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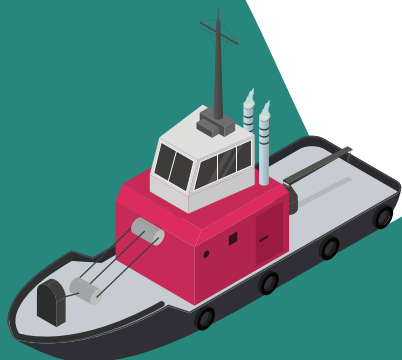
SUMMARY

OF LAWS REGULATING

FLOATING ARMOURIES

AND THEIR OPERATIONS

Annex A to Maritime Crime: A Manual for
Criminal Justice Practitioners



GLOBAL MARITIME
CRIME PROGRAMME

UNITED NATIONS OFFICE ON DRUGS AND CRIME
Vienna

Summary of Laws Regulating Floating Armouries and their Operations

Annex A to Maritime Crime: A Manual
for Criminal Justice Practitioners

Global Maritime Crime Programme



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Chapter 1

Background

KEY POINTS

1. Floating armouries (FAs) are vessels that provide offshore storage of weapons, ammunition and security equipment, and are a recent development born of the logistical needs of private maritime security companies engaged in the protection of commercial ships from pirate attacks.
2. Few laws, if any, deal specifically with FAs, but a number of national laws and international instruments are applicable to their activities and operations.
3. There is no separate legal status for FAs, or distinctive legal classification of them, except as determined on a State-by-State basis within flag State registries. No centralized weapon registration system and no central registration of floating armouries themselves (beyond flag State registrations) exists.

KEY TERMS

FLOATING ARMOURY (FA): A floating armoury (FA) is a vessel that has the facility to store small arms, ammunition and security-related equipment and usually operates beyond the territorial sea of any coastal States. The FA may have the facilities to accommodate privately contracted armed security personnel for periods of time between tasks. FAs with accommodation are commonly referred to as “Floatels”. FAs are also described by some national authorities as “vessel-based armouries” (VBA), “security support vessels” or offshore security support vessels.

PRIVATE MARITIME SECURITY COMPANY (PMSC): A private organization which provides security personnel – armed, unarmed or both – on board ships and in other maritime contexts for protection against maritime security threats..

PRIVATELY CONTRACTED ARMED SECURITY PERSONNEL (PCASP): Armed guards embarked on board a commercial ship, fishing vessel, yacht or other private vessel. PCASP are also referred to as “sea marshals” by some national authorities.

OPERATIONAL EQUIPMENT PACKAGE (OEP): The OEP is the security equipment, including weapons, ammunition and security-related equipment, including a ballistic helmet, ballistic body armour, binoculars, a GPS device, a satellite telephone, a VHF radio and a trauma first aid kit, used by PCASP while embarked on commercial vessels and stored on FAs.

1.1 Origin of floating armouries

While this annex applies to the laws relating to floating armouries (FAs) in a general and global manner, the origin of FAs was in the Indian Ocean in support of counter-piracy operations conducted by private maritime security companies (PMSCs). The upsurge of piracy in the Gulf of Aden and the wider Indian Ocean from 2006 to 2009 eventually led commercial shipowners to contract armed guards to protect their vessels transiting the formally specified High Risk Area¹ (HRA), where piracy attacks were most prevalent. Despite international concerns over the use of privately contracted armed security personnel (PCASP) on ships, their use was effective, and as of the present date of publication (September 2019), no ship with PCASP embarked has been successfully overtaken by pirates.

However, the demand for privately contracted armed security personnel (PCASP) has precipitated a new set of legal and logistical concerns. Even today, flag States vary as to whether they permit armed guards on their vessels. For the flag States that allow armed guards, the movement of weapons and personnel onto and off the vessels poses a challenge. Since most port and coastal States have restrictive, bureaucratic and costly procedures for arms, ammunition and security equipment entering their territory, private maritime security companies quickly sought to find the most cost-effective approach to embarking and disembarking both kit and personnel. By the end of 2012, most private maritime security companies had turned to floating armouries to solve this problem. Located outside the territorial sea and beyond the contiguous zone of coastal States, where applicable (i.e., for States having established such a zone), the FAs facilitate the embarkation and disembarkation of PCASP with their operational equipment package (OEP) around the edge of the High Risk Area. While there are fewer today than during their peak, floating armouries continue to provide support to PMSCs transiting the High Risk Area.

¹ International Maritime Organization, “Somali pirate activity: the High Risk Area”, web page containing revisions of the boundaries of the High Risk Area and supporting guidance, available at www.imo.org.

1.2 Floating armoury operations

According to an extensive survey of operators and customers of floating armouries conducted by UNODC at the peak of such operations, roughly 10–12 operators and around 20 vessels supported as many as 2,500–3,000 PCASP embarkations/disembarkations in the High Risk Area each month. Currently, it is estimated that as of September 2018 there are around 1,500–1,800 embarkations/disembarkations in the High Risk Area each month, and the most accurate list of FAs available as of September 2020 can be found below, in the table of current floating armoury operators.

Floating armouries have also started to provide accommodation for the privately contracted armed security personnel (PCASP) on board their vessels for the period between their transits across the High Risk Area. A number of floating armouries continue to operate in the Red Sea and the Gulf of Oman as “Floatels” for PCASP.

Although the details of the processes for the initiation, administration and arrangements for PCASP to embark/disembark FAs differ, the basic conduct of operations of floating armouries are as follows:

- *Embarkation from port.* PCASP will normally fly from their home locations to the port of embarkation, where they congregate. They then embark a support vessel (shuttle), which takes them to a floating armoury, where they are provided with OEPs belonging to their contracting PMSC. If they are to remain on board the floating armoury for a period of time, they are allocated accommodation while they await tasking from their PMSC.
- *Embarkation from the floating armoury to a client vessel on task.* When the private PCASP has been tasked by its PMSC to join a client vessel for a voyage, the team prepares their OEP and personal kit. The PMSC/PCASP team leader makes arrangements with the floating armoury staff for a boat transfer from the floating armoury (which normally have small seagoing boats available for transfers of PCASP to the client vessel. The client vessel will pass the FA at a distance of between 0.5 and 5 nautical miles at slow speed (4–6 knots), and the transfer is carried out if

weather conditions are safe. The PCASP will then be on task on board the client vessel.

- *Disembarkation from a client vessel.* At the end of a PCASP task on a client vessel, the PCASP team will prepare for disembarkation. The client vessel will pass the FA at a distance of between 0.5 and 5 nautical miles at slow speed, and the transfer is carried out if weather conditions are safe. On arrival at the floating armoury, the PCASP will secure their OEP and, if staying on board, be allocated accommodation on the floating armoury. The PCASP may either be transferred back to a home port if and when possible or remain on board the FA awaiting subsequent tasking.
- *Disembarkation to port.* On completion of their task(s), the PCASP may be returned to a port by support vessel (shuttle), leaving their OEP on board the floating armoury. They will then either fly back to their home locations, stay at temporary accommodation ashore awaiting retasking, or relocate in the theatre.
- *Accommodation on board floating armouries.* PCASP can be accommodated on board floating armouries for varying lengths of periods between tasks. The length of time they remain on board is principally determined by their contracting PMSC. Floating armoury service providers estimate that the average length of stay on board a floating armoury is about seven days, but there have

been occasions when individuals have remained on floating armouries for more than 100 days.

