceless against Somali pirates and were caught completely off guard. Stakeholders therefore sought the best means to protect merchant vessels, ranging from naval escorts, to vessel perimeter protection measures and citadels; however, the deployment of armed guards has caused the greatest controversy in the industry. This study examines the international guidelines on the use of privately contracted armed security personnel, and flag states, shipowners and coastal states' response, focusing on the difficulties faced by security firms in embarking or disembarking armed personnel in South African ports.

The Gulf of Aden is arguably the busiest shipping lane in the world connecting Europe and the West with Asia. It is reported that there were 237 actual and attempted attacks and 28 successful hijackings in 2011,² whilst there were 75 attacks and 14 successful hijackings of merchant vessels off the coast of Somalia, Gulf of Aden and in the Indian Ocean in 2012. In 2013, 15 attacks and two hijackings of vessels off Somalia were recorded, the lowest since 2006.³ It is estimated that Somali piracy costs the world economy around \$6 billion annually⁴ with some scholars setting the figure higher at between \$7 billion and \$12 billion per year.⁵ In addition to the actual costs, considerable potential costs may be incurred. For example, some scholars are of

¹ ICC International Maritime Bureau 'Piracy and Armed Robbery against Ships Annual Report for the period 1 January 2006 – 31 December 2006'. Available on request at www.ics-ccs.org.
Neethling, Theo 'Piracy around Africa's West and East coasts: A comparative political perspective' (2010) 38 (2) *Scientia Militaria: South African Journal of Military Studies* at 91.
Minister L. N. Sisulu 'Address at the SADC Extraordinary meeting on Regional Anti-Piracy strategy' (25 July 2011) at 7. Available at <http://www.dod.mil.za/speeches/July2011/anti-piracy%20strategy%20.pdf> accessed on 18 August 2014.

² ICC International Maritime Bureau 'Piracy and Armed Robbery against Ships Annual Report for the period 1 January 2013 – 31 December 2013', page 24. Available on request at www.ics-ccs.org.

³ Ibid.

⁴ Oceans Beyond Piracy 'The Economic Cost of Somali Piracy 2012' available at <http://oceansbeyondpiracy.org/publications/economic-cost-piracy-2012> accessed on 8 November 2013.

⁵ Henri Fouché 'Staggering global economic and human cost of maritime piracy on the eastern seaboard of Africa' (2011) 24(3) *Acta Criminologica: Southern African Journal of Criminology* at i.

the view that piracy off the East and West coast of Africa has the potential to cause catastrophic environmental incidents which littoral states are not equipped to deal with.⁶

The international community responded to the increase in sea piracy by deploying naval vessels in the area. Best management practices were also developed for the industry to adopt accepted standards to prevent and/or deter attacks and ensure open lines of communication and information sharing between countries.

Pirate attacks increased between 2006 and 2010⁷ and vessels and crews were being held to ransom despite the military response from various states. Vessel owners were forced to arrange ransom payments in order to get their vessels and crew released. It is estimated that the average ransom payment is in the sum of US\$2.7 million per vessel (calculated during the period 2005 to 2012) with total payments of approximately US\$413 million.⁸ These statistics show that the presence of naval forces in the Indian ocean did not deter Somali pirates⁹ as they started operating from ‘mother-ships’ able to deploy skiffs to attack a nearby vessel¹⁰ far in the Indian Ocean to avoid the naval patrols.¹¹ The pirates obtained global positioning systems to track vessels and were well organised, with high powered outboard motors, fully automatic weapons,

⁶ Herbig & Fouché ‘Maritime piracy and conservation crime in Africa: Has the die been cast for an environmental disaster?’ (2013) 26(1) *Acta Criminologica: Southern African Journal of Criminology* at 39-41.

⁷ International Maritime Organisation (IMO) ‘Reports on acts of piracy and armed robbery against ships – Annual report – 2010’ (1 April 2011) MSC.4/Circ.169 at Annex 4 - available at [http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/Piracy/Pages/Piracy-reports-\(annual\)-1996-2012.aspx](http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/Piracy/Pages/Piracy-reports-(annual)-1996-2012.aspx) accessed on 4 April 2014.

⁸ Christopher Harress ‘Secret Flow of Somali Piracy Ransoms: 179 Hijacked ships Generated some \$400M in Payments since 2005. So where has it all gone?’ (4 November 2012) available at <http://www.ibtimes.com/secret-flow-somali-piracy-ransoms-179-hijacked-ships-generated-some-400m-payments-2005-so-where-has> accessed on 9 November 2013.

⁹ Jeffrey Gettleman ‘Naval patrols fail to deter pirates’ (17 December 2008) – World Security Network available at <http://www.worldsecuritynetwork.com/Terrorism/Gettleman-Jeffrey/Naval-patrols-fail-to-deter-pirates> accessed on 22 November 2013.

¹⁰ Best Management Practices for Protection Against Somalia Based Piracy, Version 4 – August 2011 (BMP4) - IMO Resolution MSC.324(89) on ‘Implementation of Best Management Practice Guidance by the publication: IMO Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia’ – MSC.1/Circ. 1339, Section 4 at page 9.

H Fouché ‘Policing Maritime Piracy in Southern Africa’ (2006) 19 (3) *Acta Criminologica: Southern African Journal of Criminology* 184.

¹¹ Henri Fouché ‘Somali pirates take to the high seas: Expediency or long-term pirate strategy’ (2009) 37 (2) *Scientia Militaria: South African Journal of Military Studies* at 68.

rocket-propelled grenades and hook ladders to enable them to board vessels.¹² This left vessel owners with little choice but to deploy armed guards to protect the ship, cargo and crew.

During the second half of 2010, private maritime security companies (PMSC) began offering armed protection services to vessel owners as a means of defence against acts of sea piracy. Security teams, mostly comprised of former British and American marines, were placed on board vessels transiting the Gulf of Aden and Indian Ocean.¹³ One of the most effective means of preventing a pirate attack “is to secure the vessels themselves”.¹⁴

The deployment of armed guards on merchant vessels was not without controversy; various arguments for and against this strategy were made by owners, protection and indemnity clubs (P&I Clubs), governmental organisations and the International Maritime Organisation (IMO). It should be noted that the use of armed guards was not recommended in the Best Management Practice version 2.¹⁵

The use of weapons on board vessels to deter piracy was given “[a] boost on 15 February 2011 when the International Chamber of Shipping (ICS) announced a change of stance on armed guards, recognising that they were being used off Somalia.”¹⁶ Prior to this, the German and British Governments were firmly against the placement of privately contracted armed security personnel (PCASP) on board vessels flying their flags; this changed once their respective legislatures reviewed their national policies.¹⁷

¹² Best Management Practices for Protection Against Somalia Based Piracy, Version 4 – August 2011 (BMP4) - IMO Resolution MSC.324(89) on ‘Implementation of Best Management Practice Guidance by the publication: IMO Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia’ – MSC.1/Circ. 1339, Sections 4.3 and 4.4 at page 10.

¹³ Yvonne M. Dutton ‘Gunslingers on the high seas: A call for regulation’ (2014) 24 *Duke Journal of Comparative & International Law* at 117.

¹⁴ Douglas Guilfoyle ‘Somali Pirates as Agents of Change in International Law – making and Organisation’ (2012) 1 (3) *Cambridge Journal of International and Comparative Law* at 101.

¹⁵ Section 2(b)(vii): Best Management Practices to deter Piracy in the Gulf of Aden and off the Coast of Somalia, Version 2 – August 2009 – IMO ‘Piracy and Armed Robbery against Ships in Water off the Coast of Somalia’ - MSC.1/Circ. 1332 (16 June 2009) available at <http://www.nec.gr/downloads/26BMP.pdf> accessed on 4 December 2013.

¹⁶ Stephen Askins ‘Piracy: Issues arising from the use of armed guards’, Ince & Co Publication 2011 available at http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/Ince_Piracy-issues-arising-from-the-use-of-armed-guards.pdf accessed on 9 November 2013.

¹⁷ *Ibid.*

See also Yvonne M. Dutton ‘Gunslingers on the high seas: A call for regulation’ (2014) 24 *Duke Journal of Comparative & International Law* at 130-131.

The ICS chairman stated that:

ICS has had to acknowledge that the decision to engage armed guards, whether military or private, is a decision to be made by the ship operator after due consideration of all of the risks, and subject to the approval of the vessel's flag state and insurers. The consensus view amongst shipping industry associations remains that, in normal circumstances, private armed guards are not recommended, and are a clear second best to military personnel.¹⁸

Numerous issues arose, including the assertion that the use of armed guards “could result in escalation of the use of force”¹⁹ Vessel owners needed to balance this with the substantial decrease in the risk of their vessels being hijacked if such measures were taken.

Stakeholders in the private maritime security industry use the selling point that, “to date, no ship has been successfully taken by Somali pirates with a PCASP team on board”.²⁰ Some scholars argue that “armed private contractors present a fiscally sound solution to the problem of piracy for shipowners” in comparison to the cost of increased war risk premiums and additional fuel to divert vessels from dangerous waters.²¹ It is thus difficult for shipowners to justify not deploying armed guards on a vessel when confronted with a 100 per cent success rate in deterring pirate attacks and the economic benefits. Abeyratne argues that ship owners may face potential liability if armed guards are not used on their vessels as they “may not have an excuse for not

¹⁸ International Chamber of Shipping ‘Shipping Industry Changes Stance on Armed Guards’ (15 February 2011) available at <http://www.ics-shipping.org/2011.htm#15feb> accessed on 9 November 2013.

¹⁹ Stephen Askins ‘Piracy: Issues arising from the use of armed guards’, Ince & Co Publication 2011 available at http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/Ince_Piracy-issues-arising-from-the-use-of-armed-guards.pdf accessed on 9 November 2013.

²⁰ Sailor’s Society ‘Piracy Update: Armed Guards, West African Hi-jackings and Guardcon revisited’ (31 October 2013) available at <http://saiss.co.za/piracy/piracy-update-armed-guards-west-african-hijackings-and-guardcon-revisited/> accessed on 9 November 2013.

John Stupart ‘Private Military Contractors in Somalia’ (July, 2013) *Africa Conflict Monthly Monitor*, Consultancy Africa Intelligence (Pty) Ltd at 39.

²¹ Sean Patrick Mahard ‘Blackwater’s New Battlefield: Toward a Regulatory Regime in the United States for Privately Armed Contractors at Sea’ (2014) 47(1) *Vanderbilt Journal of Transnational Law* at 341.

carrying armed guards in the ships in the face of such flexibility and ... not making use of applicable legislation”.²²

It is reported that up to 28 per cent of all ships transiting the Indian Ocean are carrying armed guards at an annual cost of USD530 million²³ to vessel owners. The private maritime security industry is expanding rapidly “especially because of their deterrence success rate to date and the consequential increasing number of states which have sanctioned or licensed such armed agents on their ships”.²⁴ This study discusses the measures and policies adopted by the IMO and member states to protect a vital trade route and, in particular, the response to the armed self defence mechanism implemented by shipowners to protect their vessels from pirate attacks, namely, privately contracted armed security guards (PCASP).

1.2 Objectives of the research

The objectives of the research are to determine whether there are international policies that regulate the use of PCASP on board merchant ships and, in particular, if there are obligations on coastal states to facilitate the movement of these personnel with specific reference to South Africa. The study investigates the issues raised by the shipping industry regarding the use of armed guards and how these issues have been addressed or settled through the IMO guidelines and recommendations. This includes a comparative analysis of the position of four flag states, including the largest vessel registry in the world, Panama, regarding PCASP on board vessels flying their flags as well as the policies adopted by Egypt, a coastal state in Africa which has jurisdiction over the Suez Canal, the sea lane leading to or from the Gulf of Aden and nearby coastal states.

²² Ruwantissa Abeyratne ‘The use of armed guards on board merchant vessels’ (2012) 5 *Journal of Transportation Security* at 167 available at <http://link.springer.com/article/10.1007%2Fs12198-012-0088-5#> accessed on 13 March 2014.

²³ Project of the Graduate Institute of International and Development Studies, Geneva, ‘*Small Arms Survey 2012: Moving Targets*’ page 206 – available at <http://books.google.co.za/books?id=hY3s5nHUM24C&pg=PA206&lpg=PA206&dq=SAMI+percentage+of+ships+carrying+guards&source=bl&ots=YO81DBaF2D&sig=IUmMbfL6Vi4bPnRJkg826Ca79c&hl=en&sa=X&ei=Qy9-UvnrLMHX7Abk8ICoAg&ved=0CCgQ6AEwAA#v=onepage&q=SAMI%20percentage%20of%20ships%20carryi ng%20guards&f=false> accessed on 9 November 2013.

²⁴ Clive R. Symmons ‘Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea’ (2012) 51/1 *Military Law and the Law of War Review* at 28.

The primary objectives of this research study are to determine, firstly, what South African laws or policies govern the permitting, movement and storage of weapons on board merchant vessels entering South African ports; and, secondly, whether these laws effectively facilitate these activities within the ambit of the international recommendations and guidelines to coastal states on the use of PCASP on board merchant vessels to combat sea piracy.

1.3 Key research questions

The following key research questions are addressed:

1. What international legal instruments regulate the use of PCASP on board merchant vessels?
2. What policies have been adopted by flag states as well as coastal states with jurisdiction near the Gulf of Aden relating to armed guards on merchant vessels?
3. Does South Africa allow firearms to be brought into its territory on board merchant vessels?
4. What is the process involved in obtaining the necessary permission/documentation?
5. What conditions are attached to such permission?
6. Does South African legislation specifically cater for armed guards on board merchant vessels entering its ports?

1.4 Research methodology

The researcher conducted desktop research, relying on primary and secondary sources. The researcher did not find it necessary to conduct interviews as the primary resources available in the form, for example, of South African court case pleadings and annexures was deemed sufficient for the purpose of this study in that they provided concrete examples of how the South African Firearms Control Act 60 of 2000 and the regulations thereto are applied in practice.

Primary sources

International conventions governing the law of the sea, maritime terrorism and security and safety of life at sea were reviewed as such international law binds states which are parties thereto. The researcher obtained a list of the countries that ratified the international conventions from the United Nations' (UN) online treaty collection. The guidelines, recommendations, best management practices and reports published online by the IMO whose website is available to the public, were analysed. The IMO is tasked with creating regulatory frameworks to ensure the safety and security of shipping on the world's oceans. While non-mandatory, these provide legal frameworks within which member states can develop their domestic policies or legislation, which should be intrinsically similar to the objectives set out in the documents. The researcher set out to establish whether coastal member states completed the IMO questionnaire on their domestic policies.

Furthermore, the legislation, official published guidelines and circulars of four flag states, including Panama, the country with the largest vessel registry in the world, were compared in order to determine what their policies on armed guards are, and whether there are differences or similarities with the IMO recommendations and guidelines to flag states.

Egypt's official circulars on the use of armed guards in its territory were also analysed as Egypt is a coastal state with jurisdiction over the Suez Canal, with access to and from the Gulf of Aden. Academic commentary on, and response to, the IMO questionnaire on the policies of other states with jurisdiction near the Gulf of Aden was also analysed.

The research included an analysis of statistics on vessels recorded in states' registries from the United Nations Conference on Trade and Development (UNCTAD) - an international organisation tasked with the development of international trade and publishing figures relating to, amongst others, shipping.

The research also included a review of South African legislation regulating the importation of firearms and ammunition into South African territory including the Firearms Control Act²⁵ (FCA), National Conventional Arms Control Act²⁶ (NCACA) and Customs and Excise Act²⁷

²⁵ The Firearms Control Act 60 of 2000, as amended.

²⁶ The National Conventional Arms Control Act 41 of 2002, as amended.

(C&E Act). The researcher presents a detailed analysis of the FCA and the regulations promulgated thereunder. Matters falling outside the ambit of the FCA, and governed by the NCACA and C&E Act, fall outside the scope of the study and are thus not discussed in detail.

The focus of the analysis was the legislative provisions relevant to the entry of weapons into South African ports on board merchant vessels deploying PCASP to combat sea piracy.

This required the researcher to determine whether any directives or communication relating to PCASP on board merchant vessels have emanated from the South African Police Service (SAPS), which is tasked with enforcement and implementation of the FCA and regulations in the Republic of South Africa. These communications are attached in annexure B.²⁸ Much weight was placed on these communications to highlight the issues addressed in this study.

Secondary sources

The researcher conducted an extensive review of journal articles through the use of websites and the global literature on the issues addressed in this study. The placement of armed guards on vessels in response to maritime piracy is a new phenomenon and is thus a fresh topic for discussion and opinions. The researcher conducted a comprehensive survey of the literature by South African and African authors and academics. Whilst some studies have been conducted on piracy along the African coastline exist,²⁹ and others make passing reference to armed guards

²⁷ The Customs and Excise Act 91 of 1964, as amended.

²⁸ Items 1 to 4 of annexure B, and the information about the unreported South African legal cases presented in Chapter 4 were obtained from the court documents on public record in the Durban High Court, which include reference to the full pleadings and annexures as well as the judgments.

²⁹ H Fouché 'Policing Maritime Piracy in Southern Africa' (2006) 19 (3) *Acta Criminologica: Southern African Journal of Criminology* 180-194. B.P.O. Mokoena 'Report from the Workshop on Maritime Policing to Combat Maritime Crime' (2013) 2(3&4) *Journal of African Union Studies (JoAUS)* at 35. Neethling, Theo 'Piracy around Africa's West and East coasts: A comparative political perspective' (2010) 38 (2) *Scientia Militaria: South African Journal of Military Studies* at 89-108. Thean Potgieter 'The Maritime Security Quandary in the Horn of Africa Region: Causes, Consequences and Responses' (January, 2008) *East African Human Security Forum Discussion Paper*; Hanns Seidel Foundation Kenya. Available at http://www.grid.unep.ch/FP2011/step1/pdf/005_Potgieter_2009.pdf accessed on 20 August 2014. Potgieter, T 'The lack of maritime security in the Horn of Africa: Scope and effect' (2009) xxxi(1) *Strategic Review for Southern Africa* 66. Freedom C Onuoha 'Sea piracy and maritime security in the Horn of Africa: The Somali coast and Gulf of Aden in perspective' (2009) 18(3) *African Security Review*, Institute for Security Studies 31-44.

deployed on board merchant vessels,³⁰ no study has been conducted to date that specifically addresses the issue of permitting and controlling the movement of weapons and PCASP in South African ports and analysing the FCA and regulations.

The researcher relied on various internet sources, including articles by maritime law practitioners and P&I Clubs and online news articles. A number of facts and figures are provided in online news articles relating to the use of PCASP on merchant vessels. The purpose of using such sources is to understand the latest developments in the use of armed guards in flag and port states.

1.5 Detailed chapter breakdown

This first chapter introduces the study topic and provides the background to the research, namely, the international response to the use of armed guards on board merchant vessels as a means of defence against Somali piracy. The study's objectives are discussed with reference to the key research questions that will be addressed in subsequent chapters, and the research methodology is explained. Chapter Two discusses the international recommendations and regulations governing the deployment of PCASP, focusing on the IMO recommendations to coastal and port states. Chapter Three briefly discusses the laws of a number of foreign states and regulations relating to armed guards on board merchant vessels.

The crux of the study is Chapter Four where South African law and policy governing permits for weapons brought into South Africa's ports on board merchant vessels deploying PCASP is discussed. Shortcomings in the current Firearms Controls Act, 60 of 2000 and regulations promulgated thereunder, are analysed in detail, followed by an analysis of recent cases heard in the Durban High Court where these provisions were applied to disputes arising in relation to the firearms permit requirements applicable to PCASP and vessel owners intending to call at a South African port. The chapter discusses security concerns relating to armed guards as well as the

³⁰ Henri Fouché 'Somali pirates take to the high seas: Expediency or long-term pirate strategy' (2009) 37 (2) *Scientia Militaria: South African Journal of Military Studies* 67-81. John Stupart 'Private Military Contractors in Somalia' (July, 2013) *Africa Conflict Monthly Monitor*, Consultancy Africa Intelligence (Pty) Ltd 39-42. Freedom C Onuoha 'Sea piracy and maritime security in the Horn of Africa: The Somali coast and Gulf of Aden in perspective' (2009) 18(3) *African Security Review*, Institute for Security Studies 31-44. Potgieter, TD 'Maritime Security in the Indian Ocean: strategic setting and features' (August, 2012) 236 *Institute for Security Studies Paper* 1-21. B.P.O. Mokoena 'Report from the Workshop on Maritime Policing to Combat Maritime Crime' (2013) 2(3&4) *Journal of African Union Studies (JoAUS)* at 35.

permit application process and requirements in South Africa which can potentially hinder the operation of merchant vessels intending to call at South African ports with PCASP and weapons on board.

Chapter Five concludes the study. It presents the findings in relation to each of the key research questions and recommends specific amendments to South African firearms legislation in order to facilitate the movement of armed guards in South Africa's ports, with reasons for such amendments.

CHAPTER TWO

INTERNATIONAL GUIDELINES

2.1 Introduction

The definition of piracy in terms of international law is set out in Article 101 of the United Nations (UN) Convention on the Law of the Sea (UNCLOS):³¹

Piracy consists of any of the following acts:

- (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).

In terms of where the act takes place, provided that attacks on merchant vessels are on the high seas and not in a member state's territorial waters, the *modus operandi* and actions of the Somali pirates would fall within this definition. Member states have an obligation to repress piracy and "shall cooperate to the fullest possible extent"³² in achieving this. It should be noted, however, that there are no express provisions in UNCLOS on preventative measures that may or may not be used to deter pirate attacks. Member states are entitled to seize a pirate ship (as defined) and arrest persons found on board notwithstanding same being on the high seas.³³

Should a vessel be hijacked within the territorial waters of a state, this act would fall within the ambit of Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of

³¹ United Nations Convention on the Law of the Sea, 1982, New York: United Nations.

³² Ibid, Art 100.

³³ Ibid Art. 105 read with Art. 107.

Maritime Navigation (SUA)³⁴ and, when article 3 is incorporated into the national legislation of a state party to the convention, these unlawful acts are deemed punishable.³⁵ The SUA also does not contain provisions regarding the prevention of piracy within a state's territorial waters and EEZ or on the use of PCASP.

Article 3 of the SUA states that:

1. Any person commits an offence if that person unlawfully and intentionally;
 - (a) Seizes or exercises control over a ship by force or threat thereof or any other form of intimidation ...

Although the SUA and scholars recognise that piracy occurs in the territorial waters and EEZ of member states, and not only on the high seas as defined in UNCLOS,³⁶ reliance on the prosecution of pirates is not sufficient to deter attacks. If PCASP disembark when vessels are in coastal waters this leaves the vessel vulnerable to piracy, particularly in Gulf of Aden littoral states. The mv "Fairchem Bogey" was hijacked by suspected Somali pirates on 21 August 2011 whilst she was anchored off the coast of Oman. The incident took place shortly after a PCASP team disembarked from the vessel subsequent to completing a transit through the Gulf of Aden as was normal procedure. The question needs to be asked; would the hijacking have been successful if the armed guards were on board the vessel whilst anchored in Oman's territory? Statistics show that to date no vessel has been hijacked with an armed team on board. Although PCASP were becoming a popular and effective deterrent against pirate attacks there was a lacuna in the existing international law as it did not regulate the use of same on board merchant vessels plying their trade in the world's oceans.

³⁴ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted on 10 March 1988, entered into force on 1 March 1992; Rome: United Nations (SUA).

³⁵ Article 5 of SUA makes it obligatory for member states to make the offences listed in Article 3 punishable in terms of their national legislation. Art.5 reads:

Each State Party shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of those offences.

³⁶ H Fouché 'Policing Maritime Piracy in Southern Africa' (2006) 19 (3) *Acta Criminologica: Southern African Journal of Criminology* at 188, is of the view that UNCLOS is "clearly in need of revision to make provision for the geographical location of incidents of piracy in the 21st century".

The IMO³⁷ aims to ensure the “general adoption of the highest technical standards concerning maritime safety and efficiency; prevent discriminatory practices that may restrict international trade and promote the exchange of information of any shipping matters among member state Governments”.³⁸ The IMO has various committees made up of experts in their fields including maritime trade, law and security. The function of the IMO is “consultative and advisory”.³⁹ The IMO Convention established three main organs, the Assembly, Council and the Maritime Safety Committee (MSC).⁴⁰

The MSC considers “aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, marine casualty investigation and any other matters directly affecting maritime safety”.⁴¹ Member States, Non-Governmental Organisations and associations request assistance from the IMO with particular issues that affect the interests of their state and/or organisation. The Republic of South Africa is a member of the IMO and acceded to the IMO convention in 1995.⁴² The IMO plays a proactive role in developing guidelines for member states on issues that arise in the maritime industry which require consistent rules and regulations due to the international nature of maritime trade. The laws governing maritime trade need to be consistent as trans-ocean movement of vessels involves a wide variety of jurisdictions and ship owners should systematically comply with obligations rather than on an *ad hoc* basis for each country the vessel will transit.

Responses to the piratical attacks between 2008 and 2013 resulted in the IMO publishing guidelines to assist member states to regulate the private maritime security industry. The IMO is often called on to act swiftly to new circumstances that affect the shipping industry.

³⁷ The IMO was created by the Convention on InterGovernmental Maritime Consultative Organization E/Conf4.61 on 16 March 1948; London (IMCO Convention) and the name was later changed to International Maritime Organization (IMO) in 1982 (hereinafter referred to as the IMO Convention).

³⁸ Article 1 of the IMCO Convention.

³⁹ Article 2 of the IMCO Convention.

⁴⁰ The IMCO Convention in Article 12 states that the Organization will comprise of “an Assembly, a Council and a Maritime Safety Committee.

⁴¹ Article 29 of the Convention on the InterGovernmental Maritime Consultative Organization E/Conf4.61 on 16 March 1948 (“IMCO Convention”).

⁴² United Nations Treaty Collection available at

http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=XII-1&chapter=12&lang=en accessed on 4 December 2013.

The IMO through the MSC heeded the call from the UN Security Council - which encourages the development of regulations for the use of PCASP⁴³ - for shipowners, flag states, coastal and port member states as well as PMSC to address the complex issue of placing PCASP on board merchant vessels as a means of protection against piratical attacks in the Indian Ocean and Gulf of Aden. The MSC convened an intercessional meeting of the “Maritime Security and Piracy Working Group” to develop such guidelines⁴⁴. The interim guidelines for shipowners⁴⁵ and interim recommendations for flag states⁴⁶ were published simultaneously on 23 May 2011.

In answering this study’s first research question, the researcher discusses the main provisions of the IMO guidelines and recommendations on armed guards in relation to the following issues highlighted by industry experts⁴⁷:

1. The problem of a divided command – who would ultimately be in charge on board the vessel if a security team were to engage an approaching pirate skiff in the middle of the Indian Ocean?

⁴³ United Nations Security Council Resolution 1816 (2008) adopted at its 5902nd meeting on 2 June 2008; New York: United Nations at para. 4 and 5:

4. Further urges States to work in cooperation with interested organizations, including the IMO, to ensure that vessels entitled to fly their flag receive appropriate guidance and training on avoidance, evasion, and defensive techniques and to avoid the area whenever possible;
5. Calls upon States and interested organizations, including the IMO, to provide technical assistance to Somalia and nearby coastal States upon their request to enhance the capacity of these States to ensure coastal and maritime security, including combating piracy and armed robbery off the Somali and nearby coastlines.

See with particular reference to PCASP: United Nations Security Council Resolution 2125 (2013) adopted at its 7061st meeting on 18 November 2013; New York: United Nations at para 3 and para. 26:

3. *Noting* the efforts of flag States for taking measures to permit vessels sailing under their flag transiting the High Risk Area (HRA) to embark vessel protection detachments and privately contracted armed security personnel (PCASP), and *encouraging* States to regulate such activities in accordance with applicable international law and permit charters to favour arrangements that make use of such measures,
26. *Encourages* flag States and port States to further consider the development of safety and security measures on board vessels, including, where applicable, developing regulations for the use of PCASP on board ships, aimed at preventing and suppressing piracy off the coast of Somalia, through a consultative process, including through the IMO and ISO.

⁴⁴At the MSC’s 89th session from 11 – 20 May 2011.

⁴⁵ IMO Interim Guidance to shipowners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the high risk area. MSC.1/Circ. 1405. Rev. 1 (hereinafter referred to as Guidance to Shipowners).

⁴⁶IMO Interim Recommendations for Flag States regarding the use of Privately Contracted Armed Security Personnel on board ships in the high risk area. MSC.1/Circ. 1406. Rev.1 (hereinafter referred to as Guidelines to Flag States).

⁴⁷ Stephen Askins ‘Piracy: Issues arising from the use of armed guards’, Ince & Co Publication 2011 available at http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/Ince_Piracy-issues-arising-from-the-use-of-armed-guards.pdf accessed on 9 November 2013.

2. When would a security team be entitled to use lethal force and what are the rules governing the use of force?
3. Who needs to be notified of the presence of PCASP on board a vessel?
4. What criteria should be used for a risk assessment of a PMSC?
5. How will the export and import of weapons be controlled in coastal states' ports, and how is the licensing of such weapons by PMSC to be controlled?

Concerted effort is required to ensure consistent, coherent and codified requirements in order to ensure that international maritime trade is not unduly disrupted and that the interests of a port state's security are not compromised.

2.2 IMO Guidance to Shipowners

The Guidance to Shipowners⁴⁸ was drafted in response to the “extended use of armed guards and marked expansion in the number of firms offering armed maritime security services for vessels transiting the HRA⁴⁹”. For the purpose of this study, revision 2,⁵⁰ which was published on 25 May 2012, is discussed as it revoked revision 1.⁵¹ The IMO expressly acknowledged the rapid growth of PMSC firms offering protection against piracy and sought to provide guidance to the international maritime community on their use.

⁴⁸IMO Interim Guidance to shipowners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the high risk area. MSC.1/Circ. 1401. Rev. 1 - introduction paragraph 1.

⁴⁹ HRA stands for the “High Risk Area” as defined in Best Management Practices for Protection Against Somalia Based Piracy, Version 4 – August 2011 (BMP4) - IMO Resolution MSC.324(89) on ‘Implementation of Best Management Practice Guidance by the publication: IMO Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia’ – MSC.1/Circ. 1339 as:

Section 2.4: “an area bounded by Suez and the Strait of Hormuz to the North, 10`S and 78`E”.

⁵⁰ IMO Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, MSC.1/Circ.1405/Rev.2.

⁵¹ Ibid para. 9.

The urgent need to address the issue of PCASP is highlighted in the circular and reference is made to Guidance to Flag States and the MSC FAL Questionnaire,⁵² which should be read in conjunction with the Guidance to Shipowners.⁵³

The IMO did not officially endorse the use of PCASP,⁵⁴ but stated that the Guidance to Shipowners was drafted on the “understanding that shipping companies may find it difficult to identify reliable, professional private providers of armed security”.⁵⁵ The intention is to provide guidance to shipowners who decide to use PCASP to protect their crews, cargo and vessels from pirate attacks by striking a balance between protecting international trade routes and the security of coastal states, crews and persons plying their trade on the open seas. The IMO “have taken the lead in laying down international guidelines for [private armed security guards] PASGs at least; and States seem already to be adopting such international standard-setting rules into their domestic rules”.⁵⁶ The IMO states that Best Management Practice⁵⁷ (BMP) should be implemented in conjunction with the use of PCASP after a thorough risk assessment has been carried out by shipowners – not the alternative.⁵⁸ BMP refers to “(passive and non-lethal) measures vessels should take to protect themselves from a pirate attack... making it a kind of industry-policed soft-law”.⁵⁹

BMP will be referred to intermittently as most, if not all, P&I Clubs insist on strict compliance with same.⁶⁰ It is thus important that shipowners adhere to the provisions of BMP and

⁵² IMO Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on Board Ships, MSC-FAL. 1/Circ.2 - 22 September 2011.

