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Privatisation of Policing at Sea by States and the European Union and its Challenges under International Law

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Abstract

This article discusses the privatisation of policing at sea, in the form of the delegation of police powers by States and the EU to private vessels. Admittedly, such privatisation has significantly increased the last years and gives rise to numerous international law questions, including questions concerning the consistency of such practice with international law, the prerequisites under the law of the sea for the exercise of such law enforcement powers by these private vessels, as well as questions concerning international responsibility and immunities. This article addresses the above questions, exploring inter alia the lawfulness of this privatisation under general international law and the jurisdictional bases through which States, or the EU, may lawfully delegate policing powers to private actors. It concludes that, notwithstanding its innovative character, this practice remains subject to the general principles governing law enforcement at sea, including principles of legality and reasonableness.

Keywords: privatisation, law enforcement at sea, immunities of State vessels, international responsibility

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1. Introduction

When reference is made to privatisation of maritime security, consideration is primarily of private armed guards on board merchant vessels.[1] Indeed, the use of privately contracted armed security personnel on board ships operating in, or navigating through, the Western Indian Ocean and the Gulf

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1 IMO MSC.1/Circ.1405/Rev.2 (25 May 2012). See also IMO 'Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1406/Rev.; 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' (25 May 2012) MSC.1/Circ.1408/Rev.1; and IMO 'Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships' (12 June 2015) MSC.1/Circ. 1333/Rev.1. For a thorough academic analysis of the use of private armed security services, see *inter alia* A Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (2013) 62 ICLQ 667; C Spearin, 'Private Military and Security Companies v International Naval Endeavours v Somali Pirates' (2012) 10 JICJ 823; I Van Hespen, 'Protecting Merchant Ships from Maritime Piracy by Privately Contracted Armed Security Personnel: A Comparative Analysis of Flag State Legislation and Port and Coastal State Requirements' (2014) 45 JMLC 361; E Williams, 'Private Armed Guards in the Fight against Piracy' in E Papastavridis & K Trapp (eds), *La Criminalité en Mer/Crimes at Sea*, (Martinus Nijhoff 2014) 339.

of Aden proved instrumental to the rapid decrease of acts of piracy and armed robbery in that region that had loomed large in the period 2008-2012.[2] Private armed guards have also been employed in other regions[3] to protect shipping from such acts.

It is not only the shipping industry that employs private maritime security companies to combat threats to maritime security. It is noticeable in recent years that states are also increasingly commissioning private maritime security companies and Non-Governmental Organisations (NGOs) to patrol their waters.[4] In addition, European Union agencies, such as the European Fisheries Control Agency (EFCA),[5] and soon the European Border and Coast Guard Agency (FRONTEX),[6] are chartering private vessels together with their crew to conduct maritime surveillance and enforcement.

This article addresses this aspect of privatisation of policing at sea, namely the delegation of police powers by States and the EU to private entities. Such privatisation gives rise to numerous international law questions, including questions concerning the consistency of such practice with international law, the prerequisites under the law of the sea for the exercise of such law enforcement powers, as well as questions concerning international responsibility and immunities. This article unpacks these issues and discusses the place under international law of private actors in maritime law enforcement. Section 2 provides an overview of the relevant practice. Section 3 considers its lawfulness under general international law, and the law of the sea. Section 4 highlights issues concerning immunities and responsibility under international law. Section 5 concludes that, notwithstanding its innovative character, this practice remains subject to the general principles governing law enforcement at sea, including principles of legality and reasonableness.

2. Relevant Practice

The involvement of private security companies, primarily in land-based armed conflicts, has been recorded since the 2000s.[7] In the maritime context, it is reported that, in 1999, a private security com-

2 On piracy off Somalia see *inter alia* R Geiss and A Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011); E Papastavridis, 'Piracy off Somalia: The Emperors and the Thieves of the Oceans in the 21st Century', in A Abass (ed), *Protecting Human Security in Africa* (OUP 2010) 122.

3 On piracy off the Gulf of Guinea see UNSC Res 2634 (31 May 2022) UN Doc S/RES/2634; see also A Eruaga and M Mejia, 'Piracy and Armed Robbery against Ships: Revisiting International Law Definitions and Requirements in the Context of the Gulf of Guinea' (2019) 33 Ocean Yearbook 421.