- *Embarkation/disembarkation directly to client vessel in port.* PCASP may embark the client vessel in port prior to the OEP collection at the floating armoury, and disembark in port after the OEP drop-off, with only the OEP being transferred to/from the floating armoury. In the Red Sea, PCASP can embark the vessel at Suez and not collect their OEP until just outside the High Risk Area boundary in the southern Red Sea some three days later.

1.3 Procedural history

Concerns relating to floating armouries have been raised in numerous forums, including the Maritime Safety Committee of the International Maritime Organization, the Contact Group on Piracy off the Coast of Somalia and the United Nations Security Council. These expressions of concern led to the present legal analysis, which has benefited from comments from various sections of UNODC, the International Maritime Organization and the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs, as well as comments from the attendees of the law expert meeting of the UNODC Global Maritime Crime Programme, held in Colombo in June 2018.

The present analysis seeks to set out the relevant legal provisions applicable to floating armouries at the time of the initial publication (January 2019).



Chapter 2

Current floating armoury operators

As of September 2020, there are four operators of floating armouries (FAs) – MNG Maritime, Palm Charters, Sinbad Navigation and Ambrey – and their armoury vessels change on a fairly regular basis. The table below provides information about current FAs

and related vessels including the owners/charterers (with country of company registration), State of vessel registration, accommodation capacity and additional relevant information:

COMPANY	VESSEL	ROLE	LOCATION	CLIENT BUNKS	REMARKS
Ambrey (United Kingdom)	Menkar	MIO VBA	MIO	100	Drifts E. of Maldives
	Markab	RS VBA	RS	100	Anchored in RS
	Mirfak	tbc	tbc	100	Role unknown
	Bateleur	MIO logistics	MIO	N/A	Resupply vessel
	Orcades	SW HRA VBA	SW	50	Off Madagascar
	Servus	GoO Shuttle	GoO	N/A	Drifts in GoO
	Team Clio	GoO VBA	GoO	45	Chartered VBA
	Venturer	GoO logistics	GoO	N/A	Purchased
Sinbad Navigation (United Arab Emirates)	Aladin	RS VBA	RS	70	Anchored in RS
	AM230	GoO transfer	GoO	N/A	Swedish S200-class
	Antarctic Dream	MIO VBA	MIO	150	On route to MIO
	Genesis	MIO logistics	MIO	40	Currently drydock in Dubai
	Jupiter	GoO VBA	GoO	120	Chartered; anchored
	MR280	RS logistics	RS	N/A	Swedish S200-class
	OW267	RS transfer	RS	N/A	Swedish S200-class
	Sinbad	RS VBA	RS	70	Anchored
	Yasmeen	MIO transfer	MIO	N/A	Swedish S200-class
	Yasmeen M	GoO VBA	GoO	N/A	Back up accommodation
Palm Charters Group (Spain)	Alannah Palm	GoO Shuttle	GoO	N/A	
	Blue Palm	GoO logistics	GoO	95	Ex-MNG Discovery
	Golden Palm	RS VBA	RS	120	Ex-Sultan
	Grey Palm	MIO VBA	MIO	50	Ex-Sealion
	Intercom 1	GoO logistics	GoO	50	Ex-MNG Endeavour
	Sterling Palm	MIO logistics	MIO	48	Ex-Alfonsa/ MNG Resolution
	White Palm	GoO VBA	GoO	66	Ex-Defiant
MNG Maritime (United Kingdom)	MNG Capt James Cook	RS VBA	RS	300	Anchored in RS
	MNG Jorgia	GoO Shuttle	GoO	N/A	Swedish S200-class
	MNG Pembroke	GoO VBA	GoO	140	Anchored in GoO
	Kalpana	RS logistics	RS	N/A	

RS = Red Sea; GoO = Gulf of Oman; VBA = Vessel Based Armoury; MIO = Mid-Indian Ocean; HRA = High Risk Area;



Chapter 3

Extant laws relevant to
floating armouries

Floating armouries (FAs) are not directly addressed by any international instruments. A variety of hard and soft international laws, as well as some national systems of regulation, nevertheless relate to some degree to the activities of floating armouries.

In general, there are three aspects of an FA operation to which existing laws apply:

1. The vessel, its armoury and the services it provides;
2. The services facilitated by the vessel;
3. The individuals involved.

3.1 The vessel

While it may seem obvious, FAs are, first and foremost, vessels and must therefore comply with the extensive national and international laws pertaining to vessels. Furthermore, for the purpose of this analysis, FAs will be examined only to the extent that they are merchant vessels, rather than State-owned warships that enjoy certain immunities. State-owned FAs are not covered by this analysis.

Innocent passage and coastal State interests

One of the legal issues most relevant to FAs is the right to exercise innocent passage through the territorial sea. Passage through the territorial sea, which includes anchoring that is incidental to ordinary navigation or necessitated by distress, is defined by article 18 of the United Nations Convention on the Law of the Sea (UNCLOS) and can be innocent or not. While articles 17–26 of UNCLOS all contain guidance on innocent passage, a number of divergent views exist. There is a split in States' opinions relating to innocent passage by vessels with weapons on board when those weapons are not part of the sealed cargo of the vessel. While some States permit carriage of arms, others consider an armed transit *per se* to be "prejudicial to the peace, good order or security of the coastal State" and not innocent under article 19 of UNCLOS. Without any common position on this issue, therefore, FAs could be arrested pursuant to article 27 of UNCLOS in the midst of what they thought was innocent passage, but which the coastal State considered to be disturbing the peace of the country or the good order of the territorial sea.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

SECTION 3. INNOCENT PASSAGE IN THE TERRITORIAL SEA

SUBSECTION A. RULES APPLICABLE TO ALL SHIPS

ARTICLE 17

Right of innocent passage

Subject to this Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea.

ARTICLE 18

Meaning of passage

1. Passage means navigation through the territorial sea for the purpose of:

(a) traversing that sea without entering internal waters or calling at a roadstead or port facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or port facility.

2. Passage shall be continuous and expeditious. However, passage includes stopping and anchoring, but only insofar as the same are incidental to ordinary navigation or are rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.

ARTICLE 19

Meaning of innocent passage

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.

2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:

(a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;

(b) any exercise or practice with weapons of any kind;

[...]

(f) the launching, landing or taking on board of any military device;

[...]

(l) any other activity not having a direct bearing on passage.