⁵³ IMO Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, MSC.1/Circ.1405/Rev.2, para. 2/5.

⁵⁴ Ibid para. 1.1.

⁵⁵ IMO Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, MSC.1/Circ.1405/Rev.2.

⁵⁶ Clive R. Symmons ‘Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea’ (2012) 51/1 *Military Law and the Law of War Review* at 27.

⁵⁷ Best Management Practices for Protection Against Somalia Based Piracy, Version 4 – August 2011 (BMP4) - IMO Resolution MSC.324(89) on ‘Implementation of Best Management Practice Guidance by the publication: IMO Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia’ – MSC.1/Circ. 1339. This revoked MSC.1/Circ.1337, namely version 3 of BMP.

⁵⁸ IMO Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, MSC.1/Circ.1405/Rev.2 at Annex para. 1.5.

⁵⁹ Douglas Guilfoyle ‘Somali Pirates as Agents of Change in International Law – making and Organisation’ (2012) (1):3 *Cambridge Journal of International and Comparative Law* at 101.

⁶⁰ The International Group of P&I Clubs “recommend shipowners take all lawful, prudent and appropriate measures to harden ships against attack as outlined in the most recent version of the Best Management Practices (BMP)” –

governments should consider the document when developing or reviewing their policies on PCASP.

2.2.1 Divided command

An issue which needed to be urgently addressed was the chain of command on board vessels. The presence of PCASP, usually ex-military trained marines, could create a situation of divided command that might result in liability issues for shipowners and in turn, their insurers were an incident to occur. Having a PCASP team with a team leader on board a vessel under the command of the 'Master'⁶¹ may result in divided command when the vessel is under attack. This places both the owners and the Master at risk of falling foul of the International Convention for the Safety of Life at Sea (SOLAS)⁶² if his/her ultimate command is compromised.⁶³ The PMSC may argue that "the right to self-defence outweighs the Master's overall responsibility to his/her crew and environment".⁶⁴

The guidelines advise shipowners to obtain a clear statement from the PMSC that the Master of the vessel "remains in command and retains the overriding authority on board, and an agreed procedure in the event of the Master being unavailable".⁶⁵ Issues could arise where lethal force is utilised and the consequence is "outsourced to the captain of the private ship".⁶⁶ However, the practise has been to insert a clause that transfers the Master's authority to utilise force to the

available at <http://www.ukpandi.com/knowledge/article/ig-updates-piracy-faqs-august-2013-38707/> accessed on 11 November 2013.

⁶¹ Merchant Shipping Act 57 of 1951, as amended:Section 2: "master" means, in relation to a ship, any person (other than a pilot) having charge or command of such ship.

⁶² International Convention for the Safety of Life at Sea 1974, London: United Nations.

⁶³ Article 34(1) of the International Convention for the Safety of Life at Sea 1974;

The Owner, Charterer, the Company operating the ship as defined in Regulation 1x/1 or any other person shall not prevent or restrict the Master of the Ship from taking or executing any decision which, in the Master's professional judgment, is necessary for the safety of life at sea and protection of the marine environment.

⁶⁴ Stephen Askins 'Piracy: Issues arising from the use of armed guards' (page 2), Ince & Co Publication 2011 available at http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/Ince_Piracy-issues-arising-from-the-use-of-armed-guards.pdf accessed on 9 November 2013.

⁶⁵ IMO Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, MSC.1/Circ.1405/Rev.2, paragraph 5.9.

⁶⁶ Clive R. Symmons 'Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea' (2012) 51/1 *Military Law and the Law of War Review* at 42.

PCASP under certain circumstances and this could contravene the provisions of SOLAS.⁶⁷ Dutton is of the view that merely noting that the Captain has ultimate command and authority to order the use of force “can leave room for interpretation – and for errors”.⁶⁸ In contrast, Symmons argues that the Master may intervene and order a ceasefire if he/she perceives a “threat to the safety of his crew or marine environment”.⁶⁹ The issue that arises is the question of who has the ultimate authority to decide to engage a perceived threat; does the armed guards’ right to self-defence outweigh the Master’s duty to protect his/her crew and the marine environment? One would think that the right to life is the primary right; however, a well-documented set of rules and procedures in the event of an attack, along with efficient communication should ensure that any decision taken by either party on board has been discussed and sufficiently considered.

2.2.2 Rules on the use of force

The issue of the rules on the use of force (RUF) by a PCASP team is addressed in the IMO recommendations as well as the BIMCO Guardcon contract⁷⁰ and it is suggested that these be incorporated in or attached to the security contract between vessel owners and PMSC.⁷¹ The Guidance to Shipowners states that it is “essential that all PCASP have a complete understanding

⁶⁷ Clive R. Symmons ‘Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea’ (2012) 51/1 *Military Law and the Law of War Review* at 43.

⁶⁸ Yvonne M. Dutton ‘Gunslingers on the high seas: A call for regulation’ (2014) 24 *Duke Journal of Comparative & International Law* at 153.

⁶⁹ Clive R. Symmons ‘Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea’ (2012) 51/1 *Military Law and the Law of War Review* at 43.

⁷⁰ The Baltic and International Maritime Council (BIMCO) is a Non-Governmental Organisation (NGO) providing a wide range of services to the shipping industry with its head office in Copenhagen, Denmark. BIMCO’s main objective is “to facilitate the commercial operations of its membership by means of developing standard contracts and clauses, and providing quality information, advice, and education”. See generally <https://www.bimco.org> accessed on 16 March 2014. BIMCO Guardcon is a standard form contract for the employment of security guards on vessels – published 28 March 2012 available at https://www.bimco.org/~media/Chartering/Document_Samples/Sundry_Other_Forms/Sample_Copy_GUARDCO_N_04_01_2013.ashx accessed on 16 March 2014.

⁷¹ Stephen Askins ‘Piracy: Issues arising from the use of armed guards’ (page 3), Ince & Co Publication 2011 available at http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/Ince_Piracy-issues-arising-from-the-use-of-armed-guards.pdf accessed on 9 November 2013.

of the rules for the use of force as agreed between shipowners, PMSC and master”.⁷² The rules must be in writing and be agreed to by the parties providing security and having overall command of the vessel. There should be consistency in the RUF to ensure clarity to all those on board the vessel, including the Master and crew.

The right to self-defence is listed as a primary reason to utilise firearms on board.⁷³ The final decision on what the RUF entail is left to shipowners and PMSC because risk assessment and standard operating procedures may differ slightly between the parties. Dutton notes that “[T]he need to avoid chaos on the high seas is good reason for states to provide clear, detailed, and uniform guidance”.⁷⁴ The BIMCO Guardcon contract makes express provision for a written set of rules on the RUF in the form of an annexure.⁷⁵ BIMCO similarly provides for the overriding exception that firearms can be used in self-defence or the defence of others.⁷⁶

2.2.3 Notification to interested parties

The IMO strongly recommends that shipowners notify their vessels’ flag state and their P&I insurers of their decision to use PCASP aboard their vessels.⁷⁷ Askins suggests that it would be “prudent to discuss the use of armed guards with underwriters and cargo owners and an agreement should be reached with charterers on any expected deviation as a result of embarkation or the presence of PCASP (for fear of falling foul of the charter party for an unreasonable deviation from the intended route)”.⁷⁸

In essence, the Guidance to Shipowners sets out a list of requirements that should be adhered to prior to authorising the use of PMSC. The support of the P&I Clubs is important for shipowners,

⁷² IMO Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, MSC.1/Circ.1405/Rev.2, paragraph 5.13.

⁷³ Ibid para 5.15.

⁷⁴ Yvonne M. Dutton ‘Gunslingers on the high seas: A call for regulation’ (2014) 24 *Duke Journal of Comparative & International Law* at 155.

⁷⁵ BIMCO Guardcon Contract – Box 18 and Clause 3 of the Individual waivers to be signed by PSCAP boarding the vessel and Clause 8(b) and (c) of Masters Authority - makes reference to the set RUF attached to the agreement.

⁷⁶ BIMCO Guardcon Clause 8(d) and; IMO Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, MSC.1/Circ.1405/Rev.2, para. 5.15.

⁷⁷ Ibid para 3.1 and 5.2.

⁷⁸ Stephen Askins ‘Piracy: Issues arising from the use of armed guards’ (page 3), Ince & Co Publication 2011 available at http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/Ince_Piracy-issues-arising-from-the-use-of-armed-guards.pdf accessed on 9 November 2013.

as to fall foul of the terms of their P&I cover will result in the possible repudiation of claims. Furthermore P&I Clubs are known to reduce the war risk, kidnap and ransom premium by up to 50 per cent for members whose vessels carry a four-person armed security team on board whilst transiting the HRA.⁷⁹

2.2.4 Risk assessment

The criteria for conducting a risk assessment of PMSC are set out in the Guidance to Shipowners that specifically recommend that a due diligence be undertaken of experience, financial standing and the extent of comprehensive insurance cover held by the PMSC.⁸⁰ PMSC should demonstrate the following to shipowners:

- access to maritime legal representatives in port/coastal states,
- understanding of port states' requirements for the presence,
- movement and/or facilitation of PCASP within their territory,
- background and criminal checks of PMSC personnel,
- adequate training and certification for the use of security equipment and importantly,
- maritime as opposed to land based experience.⁸¹

2.2.5 Control of import, export and licensing of weapons

The management of firearms⁸² during transit, embarkation and disembarkation requires regulation as without the presence of weaponry, there would be fewer complications in having security personnel on board. The Guidance to Shipowners states that the PMSC should ensure

⁷⁹ International Group of Protection and Indemnity Clubs 'Marsh: Piracy – the insurance implications' - page 9 available at <http://www.igpandi.org/downloadables/piracy/news/Marsh%20Piracy%20implications.pdf> accessed on 11 November 2013. M Mineau 'Pirates, Blackwater and Maritime Security: The rise of Private Navies in response to Modern Piracy' (2010) Vol. 9 (1) *Journal of International Business and Law* at 67.

⁸⁰ IMO Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, MSC.1/Circ.1405/Rev.2, paragraph 3 – 4.

⁸¹ Ibid para 4 - 5.

⁸² All reference to firearms includes ammunition and security equipment.

“documentary compliance with the applicable flag, coastal and port State legislation”.⁸³ The PMSC should avoid any complications with documentary compliance in a port state as this could have a major impact on the operations of the vessel and PCASP, costing shipowners money and causing delays in the delivery of cargo. Askins states that the “licensing system needs to be streamlined”⁸⁴ and the researcher is of the view that the necessary permit applications or permission from port state governmental authorities to allow the disembarkation of weapons in its territory should also be streamlined. Any inconsistency and/or bureaucracy faced by owners or PMSC in port and coastal states, after permission has been granted by flag states, can impact the operations of the vessel and cause significant delays and wasteful expenditure. Compliance with a multitude of jurisdictions’ laws on weapons permits is certainly no easy task. Matters are further complicated by the fact that most countries accepting the entry into their territorial waters and ports of armed guards on board merchant vessels will be African and Middle Eastern countries – each with their own internal security concerns.

Other factors to consider in the management of firearms include correct licences, certification, proof of purchase and a complete inventory of weaponry and procedures relating thereto.⁸⁵ The Guidance to Shipowners states that there must be “full legal compliance with any applicable licences, national jurisdiction and port state laws”.⁸⁶ It requires that the number of weapons, ammunition and serial numbers be recorded. There should be standard procedures for on board and land based stowage of weapons as well as a prohibition on where and when not to handle same.⁸⁷

The IMO suggests that the categorisation of the PCASP should be determined by the flag state.⁸⁸ On the other hand, the BIMCO Guardcon contract provides for the categorisation of PCASP on board vessels as “supernumeries”⁸⁹. This is also accepted by the Panamanian Maritime

⁸³ IMO Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, MSC.1/Circ.1405/Rev.2, para. 5.12(1).

⁸⁴ Stephen Askins ‘Piracy: Issues arising from the use of armed guards’ (page 4), Ince & Co Publication 2011 available at http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/Ince_Piracy-issues-arising-from-the-use-of-armed-guards.pdf accessed on 9 November 2013.

⁸⁵ IMO Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, MSC.1/Circ.1405/Rev.2, paragraph 5.12.

⁸⁶ Ibid para 5.12.

⁸⁷ Ibid para 5.12(3) and (4).

⁸⁸ Ibid para 5.20.

⁸⁹ BIMCO Guardcon contract - Clause 7 (j).

Authorities.⁹⁰ The alternative would be for PCASP to be listed as crew. The researcher is of the view that a clear distinction between crew and PCASP allows for transparency in the industry and for port state control measures. Supernumeries means “exceeding the usual”⁹¹ and is an indication, in shipping terms, that persons so categorised are not part of the vessel’s crew.

The guidelines that shipowners should consider prior to utilising the services of a PMSC have been selected as they will be linked to the South African policy on armed guards. One can envisage the major complications shipowners and PMSC could face where a flag, port or coastal state’s existing laws on the movement of weaponry through its territory or on board ships flying its flag “may not have been developed taking into account or to cater for the various scenarios related to the embarkation or disembarkation of PCASP or of their firearms or security-related equipment, or for the arrival...”⁹²

2.3 IMO Recommendations to Flag States

This study focuses on South Africa, which has no merchant vessels registered under its flag but is an important port state. Durban is the busiest port in Africa and has the largest container handling infrastructure in the southern hemisphere.⁹³ As a port state, South Africa should consider the IMO guidelines to flag states on the use of PCASP in developing its own laws and policies.

The Revised Interim Recommendations for Flag States (Flag State Recommendations)⁹⁴ are not intended to force flag states to adopt certain policies but strongly urge governments to develop and publish legislation that either allows for or prohibits the use of PCASP.⁹⁵ The document

⁹⁰ Panama Maritime Authority ‘Requirements regarding the use of Privately Contracted Armed Security Personnel on board Panamanian Flagged Vessels’ - Merchant Marine Circular MMC-228 (6 July 2011) para.4 - available at <http://www.skuld.com/upload/INSIGHT/Piracy/Panama-MMC-228.pdf> - accessed on 16 November 2013.

⁹¹ Merriam-Webster online dictionary available at <http://www.merriam-webster.com/dictionary/supernumerary> accessed on 16 March 2014.

⁹² IMO Interim Recommendations for Port and Coastal States Regarding the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, MSC.1/Circ.1408/Rev.1 – Introduction para. 6.

⁹³ Department of Public Enterprises website and facts on Transnet limited as a state owned company, available at <http://www.dpe.gov.za/state-pg-9-32> accessed on 24 November 2013.

⁹⁴ IMO Revised Interim Recommendations for Flag States regarding the Use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area. MSC.1/Circ. 1406/Rev.2 (25 May 2012).

⁹⁵ IMO Revised Interim Recommendations for Flag States regarding the Use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area. MSC.1/Circ. 1406/Rev.2 (25 May 2012), annex para 2.

states that “the carriage of such personnel and their firearms and security related equipment is subject to flag state legislation and policies”,⁹⁶ thereby affirming the sovereignty of member states to determine whether to allow the use of PCASP. However, the IMO requires flag states to clarify their position on armed guards to the organisation for circulation to all member states.⁹⁷

The Flag State Recommendations are short on detail and suggest that if a flag state does decide to allow the use of PCASP minimum requirements should be considered in the policy document.

⁹⁸

The publication of the Flag State Recommendations led a number of member states to amend their policies permitting the use of PCASP on board vessels flying their flag; Greece, Denmark, the Isle of Man, Liberia, Malta, Marshal Islands, Singapore, Finland, Panama, Germany, Hong Kong, Italy, Norway, Spain, the United Kingdom and the United States of America amended their policies/laws on armed guards.⁹⁹

The Flag State Recommendations and the reaction thereto are not considered in detail as the study focuses on South Africa’s policy on PCASP on board vessels arriving in its territory. It is, however, worth noting that the Flag State Recommendations should be read in conjunction with the IMO Guidelines to port states¹⁰⁰ and shipowners.¹⁰¹

2.4 IMO Recommendations to Port or Coastal States

The recommendations discussed in this section are important in understanding South Africa’s laws and policies on permitting, and the movement and storage of weapons entering South African ports on board merchant vessels deploying PCASP as well as whether these laws

⁹⁶ Ibid.

⁹⁷ Ibid annex para. 5.3.

⁹⁸ Ibid annex para. 2.3 - 2.5.

⁹⁹ International Chamber of Shipping (ICS), European Community Shipowners Associations (ECSA) ‘Comparison of Flag state laws on armed guards and arms on board’ (June 2012) BIMCO publication available at https://www.bimco.org/en/Security/Piracy/Guidance_on_piracy/~media/Security/Piracy/Private_Armed_Guards_Flag_State_Laws_June_2012.ashx accessed on 4 April 2014.

¹⁰⁰ IMO Revised Interim Recommendations for Port and Coastal States regarding the Use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area. MSC.1/Circ.1408/Rev.1.

¹⁰¹ IMO Interim Guidance to Shipowners, Ship Operators and Shipmasters on the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, MSC.1/Circ.1405/Rev.2.

effectively facilitate such activities in line with the international guidelines to coastal states on the use of PCASP.

South Africa is a member state of the UN and IMO and although voluntary, member states are encouraged to adopt policies consistent with those of the IMO and other UN sub-committees. The IMO Interim Recommendations for Port and Coastal States state:

...Member Governments... should have in place policies and procedures... Such policies and procedures... should facilitate the movement of PCASP and of their firearms.¹⁰²

The port state recommendations came at a critical period for the shipping industry when the number of member states favouring the use of armed guards on vessels transiting the HRA was increasing.¹⁰³

The MSC recognised that “there was an urgent need to develop further recommendations to Governments, and, in particular, for port states, on aspects related to the embarkation, disembarkation and carriage of PCASP and firearms”.¹⁰⁴ The issue of armed guards is complex in that numerous interested parties need to be considered, particularly since it relates to the movement of weapons. The MSC recognised that although flag state authorisation may be granted, “the facilitation of the movement of PCASP was affected by the national legislation and policies of port states and there was a need to address the concerns of port states with regards to the presence of PCASP and firearms... in their territorial seas”.¹⁰⁵ This is illustrated by the bureaucratic nature and various interpretations of existing legislation in South Africa when trying

¹⁰² IMO Interim Recommendations for Port and Coastal States regarding the Use of Privately Armed Security Personnel on board ships in the High Risk Area, IMO MSC.1/Circ. 1408 (16 September 2011) and subsequently revised in IMO Revised Interim Recommendations for Port and Coastal States regarding the Use of Privately Armed Security Personnel on board ships in the High Risk Area, IMO MSC.1/Circ. 1408/Rev.1 (25 May 2012): Annex para. 5.

¹⁰³ Project of the Graduate Institute of International and Development Studies, Geneva, ‘*Small Arms Survey 2012: Moving Targets*’ page 206 – available at <http://books.google.co.za/books?id=hY3s5nHUM24C&pg=PA206&lpg=PA206&dq=SAMI+percentage+of+ships+carrying+guards&source=bl&ots=YO81DBaF2D&sig=IUmMbfL6Vi4bPnRjkg826Ca79c&hl=en&sa=X&ei=Qy9-UvnrLMHX7Abk8ICoAg&ved=0CCgQ6AEwAA#v=onepage&q=SAMI%20percentage%20of%20ships%20carryi ng%20guards&f=false> accessed on 9 November 2013.

¹⁰⁴ IMO Revised Interim Recommendations for Port and Coastal States regarding the Use of Privately Armed Security Personnel on board ships in the High Risk Area, IMO MSC.1/Circ. 1408/Rev.1, para. 1.

¹⁰⁵ *Ibid* para. 2.

to obtain permits and authorisation for the landing of PCASP during 2011; this is discussed in Chapter Four with reference to unreported case law.

The port state recommendations suggest that member states develop policies with regard to embarkation, disembarkation and vessels with PCASP and firearms on board. Issues such as relevant notification of the authorities, transport, storage and declaration of weapons, identification of PCASP team members and flag state authorisation of the presence of PCASP on board should be considered when developing such policies and procedures.¹⁰⁶

Member states are “urged to bring the port recommendations to the attention of all national authorities concerned with border control issues”¹⁰⁷ and to “bring to the attention of the MSC the results of the experience gained from the use of the port recommendations”.¹⁰⁸

A member state’s sovereignty is not threatened as the “recommendations are not intended to override or otherwise interfere with the implementation and enforcement of national legislation”.¹⁰⁹

PMSC firms and vessel owners “need to know whether and under what conditions the embarkation and disembarkation of PCASP and firearms is allowed” in port states.¹¹⁰ Member states’ policies should “facilitate the movement of PCASP”.¹¹¹ The port state recommendations state that “such policies and procedures should be made known to the shipping industry and PCASP service providers and communicated to the IMO in order to enable flag states to act accordingly”.¹¹²

Communication is a key feature of the port state recommendations and the IMO published a questionnaire¹¹³ which coastal member states were urged to complete and submit to the MSC by 30 November 2011, preferably attaching a copy of their national legislation regulating the

¹⁰⁶ Ibid Annex para. 7.

¹⁰⁷ Ibid para. 6.

¹⁰⁸ Ibid para. 7.

¹⁰⁹ Ibid para. 2.

¹¹⁰ IMO Revised Interim Recommendations for Port and Coastal States regarding the Use of Privately Armed Security Personnel on board ships in the High Risk Area, IMO MSC.1/Circ. 1408/Rev.1.

¹¹¹ Ibid para. 5.

¹¹² Ibid.

¹¹³ IMO Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on Board Ships, MSC-FAL. 1/Circ.2 - 22 September 2011.

presence of armed guards in their ports.¹¹⁴ The IMO has received responses from 20¹¹⁵ coastal states. However, South Africa's response is nearly two-and-a-half years overdue.¹¹⁶

Reference to South Africa's position on armed guards arriving in its ports is contained in a notice from P&I Associates (Pty) Ltd, a local company acting as the correspondent for international P&I Clubs, dated 20 February 2010¹¹⁷ distributed amongst the International Group of Protection and Indemnity Clubs.¹¹⁸ This highlights that an application for a firearms permit must be submitted to the South African Police Service (SAPS) at least 21 days prior to the arrival of the armed guards, failing which Masters of vessels may be arrested and criminally charged for contravening the Firearms Control Act 60 of 2000 (FCA).¹¹⁹ The SAPS set out their interpretation of the applicability of the FCA in a letter addressed to the South African Association of Ship Operators and Agents and confirmed the "21 day rule".¹²⁰ Some authors have noted that this rule applies,¹²¹ whilst others state that in 2012 South Africa would not allow armed guards in its territorial waters.¹²²

¹¹⁴ Ibid para 8.

¹¹⁵ These states include Australia, Brazil, Denmark, Egypt, France, Hong Kong, China, India, Israel, Jordan, Liberia, Madagascar, Mauritius, Panama, Somalia, Spain, the United Kingdom, and the United States of America. See IMO 'Responses received from port and coastal State requirements related to privately contracted armed security personnel (PCASP)' (17 November 2011) available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Responses-received-on-Private%20Armed%20Security.aspx> accessed on 5 April 2014.

¹¹⁶ Ibid.

¹¹⁷ North of England P&I Association 'Piracy: Somalia and the Gulf of Aden – updates' (21 November 2011) available under the South Africa chapter at <http://www.nepia.com/publications/industrynews/ships/africa/795/> accessed on 24 November 2013.

¹¹⁸ The International Group of P&I Clubs comprises of 13 of the Worlds' biggest P&I Clubs which provide insurance cover to approximately 90 per cent of the world's merchant vessels. The members re-insure each other in a mutually beneficial manner and enter into various agreements – available at <http://www.igpandi.org/Home> accessed on 24 November 2013.

¹¹⁹ North of England P&I Association 'Piracy: Somalia and the Gulf of Aden – updates' (21 November 2011) available under the South Africa chapter at <http://www.nepia.com/publications/industrynews/ships/africa/795/> accessed on 24 November 2013.

¹²⁰ Brigadier Gopaul 'Developing a mechanism to control the movement of arms and ammunition in and through the sea ports of entry, used by private armed security agencies to protect vessels from piracy and armed robbery at sea' – SAPS Communiqué from the Office of the National Commander: Durban Harbour addressed to the SAASOA Durban Chapter Chairperson, 28 February 2011, (Ref: 3/5/1) annexed to this study marked "B" item 3. *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011 annexed to the replying affidavit of Mark Andrew Wilson (see paragraph 4.6) marked "MAW9".

¹²¹ Ruwantissa, Abeyratne 'The use of armed guards on board merchant vessels' (2012) 5 *Journal of Transportation Security* at 159 available at <http://link.springer.com/article/10.1007%2Fs12198-012-0088-5#> accessed on 13 March 2014.

¹²² Yvonne M. Dutton 'Gunslingers on the high seas: A call for regulation' (2014) 24 *Duke Journal of Comparative & International Law* at 122.

The MSC acknowledged that local legislation or policies may not cater for the “very recent and still evolving development”¹²³ of the use of PCASP on board merchant vessels. Member states “should not establish policies and procedures which hinder or may hinder the continuation of maritime trade or interfere with the navigation of ships and should ensure that all are consistent with international law”.¹²⁴

Pizor states that, “[I]n order for armed guards to provide the necessary protection against pirates, the laws of the coastal and flag state countries need to allow merchant ships to hire armed guards. Countries need to amend their maritime law (sic) so ships can be protected in all seas, whether territorial or international. Countries can then continue to control the safety in territorial waters through regulations and licensing schemes.”¹²⁵ Pizor comments that “a unified standard will help ships travelling to several ports on the same trip to ensure compliance with all regulations.”¹²⁶ It is suggested that the guidelines require littoral states to be consistent in their policies on armed guards in order to assist PMSC to ensure compliance with the laws in the territories within which the teams will transit.¹²⁷

2.5 IMO Guidelines to Private Maritime Security Companies

In 2012, the IMO addressed the growing maritime security industry by publishing interim guidelines on PMSC.¹²⁸ The PMSC Guidelines were designed to complement international policies relating to the issue of armed guards¹²⁹, thereby ensuring consistent development of policies. Member states “are also urged to take any necessary action to ensure the

¹²³ IMO Revised Interim Recommendations for Port and Coastal States regarding the Use of Privately Armed Security Personnel on board ships in the High Risk Area, IMO MSC.1/Circ. 1408/Rev.1, para.6.

¹²⁴ Ibid.

¹²⁵ Brittany E. Pizor ‘Lending an “Invisible Hand” to the Navy: Armed Guards as a free market assistance to defeating piracy’ (2012) Vol. 45 (1) *Case Western Reserve Journal of International Law* at 558.

¹²⁶ Ibid 562.

¹²⁷ Potgieter, TD ‘Maritime Security in the Indian Ocean: strategic setting and features’ (August, 2012) 236 *Institute for Security Studies Paper* at 12. See also Theodore T. Richard ‘Reconsidering the Letter of Marque: Utilizing Private Security Providers Against Piracy’ (2010) 39 (3) *Public Contract Law Journal* at 454-455 where he states that security providers must not only comply with flag states’ laws, but the laws of coastal states through which they are transiting.

¹²⁸ IMO Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on board ships in the High Risk Area, IMO MSC.1/Circ. 1443 (hereinafter referred to as PMSC Guidelines)

¹²⁹ Ibid para 3.

implementation, as appropriate, of the interim guidance given in the annex”.¹³⁰ The MSC recognises that there is no international law or standard which governs the unique position of armed guards on merchant vessels. The PMSC Guidelines “would improve governance, reduce the potential for accidents and promote competent, safe and lawful conduct at sea”.¹³¹

PMSC are urged to obtain the necessary prior authorisation from the flag state before PCASP board a vessel for transit, as well as the country where the PMSC is registered and states in which operations will be conducted or through which teams will transit.¹³² This is relevant for South Africa as a port state since PCASP teams have and continue to transit and conduct operations in South African territory.

The PMSC Guidelines are not binding but “provide minimum recommendations on the competencies and abilities a professional PMSC is expected to have”.¹³³ They therefore assist shipowners, and port and flag states when faced with a request for permission for a PCASP team to enter their territory or board a vessel with weapons. The PMSC Guidelines recommend that the PMSC provide supporting documentation to enable a shipowner to undertake a due diligence exercise which includes demonstrating access to maritime legal advice in the areas of operation.¹³⁴ This includes the licensing and permitting of weapons.

The PMSC must “establish competence and experience in maritime and piracy awareness as opposed to land based skill”.¹³⁵ It must have a working knowledge of BMP 4 and provide testimonials from previous clients.¹³⁶ There should be an established policy on vetting PCASP including background checks, criminal record checks and employment history verification. An employee should demonstrate via documentary proof adequate weapons, rules of force and all relevant policy training.¹³⁷ This is important for vessel owners as they require competent security personnel to protect their assets and crew. For example, the majority of PCASP are ex-

¹³⁰ Ibid para 7.

¹³¹ Ibid Annex para 1.

¹³² Ibid Annex para. 3.

¹³³ IMO Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on board ships in the High Risk Area, IMO MSC.1/Circ. 1443, Annex para. 4.

¹³⁴ Ibid , Annex para. 3.2, 3.3.

¹³⁵ Ibid Annex para. 3.7/8.

¹³⁶ Ibid Annex para. 3.7.3.

¹³⁷ Ibid Annex para. 4.3.

Royal British Marines. A number of British PMSC have a policy that only these men and woman will be employed to provide protection on the high seas.¹³⁸

2.5.1 Management of firearms

Paragraph 5 of the Annex to the PMSC Guidelines sets out the standard recommendations for management of the firearms carried by PCASP. PMSC should provide proof of compliance with port and coastal states' laws relating to the carriage, storage, embarkation and disembarkation of weapons.¹³⁹ There should be provision for stowage of the weapons on board as well as containers in which the equipment will be transferred on and off a vessel.¹⁴⁰ In essence, this means that the PMSC should adopt codified procedures for the movement, storage and handling of the weapons – self regulation according to the specific needs and requirements of PMSC, vessel owners and transiting port state regulations.

The procedures for the management of firearms should comply with port state legislation. South Africa thus has an opportunity to publish policies or clarify the existing firearms permit procedures so that PMSC can adhere thereto prior to their arrival in South African territory. The researcher will recommend amendments to the current legislation whilst considering the PMSC Guidelines.

The rules of force should be agreed in writing between shipowners and PMSC.¹⁴¹ This is a common theme throughout the IMO recommendations and is important for the regulation of PCASP.

The MSC recommends that there be a clear policy on record keeping and incident reporting by the PMSC.¹⁴² This is to ensure that information is shared between member states and shipowners in order to promote transparency in the industry.

¹³⁸ Charlotte Edgar 'To catch a pirate: The British ex-servicemen battling to protect international shipping from the clutches of Somali pirates' (20 December 2011) available at <http://www.dailymail.co.uk/home/moslive/article-2071108/British-ex-servicemen-battling-protect-international-shipping-Somali-pirates.html> accessed on 4 December 2013.