Pursuant to article 25 (1) of UNCLOS, a coastal State may take the necessary steps to prevent passage which is not innocent. As merchant vessels, FAs would be subject to such prevention, as would any other vessel. Additionally, if the coastal State determines that such passage is a “crime...of a kind to disturb the peace of the country or the good order of the territorial sea” under article 27, it may exercise criminal jurisdiction over an FA. Genuine and good faith discrepancies between States’ interpretation of these UNCLOS provisions mean that there is no consistent legal position on how the passage of an FA through the territorial sea is to be treated by a coastal State.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 27

Criminal jurisdiction on board a foreign ship

1. The criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in the following cases:

(a) if the consequences of the crime extend to the coastal State;

(b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;

Passage through the contiguous zone by FAs is also a matter of some legal disagreement among States. FAs typically seek to keep their operations outside the contiguous zone, but when transiting the contiguous zone, some States have taken the position that under article 33 of UNCLOS, there is a right to arrest a vessel to prevent the customs infringement of bringing arms illegally into the country. While States do have a right to prevent infringement of their customs, fiscal immigration or sanitary laws in the contiguous zone, there remain divergent views on how that right applies to FAs.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 33

Contiguous zone

1. In a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory or territorial sea.

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Flag State responsibilities

FAs normally operate outside the territorial sea and the contiguous zone, and thus within the exclusive jurisdiction of flag States over vessels flying their flag on the high seas, as well as in relation to activities within the exclusive economic zone which do not fall under the jurisdiction of the coastal State pursuant to Part V of UNCLOS. Flag State law is consequently of paramount importance for governing the conduct of FA vessels. It is also important to recall that articles 58 (2) and 88 of UNCLOS further emphasize that “the high seas shall be reserved for peaceful purposes”. The activity of FAs is set against this backdrop.

UNITED NATIONS CONVENTION ON THE LAW OF THE SEA

ARTICLE 94

Duties of the flag State

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. In particular every State shall:

(a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and

(b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.

3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to:

(a) the construction, equipment and seaworthiness of ships;

(b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments;

(c) the use of signals, the maintenance of communications and the prevention of collisions.

4. Such measures shall include those necessary to ensure:

(a) that each ship, before registration and thereafter at appropriate intervals, is surveyed by a qualified surveyor of ships, and has on board such charts, nautical publications and navigational equipment and instruments as are appropriate for the safe navigation of the ship;

(b) that each ship is in the charge of a master and officers who possess appropriate qualifications, in particular in seamanship, navigation, communications and marine engineering, and that the crew is appropriate in qualification and numbers for the type, size, machinery and equipment of the ship;

(c) that the master, officers and, to the extent appropriate, the crew are fully conversant with and required to observe the applicable international regulations concerning the safety of life at sea, the prevention of collisions, the prevention, reduction and control of marine pollution, and the maintenance of communications by radio.

5. In taking the measures called for in paragraphs 3 and 4 each State is required to conform to generally accepted international regulations, procedures and practices and to take any steps which may be necessary to secure their observance.

6. A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

7. Each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

FAs are typically flagged with open registries that have inconsistent track records in respect of exercising their duties under article 94 of UNCLOS. A stateless FA would, in many cases, create a variety of national law enforcement challenges, despite rights afforded under article 110 of UNCLOS. Currently, they are all lawfully flagged in accordance with UNCLOS. Generally speaking, therefore, FAs will be subject predominantly to the jurisdiction of the flag State with regard to the conduct and operations of FAs on the high seas under article 92 (1) of UNCLOS.

Under flag State responsibilities, the minimum international requirement for addressing FAs would be to abide by any generally accepted international rules and standards. As no international body has set out any specific or direct treatment of FAs, and, notwithstanding the fact that some but not all flag registries and classification societies identify FAs as “special purpose vessels”, there are no discernible, generally accepted international rules and standards applicable to FAs at this time.

Port State

The port State has the right to engage, with respect to any FA, in investigations and enforcement actions under national laws adopted in accordance with UNCLOS. Any violation of enforceable international or national laws occurring in its territorial sea, any continuing violation originating on the high seas, any extraterritorial action for which there is a bilateral agreement on assistance, or any pollution violation addressed by article 218 of UNCLOS may be handled by port State authorities.

Enforcement jurisdiction

Naturally, any normal cause for exercise of law enforcement jurisdiction over a vessel would also apply to FAs. If there are reasons for exercising enforcement jurisdiction – for example, suspicion of illicit trafficking in narcotic or psychotropic substances or environmental concerns relating to violations under the International Convention for the Prevention of Pollution from Ships (MARPOL) – there is nothing that would make such enforcement action different for an FA than for any other vessel. Normal rules apply.

Similarly, port and coastal States, in accordance with domestic legislation, could exercise legal authority over a vessel, and arrest a vessel itself, not just the people on it (in rem actions), consistent with UNCLOS. In such instances, national law would govern the treatment of the weapons and OEPs as being potentially the cargo of the vessel, or more likely appurtenances of the vessel and thus subject to the in rem action, as well.

One of the most important means of exercising enforcement jurisdiction over FA operations is by exercising personal jurisdiction over the individuals and companies that use them. If a State has mandated that its nationals and any companies registered in its territory comply with certain requirements in order to use FAs, that State can exercise personal jurisdiction to enforce those laws.

Existing long-arm laws may also apply. For example, it may be illegal for an individual from a country to possess a certain type of weapon without a national licence even when that individual is outside the territorial jurisdiction of the State. If that person is working on an FA, the State may be able to prosecute the person even if no undesirable incident has occurred.

Enforcement in the exclusive economic zone

Some State laws may also provide for particular types of actions against the vessel itself even if an FA is operating beyond the territorial sea. A particularly strong mechanism for exercising law enforcement jurisdiction in the exclusive economic zone per article 56 of UNCLOS, for example, may relate to supply, bunkering and fuelling operations. FAs constantly need to be refuelled and resupplied, and the land-maritime nexus for such operations may give long-arm jurisdiction to the State under certain liability theories in which the fuelling vessels are considered to be engaged in some form

of criminal relationship with the vessels on the high seas. The International Tribunal for the Law of the Sea in the case of the M/V “Virginia G”² found that coastal States have regulatory authority to govern refuelling at sea when the bunkering is linked with illegal fishing activities. The enforcement, however, must be necessary to sanction non-compliance and deter future activity.

International safety management

Under the International Convention for the Safety of Life at Sea, 1974 (SOLAS), all flagged vessels over 500 gross tons must comply with the International Safety Management (ISM) Code. The ISM Code requires vessels, among other things, to have a procedural manual for what is done on board the ship in normal conditions and in emergency situations. Given the nature of FA operations, the procedure manual would not look like that of a normal vessel, in terms of both regular and emergency procedures. The decision about the adequacy of the manual, however, rests with the flag State administration, and there are currently no recognized uniform requirements or standards among flag States.

International Ship and Port Facility Security Code

Also under the International Convention for the Safety of Life at Sea, all flagged vessels over 500 gross tons must comply with the International Ship and Port Facility Security (ISPS) Code. The ISPS Code was written following the terrorist attacks of 11 September 2001 and aims, according to article 1.2 “to detect security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade”. The Code requires a formal ship security assessment to be conducted and documented, which in turn leads to the production of a ship security plan, the appointment of a ship security officer and the provision of training, drills and exercises in ship security. For the safety and security of maritime commerce, and to be consistent with the aims of the Convention, the scrutiny applied to FAs in assessing ISPS compliance should theoretically be different from that of normal merchant ships. However, responsibility for that scrutiny rests with the flag State and such scrutiny can therefore vary greatly.

² International Tribunal for the Law of the Sea, *M/V “Virginia G” Case (Panama v. Guinea-Bissau)*, Case No. 19, Order of 2 November 2012.

Becoming a vessel in support of a belligerent party

FAs, at least within the scope of this annex, are private vessels. But private vessels may become military targets in certain circumstances, even without changing their status as merchant ships under UNCLOS. Increasingly expansive logic has led to commercial vessels with cargo that finances a war effort to be attacked as warships. Therefore, there is a legal argument that if an FA were to support a State actor or its proxy in engaging in either direct combat or hybrid warfare, it could become a legitimate military target.

3.2 The armoury

While the term “floating armoury” suggests that FAs are primarily armouries and that their floating status is secondary to their status as an armoury, that is not the case from a law enforcement standpoint. When examining the legal regimes applicable to them, it is important to think about how law enforcement officers would encounter a floating armoury. Since the simple answer is “on the water” and, in most cases, on the high seas, maritime law is paramount, as FAs are first and foremost merchant ships under UNCLOS. The fact that they contain an armoury is secondary to their character as a vessel under international maritime law. Reviewing the legal regime relating to the armoury and, in turn, the weapons on an FA is therefore conducted within the context of maritime law.

In recent decades, States have come together to address the danger posed by small arms and light weapons through a variety of instruments, both binding and non-binding. While the activities of FAs necessarily involve the movement of weapons internationally, their offshore operations make it more difficult to apply those instruments on small arms and light weapons through the laws of flag, port and coastal States as well as the long-arm laws applied to certain nationals. There is therefore no international oversight mechanism for controlling the weapons that come on and off FAs.

What follows is an overview of some of the main international instruments that apply to the arms and armoury on board FAs.

Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects

The United Nations Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects (PoA) of 2001 is a non-binding framework for controlling global illicit trade in the sort of weapons that have become a major source of insecurity since the end of the Cold War. Although not binding on States, the Programme of Action does include political commitments to address the stockpiling and management of weapons, international transfers of weapons and illicit trafficking, among other matters. Perhaps most significantly, it commits States to work together regionally and globally to address concerns relating to small arms and light weapons. Article 28, for example, calls upon States “to encourage, where needed, regional and sub-regional action on illicit trade in small arms and light weapons in all its aspects in order to, as appropriate, introduce, adhere, implement or strengthen relevant laws, regulations and administrative procedures”. Furthermore, at the global level, article 39 encourages coming to a common understanding of and position on issues relating to small arms and light weapons. Article 36 requires the traceability of weapons.

PROGRAMME OF ACTION TO PREVENT, COMBAT AND ERADICATE THE ILLICIT TRADE IN SMALL ARMS AND LIGHT WEAPONS IN ALL ITS ASPECTS

1. We, the States participating in this Conference, bearing in mind the different situations, capacities and priorities of States and regions, undertake the following measures to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects:

...

At the regional level

...

25. To encourage negotiations, where appropriate, with the aim of concluding relevant legally binding instruments aimed at preventing, combating and eradicating the illicit trade in small arms and light weapons in all its aspects, and where they do exist to ratify and fully implement them.

26. To encourage the strengthening and establishing, where appropriate and as agreed by the States concerned, of moratoria or similar initiatives in affected regions or subregions on the transfer and

manufacture of small arms and light weapons, and/or regional action programmes to prevent, combat and eradicate the illicit trade in small arms and light weapons in all its aspects, and to respect such moratoria, similar initiatives, and/or action programmes and cooperate with the States concerned in the implementation thereof, including through technical assistance and other measures.

27. To establish, where appropriate, subregional or regional mechanisms, in particular trans-border customs cooperation and networks for information sharing among law enforcement, border and customs control agencies, with a view to preventing, combating and eradicating the illicit trade in small arms and light weapons across borders.

28. To encourage, where needed, regional and subregional action on illicit trade in small arms and light weapons in all its aspects in order to, as appropriate, introduce, adhere, implement or strengthen relevant laws, regulations and administrative procedures.

29. To encourage States to promote safe, effective stockpile management and security, in particular physical security measures, for small arms and light weapons, and to implement, where appropriate, regional and subregional mechanisms in this regard.

...

31. To encourage regions to develop, where appropriate and on a voluntary basis, measures to enhance transparency with a view to combating the illicit trade in small arms and light weapons in all its aspects.

At the global level

32. To cooperate with the United Nations system to ensure the effective implementation of arms embargoes decided by the United Nations Security Council in accordance with the Charter of the United Nations.

...

36. To strengthen the ability of States to cooperate in identifying and tracing in a timely and reliable manner illicit small arms and light weapons.

37. To encourage States and the World Customs Organization, as well as other relevant organizations, to enhance cooperation with the International Criminal Police Organization (INTERPOL) to identify those groups and individuals engaged in the illicit trade in small arms and light weapons in all its aspects in order to allow national authorities to proceed against them in accordance with their national laws.

38. To encourage States to consider ratifying or acceding to international legal instruments against terrorism and transnational organized crime.

39. To develop common understandings of the basic issues and the scope of the problems related to illicit brokering in small arms and light weapons with a view to preventing, combating and eradicating the activities of those engaged in such brokering.

40. To encourage the relevant international and regional organizations and States to facilitate the

appropriate cooperation of civil society, including non-governmental organizations, in activities related to the prevention, combat and eradication of the illicit trade in small arms and light weapons in all its aspects, in view of the important role that civil society plays in this area.

41. To promote dialogue and a culture of peace by encouraging, as appropriate, education and public awareness programmes on the problems of the illicit trade in small arms and light weapons in all its aspects, involving all sectors of society.

Embargoes and sanctions

The Programme of Action, in its article 32, mentions cooperation to ensure the effective implementation of arms embargoes. The legal application of embargoes in the context of FAs, however, is complex. Given that the personnel involved have a range of nationalities, that the flag States involved vary, and that an FA may traverse a coastal State's territorial sea or call at a port, there are numerous ways in which the operation of an FA could encounter an arms embargo. Since most embargoes are ad hoc on a State-by-State basis, however, any analysis of them would likewise need to be State-specific and, as a practical matter, most likely specific to the individuals involved more than to the overall operations of the FA. Some Security Council-derived embargoes, however, may be more generally applicable.

The Arms Trade Treaty

The Arms Trade Treaty (ATT), the newest international instrument related to global arms control, entered into force in December 2014, partly as a hard law complement to the Programme of Action. As of early 2019, it had 99 States parties. The express objectives of the ATT are to “establish the highest possible common international standards for regulating or improving the regulation of the international trade in conventional arms; [and] prevent and eradicate the illicit trade in conventional arms and prevent their diversion”. That said, the application of the ATT in the maritime domain remains in dispute. While the provisions relating to transfer, brokering and trans-shipment could all be interpreted as applying to the maritime space, coastal State jurisdiction and flag State jurisdiction are not the same. No consensus view exists as to whether the ATT applies in the maritime context, although State practice suggests a preference for its application in the maritime context.