¹³⁹ IMO Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on board ships in the High Risk Area, IMO MSC.1/Circ. 1443, Annex para. 5.10.1.

¹⁴⁰ Ibid Annex para. 5.10.2 and 5.10.4.

¹⁴¹ Ibid Annex para. 5.13.14.

The PMSC Guidelines have been welcomed by the Security Association of the Maritime Industry (SAMI)¹⁴³ in light of the increased number of PMSC offering armed maritime security services.¹⁴⁴ The SAMI has developed a three stage accreditation process for its 57 members¹⁴⁵ including due diligence, system checks and a site visit.¹⁴⁶ The SAMI self-regulation system for PMSC will enhance safety within the maritime security industry. The potential for accidental injury or death is of concern to experts in the field of maritime security and the prevention of loss of life is of utmost importance. In February 2012, two Indian fishermen were allegedly shot and killed by two Italian Vessel Protection Detachments (VPDs)¹⁴⁷ whilst providing protection against piracy on board the mv “Enrica Lexie”.¹⁴⁸ It should be noted that there is a distinction between VPDs who are military personnel hired from the state by commercial vessel owners/operators and PCASP who are privately contracted armed security providers not in the service of a state’s military. This incident nevertheless highlights the issues that could arise with the placement of armed protection personnel on board merchant vessels as a means of self defence against piratical attack.¹⁴⁹ The VPDs allegedly mistook the unarmed fishermen for pirates and this led to vigorous diplomatic engagement between the two countries. The Italians

¹⁴² IMO Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on board ships in the High Risk Area, IMO MSC.1/Circ. 1443, Annex para. 5.18.

¹⁴³ The Security Association of the Maritime Industry (SAMI) is a maritime security association whose fundamental role is to bridge the gap between shipping and security. “SAMI is actively involved in a number of projects covering a spectrum of maritime security issues and projects; from education and training through to operational guidance and regulation.” SAMI works in collaboration with shipping organisations, governments, academics, welfare bodies and its members to highlight key issues and encourage development within the maritime security industry. See more at: <http://www.seasecurity.org/our-work/> accessed on 20 March 2014.

¹⁴⁴ SAMI ‘Security Accreditations Continues’ (25 April 2012) available at <http://www.seasecurity.org/mediacentre/security-accreditations-continue/> accessed on 20 March 2014.

¹⁴⁵ A list of the approved PMSC members of SAMI is available at http://www.seasecurity.org/directory_categories/certified-pmscs/ accessed on 20 March 2014.

¹⁴⁶ SAMI press release ‘Private Maritime Security Accreditations Launch’ (1 February 2012) available at <http://www.seasecurity.org/mediacentre/private-maritime-security-accreditations-launch/> accessed on 20 March 2014.

¹⁴⁷ VPDs are privately hired military teams providing protection against sea piracy on board merchant vessels. Brown explains that “their role has been explained as ‘self-defence, liaison with law enforcement agencies, training and security vetting of personnel, the use of weapons, communications with sovereign authorities, record-taking and evidence’” – see James Brown ‘Pirates and Privateers: Managing the Indian Ocean’s Private Security Boom’ at page 9 (September 2012) Lowy Institute for International Policy available at <http://www.lowyinstitute.org/publications/pirates-and-privateers-managing-indian-oceans-private-security-boom> - accessed on 20 March 2014.

¹⁴⁸ Anurag Kotoky ‘Indian Police detain Italians accused of killing fishermen’ (19 February 2012) Reuters available at <http://www.reuters.com/article/2012/02/19/us-india-italy-fishermen-idUSTRE81I0F720120219> accessed on 4 December 2013.

¹⁴⁹ Yvonne M. Dutton ‘Gunslingers on the high seas: A call for regulation’ (2014) 24 *Duke Journal of Comparative & International Law* at 121.

were permitted to return home to vote in the general elections and have since returned to India to face charges. This was not without controversy because the Italian government initially refused to send the VPDs back to face trial in the Indian Supreme Court despite an undertaking to do so.¹⁵⁰ Important issues of law will be addressed in the trial as it is alleged that the incident took place in international waters on an Italian flagged vessel.¹⁵¹ The Italian government will argue, on behalf of its two citizens, that the Indian courts do not have jurisdiction as the incident did not occur within Indian territorial waters, and, in the alternative, that the VPDs acted in self-defence¹⁵².

The policies of port states and flag states, that have the largest vessel registry and which exercise jurisdiction over a transit route leading to and from the Gulf of Aden or situated nearby are discussed in the following chapter.

¹⁵⁰ Liz McMahon 'Return of Italian marines to India raises stakes for armed guards' (25 March 2013) – Lloyds List available at <http://www.lloydslist.com/ll/sector/regulation/article419744.ece> accessed on 20 March 2014.

¹⁵¹ A Banerji 'Murder Trial of Italian Marines in India navigates murky waters' (10 June 2013) Reuters available at <http://in.reuters.com/article/2013/06/10/india-italy-marines-idINDEE95900B20130610> accessed on 4 December 2013.

¹⁵² Clive R. Symmons 'Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea' (2012) 51/1 *Military Law and the Law of War Review* at 29 and 57 see also in this regard footnote 174 of the article.

CHAPTER THREE

THE GLOBAL RESPONSE

3.1 Foreign jurisdiction laws and policies

This chapter discusses five IMO member states' policies on armed guards with regard to vessels flying their flag and/or transiting through their territory. It also examines the policies of states which have been identified as PCASP hub points and which facilitate the movement of teams in their territory.

It is important at the outset to distinguish between flag states' laws on authorisation of the use of PCASP on vessels and port or coastal states' laws regarding the transiting of weapons through the territory. The policies of both flag and coastal states on armed guards are analysed in order to assist South Africa to develop its laws to facilitate the movement of PCASP and weapons in its territory.

Egypt's policies on armed guards transiting through its territory, namely the Suez Canal, are highlighted because of the significant changes that took place in respect of those policies within a period of six months, and the importance of the Suez as a transit route to the Gulf of Aden. The Egyptian policies are further relevant for the purpose of this study that focuses on the port state regulation of PCASP, in particular, South Africa's position as a port state on the east coast of Africa. Comparative reference is made to the policies of other states having jurisdiction near the Gulf of Aden and academic commentary thereon.

Panama has the largest tonnage in the world registered under its flag¹⁵³ and it is therefore important to determine whether the maritime administration permits the presence of PCASP on board vessels flying its flag. This is relevant as a large number of these vessels will be calling at South African ports, and it is a useful means of examining the consequences of inconsistencies between flag state policies and the position adopted by South Africa as a port state.

¹⁵³ Michele Labrut 'Panama Registry keeps top slot but growth slows' (25 February 2013) Seatrade Global available at <http://www.seatrade-global.com/news/americas/panama-registry-keeps-top-slot-but-growth-slows.html> accessed on 29 March 2014.

This chapter also discusses developments that led to the promulgation of the Italian law decree 107/2011 on the use of VPDs. It is useful to consider the alternative open to states of authorising the use of VPDs rather than PCASP. The disadvantages of adopting such a policy are highlighted with reference to the mv “Enrica Lexie” mentioned in Chapter Two. The Italian government is responsible for the actions of the naval officers even though they were deployed on a merchant and not a naval vessel (or warship). They are in the employ of or are state agents and this could lead to diplomatic issues between states where an incident occurs.

The amendments to the Norwegian Ship and Security Act¹⁵⁴ and the United Kingdom (UK) guidance from the Department for Transport are discussed as both nations are described as “traditional maritime nations”¹⁵⁵ and have thus influenced the development of global maritime policy.¹⁵⁶

3.2 Egypt

The Suez Canal is subject to the Convention Respecting the Free Navigation of the Suez Maritime Canal 1888 (Constantinople Convention) which guarantees the “free right of passage of all vessels irrespective of flag and contracting states may not interfere with the free use of the canal”.¹⁵⁷ The Suez Canal falls within the Egyptian territorial sea and is arguably the most important transit lane in the world. Egyptian laws apply to vessels intending to transit through the Canal.

¹⁵⁴ Amendments to Regulation of 22 June 2004 no. 972, by the insertion of Sections 17 – 25 concerning protective security measures on board ships and mobile drilling units into Act of 16 February 2007 No.9 relating to Ship Safety and Security (The Ship Safety and Security Act).

¹⁵⁵ Frans A.J. Waals; Dr. Albert W. Veenstra ‘A forecast model and benchmarking of the supply and demand of maritime officers’ (November 2012), paper presented at the IAME Panama 2002 International Steering Committee available at https://www.google.se/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CFAQFjAF&url=http%3A%2F%2Fwww.eclac.cl%2Ftransporte%2Fperfil%2Fiame_papers%2Fproceedings%2FWaals_et_al.doc&ei=UCESU62RNaiCzAPp_4KgCw&usg=AFQjCNE9PR-WGh1-oQwFSBbolMmjy3OTSA&sig2=ru5_iP5XUJJoJbA0w4tREA accessed on 20 March 2014.

¹⁵⁶ Sean Patrick Mahard ‘Blackwater’s New Battlefield: Toward a Regulatory Regime in the United States for Privately Armed Contractors at Sea’ (2014) 47(1) *Vanderbilt Journal of Transnational Law* at 337, 356-359, 360-365. See the discussion on the Norwegian laws; the author suggests that the United States Amendments should be modelled on same.

¹⁵⁷ Article I of the Convention Respecting the Free Navigation of the Suez Maritime Canal 1888 – The Constantinople Convention, 1904.

The policies adopted by Egypt are an example of how a coastal state's decision to reverse the permitting of armed guards moving through its territory can potentially affect PMSC and vessel operations. For example, if the Egyptian authorities declare that PCASP are not permitted to transit through the Suez Canal with weapons on board whilst a vessel is two days sailing distance from the Canal, the PMSC and vessel owners will have to make urgent alternative arrangements to disembark the weapons prior to entering Egyptian territory. The vessel could be diverted to an unscheduled port or the PMSC will need to make arrangements to deploy a small craft to take possession of the weapons – by transferring out at sea. This will inevitably cause delays and increased costs for both the PMSC and shipowner.

Political instability in Egypt substantially affected vessel and PMSC operations because of the blanket prohibition of armed guards on vessels entering the Suez Canal. This is recorded in a Notice from the Head of the Maritime Transport Sector, dated 29 August 2011 addressed to the Alex Shipping Chamber.¹⁵⁸ A meeting with the Egyptian Armed Forces concluded with the decision “not to allow commercial vessels to have arms/security teams on board, as this is contrary to International Maritime Law”.¹⁵⁹ The notice re-iterated that, “the Suez Gulf is entirely Egyptian territorial water” and that “the Master or the Agent of the vessel shall provide a Commitment letter to the Pilot and Port Authority stating that the vessel does not have any arms or ammunition on board used for securing the vessel”¹⁶⁰ upon the boarding of the pilot in Egyptian territory.

The notice does not clarify on what grounds the presence of PCASP on board merchant vessels is “contrary to international maritime law”. The IMO Guidelines to Shipowners and Flag States, discussed in Chapter Two, tacitly authorised the use of PCASP on board vessels as a means of protection against piracy and were published in May of the same year, 2011.¹⁶¹ A member state has exclusive sovereignty over its territorial sea; however, this is subject to a vessel's right to

¹⁵⁸ Egyptian Department of Maritime Licensing ‘Maritime Transport Sector Document Nr. 420/1/3/N’ addressed to the Chairman of Alex Shipping Chamber (29 August 2011) which is annexed to this dissertation marked “B” item 5 available at <http://www.britanniapandi.com/download.cfm?docid=BE337F32-4B04-4BB4-9C55E2D7701BF54F> accessed on 20 March 2014.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ IMO Interim Guidance to shipowners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the high risk area. MSC.1/Circ. 1401. Rev. 1. IMO Interim Recommendations for Flag States regarding the use of Privately Contracted Armed Security Personnel on board ships in the high risk area. MSC.1/Circ. 1406. Rev.1.

innocent passage.¹⁶² The IMO expressly confirmed that “no international guidance or standards exist at present for PMSC”.¹⁶³ The researcher is thus of the view that the Egyptian authorities were mistaken and that, in general terms, there is no contravention of international maritime law if a PCASP team is on board a merchant vessel. The Egyptian notice simply refers to ‘international law’ without identifying a specific law. The relevant law is Article 19 of UNCLOS which provides the right of free passage, “provided the innocent passage is not prejudicial to the peace, good order or security of the coastal state”.¹⁶⁴ Article 19(2) of UNCLOS sets out various categories of non-innocent activity including, “any exercise or practice with weapons”.¹⁶⁵ Petrig states that “it seems difficult to argue that the simple presence of arms or armed guards on board a private ship is a non-innocent activity” because “the use of armed force in self-defence or defence of others by PMSC personnel is thus not an active hostile use of force as required by the wording ‘any exercise or practice with weapons of any kind’”.¹⁶⁶

The extraordinary internal security situation in Egypt during 2011 with the uprising against the government of President Mubarak resulted in increased fears of weapons movement in Egyptian territory. For example, Onuoha notes that Blackwater Worldwide, now operating as a PMSC, was investigated for arms trafficking in Iraq in 2007 whilst providing private military security services.¹⁶⁷ Under these circumstances, it was not unreasonable for the state to prohibit the transit of weapons through their territory by private security providers; however, it is submitted that such prohibition should have been made with clear reference to the provisions of international law and not based on an allegation that same is generally contrary to international maritime law.

The notice expressly stated that the Master and crew of any vessel found with arms on board whilst in Egyptian territory would be subject to arrest, as would the vessel, and prosecution by

¹⁶² Article 17 and 19 of the United Nations Convention on the Law of the Sea, 1982, New York: United Nations (UNCLOS).

¹⁶³ IMO Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on board ships in the High Risk Area, IMO MSC.1/Circ. 1443, Annex para. 1.2.

¹⁶⁴ Article 19 of UNCLOS.

¹⁶⁵ Article 19(2) (b) of UNCLOS.

¹⁶⁶ A Petrig ‘The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates’ – *International and Comparative Law Quarterly* (UK) (1 July 2013) at 28 – 32.

¹⁶⁷ Freedom C Onuoha ‘Sea piracy and maritime security in the Horn of Africa: The Somali coast and Gulf of Aden in perspective’ (2009) 18(3) *African Security Review*, Institute for Security Studies at 41.

the Egyptian Prosecuting Authority.¹⁶⁸ The IMO Guidelines to coastal states recommended that “member states should not establish policies and procedures which hinder or may hinder the continuation of maritime trade or interfere with the navigation of ships and should ensure that all are consistent with international law”.¹⁶⁹ If it can be proved that vessels were delayed or diverted from Egyptian territorial waters, the researcher is of the view that the prohibition policy did in fact hinder maritime trade and/or interfere with the navigation of ships. For example, a vessel on a liner trade carrying armed guards that is heading towards the Suez Canal to deliver cargo to a European country two days prior to the issue of the Egyptian notice would have been forced to call at an unscheduled port and/or make arrangements for the transfer of the PCASP and weapons from the vessel. The costs and logistical implications could run into tens of thousands of dollars.

In September 2011, the Egyptian Ministry of Transport objected to the Ministry of Defence’s requirements set out in the 29 August 2011 notice, “on the basis that this decision is quite difficult to adopt and would lead to a negative impact on shipping through Suez Canal (sic)”.¹⁷⁰ After discussions between the Ministry of Defence, Department of Transport and Suez Canal Authority, it was agreed that vessels transiting the Suez Canal may carry armed guards on board provided “written authorization from flag state, details of arms and ammunition, full details of the PMSC, the number of guards on board as well as a declaration that the weapons will not be used in Egyptian territorial waters is submitted”.¹⁷¹

This agreement was revoked in January 2012 when the Head of the Maritime Sector issued another notice to the Chairman of the Port Said Chamber of Shipping, and to shipping agents, setting out the change in policy on PCASP on board vessels in Egyptian territory.¹⁷²

¹⁶⁸ Egyptian Department of Maritime Licensing ‘Maritime Transport Sector Document Nr. 420/1/3/N’ addressed to the Chairman of Alex Shipping Chamber (29 August 2011) is annexed to this dissertation marked “B” item 5 available at <http://www.britanniapandi.com/download.cfm?docid=BE337F32-4B04-4BB4-9C55E2D7701BF54F> accessed on 20 March 2014.

¹⁶⁹ IMO Revised Interim Recommendations for Port and Coastal States regarding the Use of Privately Armed Security Personnel on board ships in the High Risk Area, IMO MSC.1/Circ. 1408/Rev.1, Annex para. 6.

¹⁷⁰ Egyptian Marine Insurance Consultations and Services (EMICS) ‘*Piracy-Weapons & Armed Guards on board vessels transiting Suez Canal*’ – (October 2011) available at www.emicsegypt.com accessed on 14 May 2013.

¹⁷¹ Chairman, Adel El Lamy ‘Port Said Chamber of Shipping Notice to Members’ - 22 September 2011 available at www.emicsegypt.com accessed on 14 May 2013.

¹⁷² Rear Admiral / El Sayed Hamed Hedaya ‘Maritime Transportation Sector Notice to the Chairman of Port-Said Chamber of Shipping’ - January 2012 available at <http://www.skuld.com/upload/INSIGHT/Piracy/Egypt%20->

Masters calling at Egyptian ports with arms on board are now required to “certify that weapons are under lock in a closed box and are to be delivered to the port police upon berthing, to be returned at time of departure”.¹⁷³ The notice states that: “for Suez Canal transiting commercial vessels, the port security police, will receive the weapons on board at the entry point and transport it by land, then redeliver it to the vessel again at point of canal exit”.¹⁷⁴ At first glance this seems reasonable; however, the Suez Canal is 193.30 kilometres¹⁷⁵ in length from point of entry to point of exit. The policy therefore requires land based transport of the weapons to the entry and exit points of the canal.

This policy raises a number of issues:

1. Who will pay for the transport of the weapons on land?
2. Who would be liable should the weapons disappear whilst in police custody (not an unrealistic possibility bearing in mind the political instability in the country)?
3. How will the weapons be disembarked and/or re-delivered to the vessel at the various entry and exit points?
4. Who would pay for this exercise should the vessel need to come into port, or, alternatively, need to utilise the services of a launch boat?
5. Would the fact that the weapons are no longer in the possession of the PCASP team members, *albeit* for a number of days, have the potential to affect the shipowner’s and/or PMSC’s insurance cover?

[%20Armaments%20on%20board%20vessels.pdf](#) - accessed on 16 May 2013. Florquin, N. ‘Escalation at Sea: Somali Piracy and Private Security Companies’ in Project of the Graduate Institute of International and Development Studies ‘*Small Arms Survey 2012: Moving Targets*’: Geneva, Cambridge 2012 at 209. See also Maritime Transport Sector (MTS) ‘Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on board Ships’ – November 2012 available at http://psm.du.edu/media/documents/international_regulation/united_nations/imo/imo_egypt_response.pdf accessed on 20 August 2014.

¹⁷³ Ibid para. 2.

¹⁷⁴ Ibid para 4.

¹⁷⁵ Suez Canal Authority ‘Canal Characteristics’ – available at <http://www.suezcanal.gov.eg/sc.aspx?show=12> – accessed on 16 November 2013.

6. What are the implications for the PMSC's firearms licence should the weapons be delivered into the custody of persons not authorised to possess same?

All the above, and many more, questions raise serious issues with the Egyptian policy on taking possession of the weapons for redelivery at the exit points of the Canal. It was reported that the United States Coast Guard had made special arrangements with the Suez Canal authority for the hand-over of US weapons as the requirement "violated International Traffic in Arms Regulations".¹⁷⁶

It is reported that numerous PMSC firms are avoiding the complications in Egyptian territory by chartering smaller tonnage vessels in and around the Red Sea and Gulf of Aden with an armoury large enough to supply ships entering and exiting the Suez Canal. These supply vessels are stationed in international waters,¹⁷⁷ thereby avoiding the jurisdiction of Egyptian defence and police authorities and other port states' "arms trafficking regulations".¹⁷⁸ Dutton describes the situation as follows: "the need to comply with varying and shifting state weapons laws as one of the greatest burdens faced by ships seeking to use armed security personnel for protection and the reason why some private security companies are stocking 'floating armouries [sic]' on the high seas"¹⁷⁹, while Shah states that floating armouries have "morphed into another source of anxiety confronting the international community, their existence on the 'fringes of legality' ... has created reservations and even outright suspicion in States over these entities."¹⁸⁰

¹⁷⁶ Florquin, N. 'Escalation at Sea: Somali Piracy and Private Security Companies' in Project of the Graduate Institute of International and Development Studies 'Small Arms Survey 2012: Moving Targets': Geneva, Cambridge 2012 at 209.

¹⁷⁷ Oscar Rickett 'Piracy fears over ships laden with weapons in international waters' - The Guardian (10 January 2013) available at <http://www.theguardian.com/world/2013/jan/10/pirate-weapons-floating-armouries> accessed on 24 November 2013.

¹⁷⁸ James Brown 'Pirates and Privateers: Managing the Indian Oceans' Maritime Security Boom' (12 September 2012) at page 5/6. Lowy Institute for International Policy available at <http://www.lowyinstitute.org/publications/pirates-and-privateers-managing-indian-oceans-private-security-boom> - accessed on 16 November 2013.

¹⁷⁹ Yvonne M. Dutton 'Gunslingers on the high seas: A call for regulation' (2014) 24 *Duke Journal of Comparative & International Law* at 122.

¹⁸⁰ Riddhi K Shah 'Piracy and Floating Armouries in the Indian Ocean: Risk or a Solution?' (23 April 2014) #4406 Institute of Peace and Conflict Studies at 1. Available at http://psm.du.edu/media/documents/reports_and_stats/think_tanks/ipcs_piracy_floating_armouries_2014_04.pdf accessed on 20 August 2014.

In 2011 a Protection Vessels International (PVI)¹⁸¹ security team was arrested by the Eritrean Police and was accused of undermining Eritrea's security by being in possession of weapons on an uninhabited island in its territory. Political intervention by the British Government as well as an apology resulted in the PCASP being released without further charges and the matter was downplayed as an "operational error".¹⁸² PVI issued a statement that their vessel needed to re-fuel in Eritrea and that they decided to discharge the weapons and ammunition on the small island so as not to take the security equipment into port.¹⁸³

The arrest of the PVI security team took place during the various changes in Egyptian policies on armed guards, namely, late 2011. Whilst it cannot be suggested that the PVI incident is directly linked to the Egyptian shift in policy, the incident highlights the importance of ensuring full cooperation between governments with coastlines that border the HRA and greater Indian Ocean, including South Africa. McMahon comment that various policies in littoral states have led to the increased use of floating armouries in the Indian Ocean.¹⁸⁴ Changes in policy can have a major impact on operations and result in the arrest of PCASP or Masters in circumstances where there may have been confusion about the applicable laws and policies, and no intentional violation of state law.

Thus, whilst Egypt initially imposed a blanket prohibition, it now accommodates weapons embarkation only if the weapons are removed from the vessel when entering Egyptian waters and transported or stored by Government officials. However a number of other states have provided blanket approval for the operation of PCASP. These options are considered further in section 3.3, the analysis of South Africa's laws and policies in Chapter Four, and the recommendations in Chapter Five.

¹⁸¹ A PMSC firm known as one of the largest and most recognisable in the industry that was among the top 10 fast growing companies in the United Kingdom in 2011.

¹⁸² Full PVI statement is available at <http://ertra.com/blogna/?p=300> accessed on 24 November 2013.

¹⁸³ Full PVI statement is available at <http://ertra.com/blogna/?p=300> accessed on 24 November 2013. See further Florquin, N. 'Escalation at Sea: Somali Piracy and Private Security Companies' in Project of the Graduate Institute of International and Development Studies '*Small Arms Survey 2012: Moving Targets*': Geneva, Cambridge 2012 at 209.

¹⁸⁴ Leander, T. McMahon, L 'Ship arrest in India raises questions about state jurisdiction.' Lloyds List. 16 October 2013 available at <http://www.lloydlist.com/ll/sector/ship-operations/article431018.ece> accessed on 24 April 2014. See also the discussion by Riddhi K Shah 'Piracy and Floating Armouries in the Indian Ocean: Risk or a Solution?' (23 April 2014) #4406 Institute of Peace and Conflict Studies. Available at http://psm.du.edu/media/documents/reports_and_stats/think_tanks/ipcs_piracy_floating_armouries_2014_04.pdf accessed on 20 August 2014.

3.3 Policies of other Coastal States around the Gulf of Aden.

The states of Djibouti,¹⁸⁵ Mauritius¹⁸⁶ and Sri Lanka¹⁸⁷ allow the embarkation/disembarkation of PCASP within their territory.¹⁸⁸ Brown notes that “The Sri Lankan Government provides comprehensive support for PMSCs...”¹⁸⁹ Solace Global Maritime, a UK registered PMSC, discussed further in section 4.3.4, has authorisation from the governments of Djibouti, Mauritius, Tanzania and Oman in respect of firearms, ammunition and personnel movement in their respective territories.¹⁹⁰

It is reported that “Sri Lanka is one of the few countries in the region to authorise the transit of armed guards through their waters for on board protection of merchant ships and fishing vessels”.¹⁹¹ The PMSCs are vetted and the Sri Lankan defence ministry issue approvals to enable them to operate in Sri Lankan territory.¹⁹² It is estimated that up to 50 PMSCs are operating in Sri Lanka and some have entered into joint ventures with a government owned company.¹⁹³ PMSCs are able to hire firearms and ammunition – to be returned within one month - from the Sri Lankan military and must employ a military officer in his or her personal capacity

¹⁸⁵ Florquin, N. ‘Escalation at Sea: Somali Piracy and Private Security Companies’ in Project of the Graduate Institute of International and Development Studies ‘*Small Arms Survey 2012: Moving Targets*’: Geneva, Cambridge 2012 at 210.

¹⁸⁶ The Republic of Mauritius response to the IMO FAL Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on Board Ships, MSC-FAL. 1/Circ.2 available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Responses-received-on-Private%20Armed%20Security.aspx> accessed on 3 September 2014.

¹⁸⁷ Sri Lanka Ports Authority ‘Sri Lanka provides anti piracy protection’ (24 January 2013) available at http://www.slpa.lk/news_events_13005.asp accessed on 7 April 2014.

¹⁸⁸ James Brown ‘Pirates and Privateers: Managing the Indian Oceans’ Maritime Security Boom’ at 7 (12 September 2012) Lowy Institute for International Policy available at <http://www.lowyinstitute.org/publications/pirates-and-privateers-managing-indian-oceans-private-security-boom> accessed on 16 November 2013.

¹⁸⁹ Ibid.

¹⁹⁰ *Solace Global Maritime Ltd UK v Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case number 35/2012, annexure “DJP19” of the applicant’s replying affidavit (David John Peach) at pg 236-237 and 248-256 of the indexed bundle.

¹⁹¹ Sri Lanka Ports Authority ‘Sri Lanka provides anti piracy protection’ (24 January 2013) available at http://www.slpa.lk/news_events_13005.asp accessed on 7 April 2014.

¹⁹² Ibid.

¹⁹³ Ibid.

to “monitor the use of the weapons”.¹⁹⁴ Income is generated from the hire of weapons and storage of PMSC-owned equipment. However, the researcher is of the view that notwithstanding the Sri Lankan authorities’ general cooperation with PMSCs, South Africa should not adopt its policy on the hiring of firearms and ammunition. Instead, the focus should be on the manner in which PMSCs are vetted, and given “prior approval” and weapons are permitted coupled with control of their movement in South African territory.

Florquin reports that Djibouti charges US\$150 000 per PMSC for annual permits to operate in its ports with weapons.¹⁹⁵ Firearms and ammunition are available for rental by a single authorised company, Djibouti Maritime Security Services (DMSS).¹⁹⁶ Florquin further reports that DMSS “operates a fast supply vessel that allows it to go to sea to retrieve weapons from returning ships before they move on to other ports that do not allow armed guards to enter”.¹⁹⁷ The Djibouti annual permit system thus allows for the free movement of personnel and weapons prior to and after transit through the Gulf of Aden, thereby optimally utilising its geographical location.

The Republic of Mauritius merely requires “24 hours (preferably 48 hrs)” notice from a vessel carrying armed security personnel.¹⁹⁸ The vessel must supply details of the firearms, security personnel and “[A] letter of authorisation from The Commissioner of Police authorising Transit and Storage of Firearms and Ammunition” to the Mauritius Revenue Authority, Harbour Master and Mauritian Police.¹⁹⁹ Proof of flag state authorisation for the use of PCASP must be submitted to the Mauritius Police and “in order to operate in the territorial waters of Mauritius, foreign Private Maritime Security Companies (PMSC) providing services of PCASP onboard vessels, need to obtain prior authorisation of the Government of Mauritius (Prime Minister’s

¹⁹⁴ Florquin, N. ‘Escalation at Sea: Somali Piracy and Private Security Companies’ in Project of the Graduate Institute of International and Development Studies ‘*Small Arms Survey 2012: Moving Targets*’: Geneva, Cambridge 2012 at 210.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid. See also United Nations Security Council: *Report of the Monitoring Group on Somalia and Eritrea* S/2011/433 (18 July 2011) pursuant to Security Council resolution 1916 (2010) at 302; United Nations: New York.

¹⁹⁷ Ibid, with reference to the United Nations Security Council: *Report of the Monitoring Group on Somalia and Eritrea* S/2011/433 (18 July 2011) pursuant to Security Council resolution 1916 (2010) at 305; United Nations: New York.

¹⁹⁸ Response from the Republic of Mauritius to the IMO Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on Board Ships, MSC-FAL. 1/Circ.2 at 2 available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Responses-received-on-Private%20Armed%20Security.aspx> accessed on 3 September 2014.

¹⁹⁹ Ibid at 3.

Office)”.²⁰⁰ This is a “prior approval” process which takes approximately one month and thereafter details of subsequent vessels and teams are to be submitted preferably on 48 hours’ notice. The response from Mauritius to the IMO questionnaire lists, in detail, the various authorities that need to be notified of the arrival of armed guards, including the Port Master, National Coast Guard, Harbour Police and Commissioner of Police.²⁰¹ The Mauritian authorities require information relating to the “bona fides” of the PMSC, firearms licenses, and authorisation from the country of registration and purchase of firearms, security bonds and indemnities.²⁰² The Mauritian Police require that weapons disembarked in port be handed over into their custody for transport to a storage facility and a charge is levied.²⁰³ The remainder of the response sets out in detail which authority requires certain documents. There is collaboration between the Customs, Police, Harbour Master and Port Authority with regards to PCASP arriving in Mauritian territory.

The researcher is of the view that South Africa should model its procedures on the Mauritian framework, especially, the prior approval and “authorization” of PMSC to operate in its territory. The period of one month to obtain approval is reasonable considering that the intention is for vessels to only submit 48 hours’ notice of arrival of a PCASP thereafter. However, the storage of weapons can be undertaken by South African gunsmiths with the requisite storage licenses, as has been the procedure for PMSCs operating in South African territory, instead of placing this extra burden and cost on the SAPS.²⁰⁴

The researcher suggests that the South African government consider the proactive approach of these countries and implement policies that will facilitate the movement of PCASP in its ports because “PMSCs have a legitimate and probably increasing, long-term role in the counter-piracy fight and act therefore to recapture leadership of the policy and regulatory agenda related to their

²⁰⁰ Ibid at 4.