One additional caveat must be raised: the ATT “shall not apply to the international movement of conventional arms by, or on behalf of, a State party for its use provided that the conventional arms remain under that State party’s ownership”. As noted, it is possible that a State or a State proxy may wish to use an FA (for either legitimate or nefarious purposes). In such instances, the ATT would not apply to those particular weapons as long as the State retained ownership of them.

Articles 3, 4 and 5 of the ATT all require States to establish national systems of control for ammunition and parts, and for conventional arms in general. In accordance with article 5 of the Treaty, each State Party is to establish and maintain a national control system, including a national control list, in order to implement the provisions of the Treaty. The control list must be provided to the ATT Secretariat pursuant to article 5 (4). In applying the ATT to flagged vessels, FAs must be placed under the control system of the flag States. If that has not been done, the flag State would be in violation of the ATT.

ARMS TRADE TREATY, ARTICLES 3, 4, AND 5

ARTICLE 3. AMMUNITION/MUNITIONS

Each State Party shall establish and maintain a national control system to regulate the export of ammunition/munitions fired, launched or delivered by the conventional arms covered under Article 2 (1), and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such ammunition/munitions.

ARTICLE 4. PARTS AND COMPONENTS

Each State Party shall establish and maintain a national control system to regulate the export of parts and components where the export is in a form that provides the capability to assemble the conventional arms covered under Article 2 (1) and shall apply the provisions of Article 6 and Article 7 prior to authorizing the export of such parts and components.

ARTICLE 5. GENERAL IMPLEMENTATION

1. Each State Party shall implement this Treaty in a consistent, objective and non-discriminatory manner, bearing in mind the principles referred to in this Treaty.
2. Each State Party shall establish and maintain a national control system, including a national control list, in order to implement the provisions of this Treaty.

3. Each State Party is encouraged to apply the provisions of this Treaty to the broadest range of conventional arms. National definitions of any of the categories covered under Article 2 (1) (a)–(g) shall not cover less than the descriptions used in the United Nations Register of Conventional Arms at the time of entry into force of this Treaty. For the category covered under Article 2 (1) (h), national definitions shall not cover less than the descriptions used in relevant United Nations instruments at the time of entry into force of this Treaty.

4. Each State Party, pursuant to its national laws, shall provide its national control list to the Secretariat, which shall make it available to other States Parties. States Parties are encouraged to make their control lists publicly available.

5. Each State Party shall take measures necessary to implement the provisions of this Treaty and shall designate competent national authorities in order to have an effective and transparent national control system regulating the transfer of conventional arms covered under Article 2 (1) and of items covered under Article 3 and Article 4.

6. Each State Party shall designate one or more national points of contact to exchange information on matters related to the implementation of this Treaty. Each State Party shall notify the Secretariat, established under Article 18, of its national point(s) of contact and keep the information updated.

One of the most relevant provisions of the ATT for FAs is article 9, which requires that “each State Party shall take appropriate measures to regulate, where necessary and feasible, the transit or trans-shipment under its jurisdiction of conventional arms covered under Article 2 (1) through its territory in accordance with relevant international law”. In applying the ATT to flagged vessels under domestic law, this provision would place a requirement on the flag State to control the movement of weapons on and off FAs.

The issue of brokering is also potentially pertinent to the control of FAs. According to a 2007 United Nations report, “a broker in small arms and light weapons can be described as a person or entity acting as an intermediary that brings together relevant parties and arranges or facilitates a potential transaction of small arms and light weapons in return for some form of benefit, whether financial or otherwise”.³ This does not include “acting as dealers or agents,” but does not necessarily have to take place at the same location as the physical transfer of weapons themselves. Under article 10 of the ATT, “each State Party shall take measures,

³A/62/163.

pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms covered under Article 2 (1). Such measures may include requiring brokers to register or obtain written authorization before engaging in brokering.” If, therefore, any brokering occurs on an FA, it should be controlled by the flag State under the ATT.

The export (article 7) and import (article 8) provisions of the ATT are of uncertain applicability regarding FAs, as there is no universal position on the matter. When applied, however, a heavy onus is placed on flag States to establish extensive controls for weapons coming onto or leaving FAs. In particular – and this gets into the activity facilitated by the FA – the FA would have to make sure that the weapons leaving the vessel were not going to be used to violate international laws or “undermine peace and security”. This would mean that the flag State would have to require the FA to vet its clients, as well as control the weapons themselves. Such is the case, for example, with Saint Kitts and Nevis, which has extensive control requirements and which audits its FAs every six months.

Finally, and perhaps most relevant to FAs, article 11 places a burden on States to prevent the diversion of small arms and light weapons. This requirement transcends the State’s jurisdiction; so, even if the ATT is not expressly applied to flagged vessels under domestic law, States parties would still be required to take action to prevent the diversion of weapons through FAs, including by means of import and export controls. This would usefully address concerns related to the laundering of weapons, among other things. It is an oblique approach, but it is one potential means of getting States to take action and take responsibility for FAs.

ARMS TRADE TREATY, ARTICLES 7, 8 AND 11

ARTICLE 7. EXPORT AND EXPORT ASSESSMENT

1. If the export is not prohibited under Article 6, each exporting State Party, prior to authorization of the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4, under its jurisdiction and pursuant to its national control system, shall, in an objective and non-discriminatory manner, taking into account relevant factors, including information provided by the importing State in accordance with Article 8 (1), assess the potential that the conventional arms or items:

(a) would contribute to or undermine peace and security;

(b) could be used to:

- (i) commit or facilitate a serious violation of international humanitarian law;
- (ii) commit or facilitate a serious violation of international human rights law;
- (iii) commit or facilitate an act constituting an offence under international conventions or protocols relating to terrorism to which the exporting State is a Party; or
- (iv) commit or facilitate an act constituting an offence under international conventions or protocols relating to transnational organized crime to which the exporting State is a Party.

2. The exporting State Party shall also consider whether there are measures that could be undertaken to mitigate risks identified in (a) or (b) in paragraph 1, such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States.

3. If, after conducting this assessment and considering available mitigating measures, the exporting State Party determines that there is an overriding risk of any of the negative consequences in paragraph 1, the exporting State Party shall not authorize the export.

4. The exporting State Party, in making this assessment, shall take into account the risk of the conventional arms covered under Article 2 (1) or of the items covered under Article 3 or Article 4 being used to commit or facilitate serious acts of gender-based violence or serious acts of violence against women and children.

5. Each exporting State Party shall take measures to ensure that all authorizations for the export of conventional arms covered under Article 2 (1) or of items covered under Article 3 or Article 4 are detailed and issued prior to the export.

6. Each exporting State Party shall make available appropriate information about the authorization in question, upon request, to the importing State Party and to the transit or trans-shipment States Parties, subject to its national laws, practices or policies.

7. If, after an authorization has been granted, an exporting State Party becomes aware of new relevant information, it is encouraged to reassess the authorization after consultations, if appropriate, with the importing State.