²⁰¹ Ibid at 3.

²⁰² Ibid at 7.

²⁰³ Ibid at 12.

²⁰⁴ See for example the use of Titan Arms and Ammunition in Durban by Solace Global Maritime Ltd UK. *Solace Global Maritime Ltd UK v Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case number 35/2012, annexure “DJP19” of the applicant’s replying affidavit (David John Peach) at pg 238 of the indexed bundle.

use”.²⁰⁵ Florquin states that South Africa is a “key transit point[s]” which only allows semi-automatic weapons to enter its territory.²⁰⁶ The researcher is of the view that Florquin’s statement, based on interviews with PMSCs in 2011, was in the midst of the “critical period” and the refusal to issue permits resulting in the seizure of weapons by the SAPS led to the three separate court cases discussed in Chapter Four. In simple terms, if other states are able to accommodate the movement of PCASP in their territory and set out clear requirements and policies, provided security interests are considered, South Africa should have no difficulty in amending its outdated legislation and developing procedures that can facilitate PMSC in South African territory.

3.4 Panama

Approximately 21.5 per cent²⁰⁷ of the world’s merchant vessels (measured according to dead weight tonnage) are registered under the Panama flag and it is regarded as a flag of convenience because of the unrestricted nationalities of crew complement, tonnage tax regime²⁰⁸ and due to its protection of the identity of the shareholding of the shipowning companies “through a complex web of corporate entities”.²⁰⁹ It is important to examine the response of the Panamanian Maritime Authority (PMA) to the use of PCASP on ships flying its flag as this policy will apply to a large number of vessels calling at South African ports.

²⁰⁵ James Brown ‘Pirates and Privateers: Managing the Indian Oceans’ Maritime Security Boom’ at 7 (12 September 2012) Lowry Institute for International Policy available at <http://www.lowyinstitute.org/publications/pirates-and-privateers-managing-indian-oceans-private-security-boom> - accessed on 16 November 2013 at 11. See also Mineau, M. ‘Pirates, Blackwater and Maritime Security: The rise of Private Navies in response to Modern Piracy’ (2010) Vol. 9 (1) *Journal of International Business and Law* at 77-78.

²⁰⁶ Florquin, N. ‘Escalation at Sea: Somali Piracy and Private Security Companies’ in Project of the Graduate Institute of International and Development Studies ‘*Small Arms Survey 2012: Moving Targets*’: Geneva, Cambridge 2012 at 207-208.

²⁰⁷ United Nations Conference on Trade and Development (UNCTAD) ‘Review of Maritime Transport’ (2013) United Nations publication at 54 chapter D.1. available at http://unctad.org/en/publicationslibrary/rmt2013_en.pdf accessed on 29 March 2014.

²⁰⁸ For a general discussion on the history and aspects of flags of convenience see Francisco J. Montero Llacer ‘Open registers: Past, present and future’ (2003) 27 *Pergamon: Marine Policy* 513-523. Available at <http://www.sciencedirect.com/science/journal/0308597X/27> accessed on 17 July 2014.

²⁰⁹ T Coraggio ‘Panama: Free-trade tax haven; A free-trade deal would normalize Panama’s status as a notorious tax haven for U.S. based corporations’ (14 September 2011) available at http://fpif.org/panama_free-trade_tax_haven/ accessed on 4 December 2013.

The PMA published its policy on armed guards in a Merchant Marine Circular.²¹⁰ It makes direct reference to the IMO recommendations²¹¹ for the attention of all “ship owners, company security officers, legal representatives of Panamanian Flagged Vessels, Panamanian Merchant Marine Consulates and Recognized Organizations”.²¹²

The notice does not set out specific requirements for the authorisation of PCASP but rather directs interested parties to the IMO Circulars²¹³ in deciding on the use of a PMSC to protect vessels transiting the HRA. The PMA states that “ships, which intend hiring the services of private security firms, should provide the crew with the necessary training and information about the risks of having an armed team on board”.²¹⁴ This is not commonly found in the policies published by other jurisdictions or IMO Guidelines and should, in the researcher’s view, be incorporated into BMP 4; as greater understanding of the roles of all on board will enhance the application of standard operating procedures in the event of imminent attack.

Authorisation for the use of PMSC and a PCASP team was initially required from the General Directorate of Merchant Marine (GD) with the following documents in support of such permission, a “motivational letter from the owner requesting approval, a signed bi-lateral agreement between the owner and PMSC²¹⁵, details of PCASP team and proof of training and experience of PCASP team members”.²¹⁶

²¹⁰ Panama Maritime Authority ‘Requirements regarding the use of Privately Contracted Armed Security Personnel on board Panamanian Flagged Vessels’ - Merchant Marine Circular MMC-228 (6 July 2011) available at <http://www.skuld.com/upload/INSIGHT/Piracy/Panama-MMC-228.pdf> - accessed on 16 November 2013.

²¹¹ IMO Interim Guidance to ship owners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the high risk area. MSC.1/Circ. 1405. Rev. 1. And: IMO Interim Recommendations for Flag States regarding the use of Privately Contracted Armed Security Personnel on board ships in the high risk area. MSC.1/Circ. 1406. Rev.1.

²¹² Panama Maritime Authority ‘Requirements regarding the use of Privately Contracted Armed Security Personnel on board Panamanian Flagged Vessels’ - Merchant Marine Circular MMC-228 (6 July 2011) available at <http://www.skuld.com/upload/INSIGHT/Piracy/Panama-MMC-228.pdf> - accessed on 16 November 2013.

²¹³ IMO Interim Guidance to ship owners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the high risk area. MSC.1/Circ. 1405. Rev. 1, and IMO Interim Recommendations for Flag States regarding the use of Privately Contracted Armed Security Personnel on board ships in the high risk area. MSC.1/Circ. 1406. Rev.1.

²¹⁴ Panama Maritime Authority ‘Requirements regarding the use of Privately Contracted Armed Security Personnel on board Panamanian Flagged Vessels’ - Merchant Marine Circular MMC-228, para. 1.2. (6 July 2011) available at <http://www.skuld.com/upload/INSIGHT/Piracy/Panama-MMC-228.pdf> - accessed on 16 November 2013.

²¹⁵ Panama Maritime Authority ‘Requirements regarding the use of Privately Contracted Armed Security Personnel on board Panamanian Flagged Vessels’ - Merchant Marine Circular MMC-228, para. 3. (6 July 2011) available at <http://www.skuld.com/upload/INSIGHT/Piracy/Panama-MMC-228.pdf> - accessed on 16 November 2013. A written contract is required setting out the following; “contact details of parties, extent of insurance cover, consent to law

However, this requirement changed with a list of 79 PMSCs approved by the PMA that was published in a subsequent notice on 21 January 2013.²¹⁷ It is expressly stated that authorisation from the GD is not required, provided one of the listed PMSCs is utilised on Panamanian flagged vessels, unless a port authority requests written authorisation from the PMA.²¹⁸ The blanket approval for specific PMSCs will reduce the bureaucracy and red tape involved in obtaining authorisation for each Panamanian flagged vessel. The researcher is of the view that a list of approved PMSCs should be considered by coastal states. This would reduce the time required to vet each and every PMSC intending to enter a state's port with weapons. It will also prevent double vetting by flag and coastal states of the same PMSC. If a listed PMSC is applying for a permit in a coastal state, the procedure to issue same should be more efficient without the need to verify the authenticity and standing of the company. The researcher is not suggesting a complete waiver of permit or licensing requirements in port states, but rather that the burden on the authorities to process applications and issue the necessary documentation can be significantly reduced through cooperation with flag states and prior 'blanket' recognition of certain PMSCs.

The PCASP must be enrolled as supernumeraries²¹⁹ on board all Panamanian flagged vessels and paragraph 5 states "all ship-owners when entering into a contract with a PMSC should ensure compliance with the IMO Guidelines to ship owners".²²⁰ The Panama position allows for varied interpretation of the IMO Guidelines to shipowners including the manner in which risk assessment is conducted. However, the list of approved PMSCs does create ambiguity in the requirements for shipowners. Does due diligence of the selected PMSC still have to be undertaken if a listed PMSC is engaged to provide armed protection services? The researcher is of the view that good practice dictates that shipowners should still undertake due diligence of 'listed' PMSCs; however the process is streamlined by means of the choice of already "accepted" companies for provision of armed security services.

and jurisdiction, rules of engagement, each parties obligations, duration and termination, weapons to be utilized and the specific transit route".

²¹⁶ Ibid para. 3(d) (6 July 2011).

²¹⁷ Panama Maritime Authority 'Authorized Private Maritime Security Companies (PMSC) transiting High Risk Areas' - Merchant Marine Circular MMC-245 (21 January 2013) available at <http://www.segumar.com/wp-content/uploads/2014/05/MMC-245mayo2014.pdf> accessed on 16 May 2014.

²¹⁸ Ibid para. 3.

²¹⁹ Panama Maritime Authority 'Requirements regarding the use of Privately Contracted Armed Security Personnel on board Panamanian Flagged Vessels' - Merchant Marine Circular MMC-228, para. 4. (6 July 2011) available at <http://www.skuld.com/upload/INSIGHT/Piracy/Panama-MMC-228.pdf> accessed on 16 November 2013.

²²⁰ Ibid para. 5.

In summary, the list of approved PMSCs should be utilised by other flag states, and in particular, the South African authorities in adopting or amending its procedure and policies on armed guards as a port state.

3.5 Italy

On 11 October 2011, the Italian Ministry of Defence “Confitarma” signed a protocol for the deployment of Italian Navy officers on Italian flagged merchant vessels as protection against Somali pirates.²²¹ The use of vessel protection detachments (VPDs) is notably different from the placement of private armed security personnel as the navy officers, or military protection teams (*Nuclei militari di protezione*) (NMPs) as they are sometimes referred to, are state and not private agents.

It is interesting to note that, although the personnel are military officers, the owners of the merchant vessels are required to pay a daily rate of Euro 467.00 per officer including all ancillary costs associated with embarkation and disembarkation in port.²²² The Italian policy can be considered a public-private collaboration between the government and shipowners.²²³ This is perhaps a more favourable approach as these highly trained active naval officers are accountable to the Minister of Defence, but are compensated by owners so as not to redirect government resources for the benefit of a private company. Tondini argues that “Military VPDs are indeed characterized by a much greater level of transparency...” and if there is an incident, “breaches of

²²¹ Studio Legale Garbarino Vergani ‘Piracy IV, Definitely signed the Protocol between Ministry of Defence and Confitarma’ (12 October 2011) available at <http://www.garbamar.it/ON%20THE%20WAVE%20-%20fifth%20issue%20-%20Pirateria%20-%20Piracy%20IV.pdf> accessed on 14 May 2013 with reference to the Italian protocol; Ministero della Difesa ‘Protocollo Di Intesa tra Ministero della Difesa e Confederazione Italiana Armatori (Confitarma)’ (11 October 2011) available at http://www.marina.difesa.it/attivita/operativa/nmp/Documents/A_101011_Protocollo_Difesa_CONFITARMA_UG.pdf accessed on 15 May 2014.

²²² Studio Legale Garbarino Vergani ‘Piracy IV, Definitely signed the Protocol between Ministry of Defence and Confitarma’ at 5 (12 October 2011) available at <http://www.garbamar.it/ON%20THE%20WAVE%20-%20fifth%20issue%20-%20Pirateria%20-%20Piracy%20IV.pdf> accessed on 14 May 2013 with reference to the Italian protocol; Ministero della Difesa ‘Protocollo Di Intesa tra Ministero della Difesa e Confederazione Italiana Armatori (Confitarma)’ (11 October 2011) available at http://www.marina.difesa.it/attivita/operativa/nmp/Documents/A_101011_Protocollo_Difesa_CONFITARMA_UG.pdf accessed on 15 May 2014.

²²³ Matteo Tondini ‘Some Legal and Non-Legal Reflections on the Use of Armed Protection Teams on Board Merchant Vessels: An Introduction to the Topic’ (2012) 51(1) *Military Law and the Law of War Review* at 16.

law are imputed to the VPD (and the sending State) only, and not to the master and the shipowner”.²²⁴

The costs of logistical arrangements including transport, board, lodging and flights are borne by the owners.²²⁵ There must be third party insurance to cover third party liability for negligence based on damages caused by the NMPs whilst on board providing protection.²²⁶ The owner must indemnify the Ministry of Defence against claims for deviation due to any embarkation or disembarkation of NMPs and captured pirates.²²⁷ The authority of the Master of the vessel is confirmed but only in respect of “navigation and control decisions”.²²⁸ “The passive protective measures have [sic] to be handled with the coordination of the NMP leader”.²²⁹ This raises the issue of divided command in Chapter Two.

The protocol requires the owners to take note “that the loading/unloading of NMP is easier at hub ports identified by the Navy”, an example being the Port of Djibouti.²³⁰ This could benefit South Africa should the policy accommodate PCASP (or VPDs/NMPs), and the country would thus be identified by shipowners, PMSC and naval forces as a suitable hub port. As noted in Chapter Five, with the current surge in piracy off the coast of West Africa, combined with the existing threats off the East African coast, South African ports have the unique opportunity to be identified as preferred hub ports for embarkation and disembarkation of PCASP. The advantages and risks are highlighted in Chapter Five.

The use of NMPs in Italy’s response to piracy encountered problems relating to the capacity of available naval officers to provide protection. On 2 October 2012 the Defence Committee of the

²²⁴ Ibid at 15 and 16.

²²⁵ Studio Legale Garbarino Vergani ‘Piracy IV, Definitely signed the Protocol between Ministry of Defence and Confitarma’ at 5 (12 October 2011) available at <http://www.garbamar.it/ON%20THE%20WAVE%20-%20fifth%20issue%20-%20Pirateria%20-%20Piracy%20IV.pdf> accessed on 14 May 2013 with reference to the Italian protocol; Ministero della Difesa ‘Protocollo Di Intesa tra Ministero della Difesa e Confederazione Italiana Armatori (Confitarma)’ (11 October 2011) available at http://www.marina.difesa.it/attivita/operativa/nmp/Documents/A_101011_Protocollo_Difesa_CONFITARMA_UG.pdf accessed on 15 May 2014.

²²⁶ Ibid at 2.

²²⁷ Ibid para. 6.

²²⁸ Ibid.

²²⁹ Ibid.

²³⁰ Ibid.

Italian Senate approved a resolution on armed guards on board vessels flying the Italian flag.²³¹ The committee suggested that clear resolutions be passed in favour of allowing PCASP on board as an alternative to NMPs.

A number of items were highlighted in the resolutions, including:

1. That agreements are reached with coastal states to avoid diplomatic clearance for NMPs for each vessel;²³²
2. The piracy risk area is extended to the Gulf of Guinea;²³³
3. Broader obligations and liabilities for PMSCs, including criminal and civil liability for shipowners and PMSCs for actions of their employees, namely PCASP;²³⁴
4. Insurance cover is to be held by PMSCs;²³⁵ and
5. Specific training courses have to be undertaken by PCASP.²³⁶

The Italian Regulation on the deployment of armed guards on board vessels flying its flag was gazetted on 29 March 2013 under Law Decree 107/2011, amended by Law Decree 130/2011,²³⁷ and came into force on 13 April 2013.²³⁸

This signalled the Italian government's determination that armed personnel assigned to vessels flying its flag must be regulated. The regulation makes it compulsory in the first instance to

²³¹ Senato della Repubblica, Defence 4th Standing Committee 'Proposed Resolution Scheme by Speakers on the deal assigned # 747' (27 September 2012) available at <http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=16&id=679249> accessed on 15 May 2014.

²³² Ibid para 2.

²³³ Ibid para 3.

²³⁴ Ibid para 4.

²³⁵ Ibid para 8(b).

²³⁶ Ibid.

²³⁷ Georgia Bevilacqua 'Counter Piracy Armed Services, the Italian System and the Search for Clarity on the Use of Force at Sea' (2012) 22 *The Italian Yearbook of International Law* at 50 available at http://www.sidi-isil.org/wp-content/uploads/2012/05/03_Bevilacqua.pdf accessed on 13 April 2014.

²³⁸ Studio Legale Garbarino Vergani 'Special Issue: Piracy – The Decree on the employment of Contractors on Board Italian Flagged Ships has been issued' (4 April 2013) available at <http://www.garbamar.it/on%20the%20wave%202013%20-%201%20English%20version.pdf#!> accessed on 24 November 2013 with reference to Decreto-Legge 12 luglio 2011, n. 107 'Gazzetta Ufficiale N. 160 del 12 Luglio 2011' available at <http://www.marina.difesa.it/attivita/operativa/nmp/Documents/D.Lgs%2012%20luglio%202011%20n.107.pdf> accessed on 15 May 2014.

deploy NMPs, and PCASP can only be deployed if NMPs are unavailable. There is thus a slight deviation in the published regulation from the prior resolution. Article 5 of the Law Decree further limits contractors that may be appointed as PCASP to Italian and European Union citizens and Italian security providers.²³⁹ Bevilacqua notes that the deployment of private security guards will be difficult as the conditions in the law decree will have to be met and only when a public team is unavailable, thus the “only enforceable option is that of vessel protection detachments”.²⁴⁰ Article 8 provides that the embarkation and disembarkation of weapons in coastal states must be “in compliance with the legislation of the states”.²⁴¹ Flag states are once again placing an obligation on vessel owners to ensure compliance with coastal state laws and regulations on firearms.²⁴²

There should be diplomatic agreements between flag and coastal states on the issue of armed guards. There should be an open line of communication between states in order to regulate the private maritime security industry. This approach would streamline any permit or vetting process that needs to be undertaken by flag and/or coastal and port states and also provide for a ‘blacklist’ system should any PMSC be found to have transgressed the laws of the states concerned.

3.6 Norway

The Norwegian Government published amendments to its existing legislation²⁴³ in order to regulate the use of armed guards on board vessels flying its flag. This took the form of amendments and additions to the regulations on protective security measures on board ships and

²³⁹ Ibid at 2.

²⁴⁰ Giorgia Bevilacqua ‘Counter Piracy armed services, the Italian system and the search for clarity on the use of force at sea’ (2012) 22 *The Italian Yearbook of International Law* at 52 available at http://www.sidi-isil.org/wp-content/uploads/2012/05/03_Bevilacqua.pdf accessed on 13 April 2014.

²⁴¹ Studio Legale Garbarino Vergani ‘Special Issue: Piracy – The Decree on the employment of Contractors on Board Italian Flagged Ships has been issued’ (4 April 2013) at 4 available at <http://www.garbamar.it/on%20the%20wave%202013%20-%201%20English%20version.pdf#!> accessed on 24 November 2013 with reference to Decreto-Legge 12 luglio 2011, n. 107 ‘Gazzetta Ufficiale N. 160 del 12 Luglio 2011’ available at <http://www.marina.difesa.it/attivita/operativa/nmp/Documents/D.Lgs%2012%20luglio%202011%20n.107.pdf> accessed on 15 May 2014.

²⁴² The remainder of the decree deals with reporting, training and documentation, the status of contractors (as employees of security providers) and rules of force.

²⁴³ Act of 16 February 2007 No.9 relating to Ship Safety and Security (The Ship Safety and Security Act).

mobile offshore drilling units.²⁴⁴ The regulations “were published by the Norwegian maritime Directorate on 1 July 2011”²⁴⁵ (less than two months after the publication of the IMO Guidelines to Flag States) pursuant to powers delegated in terms of the Ship Safety and Security Act.²⁴⁶ They apply to cargo ships with a gross tonnage of 500t or more which are certified for international trade.²⁴⁷

Section 20 states that, “armed guards may be employed following the completion of a risk assessment and following consultation with the master”.²⁴⁸ The Master’s role and authority is expressly confirmed, which prevents divided command on board the vessel.²⁴⁹ Abeyratne points out that “much responsibility devolves upon the ship’s master who should also be consulted about the drafting of the procedures regarding armed personnel on board”.²⁵⁰

Section 20 imposes strict obligations on vessel owners intending to deploy armed guards on their vessels. They must submit documentary proof of the competency of the PMSC selected for the security contract.²⁵¹ The industry guidelines for preventative measures would mean BMP4, installation of citadels, ship hardening installations and other non-lethal defensive equipment which must be considered prior to contracting armed guards for a Norwegian flagged vessel – in other words, a risk assessment.²⁵² Notice must be given to the owners’ insurers prior to the use

²⁴⁴ Amendments to Regulation of 22 June 2004 no. 972, by the insertion of Sections 17 – 25 concerning protective security measures on board ships and mobile drilling units into Act of 16 February 2007 No.9 relating to Ship Safety and Security (The Ship Safety and Security Act).

²⁴⁵ Amendments to Regulation of 22 June 2004 no. 972, by the insertion of Sections 17 – 25 concerning protective security measures on board ships and mobile drilling units into Act of 16 February 2007 No.9 relating to Ship Safety and Security (The Ship Safety and Security Act) - Introduction.

²⁴⁶ Section 39, Act of 16 February 2007 No. 09 relating to Ship Safety and Security (The Ship Safety and Security Act).

²⁴⁷ Ibid Section 1(b).

²⁴⁸ Ibid Section 20(1).

²⁴⁹ Ibid Section 22. See also Yvonne M. Dutton ‘Gunslingers on the high seas: A call for regulation’ (2014) 24 *Duke Journal of Comparative & International Law* at 142.

²⁵⁰ Ruwantissa, Abeyratne ‘The use of armed guards on board merchant vessels’ (2012) 5 *Journal of Transportation Security* at 164 available at <http://link.springer.com/article/10.1007%2Fs12198-012-0088-5#> accessed on 13 March 2014.

²⁵¹ Section 20(2), Act of 16 February 2007 No.9 relating to Ship Safety and Security (The Ship Safety and Security Act).

²⁵² Yvonne M. Dutton ‘Gunslingers on the high seas: A call for regulation’ (2014) 24 *Duke Journal of Comparative & International Law* at 138.

of armed guards²⁵³ and there must be a set of procedures in place for the storage of firearms whilst on board.²⁵⁴

Section 24 requires armed guards to give prior warning before engaging in the use of force, namely, light and sound signals as well as warning shots with the objective of rendering a person harmless.²⁵⁵ The prior warning requirement should perhaps be expressly agreed in the RUF between the owners and PMSC. Mahard recommends that the “United States adopt binding RUF for PCASP modelled on Norway’s Security Regulations” as “Norway has the most comprehensive and stringent RUF for PCASP”.²⁵⁶

The Norwegian regulations reflect the industry norm requirements for armed guards. It is noteworthy that the requirement of prior warning before the use of force is codified as it creates an obligation on security personnel to only engage attackers as a last resort. Abeyratne comments that “the fundamental premise of the Norwegian guidelines is that, in accordance with customary international law, the use of force is restricted to cases of necessity or self-defence”.²⁵⁷ Dutton describes the guidelines on the use of force as “cautious in approach”.²⁵⁸

It is thus safe to assume that Norwegian flag state authorisation for armed guards is trustworthy as details of the PMSC need to be supplied to the Norwegian Maritime Directorate prior to permission being granted. Furthermore, the Norwegian authorities play an active role in the vessel’s “selection and employment of private contractors”.²⁵⁹ This could reduce the red tape for coastal states when permission is requested for the facilitation of security personnel in their territories because of the reliance on the flag state’s ability to scrutinise PMSC operating on vessels registered under its flag. Whilst the Norwegian guidelines focus primarily on flag state authorisation for armed guards, the South African authorities could implement a policy whereby

²⁵³ Section 21, Act of 16 February 2007 No.9 relating to Ship Safety and Security (The Ship Safety and Security Act).

²⁵⁴ Ibid Section 22(1).

²⁵⁵ Ibid Section 242(3)/(4).

²⁵⁶ Sean Patrick Mahard ‘Blackwater’s New Battlefield: Toward a Regulatory Regime in the United States for Privately Armed Contractors at Sea’ (2014) 47(1) *Vanderbilt Journal of Transnational Law* at 337 and 368.

²⁵⁷ Ruwantissa Abeyratne ‘The use of armed guards on board merchant vessels’ (2012) 5 *Journal of Transportation Security* at 163 available at <http://link.springer.com/article/10.1007%2Fs12198-012-0088-5#> accessed on 13 March 2014.

²⁵⁸ Yvonne M. Dutton ‘Gunslingers on the high seas: A call for regulation’ (2014) 24 *Duke Journal of Comparative & International Law* at 142.

²⁵⁹ Sean Patrick Mahard ‘Blackwater’s New Battlefield: Toward a Regulatory Regime in the United States for Privately Armed Contractors at Sea’ (2014) 47(1) *Vanderbilt Journal of Transnational Law* at 356.

Norwegian flagged vessels with proof of flag state authorisation could reduce red tape for vetting the PMSC, thereby ensuring efficient processing of permits. This once again highlights the potential to increase the efficiency of the permit process of PCASP in coastal states with the cooperation of flag states.

3.7 United Kingdom

On 6 December 2012 the United Kingdom's Department for Transport published the Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances (UK Guidance).

The UK Guidance was developed in response to the rapidly expanding maritime security industry. The Department for Transport recognised that “the use of armed guards, as an additional layer of protection on top of BMP, has been shown to be a very effective means of defending ships from pirate attack [sic]”.²⁶⁰ While welcomed by the maritime industry, it is argued that the UK Guidance requires further clarity on its application outside the HRA.²⁶¹ As matters stand, United Kingdom (UK) flagged vessels are not allowed to carry armed guards off the Gulf of Guinea. This is of concern given the increased attacks off the West Coast of Africa.²⁶²

The UK Government confirmed that it did not recognise an accreditation process for PMSCs; however, it is the driving force behind the implementation of ISO 28007²⁶³ by PMSC.²⁶⁴ Barry

²⁶⁰ Section 1.3 - Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances' Version 1.2 – Department for Transport (6 December 2012).

²⁶¹ Stephen Askins 'Piracy – Armed Guards Revisited and General Overview, Recent Developments' (21 March 2013) available at <http://incelaw.com/ourknowledge/publications/piracy-armed-guards-revisited-and-general-overview> accessed on 2 April 2013.

²⁶² Forty eight incidents were recorded during 2013 in the Gulf of Guinea – ICC International Maritime Bureau 'Piracy and Armed Robbery against Ships Report for the period 1 January 2013 – 31 December 2013'. Available on request at www.icc-ccs.org.

²⁶³ The International Organization for Standardization (ISO) 'Ships and marine technology - Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract)' 2013. ISO was founded in 1947 and develops international standards for technology and business, providing specifications for products, services and good practice. See <http://www.iso.org/iso/home/about.htm> accessed on 20 March 2014.

Roche, chief executive of PVI, noted with concern the UK Government's failure to ratify guidelines in respect of the ISO accreditation standards as well as regulations governing the use of floating armouries.²⁶⁵

The UK Guidance version 1.2 was published in May 2013. It includes express reference to ISO PAS 280074:2012 and "encourage[s] shipping companies to use independent third party certification to ISO 28000...as an important component of their criteria in selecting a PMSC".²⁶⁶

The obligation to conduct a due diligence and vetting of a PMSC falls on the ship owner.²⁶⁷ Dutton notes that the UK policy requires owners to submit a "counter-piracy plan indicating why this extra level of protection, beyond following best management practices, is necessary".²⁶⁸ The UK Guidance suggests that the following minimum criteria should be adhered to in selecting a PMSC: "adequate experience and training of personnel, appropriate insurance cover, and access to maritime legal advice at various jurisdictions, understanding of port state requirements for the movement of firearms and an understanding of BMP and United Kingdom firearms legislation".²⁶⁹ It is important to note that the UK Guidance suggests that the PMSC should have undertaken police and employment background checks.²⁷⁰ This will once again reduce the individual personnel vetting procedure that needs to be undertaken by a coastal state like South Africa, should the appropriate mechanisms be in place in the flag state or country where the PMSC is registered. The researcher is of the view that inter-state cooperation is essential to regulate the maritime security industry and to facilitate the movement of guards and weapons through various territories with as little hindrance as possible, always ensuring compliance with laws and procedures.

²⁶⁴ Stephen Askins 'Piracy Update: Armed guards, West African hijackings and Guardcon revisited' autumn 2013 available at <http://incelaw.com/ourknowledge/publications/piracy-update-armed-guards-west-african-hijackings-and-guardcon-guardcon-revisited> accessed on 20 March 2014.

²⁶⁵ Liz McMahon 'Maritime security industry needs more support from UK' (13 May 2013) - Lloyd's List available at <http://www.lloydslist.com/ll/sector/regulation/article422605.ece> accessed on 29 August 2014.

²⁶⁶ Section 3 - Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances' Version 1.2 – Department for Transport (May 2013).

²⁶⁷ Section 3.4 - Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances' Version 1.2 – Department for Transport (May 2013).

²⁶⁸ Yvonne M. Dutton 'Gunslingers on the high seas: A call for regulation' (2014) 24 *Duke Journal of Comparative & International Law* at 137.

²⁶⁹ Section 3.5 - Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances' Version 1.2 – Department for Transport (May 2013).

²⁷⁰ *Ibid* Section 3.9.

Section 6.9 of the UK Guidance states that: “it is essential that the laws of a coastal state are respected and complied with.” The right of innocent passage of vessels does not outweigh a coastal state’s right to sovereignty, or the restriction of the right to acts which “are not prejudicial to the peace, good order or security of that state”.²⁷¹ The UK Guidance expressly states that the “exercise or practice with weapons” in a member state’s territory would be prejudicial to the peace and security of that state.²⁷²

For South Africa’s purposes, Section 6.12 requires that a PMSC seek clarification of a port state’s laws on firearms prior to the voyage.²⁷³ This would ensure that applications for weapons permits are submitted the moment the contract to provide armed protection for a transit is signed between owners and PMSC.²⁷⁴

The UK Guidance states that rules on the use of force must be in place and agreed to by the shipowner;²⁷⁵ however, the guidance has been described as “cautious” as it advises that personnel should attempt to prevent unlawful boarding of a vessel “using the minimum force necessary”.²⁷⁶ The primary function of the PCASP “is to prevent illegal boarding of the vessel in order to protect the lives of those onboard, using the minimum force necessary to do so”.²⁷⁷ Section 8.5 of the UK Guidance recommends that any conduct that shows capability of the use of lethal force (i.e., warning shots or showing weapons) must be done in a manner so as not to constitute an act of aggression.²⁷⁸ The mention of warning shots is noteworthy in both the

²⁷¹ Ibid Section 6.10.

²⁷² Ibid Section 6.10.

²⁷³ Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances’ Version 1.2 – Department for Transport (May 2013).

²⁷⁴ This is not always possible. For example, one might consider the case where a time charter is fixed at the port of Salalah, Oman and the vessel is ordered to sail to Durban. The South African legislation requires 21 days prior notice for permit applications. The transit time between these two ports is less than 21 days. In this case, it is difficult to comply with the legislation without delaying the vessel’s voyage.

²⁷⁵ Section 8.4 - Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances’ Version 1.2 – Department for Transport (May 2013).

²⁷⁶ Yvonne M. Dutton ‘Gunslingers on the high seas: A call for regulation’ (2014) 24 *Duke Journal of Comparative & International Law* at 140.

²⁷⁷ Section 8.3 - Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances’ Version 1.2 – Department for Transport (May 2013).

²⁷⁸ Ibid Section 8.4.

Norwegian and UK policies as no mention is made thereof in the Italian and Panamanian notices.²⁷⁹

In the researcher's view, the UK Guidance allows coastal states to utilise the provisions thereof for UK flagged vessels which allege ignorance of the coastal state's laws prior to arrival. There is an express obligation on the owner to ensure knowledge and compliance of a coastal state's laws regulating the presence or movement of firearms in its territory, as with the Panamanian, Italian and Norwegian policies.

²⁷⁹ The remainder of the UK Guidance deals with incident reporting and various counter piracy plans which are not the focus of this study.

CHAPTER FOUR

THE SOUTH AFRICAN POSITION ON ARMED GUARDS

4.1 Introduction

This chapter analyses the South African legislation governing the weapons permitting procedure, in particular, the Firearms Control Act (FCA)²⁸⁰ and the regulations²⁸¹ thereunder. Four cases heard in the KwaZulu-Natal High Court, Durban, are discussed and the problems encountered by PMSC in South Africa are highlighted with reference to the governing legislation and/or lack of consistent application thereof by the South African Police Service (SAPS).

Reference will also be made to documents annexed to these court papers, including communiqués issued by the SAPS to the local shipping industry via the South African Association of Ship Owners (SAASOA) as well as other correspondence from the port authority which sought to clarify the policy on PCASP on board vessels entering a South African port.

The chapter concludes with a discussion on the need to amend the Regulations to the FCA in order to facilitate the arming of vessels in South Africa for the purpose of self-defence against acts of sea piracy.

4.2 South African legislation

Legislation other than the FCA regulates the import and exportation of firearms and ammunition in South Africa. The Customs and Excise Act 91 of 1964, as amended (C&E Act), “provides for... the prohibition and control of the importation, export, manufacture or use of certain goods; and for matters incidental thereto”²⁸² to or from the Republic of South Africa. This study refers to the C&E Act in respect of the interpretation of “transit” and “import” by the Appellate

²⁸⁰ The Firearms Control Act 60 of 2000, as amended.

²⁸¹ Regulations to the Firearms Control Act 60 of 2000, as amended.

²⁸² Preamble to the Customs and Excise Act 91 of 1964, as amended.

Division. The remainder of the C&E Act is, however, not relevant to the primary focus of the study, namely the provisions of the FCA, and no further reference is made thereto.

The National Conventional Arms Control Act 41 of 2002 (NCACA) as amended, read with Government Gazette Notice No. 35272²⁸³ governs trade in “controlled items”²⁸⁴ in terms of which firearms as defined in the FCA are to remain regulated by the FCA and permits granted thereunder by the National Commissioner of Police.²⁸⁵ The notice indicates in the schedule that the key to determining the applicability of the FCA or NCACA permit procedures lies in identifying the types (and quantity)²⁸⁶ of the weapons in question.²⁸⁷ The schedule provides that “firearms”²⁸⁸ and “ammunition”²⁸⁹ as defined in the FCA, which fall under the categories of Munitions List 1 (light weapons) and Munitions List 3 (ammunition and related items) are governed by the provisions of the FCA, when the “dealing” in those weapons is *inter alia* for

²⁸³ National Conventional Arms Control Act 41 of 2002, as amended:

Section 1(f): ‘**controlled items**’ means controlled items specified in a notice published by the Committee in the Gazette in terms of section 27(3);

Read with Government Gazette Notice. 35272 Vol. 562 (20 April 2012), Republic of South Africa. The list of controlled items can be found in The 2010 Wassenaar Control List available at

<http://www.wassenaar.org/controllists/> accessed on 30 August 2014. The items in the Munitions List 1 include; handguns, automatic and semi-automatic “smooth-bore weapons”, amongst others. The ammunition in Munitions List 3 includes; “Ammunitions for weapons specified by ML1...”

²⁸⁴ National Conventional Arms Control Act 41 of 2002, as amended:

Section 1(u): ‘**trade in controlled items**’ includes-

- (a) any activity relating to the manufacturing, marketing, contracting, exportation, re-exportation, importation or conveyance of controlled items...

²⁸⁵ Government Gazette Notice. 35272 Vol. 562 (20 April 2012), Republic of South Africa at 7.

²⁸⁶ Ibid at 7. The export of 10 or more of a specific type of firearm requires submission of such an application by the National Commissioner of the SAPS to the National Conventional Arms Control Committee, read with section 4(3) of the National Conventional Arms Control Act 41 of 2002, as amended, and Regulation 12 thereunder.

²⁸⁷ Ibid at 4 note 2. The list of controlled items can be found in The 2010 Wassenaar Control List available at <http://www.wassenaar.org/controllists/> accessed on 30 August 2014. These items in the Munitions List 1 include; handguns and semi-automatic “smooth-bore weapons”, amongst others. The ammunition in Munitions List 3 includes; “Ammunitions for weapons specified by ML1....”

²⁸⁸ Firearms Control Act 60 of 2000, as amended:

Section 1(xii) ‘**firearm**’ means any—

- (a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs);
- (b) device manufactured or designed to discharge rim-fire, centre-fire or pin-fire ammunition;
- (c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b);
- (d) device manufactured to discharge a bullet or any other projectile of .22 calibre or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant; or
- (e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d), but does not include any device contemplated in section 5.

²⁸⁹ Firearms Control Act 60 of 2000, as amended:

Section 1 (iii) “**ammunition**” means a primer or complete cartridge.

“use for private security”.²⁹⁰ Any use for “military purposes” (which is not defined) will be governed by the NCACA.²⁹¹

However, fully automatic firearms are prohibited firearms in terms of section 4(1)(a) of the FCA and they fall in the category of Munitions List 2 (heavy weapons).²⁹² Possession of fully automatic firearms is regulated by section 4, namely, only for private or public collectors. Thus any heavy weapons on board a merchant ship would be regulated in terms of the NCACA and permits obtained thereunder.

The Dual Use Goods and Technologies list in the schedule regulates other items, such as body armour; the schedule indicates that only export of such goods is controlled under the NCACA.²⁹³ Thus, the PCASP arriving with items listed thereunder would not need permission from the National Conventional Arms Control Committee.

Against this background, the researcher is of the view that PCASP are not military personnel and their use of weapons falls within the meaning of “dealing for use for private security”; thus the permit procedure is governed by the FCA and Regulations thereunder.

4.2.1 Requirements for a permit in terms of the Firearms Control Act

Chapter 8 of the FCA and the Regulations thereto set out the requirements for the import, export and in-transit carriage of firearms to or from the Republic of South Africa.

The import, export and/or in-transit carriage of firearms is prohibited unless the person is in possession of a permit issued in terms of the FCA.²⁹⁴ A permit authorising the import or transit of firearms constitutes a licence to possess the firearm²⁹⁵ which comes with certain rights and

²⁹⁰ Government Gazette Notice. 35272 Vol. 562 (20 April 2012), Republic of South Africa at 7.

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid at 12.

²⁹⁴ Section 73

- (1) No person may import into or export from South Africa any firearms or ammunition without an import or export permit issued in terms of this Act
- (2) No person may carry in transit through South Africa any firearms and ammunition without an in-transit permit issued in terms of this Act.

²⁹⁵ The Firearms Control Act 60 of 2000, as amended, Section 77 (1).

obligations.²⁹⁶ A foreigner who holds an import permit is thus entitled to possess such firearms listed on the permit in South African territory, as if he/she holds a firearms licence issued to South African citizens or residence permit holders.

Section 14 of the FCA states that semi-automatic rifles and shotguns are “restricted firearms” for the purpose of licensing and licenses will only be issued to natural persons demonstrating the need to possess such firearm.²⁹⁷ However, this applies to licence applications and not permit applications. A licence issued under the provisions of the FCA is distinguished from a permit issued in terms of Section 74 of the FCA.²⁹⁸ It is the duty of persons wanting to import, export, possess, manufacture and/or otherwise trade in firearms to apply for “the appropriate permits from the relevant authorities.”²⁹⁹ The onus therefore rests on persons who intend, for example, to import weapons that are on board a merchant vessel for the purpose of providing protection against acts of sea piracy, namely, PCASP to ensure that the correct permits are obtained.

²⁹⁶ The Firearms Control Act 60 of 2000, as amended, Section 77(2); as imposed by the Registrar on the permit.

²⁹⁷ The Firearms Control Act 60 of 2000, as amended:

Section 14.

- (1) For purposes of this Act, a restricted firearm is any -
 - (a) semi-automatic rifle or shotgun, which cannot readily be converted into a fully automatic firearm; or
 - (b) firearm declared by the Minister, by notice in the *Gazette*, to be a restricted firearm...
- (4) The Registrar may issue a licence in terms of this section to any natural person who shows that a firearm contemplated in section 13(1) will not provide sufficient protection, and who submits reasonable information to motivate the need for a restricted firearm for self-defence purposes.

²⁹⁸ See for example Regulation 62 (4) of the Firearms Control Act 60 of 2000, as amended, which states:

Non-resident: Temporary import and export permit of a firearm not licensed in terms of the Act

- (a) An application by a person who is a non-resident and not the holder of a permanent resident permit for a temporary import permit and the subsequent export permit or multiple import and export permit in respect of any firearm or ammunition not licensed under the Act, may be submitted either to the Head: Central Firearms Register directly or to the Designated Firearms Officer at the place designated as a port of entry in terms of the Immigration Act, 2002 (Act No. 13 of 2002) where the applicant will enter into the Republic of South Africa.

See also the distinction between Chapter 6 headed “LICENCE TO POSSESS FIREARM” and Section 77 which states:

- (1) A permit for the import of a firearm or ammunition also constitutes a licence to possess such firearm or ammunition for such person and period as the Registrar may specify on the permit.

It is thus clear that the legislature intended to distinguish between a licence to possess a firearm and a permit for the purpose of import, export or carriage in-transit in the Republic of South Africa. See also the argument raised by the applicant in the *Solace Global Maritime Ltd UK v The Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case No. 35/2012 – Applicant’s Main Heads of Argument at para. 3(e) and further argued by the researcher below in section 4.2.2.

²⁹⁹ Government Gazette Notice. 35272 Vol. 562 (20 April 2012), Republic of South Africa Item 4 at 1.

4.2.2 Who must apply for a permit?

Any PCASP intending to enter South African territory with firearms and ammunition must apply for a permit to possess same and must be “a fit and proper person to hold such permit”.³⁰⁰ The South African authorities have interpreted this as meaning that an applicant for a permit must possess a competency certificate issued in terms of the Act.³⁰¹

This interpretation was disputed by the applicant in the Solace Global case, on the basis that the requirement of a competency certificate does not extend to permit applications.³⁰² Section 6(2) of the FCA provides that no licence may be issued to a person who is not in possession of a competency certificate.³⁰³ The applicant argued that the wording of this section does not mention “permit” and that a reasonable interpretation would suggest that competency certificates are limited to an application for a firearms licence.

The FCA also restricts the issuing of competency certificates to South African citizens and residence permit holders.³⁰⁴ In most cases, applicants for firearms import permits for the purpose of providing armed protection to merchant vessels are foreign citizens or companies registered outside the Republic of South Africa. However, industry practice in South Africa is for a local agent to be appointed by the foreign PMSC to apply for permits on its behalf - to be named as the ‘holder’ on the said permit. This is further examined in sections 4.4 and 4.6 in the discussion on unreported South African cases, namely the Protection Vessels International (PVI)³⁰⁵ and Solace Global cases.

The researcher is of the opinion that the interpretation of section 6(2) of the FCA adopted by the South African authorities in the Solace Global case was incorrect; a more proper interpretation is

³⁰⁰ The Firearms Control Act 60 of 2000, as amended, Section 74(1).

³⁰¹ *Solace Global Maritime Ltd UK v The Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case No. 35/2012 at para 13.1 of the Respondent’s Answering Affidavit (p. 130 of the indexed bundle) (the Solace Global case).

³⁰² *Ibid* Applicant’s Main Heads of Argument at para. 3(e).

³⁰³ The Firearms Control Act 60 of 2000, as amended,

Section 6(2): Subject to section 7, no licence may be issued to a person who is not in possession of the relevant competency certificate.

³⁰⁴ The Firearms Control Act 60 of 2000, Section 9:

(2) Where a person has not previously obtained a competency , a competency certificate may only be issued to such person if he or she-

(b) is a South African citizen or a holder of a permanent South African residence permit.

³⁰⁵ *Protection Vessels International Ltd v Minister of Safety and Security and Others* (unreported), KwaZulu-Natal High Court, Durban, Republic of South Africa Case No. 3390/2011 (PVI case).

that an applicant for an import and/or in-transit permit need not be in possession of a competency certificate.³⁰⁶

Therefore the only requirement for the issue of a firearms permit to a PCASP is that the applicant be a “fit and proper person” in terms of section 74(1) of the FCA. The term is not presently defined in the Act.

A definition of a “fit and proper person” has been included in the amendments to the FCA assented to on 17 February 2007 but it has not come into force and is awaiting proclamation by the President of the Republic of South Africa.³⁰⁷ The proposed definition will pose problems for PCASP. The amendments include the insertion of paragraph (g) in Section 1:-

- (g) **‘fit and proper person’** means a person who complies with the requirements of section 9 (2) and any regulations relevant to the competency of a person to possess a firearm in terms of this act.

The amendment therefore seeks to bring the definition of a “fit and proper person” within the requirements for persons entitled to be in possession of a competency certificate as set out in Section 9(2) of the FCA. A reasonable interpretation of the proposed definition would be that foreign applicants for permits would need to ensure that they comply with the remainder of the requirements under Section 9(2), apart from citizenship and South African residence obligations. The researcher is of the view that if such an interpretation is not adopted a foreign applicant will never be in a position to bring themselves within the ambit of the definition of a “fit and proper person”³⁰⁸ because they would fall short of the requirements of section 9(2) (b).³⁰⁹ This cannot be the intention of the legislature as the Regulations to the FCA elsewhere expressly contemplate that permits will be issued to foreign persons (non-citizens and non-residents).³¹⁰ However, if foreign applicants need to generally comply with the requirements of Section 9(2) of the FCA in

³⁰⁶ Justice Gorvin did not hand down a written judgment on this issue nor was it part of the order granted on 18 June 2012 in the *Solace Global Maritime Ltd UK v The Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case No. 35/2012.

³⁰⁷ Firearms Control Amendment Act 28 of 2006, assented to on 17 August 2007 updated to *Government Gazette* 35047 dated 17 February, 2012 (Amendment Act).

³⁰⁸ In terms of the Firearms Control Amendment Act 28 of 2006, assented to on 17 August 2007 updated to *Government Gazette* 35047 dated 17 February, 2012.

³⁰⁹ The Firearms Control Act 60 of 2000, as amended.

³¹⁰ Regulation 62 (4) and (7) of the Firearms Control Act 60 of 2000, as amended.

order to be considered a “fit and proper person”, excluding the specific requirements of citizenship or residence, this would appear to make sense: a foreign applicant must then show that he/she is of stable mental condition, is not inclined to violence,³¹¹ does not have a criminal record for offences including the handling of firearms³¹², use and/or dealing and/or possession of intoxicating drugs³¹³, or domestic and sexual violence³¹⁴ and has not been declared unfit to possess a firearm³¹⁵ in order to be considered a “fit and proper person”. The researcher is of the view that these are onerous requirements for foreign PCASP where the intention should be to increase the efficiency of the permit process; hence, the legislation does not specifically cater for this category of persons intending to enter South African territory with firearms and ammunition.

A PMSC is usually a juristic person and the researcher will illustrate how the SAPS have partly applied the provisions of the FCA in some cases. Regulation 13(5) sets out the requirements for applicants who are juristic persons. Included in this regulation is the requirement that “proof of registration or incorporation in accordance with the laws of the Republic of South Africa be submitted”.³¹⁶ A strict interpretation of regulation 13(5) suggests that only South African registered companies can apply for permits and not PMSC registered outside the Republic. Foreign PMSC are the owners of the weapons and PCASP are employees/contractors of the security firms contracted to provide protection for vessels, cargo and crew transiting the HRA.

The question that arises is whether foreign PMSCs must appoint a South African person or company to act as their agent for the purpose of the permit application.

This was the procedure adopted by Protection Vessels International (PVI)³¹⁷ and Solace Global.³¹⁸ The researcher is of the view that a strict interpretation of the legislation in these

³¹¹ Ibid Section (9) (2) (d).

³¹² Ibid Section (9) (2) (g).

³¹³ Ibid Section (9) (2) (j) and (k).

³¹⁴ Ibid Section (9) (2) (h) (ii).

³¹⁵ Ibid Section (9) (2) (p).

³¹⁶ The Firearms Control Act 60 of 2000, as amended,

Regulation (13)(5) When the applicant is a juristic person –

(b) the applications must be accompanied by proof of the registration or incorporation, as the case may be, of the juristic person in accordance with the laws of the Republic of South Africa.

³¹⁷ *Protection Vessels International Ltd v Minister of Safety and Security and Others* (unreported), KwaZulu-Natal High Court, Durban, Republic of South Africa Case No. 3390/2011 Applicant’s founding affidavit at para. 11. The representative for PVI confirmed that they appointed OPS Solutions CC trading as OPS Maritime Security Services to act as its local agent for the purpose of permits and logistical arrangements for their weapons and team in South Africa.

circumstances suggests that the ‘applicant’ for the permit is not the non-resident PMSC but the local South African company. The South African company is the entity making the application for the permit and is nominated by the PMSC. It is the South African agent who is named the holder of the permit. This interpretation could affect the entire permit procedure because there are different requirements for non-resident applicants (foreign companies or persons) and South African citizens or registered companies. The requirements differ substantially and can impact the permit application process.

4.2.3 Regulations to the Firearms Control Act

The regulations require careful analysis as there are several applicable provisions, which are not always clear, and sometimes contradictory. In navigating the regulations the following issues should be considered:

1. What type of permit must be applied for?
2. Who must the application be made to?
3. What conditions do the Regulations set to govern the application?

The Regulations to the FCA set the requirements for an application for an “import” permit and an “in-transit” permit.

“Import” is not defined in the Act but a definition can be found in the Regulations as follows:

“import” – in relation to firearms or ammunition means to bring them, or cause them to be brought, from outside the Republic of South Africa into the Republic of South Africa and includes the bringing thereof into the Republic of South Africa at any harbour or airport or other place on board any vessel or aircraft or other means of conveyance, irrespective of whether or not the firearms or ammunition are off-loaded from such vessel or aircraft or other means of conveyance for conveyance through the Republic of South Africa to any place outside the

³¹⁸ *Solace Global Maritime Ltd UK v The Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case No. 35/2012 at para 10 of the Applicant’s founding affidavit (page 9 of the indexed bundle).

Republic of South Africa or for any other purpose, or are intended to be so off-loaded; and ‘import’, when used as a verb, shall have a corresponding meaning.³¹⁹

“In-transit” is defined in the Regulations as:

the conveyance through the Republic of South Africa to another country of firearms or ammunition that has been imported.³²⁰

The presence of PCASP with weapons on board merchant vessels entering South African ports appears to fall within the definition of “import”, regardless of whether or not the firearms and ammunition are intended to be discharged. A definition of “export” is not provided in the FCA or the Regulations.

There is no case law in South Africa where the terms “import” and “in transit” have been considered in terms of firearms legislation. However, the Appellate Division (as it then was) distinguished between the words ‘transit’ and ‘import’ in respect of Section 18 of the C&E Act³²¹ in the case of *Tieber v Commissioner for Customs and Excise*.³²² It can be argued that the word “import” should be narrowly defined when one considers the dictum below:

It appears clearly that its main purpose is to ensure that customs and excise duties are paid on all goods which are brought into the Republic [imported] other than goods only in transit, i.e. goods which are landed in this country but destined for conveyance to another country. For that reason, one sees in S 18 that elaborate provision is made for the removal of goods in bond. Where bonded goods in fact leave the common customs area, which includes the Republic, no duties are payable.³²³

Thus goods are “imported” if they are landed in South Africa and are not “in transit”. It is suggested that a reasonable interpretation of “in-transit” would be restricted to situations where firearms are consigned to a final destination state, other than the Republic of South Africa – most probably to an inland African country. Thus, where goods are “in-transit” they are transported, by road, rail or possibly air, through South African territory with the intention of being imported into another state.

³¹⁹ Regulations to the Firearms Control Act 60 of 2000, Regulation 1.

³²⁰ Ibid.

³²¹ Customs and Excise Act 91 of 1964, as amended.

³²² 1992 (4) SA 844.

³²³ 1992 (4) SA at 849.

The definition of “in-transit” in the FCA Regulations is, however, ambiguous as it concludes with “*that has been imported*”. This may be interpreted to mean that all in-transit weapons are in fact also imported. The legislature surely did not intend that in-transit firearms destined for another state should be permitted under both the “import” and “in-transit” regulations. The researcher is of the view that although contradictory in the definitions, there is a clear distinction between “import” and “in-transit” firearms permits.

The definition of “in transit” refers to “the conveyance [of the firearms] through the Republic of South Africa to another country”, but this does not address the ambiguity. The word “convey” is also used in the NCACA where it is defined in Section 1 as:

in relation to controlled items, means to transport controlled items through or over the territory of the Republic, its territorial waters or its airspace to any other place or destination outside the Republic, whether or not such controlled items are off-loaded.³²⁴

Thus goods could be “conveyed” when they are intended to be landed for transport to a neighbouring African country, but could also be “conveyed” when they pass through South Africa’s territorial waters while remaining on board a vessel that is calling at a South African port, because they are still en route to a final destination. Applying this broader meaning to weapons used by PCASP might be difficult as the goods are not being conveyed to any particular final destination. For this reason, the researcher suggests that the “in transit” definition does not apply to such weapons under these circumstances.

The researcher is of the view that such weapons require an “import” permit. This could cover weapons that remain in storage on board a vessel as the definition of “import” in the FCA Regulations expressly includes circumstances where firearms are not off-loaded from the vessel.

The ability to distinguish between goods in transit and goods that have been imported is not purely trivial. The requirements for an “in-transit” and “import” firearms permit in the Regulations to the FCA differ substantially. It is impossible for a PCASP to comply with the requirements for both an “import” and “in transit” permit for the same shipment, and an interpretation of the term “in transit” which overlaps with that of “import” leads to an absurdity.

³²⁴ Section 1 of the National Conventional Arms Control Act 41 of 2002, as amended.

Regulations 61 and 63 read with Regulation 13 to the FCA set the conditions and requirements for an “in-transit” permit. An “in-transit permit” applicant must provide proof of authority to import the firearms to the country of final destination³²⁵ and must supply details of the route to be taken, including the mode of transport.³²⁶ The applicant must also produce a consignment note for the weapons that he/she is intending to transit through South Africa.³²⁷

It is not feasible for a PMSC, PCASP team and/or vessel owner to comply with the requirements for an “in transit” permit as it is common practice that weapons are exported from a country of origin with the intention of circulating amongst numerous teams and coastal states over an extended period of time with no pre-determined final destination in mind. The weapons will be disembarked in a country after a specific transit and this is not necessarily the “final destination”. PMSC generally try to ensure that weapons are discharged at a specific port after completion of a transit through the HRA, ready to be loaded on board the next vessel sailing from that particular port. This minimises the cost of the repatriation of team members, including the weapons. For example, ports in Sri Lanka, Mauritius and Djibouti are used as “hub points” for PCASP teams where personnel disembark from one vessel and embark on the next vessel with whom the PMSC has a contract to provide protection.³²⁸

Nevertheless, since those terms in the FCA have not been interpreted by South African courts the ambiguity remains and has the potential to confuse applicants seeking to obtain the correct documentation to legally allow a PCASP team to arrive in South Africa. This will be illustrated in the *mv “Roelof”*³²⁹ case discussed in section 4.3.3.

³²⁵ Regulations to the Firearms Control Act 60 of 2000, Reg. 61(b).

³²⁶ Ibid Reg. 61(c).

³²⁷ Ibid Reg. 63 (g).

³²⁸ James Brown ‘Pirates and Privateers: Managing the Indian Oceans’ Maritime Security Boom’ at 7 (12 September 2012) Lowy Institute for International Policy available at <http://www.lowyinstitute.org/publications/pirates-and-privateers-managing-indian-oceans-private-security-boom> - accessed on 16 November 2013. See also Florquin, N. ‘Escalation at Sea: Somali Piracy and Private Security Companies’ in Project of the Graduate Institute of International and Development Studies ‘*Small Arms Survey 2012: Moving Targets*’: Geneva, Cambridge 2012 at 207-210.

³²⁹ *Ralph van Urk – The owner of the mv “Roelof” v Minister of Police and Another (unreported)*, KwaZulu-Natal High Court, Durban Case number 10610/2011 (the *mv “Roelof”* case).

The requirements for an “import” permit are dealt with in section 4.2.8. It should be noted that whilst problems arise in applying the import requirements to a PCASP team, it is submitted that it is the correct permit to apply for in accordance with the FCA and Regulations.

The fact that these “hub points” have the potential to persuade vessel owners to change their sailing schedule, for example, to call at the port of Salalah, Oman to take on bunkers and guards simultaneously in place of an alternative port, should be an incentive for coastal states to ensure that administrative requirements for permits for armed guards are clear and not unduly onerous. This will be discussed in the conclusion to this study and is one of the reasons that the researcher argues that South Africa should consider amending the current legislation applicable to armed guards.

4.2.4 Conditions for non-resident import permit applicants

As noted above, it is argued that the correct permit is an “import permit”. Regulation 62 of the FCA³³⁰ sets out the conditions in respect of applications for import and export permits. Any reference made to import will include the word “export” for the purpose of this study as the nature of PCASP permit applications will involve importing to and re-exporting from South Africa. For this category of persons, the intention is not for the weapons to remain indefinitely in South Africa but rather to move freely between vessel transits around the South African coastline.

Specific prescribed conditions for “non-resident applicants” are set out in Regulation 62(4). These conditions should be read in addition to those set out in Regulation 13, which are the general requirements for permits, amongst others.

The word “person” is used when referring to non-resident applicants. Regulation 13(5) sets requirements for juristic persons who apply for a permit under the FCA. Juristic person applicants are expressly limited to South African companies.³³¹ If this is the case the import

³³⁰ The Firearms Control Act 60 of 2000, as amended.

³³¹ Regulation 13(5)(b) to the Firearms Control Act 60 of 2000, as amended.

permit requirements for South African companies, if nominated by a foreign PMSC, are to be applied and not necessarily the “non-resident” requirements.

On the other hand, where PMSCs are the applicants, South African agents would be nominated as the “responsible persons” when making application on the prescribed SAPS520 form.³³² In other words, a foreign juristic person cannot qualify as an applicant within the meaning of the Regulation 13(5) of the FCA.

Thus the SAPS have applied the Regulations to the FCA in a piecemeal fashion in order to issue permits and to accommodate PMSC by applying the requirements under Regulation 62(4) for non-resident applicants and incorporating the segments of Regulation 13(5) for juristic persons but excluding the requirement of the juristic person being a South African registered company in terms of Regulation 13(5) (b).³³³ The researcher analyses the remainder of the applicable FCA Regulations on the assumption that foreign PMSCs fall within the meaning of “non-resident applicants” in terms of Regulation 62(4), but that this is an area that requires clarification by way of amendments to the regulations.

4.2.5 Types of import permits

There are two types of import permits under Regulation 62(2), namely; (i) temporary permits and (ii) multiple import/export permits. Non-residents are entitled to apply for a temporary or multiple import and export permit.³³⁴

The word “temporary” is not defined in the FCA or the Regulations thereto. The definition of “multiple”³³⁵ expressly includes the repeated import and export of weapons permitted under the

³³² The SAPS520 is the generic form wherein details of an application for an import/export permit are completed and submitted to the SAPS. A copy of the SAPS520 is available at http://www.saps.gov.za/services/flash/firearms/downloads/import_application.pdf.

³³³ For example, in the both the *Solace Global Maritime Ltd UK v The Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case No. 35/2012 and *Protection Vessels International Ltd v Minister of Safety and Security and Others* (unreported), KwaZulu-Natal High Court, Durban, Republic of South Africa Case No. 3390/2011 applications were made on behalf of foreign juristic companies – as applicants - but the holders of the permits were named as local South African agents.

³³⁴ The Regulation is headed:

Non-resident: Temporary import and export permit of a firearm not licensed in terms of the Act.

Regulation 62(4)(a) states: An application by a person who is a non-resident and not the holder of a permanent resident permit for a temporary import permit and the subsequent export permit or multiple import and export permit...

Act. In the researcher's view, a reasonable interpretation of "temporary" includes circumstances where the firearms and ammunition are permitted to enter (or exit) the Republic on one specific occasion as a result of a single event requiring the presence of such firearms.³³⁶

The researcher will illustrate that should PMSC choose South Africa as the next hub point, a multiple import/export permit is the most appropriate authorisation for commercial and efficiency reasons. PMSCs seek to increase productivity and reduce costs for their shipowner clients with quick turn-around times. This can only occur with the free movement of weapons in and out of South Africa, correctly documented and controlled, to ensure that maritime trade is not delayed or hindered by unduly onerous requirements, or inconsistencies, in the permit application process.

4.2.6 To whom must a permit application be submitted?

The application for both a temporary and multiple³³⁷ import permit can either be submitted to; (i) the Registrar at the Central Firearms Registry (CFR) or (ii) the Designated Firearms Officer (DFO) at the port of entry.

Regulation 62 (4) Non-resident: Temporary import and export permit of a firearm not licensed in terms of the Act

- (a) An application by a person who is a non-resident and not the holder of a permanent resident permit for a temporary import permit and the subsequent export permit or multiple import and export permit in respect of any firearm or ammunition not licensed under the Act, may be submitted either to the Head: Central Firearms Register directly or to the Designated

³³⁵ The Firearms Control Act 60 of 2000, as amended,
Regulation 1:

"multiple import-export permit" means an import and export permit authorizing the multiple import and export of a specific firearm or ammunition during a specified period. Regulation 62 (6) - Multiple import export permit:

- (a) The Registrar, Designated Firearms Officer or a police official who has been delegated thereto, may issue an import permit and export permit in respect of a specific firearm and also ammunition applicable to the firearm, which permit will allow the repeated import and export of the firearm and ammunition over a fixed period of time which permit will be known as a "multiple import-export permit".

³³⁶ Temporary is defined as: "lasting for only a limited period of time; not permanent" – Oxford Dictionaries available at <http://www.oxforddictionaries.com/definition/english/temporary?q=temporary> accessed on 14 November 2013.

³³⁷ Regulation 62 (5) to the Firearms Control Act 60 of 2000, as amended.

Firearms Officer at the place designated as a port of entry in terms of the Immigration Act, 2002 (Act No. 13 of 2002) where the applicant will enter into the Republic of South Africa.³³⁸

An applicant is required to submit an application at least 21 days prior to his or her arrival, but only if the application is made directly to the CFR.

Regulation 62(4)(b):

An application submitted directly to the Head: Central Firearms Register in terms of subparagraph (a) must be lodged at least 21 days prior to the arrival of the applicant in the Republic of South Africa and the applicant must supply an address outside the borders of the Republic of South Africa whereto the permit will be posted.³³⁹

The question of whom an application can be made to is important in analysing the South African police authorities' interpretation of the FCA and the procedures for permit applications. For example, on 16 September 2010, the SAPS instructed relevant stakeholders that all permit applications (for PMSCs) must be made at least 21 days prior to the vessel's arrival,³⁴⁰ whether the application is made to the CFR or the local DFO.