ARTICLE 8. IMPORT

1. Each importing State Party shall take measures to ensure that appropriate and relevant information is provided, upon request, pursuant to its national laws, to the exporting State Party, to assist the exporting State Party in conducting its national export assessment under Article 7. Such measures may include end use or end user documentation.

2. Each importing State Party shall take measures that will allow it to regulate, where necessary, imports

under its jurisdiction of conventional arms covered under Article 2 (1). Such measures may include import systems.

3. Each importing State Party may request information from the exporting State Party concerning any pending or actual export authorizations where the importing State Party is the country of final destination.

ARTICLE 11. DIVERSION

1. Each State Party involved in the transfer of conventional arms covered under Article 2 (1) shall take measures to prevent their diversion.

2. The exporting State Party shall seek to prevent the diversion of the transfer of conventional arms covered under Article 2 (1) through its national control system, established in accordance with Article 5 (2), by assessing the risk of diversion of the export and considering the establishment of mitigation measures such as confidence-building measures or jointly developed and agreed programmes by the exporting and importing States. Other prevention measures may include, where appropriate: examining parties involved in the export, requiring additional documentation, certificates, assurances, not authorizing the export or other appropriate measures.

3. Importing, transit, trans-shipment and exporting States Parties shall cooperate and exchange information, pursuant to their national laws, where appropriate and feasible, in order to mitigate the risk of diversion of the transfer of conventional arms covered under Article 2 (1).

4. If a State Party detects a diversion of transferred conventional arms covered under Article 2 (1), the State Party shall take appropriate measures, pursuant to its national laws and in accordance with international law, to address such diversion. Such measures may include alerting potentially affected States Parties, examining diverted shipments of such conventional arms covered under Article 2 (1), and taking follow-up measures through investigation and law enforcement.

5. In order to better comprehend and prevent the diversion of transferred conventional arms covered under Article 2 (1), States Parties are encouraged to share relevant information with one another on effective measures to address diversion. Such information may include information on illicit activities including corruption, international trafficking routes, illicit brokers, sources of illicit supply, methods of concealment, common points of dispatch, or destinations used by organized groups engaged in diversion.

6. States Parties are encouraged to report to other States Parties, through the Secretariat, on measures taken in addressing the diversion of transferred conventional arms covered under Article 2 (1).

Firearms Protocol, supplementing the United Nations Convention against Transnational Organized Crime

While it might seem illogical to address the applicability of a convention's protocol before first examining the convention itself, the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (the Organized Crime Convention, or the Palermo Convention) is particularly relevant to the armoury of FAs, whereas the Organized Crime Convention itself ventures more into the services provided by FAs. The Firearms Protocol is the main global instrument for a criminal justice response to the illicit movement of firearms and other small arms. The Protocol also provides measures more specifically relevant to FAs, addressing issues such as firearms transfers, brokering, criminalization, security and preventive measures at the time of manufacturing, storage and transfers, all measures relevant to preventing and countering thefts, diversion and trafficking – no matter where they are committed, and law enforcement measures that derive from the *mutatis mutandis* application of the Organized Crime Convention. Specifically, the Protocol obligates States to criminalize the illicit manufacturing of and trafficking in arms, adopt control measures, implement the marking and tracking of arms together with record-keeping, and cooperate with other States in enforcement. Port, coastal and flag States that are parties to the Protocol should therefore, theoretically, have laws that require marking, tracking and record-keeping of arms on FAs that are within their jurisdiction.

FIREARMS PROTOCOL, SUPPLEMENTING THE ORGANIZED CRIME CONVENTION

ARTICLE 5. CRIMINALIZATION

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct, when committed intentionally:

(a) Illicit manufacturing of firearms, their parts and components and ammunition;

(b) Illicit trafficking in firearms, their parts and components and ammunition;

(c) Falsifying or illicitly obliterating, removing or altering the marking(s) on firearms required by article 8 of this Protocol.

2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences the following conduct:

(a) Subject to the basic concepts of its legal system, attempting to commit or participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of an offence established in accordance with paragraph 1 of this article.

ARTICLE 7. RECORD-KEEPING

Each State Party shall ensure the maintenance, for not less than ten years, of information in relation to firearms and, where appropriate and feasible, their parts and components and ammunition that is necessary to trace and identify those firearms and, where appropriate and feasible, their parts and components and ammunition which are illicitly manufactured or trafficked and to prevent and detect such activities. Such information shall include:

(a) The appropriate markings required by article 8 of this Protocol;

(b) In cases involving international transactions in firearms, their parts and components and ammunition, the issuance and expiration dates of the appropriate licences or authorizations, the country of export, the country of import, the transit countries, where appropriate, and the final recipient and the description and quantity of the articles.

ARTICLE 8. MARKING OF FIREARMS

1. For the purpose of identifying and tracing each firearm, States Parties shall:

(a) At the time of manufacture of each firearm, either require unique marking providing the name of the manufacturer, the country or place of manufacture and the serial number, or maintain any alternative unique user-friendly marking with simple geometric symbols in combination with a numeric and/or alphanumeric code, permitting ready identification by all States of the country of manufacture;

(b) Require appropriate simple marking on each imported firearm, permitting identification of the country of import and, where possible, the year of import and enabling the competent authorities of that country to trace the firearm, and a unique marking, if the firearm does not bear such a marking. The requirements of this subparagraph need not be applied to temporary imports of firearms for verifiable lawful purposes;

(c) Ensure, at the time of transfer of a firearm from government stocks to permanent civilian use, the appropriate unique marking permitting identification by all States Parties of the transferring country.

2. States Parties shall encourage the firearms manufacturing industry to develop measures against the removal or alteration of markings.

ARTICLE 10. GENERAL REQUIREMENTS FOR EXPORT, IMPORT AND TRANSIT LICENSING OR AUTHORIZATION SYSTEMS

1. Each State Party shall establish or maintain an effective system of export and import licensing or authorization, as well as of measures on international transit, for the transfer of firearms, their parts and components and ammunition.

2. Before issuing export licences or authorizations for shipments of firearms, their parts and components and ammunition, each State Party shall verify:

(a) That the importing States have issued import licences or authorizations; and

(b) That, without prejudice to bilateral or multilateral agreements or arrangements favouring landlocked States, the transit States have, at a minimum, given notice in writing, prior to shipment, that they have no objection to the transit.

3. The export and import licence or authorization and accompanying documentation together shall contain information that, at a minimum, shall include the place and the date of issuance, the date of expiration, the country of export, the country of import, the final recipient, a description and the quantity of the firearms, their parts and components and ammunition and, whenever there is transit, the countries of transit. The information contained in the import licence must be provided in advance to the transit States.

4. The importing State Party shall, upon request, inform the exporting State Party of the receipt of the dispatched shipment of firearms, their parts and components or ammunition.

5. Each State Party shall, within available means, take such measures as may be necessary to ensure that licensing or authorization procedures are secure and that the authenticity of licensing or authorization documents can be verified or validated.