A strict reading of Regulation 62(4)(c) suggests that a person who possesses a firearm and intends entering South Africa, can apply directly to the DFO for either a temporary or a multiple import permit on arrival at the port of entry, provided that all the necessary documentation is in order and the DFO is delegated to issue permits.

Regulation 62(4) (c) states:

The permit in respect of an application submitted to the Designated Firearms Officer on the arrival of the applicant at the port of entry... may be issued by the Designated Firearms Officer

³³⁸ Regulation 62 (4) to the Firearms Control Act 60 of 2000, as amended.

³³⁹ Regulation 62(4) (b) to the Firearms Control Act 60 of 2000, as amended.

³⁴⁰ Brigadier Gopaul 'Developing a mechanism to control the movement of arms and ammunition in and through the sea ports of entry, used by private armed security agencies to protect vessels from piracy and armed robbery at sea' – SAPS Communiqué from the Office of the National Commander: Durban Harbour addressed to the SAASOA Durban Chapter Chairperson, 16 September 2010, (Ref: 3/5/1) and annexed to this dissertation marked "B" item 1. *Solace Global Maritime UK Ltd v Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case No. 35/2012 annexed to the applicants founding affidavit marked "DJP1" at pg 24 of the indexed bundle of pleadings.

who receives the application only if the Designated Firearms Officer concerned is delegated thereto.³⁴¹

Several questions arise regarding the interpretation and application of Regulation 62(4) (c), the first being whether it is available to PCSAP at all. The following questions need to be addressed:

1. Considering the plain wording of the regulation, do the provisions of Regulation 62(4) (c) apply to PCSAP?
2. If a PCSAP team arrives in South Africa without a permit, intending to apply under Regulation 62(4) (c), but the vessel is immediately searched on entry to the port, can the personnel be arrested and prosecuted for unlawful possession of firearms? How would this impact on a permit application made after such arrest?
3. When Regulation 62(4) (c) is read with Regulation 62(7) (f), there is an apparent contradiction. How is this to be resolved in the case of applications by PCSAP?

The wording of Regulation 62(4) (c) is unambiguous in its reference to the submission of the permit application “on the arrival of the applicant at the port of entry”. Provided the DFO is delegated to issue permits at the port of entry and the members of the PCSAP team are “applicants”, Regulation 62(4) (c) *prima facie* allows armed guards (or any other applicant for that matter) to arrive in a South African port and apply for a permit on disembarkation. At OR Tambo International Airport, there is a specialised SAPS Office tasked with receiving applications for and issuing temporary firearms import permits for foreign persons arriving in South African territory.³⁴² This correlates with the provisions of Regulation 62(4) (c) and it is the researcher’s view that it would apply to armed guards or PMSCs intending to obtain permits on arrival at a South African port of entry, in particular, Durban Harbour.

On the other hand, Regulation 62(7) limits the categories of persons who may be issued with an import permit without prior approval from the Registrar.

Regulation 62(7) states:

³⁴¹ Regulation 62(4) (c) to the Firearms Control Act 60 of 2000, as amended.

³⁴² South African Airways Firearms Declaration Procedure – Available at <http://www.flysaa.com/za/en/flyingSAA/baggage/firearms.html>, accessed on 12 November 2013.

Conditions under which a temporary import permit may be issued

A temporary import permit may only be issued -

- (a) to a foreign visitor for the purpose of hunting;
- (b) to a foreign visitor to display the firearm and ammunition at a trade show or collectors' show, or to display firearms or ammunition at a sport or hunting trade show;
- (c) to a foreign visitor to participate in a competitive sports shooting event organised by recognised business, hunting, sports-shooting or collectors' organisation;
- (d) to an official of a foreign government or a distinguished foreign visitor so designated by the South African Department of Foreign Affairs;
- (e) to a foreign law enforcement officer entering the Republic of South Africa on an officially approved policing assignment; or
- (f) to a person who, for other legitimate reasons, has received the prior approval from the Registrar and where the applicant can demonstrate:-
 - (i) the lawful possession of the firearm;
 - (ii) knowledge of the safe handling and use of the firearm in question through possession of a licence for the firearm or through past experience;
 - (iii) knowledge of the South African laws relating to firearms, including the principles relating to the use, safe storage and handling of firearms and where applicable their public display;
 - (iv) a need to possess the firearm;
 - (v) that the applicant cannot reasonably satisfy that need by means other than the possession of a firearm; and
 - (vi) that he or she is at least 21 years old: Provided that the Registrar may, within his or her sole discretion and on good cause shown, exempt an applicant from this requirement.

Thus, PCASP do not fall within the categories listed in (a) to (e) above but qualify, in the researcher's view, as "a person who, for other legitimate reasons, has received the prior approval from the Registrar..." It therefore appears that prior approval from the Registrar is required prior to a PMSC submitting a temporary or multiple import permit application. No time limits or conditions are set for the prior approval; in the researcher's view, this creates uncertainty for PMSC intending to disembark PCASP teams in South African territory.

The second issue involves circumstances where a vessel is searched by the SAPS immediately after berthing, or whilst at anchorage within South African territorial waters and weapons are found on board. Any person who is in possession of weapons in South African territory without a permit is in contravention of the FCA and risks being arrested and prosecuted.³⁴³

The question that may then be asked is whether is it permissible for a Master who has been arrested for unlawful possession of firearms to argue that he or she intended applying for a temporary/multiple import permit in terms of Regulation 62(4) (c) as soon as the vessel berthed. One certainly has grounds to challenge the arrest and/or prosecution on the basis that one intended applying for a permit on arrival at the port of entry in accordance with Regulation 62 (4)(c). Furthermore, one could ask whether the Master's defence would be strengthened by producing a written instruction/advice from the owners or an attorney stating that the application can be made on arrival at the port in terms of the subsection.

Finally, one must consider what the situation would be where the responsible person³⁴⁴ continues with the permit application despite the arrest of the Master, and the permit is duly issued by the relevant DFO.³⁴⁵ The authorised DFO must consider the application before the person can be detained and charged for unlawful possession of firearms. The concern is that a permit might be refused on the grounds that the person has already been arrested for unlawful possession with a pending criminal charge.³⁴⁶ It is suggested that in such circumstances this decision would be subject to review in terms of PAJA.³⁴⁷

³⁴³ Section 73 of the Firearms Control Act 60 of 2000, as amended, prohibits the importation of weapons without a permit.

³⁴⁴ A responsible person is someone who has been authorized to make an application on behalf of a juristic person, in terms of Regulation 13(5) (a) of the FCA.

³⁴⁵ This is not unrealistic as was demonstrated in the *Solace Global Maritime Ltd UK v The Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case No. 35/2012 at para. 8 – 9 of the Applicant's Replying Affidavit (in re: David John Peach) page 154 of the indexed bundle. The applicant's South African agents applied for, and were granted, a multiple import-export permit for firearms and ammunition that were in fact in the SAPS' possession at the time of such application as they formed part of an investigation into possible violations of the Firearms Control Act 60 of 2000, as amended.

³⁴⁶ *Protection Vessels International Ltd v Minister of Safety and Security and Others* (unreported), KwaZulu-Natal High Court, Durban, Republic of South Africa Case No. 3390/2011 at para. 8 - 10 of the affidavit of Derick John Coetzee annexed to the applicant's founding affidavit wherein mention is made of the refusal of the DFO for Durban to renew an import permit on the basis of the deponent's pending criminal charge.

³⁴⁷ Section 6 (Judicial review of Administrative Act) - Promotion of Administrative Justice Act 3 of 2000. This refusal would fall under the definition of an Administrative Action in terms of Section 1.

If the person is arrested and an application for a temporary or multiple import permit is granted after the arrest, there is also uncertainty as to whether the National Prosecuting Authority may still prosecute for unlawful possession. It is important for a state to protect its national security and this may be compromised if the Regulations to the FCA permit ex-military trained and armed personnel to simply arrive in South African ports carrying semi-automatic weapons and demanding the right to apply for a permit on arrival (without prior notification).

What is important is that there is clarity on this issue and that concise requirements are published with reasonable, prescribed conditions that cater for the unique situation of armed guards on board merchant vessels.

4.2.7 Delegated designated firearms officer (DFO)

The DFO must be delegated to accept applications and issue import permits in order for Regulation 62(4)(c) to be utilised. The term “delegated” is not defined in the FCA nor the regulations thereto; however, the Registrar has an obligation in terms of Section 124(1)(h)³⁴⁸ to “designate police officials as designated firearms officers”.

The Registrar may delegate the powers conferred upon him or her to any official in the service of the state.³⁴⁹ It is thus open for an applicant to argue that when a DFO accepts applications, and issues and signs permits in his or her own name, he or she can reasonably be held to be delegated in terms of Section 141(1) of the FCA as he or she is performing a power conferred on him or her by the Registrar.

The SAPS have insisted that all applications for import and export permits must be submitted to the CFR or “SAPS National Office” 21 days prior to a vessel or persons arrival without, in the researcher’s view, considering Regulation 62(4)(c).³⁵⁰

³⁴⁸ The Firearms Control Act 60 of 2000, as amended.

³⁴⁹ The Firearms Control Act 60 of 2000, as amended, Section 141(1).

³⁵⁰ Brigadier Gopaul ‘Developing mechanisms to control the movement of arms and ammunition in and through the sea ports of entry, used by private security agencies to protect vessel’s from piracy and armed robbery at sea’ - SAPS Communiqué from the Office of the National Commander: Durban Harbour addressed to SAASOA Durban Chapter Chairperson, 28 February 2011, (Ref: 3/5/1) annexed to this dissertation marked “B” item 3. *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case

There has been no formal written communication from the SAPS stating that the DFO, for example, at Durban Central Police Station which has jurisdiction over the port of Durban, is not delegated to issue such permits. Captain Vishnu Pillay, in his capacity as the DFO for Durban Central Police Station, has issued import and export permits for foreign PMSC.³⁵¹

4.2.8 Conditions for import firearms permit

When applying for an import permit the following should be considered:

1. Who may apply?
2. What conditions must the applicant satisfy and is prior approval necessary?

A temporary or multiple import permit may only be issued to certain persons intending to enter South Africa.³⁵² These persons are limited to hunters,³⁵³ collectors attending a trade and/or collectors' show,³⁵⁴ sport shooters,³⁵⁵ foreign government officials,³⁵⁶ foreign law enforcement personnel³⁵⁷ and for any other legitimate reason.³⁵⁸ It is clear that PCASP applicants would fall into the 'catch all' category of "for any other legitimate reason". The researcher argues in the conclusion to this study that this is one of the main areas of the Regulations that require amendment in order to accommodate PCASP by removing the stringent requirements that are presently not applicable to hunters, collectors, sport shooters and foreign government officials but are applicable to PCASP.

Number 3390/2011, annexed to the replying affidavit of Mark Andrew Wilson (see paragraph 4.6) marked "MAW9".

³⁵¹ *Protection Vessels International Ltd v Minister of Safety and Security and Others* (unreported), KwaZulu-Natal High Court, Durban, Republic of South Africa Case No. 3390/2011. Confirmatory Affidavit of Derek Coetzee at para. 18, annexed to the Applicant's founding affidavit. See also *Solace Global Maritime UK Ltd v Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case No. 35/2012 where Captain Pillay issued and renewed multiple import and export firearms permits.

³⁵² Regulation 62(7) of the Firearms Control Act 60 of 2000, as amended.

³⁵³ Ibid Regulation 62(7) (a).

³⁵⁴ Ibid Regulation 62(7) (b).

³⁵⁵ Ibid Regulation 62(7) (c).

³⁵⁶ Ibid Regulation 62(7) (d).

³⁵⁷ Ibid Regulation 62(7) (e).

³⁵⁸ Ibid Regulation 62(7) (f).

Applicants who fall under the catch-all category have to comply with a more rigorous set of requirements than hunters, sports shooters, persons attending a trade show and foreign government officials. They need to demonstrate lawful possession of the weapons,³⁵⁹ knowledge and vast experience in the use of the weapons,³⁶⁰ understanding of the FCA,³⁶¹ a need to possess the weapon,³⁶² that the applicant cannot satisfy this need without a weapon³⁶³ and that the applicant is older than 21.³⁶⁴

Due to the expertise and training of PCASP, the above requirements do not seem to pose a problem, except for the age restriction which might hinder personnel under the age of 21 from being able to possess weapons in South African territory.

However, the applicants under the catch-all category must also comply with the prior approval requirement. Consideration of this requirement involves determining who can grant approval, what the required notice period is and whether such requirements can be met by ship owners and PCASPs.

The prior approval requirement is set out in Regulation 62(7) (f):

A temporary import permit may only be issued: –

to a person who, for other legitimate reasons, has received the prior approval from the Registrar and where the applicant can demonstrate...

This appears, *prima facie*, to mean that a vessel owner or PCASP team needs to obtain prior authorisation from the Registrar before making a formal application for an import permit. In other words, an application for a permit under the “catch all”³⁶⁵ category is, in the researcher’s view, a two-step process; (i) prior approval must be obtained from the Registrar, and, (ii) thereafter the required documentation for the processing of a permit application must be submitted either to the CFR or DFO at the port of entry.

³⁵⁹ Ibid Regulation 62(7) (f) (i).

³⁶⁰ Ibid Regulation 62(7) (f) (ii).

³⁶¹ Ibid Regulation 62(7) (f) (iii).

³⁶² Ibid Regulation 62(7) (f) (iv).

³⁶³ Ibid Regulation 62(7) (f) (v).

³⁶⁴ Ibid Regulation 62(7) (f) (vi).

³⁶⁵ The Firearms Control Act 60 of 2000, as amended, Regulation 62(7) (f).

The researcher is of the view that the “prior approval” requirement in Regulation 62(7)(f) is not expressly subject to the 21 day rule requirement set out in Regulation 62(4)(b). Unless both regulations must be read together, it is possible to argue that in terms of Regulation 62(7)(f), a PMSC may apply for general or “blanket” prior approval from the CFR, and may thereafter make individual applications for import permits to the DFO on arrival at the port of entry, in terms of Regulation 62(4)(c). The researcher recommends that the South African authorities develop a list of approved PMSCs similar to the Panamanian Maritime Authority’s approach discussed in Chapter Three, section 4 whereby prior approval is not required for certain companies that have already been vetted.³⁶⁶ This would reduce unnecessary delays in the permit processing procedure and improve efficiency for PMSCs. The Mauritian policy expressly states that authorisation must be obtained from the Prime Minister’s office to operate in territorial waters and thereafter, 48 hours’ notice of arrival by a PCASP team on board a merchant vessel (with necessary details of equipment and personnel) is required.³⁶⁷ The South African authorities should use the Mauritian procedures as a model for the development of a new policy regarding PCASP subject to their own security assessment.

It is submitted that this is desirable as it reduces administrative requirements by allowing the CFR to vet a PMSC once, and then allow future permit applications for a PCASP team arriving in South Africa to be submitted directly to the DFO on reasonable short notice. Alternatively, the PMSC can submit the documentation set out in the Regulation for each and every employee who may possibly enter South Africa in the near future. This does not seem sensible and will, in the researcher’s view, add to the already backlogged CFR.

As permits are not granted in the individual security personnel’s name but to the PMSC firm and the South African agent is nominated as the “responsible person”, it is submitted that it is not

³⁶⁶ Panama Maritime Authority ‘Authorized Private Maritime Security Companies (PMSC) transiting High Risk Areas’ - Merchant Marine Circular MMC-245 (21 January 2013) available at <http://www.segumar.com/wp-content/uploads/2014/05/MMC-245mayo2014.pdf> accessed on 16 May 2014.

³⁶⁷ The Republic of Mauritius response to the IMO FAL Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on Board Ships, MSC-FAL. 1/Circ.2 available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Responses-received-on-Private%20Armed%20Security.aspx> accessed on 3 September 2014.

clear whether it is also necessary to demonstrate that each security personnel meets the requirements of Regulation 62(7)(f).³⁶⁸

There is ambiguity in the Regulations to the FCA; alternatively, the authorities are simply not applying it correctly. Thus the researcher recommends that urgent amendments to the FCA are required in order to clarify the import permit application requirements, or that consideration is given to formulating a list of approved PMSCs following the Panamanian example.

4.2.9 General provisions – Regulation 13

Regulation 62³⁶⁹ conditions are in addition to those set out in Regulation 13, being the general provisions regarding applications required in terms of the FCA. Regulation 13(1) states that “a person applying for, amongst others, a permit for a purpose contemplated in the FCA must apply to the Registrar for such permit”.³⁷⁰ There is further ambiguity in the Regulations as the general conditions state that applications must be made to the Registrar; however, as noted above, Regulation 62(4)(a)/(c) allows for applications to be made directly to the DFO at the port of entry. Regulation 62³⁷¹ begins with “in addition to the provisions of regulation 13...” It is thus left open to interpretation whether the provisions of Regulation 13 override those of Regulation 62.

4.2.10 Further requirements for persons under Regulation 62(7)

Regulation 62(7) (h) (iv) states that the holder of a temporary or multiple import permit must leave the country with the firearm/s.³⁷² In practice, agents have been nominated in South Africa

³⁶⁸ This would not be the case if Regulation 13(5) of the FCA is strictly applied since a foreign PMSC can then never apply for a permit. Furthermore, if the company is the only applicant, it is difficult to make sense of some of the requirements of Regulation 62(7)(f), for example; how does one show that the applicant company is 21 years old. The only alternative is for the application to be made by a South African company, in which case the prior approval requirement applicable to non-resident applications for a permit does not apply.

³⁶⁹ The Firearms Control Act 60 of 2000, as amended.

³⁷⁰ Ibid Regulation 13(1).

³⁷¹ The Firearms Control Act 60 of 2000, as amended.

³⁷² The Firearms Control Act 60 of 2000, as amended, Regulation 62(7)(h)(iv):

...whenever the holder of the temporary import permit leaves the Republic of South Africa the firearm in respect of which the permit is issued must accompany the holder of the permit.

to make application on behalf of a foreign PMSC and are named as a representative of the PMSC and holder of the said permit.³⁷³ This practice may contravene the FCA because the South African nominee remains in the country whilst the weapons depart on the next vessel, or, alternatively, are flown out of the country.

It is suggested that the most desirable solution is that the permit holder is a local nominee. Firstly, this will allow the weapons to be imported and exported on multiple occasions, thereby not restricting certain weapons to certain PCASP teams. Secondly, liability and responsibility for the weapons would fall on the local agent as the holder of the permit and this should ease the state's security concerns. It would be difficult to hold a foreign PMSC responsible for contraventions of the FCA if their representatives are not in the country.

The researcher suggests that this requirement should be clearly codified and an exception made for local nominees of PMSCs contracted to provide protection on vessels as defence against acts of sea piracy. Further conditions can be attached to the local agent, including going through the normal vetting and security processing and being in possession of certain documentation (including a competency certificate). The local private maritime security industry can be regulated and this would prevent persons who are not responsible from holding permits for the high powered weapons that arrive on South Africa's shores.

4.2.11 The 21 day rule

It was noted above that all applications to the CFR must be submitted 21 days prior to arrival in South Africa³⁷⁴ but that this requirement does not apply, in the wording of the regulations, to applications made to the DFO on arrival at a South African port.

³⁷³ *Solace Global Maritime UK Ltd v Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case No. 35/2012 at para. 10 of the Applicant's Founding Affidavit (David John Peach).

³⁷⁴ Brigadier Gopaul 'Developing mechanisms to control the movement of arms and ammunition in and through the sea ports of entry, used by private security agencies to protect vessel's from piracy and armed robbery at sea' - SAPS Communiqué from the Office of the National Commander: Durban Harbour addressed to SAASOA Durban Chapter Chairperson, 28 February 2011, (Ref: 3/5/1) annexed to this dissertation marked "B" item 3. *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, annexed to the replying affidavit of Mark Andrew Wilson (see paragraph 4.6) marked "MAW9".

On 16 September 2010, the SAPS National Commander for Durban Harbour communicated with local shipping associations and stated, amongst other things, that permit applications for PMSC must be submitted to the SAP Commander of the Seaport of Entry and to the CFR 21 days prior to the arrival of the vessel.³⁷⁵

The SAPS have created further uncertainty by stating that concessions to the 21 day rule will be made provided motivation is submitted to the DFO.³⁷⁶ This leaves shipowners unsure of whether applications submitted within the 21 day period will be granted. No guidance is offered on what concessions will be made, and on what grounds they need to be motivated. For example, would a ship owner or PMSC be entitled to a permit if application for same is made within 24 hours of a vessel arriving? Would the fact that urgent repairs are required to the vessel or the disembarkation of a sick crew member be sufficient motivation? It is suggested that the SAPS statement is too wide, and clearer guidelines are necessary.

In terms of the SAPS procedure for permit applications for PMSC, applications are made to the local DFO but are in fact sent to the CFR for prior approval. The researcher is of the view that although the SAPS insist on submission of the application for prior approval to the CFR 21 days before a vessel's arrival, this is not practical for the shipping industry. Secondly, as explained above, there is ambiguity in that the regulations set out two ways in which to make an application for a permit, each with different conditions.

These anomalies can be remedied by expressly including the category of PCASP in Regulation 62(7) (together with hunters and sports shooters) and by setting specific requirements or conditions for temporary and multiple import permits. This will make it clear that they are not subject to the prior approval and 21 day rule requirement. The SAPS state that a reason for the

³⁷⁵ Brigadier Gopaul 'Developing mechanisms to control the movement of arms and ammunition in and through the sea ports of entry, used by private security agencies to protect vessel's from piracy and armed robbery at sea' – SAPS Communiqué from the Officer of the National Commander: Durban Harbour addressed to SAASOA Durban Chapter Chairperson, 16 September 2010 (Ref: 3/5/1) annexed to this dissertation marked "B" item 1. *Solace Global Maritime UK Ltd v Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case No. 35/2012 annexed to the applicants founding affidavit marked "DJP1" at pg 24 of the indexed bundle of pleadings.

³⁷⁶ Brigadier Gopaul 'Developing mechanisms to control the movement of arms and ammunition in and through the sea ports of entry, used by private security agencies to protect vessel's from piracy and armed robbery at sea' – SAPS Communiqué from the Officer of the National Commander: Durban Harbour addressed to SAASOA Durban Chapter Chairperson, 28 February 2011 (Ref: 3/5/1) annexed to this dissertation marked "B" item 3. *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011 annexed to the replying affidavit of Mark Andrew Wilson (see paragraph 4.6) marked "MAW9".

“21 day rule” is completion of the verification process and that the original permit will be mailed to the applicant overseas.³⁷⁷ If one takes into consideration the time it will take for the permit to be posted overseas, there is little time to process the permit. If the permit is to be collected from the local DFO, there is a possibility that the process can be expedited and finalised well within 21 days of the date of application. In fact, permits have been issued well within the 21 day rule on previous occasions for PCASP teams arriving in the port of Durban.³⁷⁸

4.2.12 Period of validity

The period of validity for temporary or multiple import permits is six (6) months.³⁷⁹ Should an error occur and the PMSC (or its local agent) fails to realise the permit is about to expire, this could create delays in a vessel berthing and/or subject persons to arrest and prosecution if the permit has or is about to expire and the weapons are on board a vessel sailing towards South African territorial waters.³⁸⁰ The researcher recommends that the period of validity be extended to 12 months. This will also lessen the burden on the DFO and CFR by reducing the number of applications from PMSC that need to be processed should South Africa be the next hub for PCASP teams. The researcher is of the view that PMSC will not need to use floating armouries around the African coastline if the permit process is effective and consistent in allowing for free movement of PCASP and weapons on board vessels sailing the East and West Coasts of Africa.

³⁷⁷ Information on the Importation of Firearms – South African Police Service website available at http://www.saps.gov.za/crime_prevention/firearms/import_info.htm - accessed on 12 November 2013:

Issuing of a permit:

An application submitted directly to the Central Firearms Control Register must be lodged at least 21 days in advance to enable the South African Police Service sufficient time to process the application and to submit the permit to the applicant to an address outside the borders of the Republic of South Africa or the nominated person.

³⁷⁸ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011 at para. 9 of Derrick Coetzee’s confirmatory affidavit to the applicant’s founding affidavit.

³⁷⁹ The Firearms Control Act 60 of 2000, as amended, Regulation 62(7) (i).

³⁸⁰ This happened in the *Solace Global Security v Min. of Safety and Security and others* (unreported) KwaZulu-Natal High Court, Durban Case number 35/2012 case. Whilst the application for the return of the weapons was in the court process, the permit for the seized weapons had expired and an amended order was sought requesting the SAPS to renew the said permit in order to lawfully take possession of same if the main prayer of declaring the detention and seizure unlawful was upheld.

4.2.13 Procedure for weapons remaining on board vessels whilst in port

During the critical period up to February 2011, vessel agents informed owners and Masters that should weapons remain on board, one simply had to make the necessary declaration to the authorities in terms of the Customs Act.³⁸¹

In other words, the bond store declaration was acceptable and there was no need for a permit if the weapons were not being discharged off the vessel. The Master would declare the weapons as transshipment/in-bond cargo and in some cases this was accepted by the SAPS and customs authorities.³⁸² The SAPS realised that this posed a serious security risk and was possibly in contravention of Section 73 of the FCA.

A letter to the Chairperson of the Maritime Security Advisory Committee in Pretoria from the office of the National Commander of Durban Harbour highlighted the uncertainty with regard to the surge of PCASP arriving in South African ports.³⁸³ Brigadier Gopaul referred to contravention of the FCA and asked for an urgent directive to be issued by the office of the Maritime Security Advisory Committee. On 28 February 2011, Brigadier Gopaul issued a directive to SAASOA explaining the SAPS policy on permits for weapons intended to fight sea piracy. The directive states that all weapons, even those remaining on board vessels, must have

³⁸¹ Section 9 and Rule 9.4 of the Customs and Excise Act 91 of 1964, as amended. See the statement by Brigadier Gopaul ‘Developing mechanisms to control the movement of arms and ammunition in and through the sea ports of entry, used by private security agencies to protect vessel’s from piracy and armed robbery at sea’ – SAPS Communiqué from the Office of the National Commander: Durban harbour addressed to the Chairperson of the Maritime Security Advisory Committee, 24 February 2011(Ref: 3/5/1) at para. 2 and 3 annexed to this dissertation marked “B” item 2. *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011 annexed to the replying affidavit of Mark Andrew Wilson (see paragraph 4.6) marked “MAW8”.

³⁸² *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011 at para. 18 of the Applicant’s Founding Affidavit (Mark Andrew Wilson); see also para. 13 and annexures “MAW3” and “MAW6(1)” of the said affidavit to illustrate the Customs declaration by the Master of the mv “Jo Kashi”.

³⁸³ Brigadier Gopaul ‘Developing mechanisms to control the movement of arms and ammunition in and through the sea ports of entry, used by private security agencies to protect vessel’s from piracy and armed robbery at sea’ – SAPS Communiqué from the Office of the National Commander: Durban harbour addressed to the Chairperson of the Maritime Security Advisory Committee 24 February 2011(Ref: 3/5/1) annexed to this dissertation marked “B” item 2. *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011 annexed to the replying affidavit of Mark Andrew Wilson (see paragraph 4.6) marked “MAW8”.

permits in terms of the FCA. He went on to expressly state that the use of an in-bond cargo declaration would no longer be accepted.³⁸⁴

This illustrates the confusion about what was allowed and which declarations were accepted. The fact that a directive was requested from the Maritime Security Advisory Committee shows that the local authorities themselves were unsure of which rules and regulations applied to armed guards on board vessels entering our ports.

Petrig notes that,

...the domestic laws of the flag, coastal or port States or of the State of incorporation of the PMSC often do not contain specific rules on the use of PMSCs. General rules, such as trade and weapons regulations, do not always provide satisfactory solutions when applied to private security companies protecting merchant ship from pirate attacks.³⁸⁵

The researcher's view that amendments are required is strengthened by Petrig's statement that "what seems necessary at this juncture is an effort to coordinate the legal frameworks governing the use of PMSCs, as regards both the interpretation of existing rules and the creation of new rules".³⁸⁶ The transfer of weapons and guards "could all be addressed through further cooperation between PSCs, port states, and the international maritime community to establish uniform and clear protocol for PSCs to follow"³⁸⁷ and "the most appropriate and effective way to do this is through a collaborative world effort".³⁸⁸ Scholars agree that a coordinated effort between coastal states is required when adopting or amending

³⁸⁴ Brigadier Gopaul 'Developing mechanisms to control the movement of arms and ammunition in and through the sea ports of entry, used by private security agencies to protect vessel's from piracy and armed robbery at sea' – SAPS Communiqué from the Office of the National Commander: Durban harbour addressed to SAASOA Durban Chapter Chairperson, 28 February 2011, (Ref: 3/5/1) annexed to this dissertation marked "B" item 3. *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011 annexed to the replying affidavit of Mark Andrew Wilson (see paragraph 4.6) marked "MAW9".

³⁸⁵ A Petrig 'The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates' – *International and Comparative Law Quarterly* (UK) – page 66 - 1 July 2013. See also Yvonne M. Dutton 'Gunslingers on the high seas: A call for regulation' (2014) 24 *Duke Journal of Comparative & International Law* at 122 and 157. See further Potgieter, TD 'Maritime Security in the Indian Ocean: strategic setting and features' (August, 2012) 236 *Institute for Security Studies Paper* at 12.

³⁸⁶ *Ibid* at 67.

³⁸⁷ Mineau M 'Pirates, Blackwater and Maritime Security: The rise of Private Navies in response to Modern Piracy' (2010) Vol. 9 (1) *Journal of International Business and Law* at 71.

³⁸⁸ Brittany E. Pizor 'Lending an "Invisible Hand" to the Navy: Armed Guards as a free market assistance to defeating piracy' (2012) Vol. 45 (1) *Case Western Reserve Journal of International Law* at 571.

laws on armed guards to ensure consistency for the maritime industry. Dutton suggests that a convention be developed outlining the laws governing the use of armed guards.³⁸⁹ The shipping industry is already burdened with numerous conventions and the researcher is of the view that such a convention would not be widely accepted especially in light of the different laws adopted by coastal states relating to armed guards, as each has its own national security concerns. It is noted that coastal states' laws were not developed with the phenomenon of PCASP in mind; it is for this reason that South Africa's FCA does not adequately regulate the movement/presence of firearms on board vessels intended for defence against piracy.

A summary of unreported South African case law follows. The effect of SAPS directives and the specific dates when same were issued should be taken in consideration.

4.3 Analysis of South African case law

During the period September 2010 to September 2011, the demand for PCASP surged with the increase in the number of successful pirate attacks in the Indian Ocean. This is referred to by the researcher as the "critical period". The incidents discussed in this chapter highlight the shortfalls in the FCA and Regulations as well as the difficulties the South African authorities faced in dealing with the arrival of foreign nationals with weapons on board vessels entering the country's ports.

A limited number of cases were heard in South Africa during the critical period; these reveal the inconsistent application of the FCA and Regulations by the SAPS.

4.3.1 The arrest of OPS Solutions CC employees

In December 2010, the Organised Crime Unit, Durban (the Hawks) arrested four employees of a local maritime security advisory company, OPS Solutions CC, based in Westville, Durban, for

³⁸⁹ Yvonne M. Dutton 'Gunslingers on the high seas: A call for regulation' (2014) 24 *Duke Journal of Comparative & International Law* at 148.

the unlawful possession of firearms and ammunition.³⁹⁰ The firearms were all permitted in terms of the FCA and were to be utilised on vessels sailing the East Coast of Africa.³⁹¹ In a highly publicised arrest, the Hawks alleged that OPS Solutions CC was not in possession of the required storage or transit permits for the weaponry.³⁹²

The criminal charges were withdrawn before the accused's second appearance in court³⁹³ but this prevented the renewal of permits for the weapons that were confiscated by the Hawks in December 2010.³⁹⁴ The SAPS also refused to entertain new permit applications from OPS Solutions CC, on behalf of PVI, for weapons on board the mv "Jo Kashi" which was due to call at the Durban port in January 2011 on the basis of the pending criminal charge against its representatives, which charges were later withdrawn.³⁹⁵ The failure to entertain the permit application on the basis of the unlawful seizure of weapons at OPS Solutions CC premises led, in the researcher's view, to the seizure and subsequent opposed application in the PVI case.

4.3.2 Protection Vessels International v The Minister of Safety and Security

On 26 January 2011 the SAPS boarded the mv "African Lion" berthed alongside the port of Richards Bay and seized three semi-automatic rifles and one pistol belonging to Protection Vessels International Ltd (PVI).³⁹⁶ Similarly, on 12 February 2011 the SAPS seized four SIG semi-automatic rifles located on board the mv "Jo Kashi" which was anchored four kilometres off the Durban coastline.³⁹⁷

³⁹⁰ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011 at para. 5 of the affidavit of Derick John Coetzee annexed to the applicant's founding affidavit.

³⁹¹ *Ibid.*

³⁹² Kamini Padayachee 'Gun smuggling accused get bail' (27 December 2010) available at <http://www.iol.co.za/news/crime-courts/gun-smuggling-accused-get-bail-1.1005272?ot=inmsa.ArticlePrintPageLayout.ot> accessed on 16 November 2013.

³⁹³ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011 at para. 7 of the affidavit of Derick John Coetzee annexed to the applicant's founding affidavit.

³⁹⁴ *Ibid* para. 16.

³⁹⁵ *Ibid* para. 9.

³⁹⁶ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011 at para. 13 of the applicant's founding affidavit (Mark Andrew Wilson).

³⁹⁷ *Ibid* para. 14.

PVI brought an urgent application on 12 March 2011 in the KwaZulu-Natal High Court, Durban seeking an order directing the respondents to issue an import permit for the weapons and for same to be returned to the applicant's local agent, OPS Solutions CC, once such permits were issued.³⁹⁸ The Minister of Safety and Security,³⁹⁹ the Head of the Organised Crime Unit, Durban (the Hawks) and the Registrar of Firearms for Durban were all cited as respondents.

Mv "African Lion" seizure

The Master of the mv "African Lion" declared that there were weapons on board in terms of standard ISPS procedure.⁴⁰⁰ The firearms declaration was made to the customs and port authorities on 26 January 2011 prior to arrival at the port of Richards Bay.⁴⁰¹ The Harbour Master raised the issue of the Master not being in possession of a temporary import permit for the said weapons and contacted the local SAPS who then seized the weapons on the berthing of the vessel.⁴⁰²

PVI's representative stated that it was his understanding that import permits were not required for weapons that were to remain on board the vessel. After the Durban DFO refused to entertain an import permit application from PVI's agent it was decided to leave the weapons on board and make the customs declaration.⁴⁰³ The deponent made reference to another vessel that had entered the port of Richards Bay a mere three weeks earlier and submitted the same declaration as the Master of the mv "African Lion" without being in possession of the required import permit and the weapons were not seized.⁴⁰⁴ However, the SAPS seized the weapons on board in this instance as the Master was not in possession of an import permit as required in terms of Section

³⁹⁸ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011 notice of motion.

³⁹⁹ The citation of the Minister of Safety and Security is in fact incorrect and the Minister should have been cited as the Minister of Police from the point when President Jacob Zuma announced the appointment and renaming of his cabinet on 10 May 2009. See <http://www.saps.gov.za/about/history.php> accessed on 28 March 2014.

⁴⁰⁰ The International Ship and Port Facility Security Code implemented in terms of Chapter XI-2 of The International Convention for the Safety of Life at Sea, 1974: London: United Nations (SOLAS).

⁴⁰¹ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, annexure "MAW3" to the applicant's founding affidavit (Mark Andrew Wilson).

⁴⁰² Ibid para. 13 of the applicant's founding affidavit (Mark Andrew Wilson).

⁴⁰³ Ibid para. 18.

⁴⁰⁴ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, para. 18 of the applicant's founding affidavit (Mark Andrew Wilson).

73 of the FCA, alleging violation of the provisions of the FCA and that the firearms formed part of a wider illegal “gun running” investigation by the Hawks.⁴⁰⁵

Mv “Jo Kashi” seizure

On 12 February 2011 the Master of the mv “Jo Kashi” submitted a declaration to the port and custom authorities at Durban that weapons were on board the vessel.⁴⁰⁶ The vessel was anchored off the coast of Durban awaiting confirmation that the import permit for the weapons had been issued by the SAPS as PVI intended disembarking the firearms and ammunition for redeployment on a subsequent vessel.⁴⁰⁷ PVI alleged that because of the criminal charges (which were withdrawn on 7 February 2011) against a member of OPS Solutions CC, the SAPS refused to entertain a permit application for the said weapons on board the vessel.⁴⁰⁸ As a result, import permits were not issued and the Master of the vessel was informed that the weapons could not be discharged in Durban. The SAPS were aware that weapons were on board and proceeded to embark and seize the weapons owned by the applicant whilst the vessel was anchored outside the port of Durban.

The DFO for Durban allegedly stated that the application was not submitted 21 days prior to the arrival of the vessel and this was another reason why the permit application was refused.⁴⁰⁹ Ironically, import permits for the weapons confiscated by the SAPS from OPS Solutions CC in December 2010, and owned by PVI, were renewed by Captain Pillay of the Durban Central SAPS.⁴¹⁰ Mr Coetzee of OPS Solutions CC stated in his affidavit that previous applications were made well short of the 21 days’ notice “rule” and were granted by the SAPS; he argued that this

⁴⁰⁵ Ibid para. 4-6 of the respondent’s replying affidavit (Daniel Caspures Reyneke)

⁴⁰⁶ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, annexure “MAW6” to the applicant’s founding affidavit (Mark Andrew Wilson).

⁴⁰⁷ Ibid para. 19.

⁴⁰⁸ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, para. 9 of the affidavit of Derrick John Coetzee annexed to the applicant’s founding affidavit.

⁴⁰⁹ Ibid.

⁴¹⁰ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, para. 16 of the affidavit of Derrick Coetzee’s annexed to the applicant’s founding affidavit.

illustrated the inconsistent application of the policy on permitting weapons for security personnel on board vessels.⁴¹¹

The SAPS's answering affidavit

In the SAPS' answering affidavit, Warrant Officer (WO) Reynecke of the SAPS Durban Organised Crime Unit set out the grounds for the seizure of the weapons, namely, that the SAPS were investigating gun-running offences linked to the applicant as well as various violations of the FCA.⁴¹² WO Reynecke stated that he was investigating the illegal trade of arms and ammunition by Mr Derick Coetzee which originated in South Africa and were shipped to Kuwait.⁴¹³ No further details on when or where this alleged arms trafficking took place were provided as the investigation was, according to him, at a sensitive stage and he was acting on intelligence supplied by a representative of the United Nations (UN).⁴¹⁴ WO Reynecke stated that the weapons were seized for the purpose of this investigation in terms of Section 22 of the Criminal Procedure Act.⁴¹⁵ A further answering affidavit was filed by WO Reynecke which extended the reasons for the seizure of PVI's weapons on board both vessels. It was alleged that four of the weapons were tested and found to be fully automatic.⁴¹⁶ Fully automatic weapons are not permitted in terms of the FCA,⁴¹⁷ let alone to enter South African territory without the correct documentation and without going through the relevant process as governed by the NCACA.

PVI highlighted the fact that the SAPS themselves were not clear on the application of the FCA to weapons that are to remain on board vessels and whether or not permits were required. In this regard, the applicant pointed out that its weapons were seized nearly two months prior to a

⁴¹¹ Ibid para. 9.

⁴¹² Ibid para. 2 of the second respondent's answering affidavit.

⁴¹³ Ibid para. 5 – 6.

⁴¹⁴ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, para. 4-5 of the second respondent's supplementary opposing affidavit (Daniel Caspures Reyneke).

⁴¹⁵ Criminal Procedure Act 51 of 1977, as amended.

⁴¹⁶ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, para. 10-11 of the second respondent's supplementary opposing affidavit (Daniel Caspures Reyneke).

⁴¹⁷ Such weapons are defined as "prohibited firearms" in terms of section 4(1)(a) of the Firearms Control Act 60 of 2000, as amended.

directive being issued by the SAPS Durban Harbour Commander to the local maritime industry via SAASOA.⁴¹⁸ It was this “grey area” that resulted in PVI ordering that the weapons remain on board both vessels and not be disembarked because permits were not obtained by the time of the vessel’s arrival in South African territory.⁴¹⁹

Judgement in the Protection Vessels International v Minister of Police case

On 22 March 2011, Madam Justice Mbatha handed down judgment after hearing oral argument from both parties. It was common cause that the seizure of the applicant’s weapons was without a warrant, and that there were no permits in place for the said weapons at the time of the seizure.⁴²⁰

The Judge referred to Regulation 62 of the FCA⁴²¹ and stated that prior approval was required for permit applications by a non-resident applicant carrying weapons on board merchant vessels entering South Africa.

Justice Mbatha stated that the communiqués from the Durban Harbour Commander of the SAPS during February 2011 did not confirm that there was a grey area in the interpretation of the FCA.⁴²² She held that the requirements set out in the legislation were clear and needed no further interpretation.⁴²³ Further she held that the provisions are mandatory and cannot be waived at the discretion of the official charged with issuing licenses.

The Judge held that the court was not empowered to order the respondents to issue or even consider permit applications which are not before it. This would be usurping the powers of the administrative arm of government. The court held that PVI failed to discharge the onus on it to

⁴¹⁸ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, para. 4.6 of the applicant’s replying affidavit referring to MAW8 and MAW9.

⁴¹⁹ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, para. 18 of the applicant’s founding affidavit (Mark Andrew Wilson).

⁴²⁰ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, page 2 of the Judgment.

⁴²¹ Regulation 62 to the Firearms Control Act 60 of 2000, as amended.

⁴²² *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, page 8 (line 24) and page 10 (line 24) of the Judgment.

⁴²³ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, page 11 (lines 3-6) of the Judgment.

prove on a balance of probabilities that the granting of the order as set out in the notice of motion outweighed the interests of the SAPS and the state, especially because four weapons were tested and found to be fully automatic according to the second respondent's version.

The applicants faced the difficult task of obtaining the order sought in the notice of motion because they were not in possession of valid firearms import permits and the application was dismissed with costs.

Comment on the PVI case

The researcher is of the view that although the order was correct in that that applicant did not have valid firearms permits when their weapons entered South African territory, the judgment highlights the shortcomings of the FCA and Regulations thereto.

Firstly, the inconsistent application of the law by the South African police authorities led the applicant (or its agent) to believe that by ensuring that the weapons remained on board whilst the vessel was in port, there was no need for an import permit and that the regular declarations to the South African Customs and the Harbour Master were sufficient. This was confirmed by the applicant's representative who stated that numerous vessels had called at port in similar situations and no action had been taken against the Master or security personnel.⁴²⁴

Secondly, it appears that the permits would have been issued but for the applicant's local agent, OPS Solutions CC member's pending criminal charge (which was withdrawn a month subsequent to the seizures).⁴²⁵ Had this occurred it would have been an entirely different case altogether as permits would most probably have been issued prior to the weapons entering South African territory. The fact that permits were renewed for other weapons in OPS Solutions CC's possession illustrates the completely *ad hoc* and inconsistent review of permit applications by the SAPS during the critical period.⁴²⁶

⁴²⁴ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, para. 18 of the applicant's founding affidavit (Mark Andrew Wilson).

⁴²⁵ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, para. 7 of the affidavit of Derrick Coetzee's annexed to the applicant's founding affidavit.

⁴²⁶ *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011, para. 16 of the affidavit of Derrick Coetzee's annexed to the applicant's founding affidavit.

Thirdly, and most importantly, the Judge's interpretation of the Regulations to the FCA, in particular the 21 day rule is of concern. In the researcher's view, the Judge erred in not taking into account the second part of Regulation 62(4)(a), particularly 62(4)(c), where provision is made for permit applications to be submitted directly to delegated DFOs and where the Regulations contain no express 21 day rule requirement.

The Judge's use of the words "prior approval" was, in the researcher's view, not correctly put in context in terms of the FCA Regulations. Prior approval from the registrar is only required for non-resident applicants who do not fall into the categories set out in Regulation 62(7) (a) – (e). The researcher has discussed at length that an application for "prior approval" does not always need to be submitted 21 days before arrival – this is only required for permit applications submitted directly to the Registrar at the Central Firearms Registry.

One cannot disregard the inconsistent application of the FCA by the SAPS. When a number of vessels are allowed to berth in Durban Harbour with weapons and the police do not seize the equipment or arrest the Master for failing to have a permit, precedent is set for the industry and ships agents who are tasked with ensuring that their principals/clients comply with local laws and procedures. With respect, the Judge failed to address the provision that allows direct application to be made to the DFO and did not consider Regulation 62(4)(7)(h) with regard to circumstances where prior approval is required. The dictum in this judgment remains open to challenge based on the wording of the Regulations.

This judgment affirms the researcher's view that the Regulations to the FCA require amendments in order for the maritime security industry to gain clarity on the correct procedure and requirements. The SAPS are not interpreting the current legislation correctly when dealing with privately armed security personnel arriving on vessels in South African ports because the legislation does not cater for this category of foreign persons seeking firearms import permits.

The question also arises as to whether a coastal state can prevent a foreign flagged vessel exercising its right of innocent passage in its territorial waters. Petrig argues that:

Article 27 UNCLOS limits the coastal State's competence to enforce violations of its domestic criminal law. While it has criminal jurisdiction against ships bound for, or leaving, its internal waters, Article 27 provides that it should not be exercised over foreign flagged vessels

(including persons on board) merely passing through territorial waters. This provision is, however, subject to a number of exceptions, including, 'if the consequences of the crime extend to the coastal State' and 'if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea'. Even if the possession of arms or the presence of armed guards on board a merchant ship were a criminal offence under the coastal State's criminal law, the consequences of this do not seem to extend to the coastal State if the ship were simply passing through the territorial sea without making a port call.⁴²⁷

It is thus debatable whether or not the SAPS had the right to seize the weapons on board the mv "Jo Kashi" whilst she was anchored off the coast of Durban and if the South African government violated the vessel's right of innocent passage in terms of Article 19 of UNCLOS. Noting Petrig's views, it is sufficient to say that because the mv "Jo Kashi" was intending to enter South African inland waters (i.e., the Durban port), the SAPS did in fact have a right of search and seizure even though the vessel was anchored off Durban's coast and the owners or flag state may find it difficult to argue that South Africa breached the vessel's right of innocent passage.

4.3.3 The Owner of the mv "Roelof" v The Minister of Police

On 21 September 2011 the owner of the mv "Roelof", Mr Ralph van Urk (a Dutch national) brought an urgent application in the KwaZulu-Natal High Court, Durban citing the Minister of Police and Brigadier Anthony Gopaul (SAPS Commander of the Durban Harbour).⁴²⁸

The applicant sought an interdict directing (i) that the SAPS issue a temporary import permit for two weapons held on board the mv "Roelof"; or alternatively, (ii) that the SAPS take custody of the weapons once the vessel berthed in the port of Durban and return same prior to sailing; (iii) that the SAPS be interdicted from arresting or detaining any person on board the vessel in respect

⁴²⁷ A Petrig 'The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates' – *International and Comparative Law Quarterly* (UK) 1 July 2013 chapter VI(A) para. 1.

⁴²⁸ *Ralph van Urk – The owner of the mv "Roelof" v The Minister of Police and Another* (unreported) KwaZulu-Natal High Court, Durban Case No. 10610/2011.

of any charge relating to the possession of unlicensed firearms and (iv) that the respondents bear the legal costs if the application was opposed.⁴²⁹

The application was brought on an urgent basis because the vessel was due to arrive in the port of Durban a couple of hours later on the same day the matter was to be heard.⁴³⁰ Mr Van Urk sought assistance from the court after the SAPS refused to issue a temporary import permit. On 15 September 2011 an application for a temporary import permit had been made by his erstwhile attorneys, Shepstone & Wylie, seven days prior to the vessel's arrival in Durban.⁴³¹

Mr van Urk had fixed a time charter whilst in the port of Mombasa and was ordered to sail to Durban to load project cargo; this instruction was received on 14 September 2011.⁴³² The agents in Durban had immediately made enquiries with the local SAPS in order to obtain the necessary permit for the weapons to enter South African territory.

Acting on instructions received from the National Head of Security for Transnet National Ports Authority,⁴³³ the applicant's attorneys had applied for an "in-transit" permit as the weapons were to remain on board whilst in port. The researcher has illustrated above that, where weapons are to remain on board a vessel, the correct permit would be an "import/export" permit and not an "in-transit" permit. The deponent to the applicant's founding affidavit confirmed under oath that the local DFO and SAPS representative advised him that a temporary import permit application must be submitted and not an in-transit permit.⁴³⁴ There were thus contradictory instructions from the port authority and the SAPS.

The applicant's attorneys alleged that the same SAPS representative stated that because the applicant for the permit was a natural person, he was precluded from making such application unless the "firearms were to be utilised for a sporting event, hunting or trade fair".⁴³⁵ Direct

⁴²⁹ Ibid applicant's notice of motion.

⁴³⁰ Ibid para. 8 of the applicant's founding affidavit.

⁴³¹ Ibid para. 9.

⁴³² Ibid para. 12.

⁴³³ *Ralph van Urk – The owner of the mv "Roelof" v The Minister of Police and Another* (unreported) KwaZulu-Natal High Court, Durban Case No. 10610/2011, para.20 of the applicant's founding affidavit. Reference is made to the email from Jabulani Moleya to Peter Balfour dated 14 April 2011. A copy of this correspondence is annexed to this dissertation marked "B" item 4. *Ralph van Urk – The owner of the mv "Roelof" v Minister of Police and Another* (unreported), KwaZulu-Natal High Court, Durban Case number 10610/2011 annexure "WMW 3" to the applicant's founding affidavit.

⁴³⁴ Ibid para. 23 of the applicant's founding affidavit.

⁴³⁵ Ibid para. 23 of the applicant's founding affidavit.

reference must therefore be made to Regulation 62 (7) (a) – (c)⁴³⁶ as the alleged authority for this statement from the SAPS. An applicant is defined in Section 1 of the FCA as “a natural person or juristic person acting through its responsible person”.⁴³⁷ The SAPS interpretation of the FCA was questioned and again highlights the issue of the prevailing legislation dealing with firearms in respect of armed guards.

The applicant argued that the FCA did not distinguish between a natural and juristic person in terms of the requirements for in-transit or import permit applications.⁴³⁸ The applicant referred to a verbal statement from the SAPS that any permit application from the owner of the mv “Roelof”, whether in-transit or import and export, would be refused on the basis that it must be submitted 21 days prior to the vessel’s arrival.⁴³⁹

The applicant contended that there was no other available remedy than to come to court on an urgent basis. The option of throwing the weapons overboard was canvassed; however, the applicant would be personally liable for prosecution in The Netherlands and possibly be denied a firearms licence in the future.⁴⁴⁰ Mr Van Urk considered a ship-to-ship transfer of the weapons outside the territorial waters of South Africa (to escape the application of South African laws) but bad weather conditions prevented this option.⁴⁴¹

Justice Mnguni granted an order on 21 September 2011 in respect of prays (ii) and (iii) directing the SAPS to take custody of the weapons and return same prior to the vessel’s departure from the port of Durban and interdicting the respondents’ from arresting or detaining any person on board in respect of any charge relating to the possession of unlicensed firearms.

⁴³⁶ The Firearms Control Act 60 of 2000, as amended.

⁴³⁷ The Firearms Control Act 60 of 2000, as amended.

⁴³⁸ *Ralph van Urk – The owner of the mv “Roelof” v The Minister of Police and Another* (unreported) KwaZulu-Natal High Court, Durban Case No. 10610/2011, para. 31 of the applicant’s founding affidavit.

⁴³⁹ *Ibid* para. 33.

⁴⁴⁰ *Ibid* para. 39.

⁴⁴¹ *Ibid* para. 38.

Comment on the mv “Roelof” case

The case was heard during the critical period when the SAPS were unsure of how to handle permit applications for weapons on board merchant vessels used in the fight against acts of sea piracy. Every effort was made by the applicant’s attorneys to comply with the SAPS requirements in order to obtain the necessary firearms permit.

The fact that the owner was only aware of its scheduled call to Durban seven days prior to arrival highlights the need for greater efficiency and consistency in respect of the permit application process and regulations. The SAPS relied on the “infamous” 21 day rule as one of the reasons for refusing to issue the firearms permit but this was unreasonable as the applicant had supplied all the documentation required in terms of the FCA and Regulations thereto and there have been circumstances, as illustrated in the PVI case, where the 21 day rule has not been strictly applied. The researcher has argued at length regarding the unreasonableness of the 21 day rule and is of the view that this case should be used as a basis for clarity and/or amendments to the Regulations to provide for the specialised needs of the shipping industry.

The statement by the SAPS representative that persons who apply in their personal capacity can only be issued with a permit if they are a sports shooter, hunter or attending a trade/collectors’ fair is not in accordance with the Regulations to the FCA. The SAPS omitted to take cognisance of Regulation 62(7) (f),⁴⁴² namely the catch-all category for applicants who do not fall under the remainder of the categories. The fact that the order was granted by the KwaZulu-Natal High Court speaks volumes and the applicant was able to show on a balance of probabilities that the prejudice to the Master outweighed the SAPS’ concern about not complying with the 21 day rule. Full disclosure was made to the court, including the weapons permit and flag state authorisation. The researcher is of the view that the remedy of approaching the courts can be avoided by means of clear, codified policies and firm intention on the part of South African government to facilitate PCASP arriving in South African ports with weapons and ammunition.

⁴⁴² The Firearms Control Act 60 of 2000, as amended.

4.3.4 Solace Global Maritime Ltd UK v The Minister of Police

On 9 January 2012 (almost a year after the seizure of the PVI weapons), an urgent application was brought in the Durban High Court by a UK registered Company, Solace Global Maritime Ltd, against the Minister of Police and three others (the Solace Case).⁴⁴³ It is noteworthy that two colonels' in the Hawks were cited in their personal capacities, namely a Col. Dafel and Col. Reyneke (who was also the investigating officer in the PVI case).

The applicant sought an order directing the respondents to return three Izhmash firearms belonging to the company which had been seized by the Hawks on board the mv "Elinakous" on 18 March 2011 in the port of Durban.⁴⁴⁴ A criminal case of unlawful possession of firearms was opened at the Maydon Wharf police station under CAS: 90/03/2011⁴⁴⁵; however, no person was arrested or charged for the alleged contravention of the FCA. The holder and person named on the temporary import firearms permit, Mr Robert Davies, was asked to submit to a warning statement but he refused to do so.⁴⁴⁶

The applicant's South African nominee/agent, Maritime Operations duly represented by Jane and Robert Davies presented a valid SAPS import permit number TI4211212 for the seized weapons with an expiry date of 30 September 2011.⁴⁴⁷ This permit was signed and issued by Captain Vishnu Pillay of the Durban Central Police Station on 4 March 2011.⁴⁴⁸ The permit was issued in the name of Robert Davies c/o Maritime Operations with an address on the Bluff, Durban. It was submitted by the applicant that, on the face of it, valid permits were in place for the weapons and same were entitled to enter South African territory.

A subsequent permit was issued for the seized weapons but in the name of Jane Davies c/o Maritime Operations. The reason for the subsequent permit was because the initial permit (TI4211212) expired.

⁴⁴³ *Solace Global Maritime Ltd UK v Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case number 35/2012.

⁴⁴⁴ Ibid para. 16 of the applicant's founding affidavit (David John Peach).

⁴⁴⁵ Ibid para. 18.

⁴⁴⁶ Ibid para. 23.4 of the respondent's answering affidavit.

⁴⁴⁷ Ibid para. 13 of the applicant's founding affidavit.

⁴⁴⁸ Ibid.

Despite numerous letters, requests for meetings and representations to the SAPS, the Hawks refused to return the firearms to the applicant's agent and the holder of the said import permit. The Hawks alleged that the permit was granted unlawfully and that the person in whose name the permit was granted, namely Mr Robert Davies, was not in actual possession of the firearms as same were on board a vessel anchored outside the port of Durban.⁴⁴⁹ Captain Vishnu Pillay confirmed under oath that the renewal permit was granted to Jane Davies for the seized weapons but at the time "she did not disclose to me that the firearms were not in her possession".⁴⁵⁰ The weapons were ironically in the care and custody of the SAPS at the time the renewal of the import permit was issued after the court application was launched.

The SAPS also alleged that the responsible person named on the permit/s was not in possession of a competency certificate.⁴⁵¹ The SAPS contended that the applicants were in contravention of the FCA and liable for prosecution. However, on 16 November 2011, the National Prosecuting Authority declined to prosecute any persons after representations were made as to why there was no contravention of the FCA.⁴⁵²

The issues in this case were as follows:

1. Whether anyone was in contravention of the FCA for failing to have a valid permit for weapons on board the vessel in South African territory.
2. Whether the two permits issued for Solace's weapons in the name of Robert and Jane Davies were/are valid.
3. If not, whether the permits were duly cancelled in terms of Section 81 of the FCA.

A valid import and export permit⁴⁵³ was issued by the SAPS for the weapons which were seized on board the mv "Elinakous". As was the procedure in Durban, a local agent duly appointed by a foreign PMSC made the application for the permit in their name. This is confirmed by the fact that numerous permits had been issued in Mr Robert Davies' name as a representative of Solace Global Maritime Ltd.

⁴⁴⁹ Ibid para. 18.9 of the respondent's answering affidavit.

⁴⁵⁰ Ibid para. 9 page 148 of the indexed bundle -Vishnu Pillay's confirmatory affidavit.

⁴⁵¹ Ibid para. 13.2 of the respondent's answering affidavit.

⁴⁵² Ibid para. 36 of the applicant's founding affidavit.

⁴⁵³ Ibid para. 13 with reference to annexure "DJP2".

Section 77(1) of the FCA⁴⁵⁴ prescribes that a temporary or multiple import and export permit constitutes a licence to possess such firearms in South Africa. The averment that the holder of the permit in this case was not in actual possession at the time of making the application demonstrates the shortfalls in the FCA in relation to maritime security operations. If this requirement was to be strictly applied, each and every vessel entering South African territory with arms on board would be subject to search and seizure as the local agent would only present the permit on the berthing of the vessel and therefore be in “actual” possession of the firearms once on board or when the weapons disembarked.

Taking into consideration the previous conduct of the SAPS in allowing local agents to hold a permit for weapons arriving in South Africa, the seizure of the applicant’s weapons suggests that the Hawks were possibly acting on a frolic of their own by seizing the weapons which were duly permitted to enter South African territory. The pleadings show that numerous teams with weapons had entered and departed the port of Durban without any problems. It was argued that a number of import firearms permits were issued to Solace’s agent previously by the same DFO, Captain Pillay, and there does not seem to be a reasonable explanation for the seizure by the Hawks in this case.

In fact, the import permit was issued two weeks prior to the seizure and arrival of the mv “Elinakous” in Durban.⁴⁵⁵ Counsel for the applicant correctly argued that the permit was valid and was not cancelled in terms of the FCA and therefore the seizure of the weapons was unlawful.

Validity of the Permits

There was no notification from the SAPS that the permits were cancelled at the time of the seizure as required in terms of Section 81(2) of the FCA.⁴⁵⁶ The weapons were permitted in

⁴⁵⁴ The Firearms Control Act 60 of 2000, as amended:

Section 77(1) - A permit for the import of a firearm or ammunition also constitutes a licence to possess such firearms or ammunition for such person or period as the Registrar may specify on the permit.

⁴⁵⁵ *Solace Global Maritime Ltd UK v Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case number 35/2012, para. 41 of the applicant’s founding affidavit.

⁴⁵⁶ Section 81(2) states:

The Registrar may, by written notice, cancel an import, export or in-transit permit if the permit holder-

terms of Section 73 of the FCA and this constituted a licence to possess same in South African territory. The SAPS were aware, as had been the practice in Durban, that vessels would arrive in port and the local agent would present the firearms permit on the quayside. Any time prior to the berthing of the vessel would technically denote that the weapons were not permitted as the holder would be on the quayside and not on board the vessel with the PCASP team and weapons.

Notice of Cancellation

The SAPS issued a Section 81 notice of cancellation of the import permit to Mr and Mrs Davies c/o Maritime Operations on 2 February 2012.⁴⁵⁷ This confirms that the permits were in fact valid when the weapons were seized on 18 March 2011; otherwise the cancellation notice would not have been issued subsequent to the institution of legal proceedings.

The applicants initially sought a costs order against the two Colonels in the Hawks as they had clearly acted outside the ambit of the FCA. The matter was also referred to the Independent Police Investigative Directorate (IPID) for investigation into the conduct of the two police officers. On 18 June 2012 Justice Gorvin granted an order to the effect that (1) the seizure and detention of the three weapons by the Respondents was and continued to be unlawful; (2) that the firearms would remain in the custody of the Respondents pending the outcome of an application for a permit for the weapons, (3) if a permit was granted, then the firearms were to be returned to the applicant or it's nominee, and (4) costs to be paid by the First Respondent.

The reason for the order in the second paragraph was because by the time the judgment was handed down, the renewed permit in the name of Mrs Jane Davies had expired and the court

(a) no longer qualifies to hold the permit; or
(b) has contravened or failed to comply with any provision of this Act or any condition specified in the permit.

- (3) A notice contemplated in subsection (2) may only be issued if the Registrar has-
- (a) given the holder 30 days' notice in writing to submit written representations as to why the permit should not be cancelled; and
 - (b) duly considered any representations received and all the facts pertaining to the matter.

⁴⁵⁷ *Solace Global Maritime Ltd UK v Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case number 35/2012, para. 4 and annexure "DJP13" to the applicant's replying affidavit (David John Peach).

could not condone a contravention of the FCA⁴⁵⁸ by allowing the weapons to be delivered to the applicant without a valid permit.

Comment on the Solace Global Case

The SAPS strictly interpreted certain sections of the FCA in alleging that the permit was issued based on incorrect information supplied by Solace's local agent. The SAPS themselves did not apply the provisions of the FCA by issuing the necessary cancellation notice and acted outside the ambit of the legislation by seizing weapons which were permitted to enter South African territory.

The fact that the SAPS seized the weapons on the basis that the holder was "not in possession of same at the time of making application" is untenable as the necessary declaration was made by the applicant that the weapons were arriving on a vessel in Durban on or about a certain date. The DFO for Durban had issued countless permits during the "critical period" and for the SAPS to utilise one requirement as the basis for the seizure, is in the researcher's view, unreasonable and unjustifiable in the circumstances of the arrival of PCASP in South African ports.