6. States Parties may adopt simplified procedures for the temporary import and export and the transit of firearms, their parts and components and ammunition for verifiable lawful purposes such as hunting, sport shooting, evaluation, exhibitions or repairs.

ARTICLE 11. SECURITY AND PREVENTIVE MEASURES

In an effort to detect, prevent and eliminate the theft, loss or diversion of, as well as the illicit manufacturing of and trafficking in, firearms, their parts and components and ammunition, each State Party shall take appropriate measures:

(a) To require the security of firearms, their parts and components and ammunition at the time of manufacture, import, export and transit through its territory; and

(b) To increase the effectiveness of import, export and transit controls, including, where appropriate, border controls, and of police and customs trans-border cooperation.

3.3 The services

The activities in which FAs engage are diverse, and so this analysis does not attempt to comprehensively address them. That said, these are some of the key legal perspectives for analysing the various services provided by FAs.

Anti-money-laundering and combating the financing of terrorism

Given that FAs are literally “offshore” entities through which a lot of money flows, laws for anti-money-laundering and combating the financing of terrorism (AML-CFT) provide important constraints. The State of registration of the companies that own and/or operate FAs have the audit responsibility to ensure that FAs are neither laundering money nor financing illicit or terrorist activities. The Financial Action Task Force has produced its Forty Recommendations for States to incorporate the financial provisions of international conventions, as well as norms and customs, into national law.

ANSI/ASIS PSC.4 Quality Assurance and Security Management for Private Security Companies Operating at Sea

The International Code of Conduct for Private Security Service Providers (2010) sought to promote principles related to international law and human rights in the operation of private security companies. ANSI/ASIS PSC.1 (2012) is a standard that was written to make that Code of Conduct measurable and auditable for private security companies. Recognizing that the principles of security on land and security in the maritime domain are almost identical, although implementation is different, another standard, ANSI/ASIS PSC.4 (2013) Quality Assurance and Security Management for Private Security Companies Operating at Sea – Guidance, served as an implementation guide to PSC.1. Considering the broad scope of this standard and its human rights focus, it is actually potentially applicable to FAs, as well as the PMSCs that use them. While it is not purpose-drafted for FAs, it contains extensive provisions relating to arms control and would apply to FA operations.

Suppression of unlawful acts at sea

The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its

Protocol of 2005 are relevant to FAs and their operations. Article 3 of the Convention could apply to FAs in three different ways: an FA could be subjected to an unlawful act, particularly in the light of its attractiveness to criminals or terrorists in need of weapons; the FA could commit an unlawful act; or the FA could facilitate its clients committing an unlawful act.

CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION OF 1988

ARTICLE 3

1. Any person commits an offence if that person unlawfully and intentionally:

1. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or

2. performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or

3. destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or

4. places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or

5. destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or

6. communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or

7. injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

2. Any person also commits an offence if that person:

1. attempts to commit any of the offences set forth in paragraph 1; or

2. abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or

3. threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

Furthermore, article 3bis of the 2005 Protocol may apply. If an FA is deemed to be engaged in or to be facilitating the intimidation of a population or the compelling of a government or an international organization to do or abstain from doing any act, it may be in violation of article 3bis (*a*). Furthermore, if through its services, the FA knowingly supports activities that unlawfully cause death, serious injury or damage to intimidate a population or compel a government or international organization to do something or abstain from something, the FA would be in violation of the 2005 Protocol. Certainly with regard to international organizations, no such allegations have been lodged against any FAs, but the 2005 Protocol remains a relevant constraint.

ARTICLE 3bis OF THE 2005 PROTOCOL

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

(a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:

- (i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or
- (ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a)(i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or
- (iii) uses a ship in a manner that causes death or serious injury or damage; or
- (iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (a)(i), (ii) or (iii); or

(b) transports on board a ship:

- (i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or
- (ii) any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or

- (iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or
- (iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

2. It shall not be an offence within the meaning of this Convention to transport an item or material covered by paragraph 1(b)(iii) or, insofar as it relates to a nuclear weapon or other nuclear explosive device, paragraph 1(b)(iv), if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons where:

(a) the resulting transfer or receipt, including internal to a State, of the item or material is not contrary to such State Party's obligations under the Treaty on the Non-Proliferation of Nuclear Weapons and,

(b) if the item or material is intended for the delivery system of a nuclear weapon or other nuclear explosive device of a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, the holding of such weapon or device is not contrary to that State Party's obligations under that Treaty.

3.4 Services facilitated by the vessel

Generally, FAs facilitate the activities of private maritime security companies (PMSCs). While FAs are not specifically regulated, there are generally accepted international rules and standards that apply to PMSCs that use FAs. Between 2009 and 2014, the International Maritime Organization produced a series of Maritime Safety Committee circulars directed at PMSCs, flag States and shipowners regarding the use of PCASP:

- 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)

- 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.3)
- 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)
- Interim guidance to private maritime security companies providing privately contracted armed security personnel on board ships in the High Risk Area (MSC.1/Circ.1443)
- Interim guidance for flag States on measures to prevent and mitigate Somalia-based piracy (MSC.1/Circ.1444)

While the above-mentioned documents provide some of the best international guidance on PMSCs, they do not mention FAs and they are predicated on the position of the International Maritime Organization which neither condemns nor endorses the use of PCASP and are thus only guidelines.

From the standpoint of the maritime industry, the BIMCO GUARDCON standard contract for the employment of security guards on vessels helped create some consistency in PMSC requirements but does not address FAs at all.

Finally, two standards have been produced for private maritime security: ISO 28007:2015 – Guidelines for private maritime security companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships; and ANSI/ASIS PSC.4. While neither addresses FAs directly, ANSI/ASIS PSC.4 could be applicable as discussed above. To date, however, no company has used it and no entity has required it.

However, there is no universal requirement that PMSCs abide by any of these instruments, vet their clients or ensure that their services are not used to facilitate criminal activity, constitute threats to peace and security or support the violation of human rights.

Accomplice liability

If an FA were to knowingly supply weapons to assist other individuals in the commission of a crime, the FA may be guilty of aiding and abetting the illicit activity. National legal regimes of accomplice liability, negligence, conspiracy and common criminal plan may be invoked against an FA if weapons originating on the FA are used in the commission of a crime.

United Nations Convention against Transnational Organized Crime

While the scope of the United Nations Convention Against Transnational Organized Crime (Organized Crime Convention, or the Palermo Convention) focuses on activities committed in States (article 3), its jurisdictional provisions in article 15 require States parties to do the following:

“1. Each State party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when:

“(a) The offence is committed in the territory of that State Party; or

“(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.”

While the crimes covered by the Organized Crime Convention are relevant to various parts of the present analysis, the facilitation of transnational criminal activity by FAs is a particular concern. Beyond the arms trafficking matters of the Firearms Protocol addressed above, the Organized Crime Convention focuses in particular on the commission of “serious crimes” by organized criminal groups, the laundering of the proceeds of crime, corruption and obstruction of justice. Article 2 of the Convention defines “serious crime” as “conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty”. A wide array of criminal activity falls under this Convention. Accordingly, the Convention could be, depending on the applicable flag, port or coastal State law, a powerful tool in addressing any criminality facilitated by an FA.