The conduct of the police officials is questionable in that only three of the nine weapons on board the mv "Elinakous" were seized. One has to question why, based on the SAPS' version of events that the permits were invalid, only these weapons were seized and not the entire arsenal. No explanation was provided in the papers presented before the court.

This case caused embarrassment for the SAPS and South Africa, notwithstanding a hefty costs order as a result of the unlawful seizure of the weapons by the Hawks.⁴⁵⁹

Mineau comments that:

⁴⁵⁸ Namely Section 73 of the Firearms Control Act 60 of 2000, as amended, that an import permit is required.

⁴⁵⁹ Tania Broughton 'Security firm wants seized guns back' (9 February 2012) The Mercury available at: <http://www.iol.co.za/news/crime-courts/security-firm-wants-seized-guns-back-1.1230348> accessed on 24 March 2014. See also 'Security Firm wants return of seized guns it bought in Malta' (12 February 2012) The Malta Independent available at <http://www.independent.com.mt/articles/2012-02-12/news/security-firm-wants-return-of-seized-guns-it-bought-in-malta-305701/> accessed on 24 March 2014.

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. 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.⁴⁶⁰

Petrig states that

...depending on the locus of the ship, different sets of rules apply to the question of whether, and under which circumstances, arms and/or armed guards are allowed on board merchant ships. These rules may not only differ and/or contradict each other, but their interpretation by domestic authorities often cannot be anticipated with a sufficient degree of certainty.⁴⁶¹

This certainly holds true for the SAPS in dealing with the presence of PCASP in the Republic of South Africa in the past three years. The interpretation of the FCA by the SAPS in applying the circumstances of PCASP has led to court action following weapon seizures where valid permits were in fact issued. Ambiguity arises in applying the Regulations to the FCA to PCASP; for example, where the holder of the import permit must be in possession of the weapons, but this can only occur once the vessel is alongside and weapons are disembarked.

Mokoena reports that, at a recent workshop on maritime policing, stakeholders in Southern Africa recognised that there needs to “be more coordination and cooperation between state departments, individual countries, and inter-governmental organizations” with regard to policing maritime crime, most notably piracy.⁴⁶² The workshop concluded that “policing alone, or even the navy alone, is not enough” to prevent/reduce maritime crime.⁴⁶³

The researcher reiterates the view that there is an urgent need to amend the Regulations to the FCA in order to prevent uncertainty and indifferent application by the SAPS. The legislature

⁴⁶⁰ Mineau M ‘Pirates, Blackwater and Maritime Security: The rise of Private Navies in response to Modern Piracy’ (2010) Vol. 9 (1) *Journal of International Business and Law* at 68.

⁴⁶¹ A Petrig ‘The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates’ *International and Comparative Law Quarterly* (UK) 1 July 2013. See also Potgieter, TD ‘Maritime Security in the Indian Ocean: strategic setting and features’ (August, 2012) 236 *Institute for Security Studies Paper* at 12.

⁴⁶² B.P.O. Mokoena ‘Report from the Workshop on Maritime Policing to Combat Maritime Crime’ (2013) 2(3&4) *Journal of African Union Studies (JoAUS)* at 35.

⁴⁶³ *Ibid.*

should be made aware of this case and the shortcomings, in the researcher's view, in the FCA Regulations in relation to privately contracted armed security personnel.

CHAPTER FIVE

CONCLUSION

5.1 Findings

This study examined the international maritime industry's response to armed guards as a means of self-defence against acts of sea piracy. The IMO guidelines or recommendations to flag states and vessel owners were formulated to address the demand for PCASP by ship operators with the "blessing" of the United Nations Security Council. The impact of these personnel on a coastal state's sovereignty was not overlooked and the IMO offered recommendations that member coastal and port states should consider when making a decision to allow armed guards to disembark or embark in their ports.

A number of flag states have amended their legislation or published guidelines for vessel owners in an attempt to regulate the presence of armed personnel on board vessels registered in their respective countries. This study comparatively analysed the provisions of the policies adopted by Panama, Italy, Norway and the United Kingdom. It was noted that there are some common provisions. Issues such as risk assessment, rules on the use of force, formal agreement between the PMSC and vessel owners as well as a due diligence of the PMSC were addressed. The Egyptian government's position on the presence of armed guards in Port Said and the Suez Canal and the amended position after only six months were also discussed. The policies of coastal states around the Gulf of Aden identified as "hub points" for PMSC equipment and personnel transfer operations were discussed and specific procedures were identified that could be a model for South Africa in developing an amended policy on PCASP.

It was noted that both flag states and coastal and port states should have a clear and concise codified policy on armed guards and that a number of states have published such policies and responded to the IMO questionnaire so that their responses are now available on the IMO website, with the exception of South Africa.

The South African Firearms Control Act No. 60 of 2000 (FCA) and Regulations thereto were analysed in order to determine whether they adequately provide for the movement of weapons by PCASP within the Republic of South Africa and whether the police authorities have been

applying the law correctly. With reference to the South African unreported case law discussed in Chapter Four, the researcher is of the view that the Regulations to the FCA require amendment in order to specifically cater for PCASP arriving in South African ports. The current legislation was not developed with the unique demand for armed personnel on board merchant vessels in South African territory in mind and the specialised operations of the maritime industry need to be considered in developing policies and laws on the issue of armed guards.

The researcher is further of the view that as a member state of the IMO, South Africa has an obligation to develop policies on armed guards which “do not hinder the continuation of maritime trade or interfere with the navigation of ships and should ensure that all are consistent with international law”.⁴⁶⁴ The three cases heard in the Durban High Court are an indication that the actions of the South African Police Service (SAPS) could well have hindered maritime trade and interfered with the navigation of the ships in question. The mv “Roelof”, for example, would have been forced either to sail outside South African territory for a further 17 days whilst the permit application was being processed or to call at another port, an action which may have had serious consequences, including a breach of its charter party agreement. The SAPS’ refusal to issue an import permit could have fallen within the ambit of “hindering maritime trade or interfering with the navigation of ships” but for the court order obtained by the owner’s erstwhile attorneys.

The researcher is of the view that the period of validity of the import permits should be extended. Djibouti grants annual permits to PMSC to conduct operations in its ports. The reason for this was highlighted in Chapter Four with reference to the *PVI v Minister of Safety and Security* and *Solace Global Ltd* cases. The seizure of weapons can significantly affect the operations of a PMSC and this should be avoided.

The key research questions posed in the introduction to this dissertation are addressed below:

⁴⁶⁴ IMO Revised Interim Recommendations for Port and Coastal States regarding the Use of Privately Armed Security Personnel on board ships in the High Risk Area, IMO MSC.1/Circ. 1408/Rev.1, Annex para. 6.

5.1.1 What international legal instruments regulate the use of PCASP on board merchant vessels?

There are no specific international conventions that deal with or regulate the use of PCASP on board merchant ships. The IMO guidelines, recommendations, best management practises and published reports, although non-mandatory, are legal frameworks that member states are urged to utilise when implementing national policy or legislation on the use of PCASP, whether as a flag state, shipowner, port state or private maritime security company. These include the IMO Recommendations to Flag States,⁴⁶⁵ IMO Guidance to Shipowners,⁴⁶⁶ IMO Recommendations to Port States,⁴⁶⁷ PMSC Guidelines⁴⁶⁸ and BMP4.⁴⁶⁹

5.1.2 What policies have been adopted by traditional maritime nations as well as coastal states with jurisdiction near the Gulf of Aden relating to armed guards on merchant vessels?

The United Kingdom and Norway amended their existing legislation in order to regulate and hence permit the use of PCASP on board vessels flying their flag. These amendments took the form of new regulations specifically governing PCASP, in the case of Norway, or interim recommendations to the shipping industry, in the case of the UK Guidance document. The Panamanian Maritime Authority issued express authorisation for the use of armed guards on board vessels flying its flag and went further to list approved PMSCs, allowing shipowners to engage these firms without further approval. However, Italy remains determined to supply VPDs and the use of PCASP on board Italian flagged vessels is permitted only if VPDs are unavailable. The researcher is of the view that there is strong support for the use of PCASP as

⁴⁶⁵ IMO Interim Recommendations for Flag States regarding the use of Privately Contracted Armed Security Personnel on board ships in the high risk area. MSC.1/Circ. 1406. Rev.1.

⁴⁶⁶ IMO Interim Guidance to shipowners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the high risk area. MSC.1/Circ. 1405. Rev.2.

⁴⁶⁷ IMO Revised Interim Recommendations for Port and Coastal States regarding the Use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area. MSC.1/Circ.1408/Rev.1.

⁴⁶⁸ IMO Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on board ships in the High Risk Area, IMO MSC.1/Circ. 1443.

⁴⁶⁹ Best Management Practices for Protection Against Somalia Based Piracy, Version 4 – August 2011 - IMO Resolution MSC.324(89) on ‘Implementation of Best Management Practice Guidance by the publication: IMO Piracy and Armed Robbery against Ships in Waters off the Coast of Somalia’ – MSC.1/Circ. 1339.

defence against acts of sea piracy from major maritime nations and hence South Africa should review its legislation and policies in order to keep up with global standards. The researcher is of the view that developing a system of “blanket approval” modelled on the Mauritian policy for certain PMSCs and publishing a list of approved firms, like the Panamanian Maritime Authority has done, will reduce the onerous processing of permit applications. The process would be streamlined if a firm is already on the list and thereafter limited documentation, specifically relating to the weapons and details of the security personnel will be required.

The Egyptian policy on armed guards changed within a period of six months and the current requirements are that vessels intending to transit the Suez Canal with weapons must disembark the weapons at the entry point and the Egyptian police will transport same to the exit point for embarkation back onto the vessel. Where vessels are calling at an Egyptian port, the weapons are to be delivered to the Egyptian police to be returned shortly prior to departure. Documents must be submitted by vessel owners should a call at an Egyptian port be intended. South Africa can learn from the Egyptian experience and should avoid adopting a policy on PCASP that has not been discussed with stakeholders, with a view to developing coherent policy and procedure on the permitting, storage, transiting and possession of firearms belonging to PMSC in South African ports. The Mauritian authorities have developed a “prior authorization” procedure for PMSCs who intend operating in Mauritian territory and those with such authorisation must merely provide 48 hours’ notice of arrival of a vessel with a PCASP team on board in order to disembark equipment and personnel for transit or storage in the custody of the Mauritian police.

Unlike the Egyptian approach, the researcher recommends that the SAPS do not take weapons into their possession and transit same between the vessel and storage facilities. This will unnecessarily burden the SAPS and can be effectively controlled by publishing clear and strict requirements for transporters and storage facilities that provide such services to PMSCs.

5.1.3 Does South Africa allow firearms to be brought into its territory on board merchant vessels?

South Africa does allow firearms and PCASP to be embarked or disembarked in South African ports. Section 73 of the FCA read with Regulation 62 provides for a non-resident to make application for a compulsory firearms permit to be obtained prior to arrival. The process and conditions attached to the permit are where South African law falls short of the international guidelines set by the IMO. The South African police authorities have a difficult task in applying legislation that does not specifically cater for the category of persons assigned to vessel protection. While it is desirable that they continue to facilitate weapons permit applications to the best of their ability, it is recommended that the FCA and Regulations be amended to make the process clear and capable of consistent application.

Petrig states that PMSCs “should leap the administrative hurdle and acquire the necessary coastal or port State authorizations and/or licenses necessary for their arms and armed guards”.⁴⁷⁰ This has occurred in South Africa. What is required is a more efficient and coherent system for the permitting of weapons and disembarking of PCASP.

5.1.4 What is the process involved in obtaining the necessary permission/documentation?

As noted in Chapter Four, a PCASP requires an import permit for weapons that will enter South African territory.

An application with supporting documentation including the firearm licence, proof of authority to export from country of origin, details of the PCASP and the serial numbers of the weapons must be submitted to the Registrar at the Central Firearms Registry at least 21 days prior to the arrival of the vessel. Although this is the correct procedure to obtain an import permit, the SAPS have allowed for concessions to the 21 day rule.

⁴⁷⁰ A Petrig ‘The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates’ *International and Comparative Law Quarterly* (UK) – page 39 (1 July 2013).

5.1.5 What conditions are attached to such permission?

The firearms permitted to enter South Africa are set out in the SAPS temporary or multiple import and export permit with the make and serial numbers. The permit is valid for six months and the holder of the permit must present it once the weapons arrive in South African territory. As noted in the SAPS communiqué, only licensed transporters and storage facilities may handle or store the weapons if they are disembarked in the Republic.⁴⁷¹ In the *PVI v Minister of Safety and Security* case, the SAPS insisted that the applicant must be in possession of the weapons at the time of applying for the permit. This is untenable for PMSC, who nominate local agents as holders of import weapons permits. The holders of the permits are only in “possession” of the weapons once the vessel is alongside and the weapons are disembarked or the agent goes on board.

5.1.6 Does the current South African legislation specifically cater for armed guards on board merchant vessels entering its ports?

Despite the FCA being applicable to PCASP and permitting weapons, the specific operational requirements of PMSC and vessel owners need to be catered for and amendments to the Regulations are, in the researcher’s view, the best way to bridge this gap in the law.

The study’s key findings with regard to shortcomings in the existing legislation were:

1. Presently, PCASP do not fall within the category of foreign persons who are entitled to apply for an import permit without prior approval from the Registrar in Pretoria. PCASP are thus required to obtain prior approval from the Registrar before making an application for a firearms permit. This is not required if one is a hunter, sports shooter, or foreign law enforcement official, or if one is attending a trade fair.

⁴⁷¹ Brigadier Gopaul ‘Developing mechanisms to control the movement of arms and ammunition in and through the sea ports of entry, used by private security agencies to protect vessel’s from piracy and armed robbery at sea’ – SAPS Communiqué from the Office of the National Commander: Durban harbour addressed to SAASOA Durban Chapter Chairperson, 28 February 2011 (Ref: 3/5/1) annexed to this dissertation marked “B” item 3. *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011 annexed to the replying affidavit of Mark Andrew Wilson (see paragraph 4.6) marked “MAW9”.

2. It is unclear whether an application made by a duly appointed South African nominee/agent (on behalf of a foreign PMSC) falls within the provisions governing resident, as opposed to non-resident, applicants.
3. There is a lack of clarity on whether applications for an import permit made to the DFO on arrival at the port of entry in terms of Regulation 62(4)(c) which require “prior approval” by the CFO in terms of Regulation 62(7)(f) are subject to the 21 day rule set out in Regulation 62(4)(b). It was found that there is a distinction between prior approval and a permit application submitted to the Registrar or DFO. However, the SAPS have interpreted the 21 day rule to apply to all permit applications from PMSC. It is suggested that should the current legislation remain unchanged, foreign PMSC should consider applying for “blanket” prior approval from the Registrar and thereafter submit permit applications on an *ad hoc* basis as and when a team is due to arrive in South Africa. This would enable a PCASP to apply for permits on arrival if documents are submitted directly to the Designated Firearms Officer (DFO) at the port of entry.

Alternatively, by including the specific category of PMSC and PCASP in the Regulations to the FCA of persons entitled to permits, the prior approval requirement would not apply and applications could proceed as if they were received from a hunter, sports shooter, person attending a trade fair or foreign law enforcement official.

In the researcher’s view, in the interests of its own internal security, South Africa cannot allow ex-military personnel to arrive at its ports with semi-automatic weapons and apply for permits without sufficient notice, whether or not blanket prior approval has been obtained. At the same time, the 21 day rule is not feasible for the maritime industry. It was shown in the *mv “Roelof”* case that a transit from Mombasa to Durban can take seven days, making it impossible to comply with the 21 day rule. A compromise is required with input from stakeholders such as the South African Association of Ship Operators and Agents (SAASOA), some of whose members facilitate weapons permits and logistical arrangements for PCASP.

The researcher is of the view that South Africa stands to benefit from the opportunity to be a suitable hub point for armed guards. The prevalence of piracy off both the West and East Coasts

of Africa positions South Africa as the perfect geographical candidate for the facilitation of PCASP.⁴⁷²

PMSCs have obtained prior authorisation from coastal states like Djibouti, Sri Lanka and Mauritius to operate from their ports.⁴⁷³ South Africa should consider adopting policies to facilitate and regulate the movement of PCASP in its ports in that “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”.⁴⁷⁴

If this were to be the case, vessels not scheduled to call at a South African port, would call to take on bunkers, crew, cargo, food and stores, generating income for the local economy. The South African government would benefit from the increase in calls by earning extra port revenue from vessels. Security personnel would need to be housed; fed and entertained, which could result in further expenditure in the local market. The economic benefits are manifest if the permit process is managed and controlled correctly, taking into consideration South Africa’s security and international guidelines.

Lindiwe Sisulu, the South African Minister of Defence from 2009 to 2012, noted that the presence of armed guards on ships was “an international trend” and that “if South Africa was going that way (to facilitate armed guards) it will require a drastic restructuring of our own regulations and our own laws to accommodate that”.⁴⁷⁵ She added that South Africa “has not

⁴⁷² ICC International Maritime Bureau ‘Piracy and Armed Robbery against Ships Report for the period 1 January 2013 – 31 December 2013. Available on request at www.icc-ccs.org. See also Prof Theo Neethling ‘Piracy around Africa’s West and East coasts: A comparative political perspective’ (2010) 38 (2) *Scientia Militaria : South African Journal of Military Studies* at 94-101.

⁴⁷³ Mineau M ‘Pirates, Blackwater and Maritime Security: The rise of Private Navies in response to Modern Piracy’ (2010) Vol. 9 (1) *Journal of International Business and Law* at 68. Florquin, N. ‘Escalation at Sea: Somali Piracy and Private Security Companies’ in Project of the Graduate Institute of International and Development Studies ‘*Small Arms Survey 2012: Moving Targets*’: Geneva, Cambridge 2012 at 209-210. See also Maritime Transport Sector (MTS) ‘Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on board Ships’ – November 2012 available at http://psm.du.edu/media/documents/international_regulation/united_nations/imo/imo_egypt_response.pdf accessed on 20 August 2014.

⁴⁷⁴ Mineau, M. ‘Pirates, Blackwater and Maritime Security: The rise of Private Navies in response to Modern Piracy’ (2010) Vol. 9 (1) *Journal of International Business and Law* at 70.

⁴⁷⁵ Reported at the Indian Ocean Naval Symposium in Cape Town on 11 April 2012 – Dean Wingrin ‘SA ponders armed guards aboard merchant ships’ (12 April 2012) – Defence Web available at

taken that decision yet”.⁴⁷⁶ However, the fact is that South Africa has and does issue permits for firearms and allows PCASP to disembark in its ports. While, in the researcher’s view, the process and regulations do not specifically cater for these circumstances, the SAPS have made concessions to accommodate the entry of PCASP into South Africa. The admission by the former Defence Minister strengthens the researcher’s view that urgent amendments to the FCA regulations are required.

In conclusion, clear conditions are required for weapons permit applications for PCASP on board merchant vessels. The researcher has discussed at length the positive contribution PCASP have made to reducing piracy off the coast of Somalia and the potential for a “major environmental catastrophe” caused by a vessel under pirate control is further argument that “preventing piracy attacks from occurring is the ultimate goal”.⁴⁷⁷ The researcher recommends amendments to the FCA Regulations in Annexure “A” of this dissertation with the intention of remedying the shortfalls in the current legislation. The IMO guidelines or recommendations and flag state regulations have been considered in order to streamline the permit process. This process should occur with co-operation between South Africa and other states in order to regulate the private maritime security industry and to protect state security by preventing illegal trade in firearms.

5.2 Recommended Amendments to the FCA Regulations

Annexure A sets out the draft amendments to the FCA Regulations proposed by the researcher. The researcher has taken into consideration the IMO guidelines as well as flag and coastal states’ policies considered in Chapter Three. In the definition section of the suggested amendments, PMSC and PCASP are defined so as to create a clear category for these specific persons/entities.

Provision for the South African agent/nominee must be set out in the amendments because of the current industry trend as illustrated by the researcher with reference to South African case law. The FCA does not provide for an agent to be named as the holder of the permit but this would be

http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=24888:sa-ponders-armed-guards-aboard-merchant-ships&catid=109:ions&Itemid=238 accessed on 22 November 2013.

⁴⁷⁶ Ibid.

⁴⁷⁷ Herbig & Fouché ‘Maritime piracy and conservation crime in Africa: Has the die been cast for an environmental disaster?’ (2013) 26 (1) *Acta Criminologica: Southern African Journal of Criminology* at 45.

the most efficient way to obtain an import permit for PCASP. The agent should also have prescribed obligations and responsibilities when named as a holder of an import permit for high powered weapons. The responsible person named on the permit should, in the researcher's view, be in possession of a competency certificate so as to ensure that the vetting process (as if he/she were applying for a firearms licence) has run its course. These provisions are set out in Regulation 1 and 62(4)(A)(x) of the suggested amendments.

The general requirements in Regulation 13 need to be amended to prevent conflict with the specific regulation dealing with permit applications, namely, Regulation 62. There is conflict between Regulations 13 and 62 in that the former requires all permit applications to be submitted to the registrar at the Central Firearms Registry. Provision should be made for foreign juristic persons registered outside the Republic of South Africa to be included. Regulation 13 limits juristic persons to entities registered or incorporated in South Africa. This is remedied in the suggested amendments in Regulation 13 and in the definition section.

There should be a clear statement from the SAPS with regard to the permit that the PCASP or PMSC should apply for, namely, a multiple import permit, and the documentation required when submitting an application. This would prevent confusion on the definition of "in-transit" and "import" as highlighted in Chapter Four. This is remedied in the suggested amendments in Regulation 62(4)(A)(a).

The researcher proposes in Regulation 62(4)(A)(b) of the suggested amendments that an appropriate time to process an application for PCASP would be five business days, thereby ensuring a compromise between vessel owners' sailing schedules and the SAPS requirements to process the documentation.

PCASP should be included in Regulation 62(7) as a specific category of persons entitled to apply for an import permit, thereby removing the requirement of "prior approval" from the Registrar at the Central Firearms Registry. This is provided for in Regulation 62(7)(ee) of the suggested amendments. The researcher considered modelling the prior approval requirement in Regulation 62(7)(f) for PCASP on the Mauritian policy; however, the further requirements listed thereunder coupled with uncertainty about the period for which prior approval will be granted does not outweigh the effect of including PCASP as a special category along with sports shooters, hunters

and persons attending a trade fair. The researcher has suggested at length that South Africa should model its policy on armed guards on that of Mauritius and this can be achieved by publishing a communiqué subsequent to the promulgation of the Regulations without affecting the nature of the Regulations. The researcher therefore suggests as an alternative, that the SAPS recommend to the industry that PMSC wanting to conduct operations in South Africa should submit sufficient documentation in order to allow the authorities to vet and thereafter formulate a list of approved PMSC which will enhance the efficient processing of permits as and when they are required. This list should not, however, prevent other PMSCs from applying for permits in the normal course of affairs, as this would no doubt be open to challenge, but would operate as a list of partially pre-approved applicants, thereby ensuring quicker processing of permits. The researcher is of the view that by making it voluntary and by assuring quicker processing of permits for already vetted PMSC, PMSCs will adhere to this recommendation as it will without doubt ensure that they are able to provide a more efficient service to their shipowner clients. Approved PMSC would also be able to market the fact that they are authorised to operate in South African ports and are able to ensure smooth operations and quick turn-around times for PCASP teams.

The multiple import permit should be valid for a minimum of one year so as to reduce the workload of the SAPS in processing a multitude of applications as set out in Regulation 62(7)(i) of the suggested amendments.

Cooperation between states is vital and with uniform regulations in place, shipping companies will be able to ensure compliance with all laws and regulations applicable to the presence of PCASP in coastal states.

ANNEXURE “A”

Suggested amendments to the FCA Regulations

The researcher suggests the following amendments to the Regulations to the Firearms Control Act 60 of 2000.

Explanatory memorandum:

The surge in pirate attacks off the East and West Coasts of Africa has led to private merchant vessels deploying armed security personnel as a means of self-defence.

Having regard to the specific nature of these personnel and requirements for the embarkation, disembarkation, storage and movement of firearms in the Republic of South Africa, the legislature is of the view that the current Firearms Control Act 60 of 2000 and regulations thereto are inadequate for the facilitation thereof in South African territory.

Taking into consideration the various International Maritime Organisation recommendations on armed guards, the legislature found it necessary to amend the Act as it was not drafted with this specific category of these personnel in mind.

The amendments set out hereunder seek to:

1. Streamline the permit process for privately contracted armed security personnel;
2. Set conditions for permit holders;
3. Standardise a format that applicants must follow when submitting an application for a firearms permit;
4. Protect and ensure the security of the Republic of South Africa at all times.

The amendments are set out as follows:

Amendments to Regulation (1) – Definitions:

Regulation 1 is amended as follows:

By insertion of the following:

“**business day**” means any day from a Monday to a Friday exclusive of weekends and all public holidays. The business day operating hours shall be from 08h00am to 16h30pm.

“**local agent**” means a South African registered company duly incorporated in terms of the Companies Act 71 of 2008 nominated by a local or foreign private maritime security company to be their representatives for the purpose of firearms permit applications and arrangements for the movement and storage of firearms in the Republic of South Africa.

“**privately contracted armed security personnel**” means a person employed by a local or foreign private maritime security company to provide armed protection on board any vessel for the purposes of defence of the vessel, its crew and cargo against acts of sea piracy and armed robbery.

“**private maritime security company**” means a local company registered in terms of the Companies Act 71 of 2008 or a foreign company duly registered in terms of the company laws of its country that provides armed security services to vessels for the purposes of self-defence against acts of sea piracy and armed robbery.

“**responsible person**” means a South African citizen employed by a local agent nominated by a private maritime security company for the purpose of firearms permit applications and arrangements for the vessel and/or privately contracted armed security personnel. The responsible person must be named as the holder of the firearms permit and be in possession of a competency certificate issued in terms of Section 9(2) of the Act.

“**sea piracy**” consists of any of the following acts:

- (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 the 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).

Amendments to Regulation 13

Regulation 13(1) is amended as follows:

By insertion of the following after the words “must apply to the Registrar...”:

“or designated firearms officer”.

Regulation 13(5) is amended as follows:

By insertion of the following after the words “...Republic of South Africa”:

“or any other country”.

Amendments to Regulation 62

Regulation 62(4) is amended as follows:

By insertion of the following:

4(A) (a) An applicant who is a Private Maritime Security Company, Privately Armed Security Personnel or Master of a vessel may only apply for a multiple import/export permit in the prescribed form, namely, SAPS520.

(b) An application for a multiple import/export permit must be submitted to the designated firearms officer at the port of entry at least five (5) business days prior to arrival in the territory of the Republic of South African.

(c) Applications will be accepted on shorter notice in the following circumstances:

(i) Where a crew member is gravely ill or injured and his immediate disembarkation from a vessel is required in a port;

(ii) Where a vessel is in danger of sinking or requires immediate repairs in a port in the Republic of South Africa; or

(iii) Where for any other reason(s), which shall be submitted in writing with the application, good cause has been shown to the satisfaction of the designated firearms officer why the permit application cannot be submitted within the required five (5) business days and should nevertheless be granted.

(d) The following documents must be submitted in support of the multiple import/export permit application:

(i) Proof of the vessel's flag state authorisation to have privately contracted armed security personnel and weapons on board;

(ii) Proof of authorisation from the country where the private maritime security company is registered to provide armed protection services on board merchant vessels;

(iii) Proof of the necessary firearms licence in the country of registration;

(iv) A copy of the firearms export documentation from the country of origin;

(v) Proof of ownership of the firearms intended to be permitted;

- (vi) Copies of the passport and police clearance from the country of residence of the Master and each member of the Privately Contracted Armed Security Personnel on board the vessel;
- (vii) Proof of the vessel's previous and next three (3) ports of call;
- (viii) A statement confirming whether the firearms are to remain on board whilst the vessel is in port and confirmation that they are locked in a safe under the control of the Master;
- (ix) If the firearms are to be disembarked off the vessel, confirmation from a transporter licensed to carry firearms in terms of Chapter 9 of the Act and the storage facility that the weapons are to be handled by them and a copy of their respective licences;
- (x) A copy of the Responsible Person's identity document and competency certificate;
- (xi) A letter of authorisation from the Private Maritime Security Company confirming that the Local Agent is entitled to act on its behalf for the purposes of the multiple import/permit application and to facilitate the movement and storage of the weapons in the Republic;
- (xii) A copy of the certificate of incorporation of the Private Maritime Security Company;
- (xiii) A copy of the vessel's ship safety certificate;
- (xiv) Proof of insurance and third party liability cover held in favour of the Private Maritime Security Company, its local agent and Privately Contracted Armed Security Personnel;
- (xv) Proof of authorisation from the vessel's protection and indemnity insurers that the vessel is entitled to carry weapons and to have Privately Contracted Armed Security Personnel on board;

- (xvi) Confirmation that the Private Maritime Security Company has access to legal advice from a local firm of attorneys.

Regulation 62(7) is amended as follows:

By insertion of the following category of persons:

“(ee) to privately contracted armed security personnel employed by a private maritime security company”.

Regulation 62(7)(h)(iv) is amended as follows:

By insertion of the following after the words “...must accompany the holder of the permit”

“unless that person is a Responsible Person and the weapons are owned by a Private Maritime Security Company and in the control of a Privately Contracted Armed Security Personnel”.

Regulation 62(7)(i) is amended as follows:

By insertion of the following after the words “...exceeding 6 months at a time,”

“except for multiple import permits issued in favour of Private Maritime Security Companies in which case the period of validity shall not exceed 12 months”.

ANNEXURE “B”

Correspondence

Item:

1. **SAPS letter addressed to SAASOA Durban Chapter Chairperson dated 16 September 2010.** *Solace Global Maritime UK Ltd v Minister of Police and others* (unreported) KwaZulu-Natal High Court, Durban Case No. 35/2012. Annexed to the applicant’s founding affidavit marked “DJP1” at pg 24 of the indexed bundle of pleadings.
2. **SAPS letter addressed to Chairperson of the Maritime Security Advisory Committee dated 24 February 2011.** *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/2011. Annexed to the replying affidavit of Mark Andrew Wilson (see paragraph 4.6) marked “MAW8”.
3. **SAPS letter addressed to SAASOA Durban Chapter Chairperson dated 28 February 2011.** *Protection Vessels International Ltd v Minister of Safety and Security* (unreported) KwaZulu-Natal High Court, Durban Case Number 3390/20. Annexed to the replying affidavit of Mark Andrew Wilson (see paragraph 4.6) marked “MAW9”.
4. **Email from Transnet Head of Security addressed to Peter Belfour dated 14 April 2011.** *Ralph van Urk – The owner of the mv “Roelof” v Minister of Police and Another* (unreported), KwaZulu-Natal High Court, Durban Case number 10610/2011. Annexure “WMW 3” to the applicant’s founding affidavit.
5. **Egyptian Maritime Transport Sector notice addressed to the Chairman of Alex Shipping Chamber dated 29 August 2011.**

Brittania P&I Club 'Egyptian Ministry of Transport letter' available at <http://www.britanniapandi.com/download.cfm?docid=BE337F32-4B04-4BB4-9C55E2D7701BF54F> accessed on 20 March 2014.

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