ORGANIZED CRIME CONVENTION

ARTICLE 5. CRIMINALIZATION OF PARTICIPATION IN AN ORGANIZED CRIMINAL GROUP

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

- (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;
- (ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:
 - a. Criminal activities of the organized criminal group;
 - b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

ARTICLE 6. CRIMINALIZATION OF THE LAUNDERING OF PROCEEDS OF CRIME

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

- (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;
- (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organized criminal groups;

(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;

(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

ARTICLE 8. CRIMINALIZATION OF CORRUPTION

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences conduct referred to in paragraph 1 of this article involving a foreign public official or international civil servant. Likewise, each State Party shall consider establishing as criminal offences other forms of corruption.

3. Each State Party shall also adopt such measures as may be necessary to establish as a criminal offence participation as an accomplice in an offence established in accordance with this article.

4. For the purposes of paragraph 1 of this article and article 9 of this Convention, "public official" shall mean a public official or a person who provides a public service as defined in the domestic law and as applied in the criminal law of the State Party in which the person in question performs that function.

ARTICLE 23. CRIMINALIZATION OF OBSTRUCTION OF JUSTICE

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences covered by this Convention;

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences covered by this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public officials.

3.5 The individuals involved

There are three main legal and regulatory perspectives with respect to people involved in FA operations: labour laws, arms trading laws and long-arm laws.

The Maritime Labour Convention

The Maritime Labour Convention was born of an international legal effort to bring together the tenets of International Convention for the Safety of Life at Sea and the United Nations Convention on the Law of the Sea and provide a safe and secure workplace, fair terms of employment and decent working and living conditions for all seafarers. As seafarers, the crew of an FA should be protected under the Maritime Labour Convention. The PMSC personnel who are accommodated on an FA are, on the other hand, a different matter. While PCASP are on task, flag States usually consider them supernumeraries. The Maritime Labour Convention applies only to crew and so likely would not apply to the PCASP on their client vessels. While on the FA, on the other hand, the PCASP personnel are considered to be either passengers or "industrial personnel" – an International Maritime Organization category for special purpose vessels – meaning that the Maritime Labour Convention does not apply to them. That Convention's applicability to FAs is therefore limited to the crew of the FA.

In accordance with the Maritime Labour Convention, seafarers are subject to a range of regulations, including in the following areas:

- Minimum age requirements for seafarers to work on a ship
- Conditions of employment
- Accommodation, recreational facilities, food and catering standards
- Health protection, medical care, welfare and social security protection
- Compliance and enforcement

The current flag States that have both registered FAs and ratified the Maritime Labour Convention are Mongolia and Saint Kitts and Nevis; Djibouti and Sierra Leone are not signatories of the Convention.

ARTICLE II.

2. Except as expressly provided otherwise, this Convention applies to all seafarers.

3. In the event of doubt as to whether any categories of persons are to be regarded as seafarers for the purpose of this Convention, the question shall be determined by the competent authority in each Member after consultation with the shipowners' and seafarers' organizations concerned with this question.

4. Except as expressly provided otherwise, this Convention applies to all ships, whether publicly or privately owned, ordinarily engaged in commercial activities, other than ships engaged in fishing or in similar pursuits and ships of traditional build such as dhows and junks. This Convention does not apply to warships or naval auxiliaries.

5. In the event of doubt as to whether this Convention applies to a ship or particular category of ships, the question shall be determined by the competent authority in each Member after consultation with the shipowners' and seafarers' organizations concerned.

6. Where the competent authority determines that it would not be reasonable or practicable at the present time to apply certain details of the Code referred to in Article VI, paragraph 1, to a ship or particular categories of ships flying the flag of the Member, the relevant provisions of the Code shall not apply to the extent that the subject matter is dealt with differently by national laws or regulations or collective bargaining agreements or other measures. Such a determination may only be made in consultation with the shipowners' and seafarers' organizations concerned and may only be made with respect to ships of less than 200 gross tonnage not engaged in international voyages.

Arms trading laws

A number of international laws have provisions relating to arms trading that apply to individuals. While the Arms Trade Treaty and the Firearms Protocol to the Organized Crime Convention have been discussed extensively above, the requirements of the Arms Trade Treaty (article 10) and the Firearms Protocol (article 13) that States regulate brokering are particularly relevant to FA operations. The bookings and facilitations that occur on an FA could be considered brokering under the arms trading laws and may therefore be regulated under the national laws of either the individuals or the flag State. The concepts of "third country brokering" and "extraterritorial brokering" appear in some national laws and are particularly applicable to FA operations in which nationals of different States engage in brokering activities on a vessel flagged in a State of which none of the individuals are citizens.

ARMS TRADE TREATY**ARTICLE 10. BROKERING**

Each State Party shall take measures, pursuant to its national laws, to regulate brokering taking place under its jurisdiction for conventional arms covered under Article 2 (1). Such measures may include requiring brokers to register or obtain written authorization before engaging in brokering.

FIREARMS PROTOCOL, SUPPLEMENTING THE ORGANIZED CRIME CONVENTION**ARTICLE 15. BROKERS AND BROKERING**

With a view to preventing and combating illicit manufacturing of and trafficking in firearms, their parts and components and ammunition, States Parties that have not yet done so shall consider establishing a system for regulating the activities of those who engage in brokering. Such a system could include one or more measures such as:

(a) Requiring registration of brokers operating within their territory;

(b) Requiring licensing or authorization of brokering; or

(c) Requiring disclosure on import and export licences or authorizations, or accompanying documents, of the names and locations of brokers involved in the transaction.

2. States Parties that have established a system of authorization regarding brokering as set forth in paragraph 1 of this article are encouraged to include information on brokers and brokering in their exchanges of information under article 12 of this Protocol and to retain records regarding brokers and brokering in accordance with article 7 of this Protocol.

Long-arm laws

As noted, some national laws attach to the citizenship of the individual beyond the territorial limits of the State. Laws and regulations relating to criminal activity, arms trading and other matters may therefore apply to certain individuals on FAs by virtue of their nationality alone. Enforcing those laws would be the exclusive responsibility of the State in question, but it is possible that one individual could be guilty of breaking his national law on board an FA even if his colleagues' identical activities are not considered to be illegal under their country's laws.



Chapter 4

Conclusion

Conclusion

While no laws, regulations or internationally agreed guidance specifically address FAs at the moment, a variety of laws do apply to them. FAs are legally indistinguishable from other vessels and are therefore bound by the same rules that would govern the carriage of weapons by any merchant or government ship operated for commercial purposes. Port, coastal and flag State jurisdiction may be exercised over FAs on various matters, including beyond the territorial sea of any States in some cases. The vessel, the armoury, the services it provides, the services it facilitates and the people involved are all constrained in some way by a mix of international, national and soft law instruments.

Other publications in this series are available online:
www.unodc.org/unodc/en/piracy/manual-and-annexes.html





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