4 V Schatz, 'Marine Fisheries Law Enforcement Partnerships in Waters under National Jurisdiction: The Legal Framework for Inter-State Cooperation and Public-Private Partnerships with Nongovernmental Organizations and Private Security Companies' (2018) 32 Ocean Yearbook 329; P Cullen, 'Privatized Maritime Security in Governance in War-torn Sierra Leone' in P Berube and P Cullen (eds) *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century* (Routledge 2012) 101. On the role of the Sea Shepherd Conservation Society see at <https://seashepherd.org/> accessed 11 June 2022.

5 Further information at <www.efca.europa.eu/en/content/chartered-means> accessed 11 June 2022.

6 Parliament and Council Regulation (EU) 2019/1896 of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624 [2019] OJ L 295, art 63 (hereinafter: FRONTEX Regulation).

7 Private military and security companies (PMSCs) have extensively used in armed conflicts since 2000 and have raised many international legal issues. See the non-binding Swiss Government and ICRC 'Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict' (17 September 2008); see also A Petrig, 'Looking at the Montreux Document from a Maritime Perspective' (2016) 2 Maritime Safety and Security Law Journal 1.

pany, Southern Cross Security, proposed a contract to Sierra Leone, to create a privatised coast guard and fisheries protection service. Southern Cross Security would board detain, and upon finding proof of illegal fishing, fine trawlers fishing illegally within Sierra Leone's waters.[8] The government signed the contract in November 1999.[9] As noted by Cullen, 'three Sierra Leonean police officers were allocated by the government to Southern Cross Security's patrol vessel upon the latter's request, but remained 'under the tactical command of […] SCS security contractor personnel'.[10] Cullen reports that fines levied by Southern Cross Security fluctuated depending on the specific charges, but averaged US$15,000 per arrested vessel.[11] Southern Cross Security conducted its fisheries protection program between November 1999 and January 2002 and reportedly fined fifty four fishing vessels.[12]

According to Schatz, Southern Cross Security has not been the only private security company that has been engaged by African countries to conduct maritime law enforcement. Another private security company called Marine Protection and Rescue Services was employed by Liberia in a privatised fisheries inspection operation. Similar practices have also been documented in Somalia.[13]

The Sea Shepherd Conservation Society, an environmental NGO, has launched several fisheries law enforcement partnerships with developing coastal States. The first government to enter into a contract with Sea Shepherd Conservation Society was Ecuador, concerning fisheries law enforcement against illegal fishing vessels in the Galápagos marine reserve within 40 miles of the islands, and therefore within the territorial sea and Exclusive Economic Zone (EEZ) of Ecuador. Sea Shepherd Conservation Society dedicated the high-speed patrol vessel *RV Sirenian* to the operation, carrying both conservation officers of the Galápagos National Park and Ecuadorian navy officers who had the authority to board, search, and arrest fishing vessels.[14] Sea Shepherd Conservation Society has engaged in similar partnerships with Costa Rica, Palau, Kiribati, Senegal, Gabon and Sao Tome and Principe.[15]

The EU has deployed private patrol vessels for law enforcement at sea: first, in 2017, EFCA chartered *Lundy Sentinel,*[16] initially flagged to the UK and later to Portugal.[17] According to the EFCA, *Lundy Sentinel* is 'deployed primarily as a fisheries patrol vessel in international, EU and where possible non-member country waters in the different joint operations and other operations from the Mediterranean and Black Sea to the North and Baltic Sea. Lundy Sentinel can also contribute to multipurpose tasks in the

8 Cullen (n 4) 103.

9 Schatz (n 4) 335.

10 Cullen (n 4) 106.

11 ibid 112.

12 Schatz (n 4) 336 with further references.

13 ibid 336.

14 ibid, 339.

15 ibid, 339-40 and further references therein.

16 See more information about Lundy Sentinel at <www.sentinel-marine.com/news/sentinel-marine-awarded-contract-by-european-fisheries-control-agency-for-charter-of-patrol-vessel> accessed 11 June 2022.

17 See n 5.

framework of European cooperation on coastguard functions, such as search and rescue, sea border control and detection of pollution, in cooperation with Member State authorities and/or Frontex and EMSA'.[18] EFCA is in the process of chartering three (3) more private 'offshore patrol vessels'.[19] It must be noted that these vessels are chartered together with the crew required to operate them.

FRONTEX will also soon charter private vessels in order to be deployed in Joint Operations of EU Member States. As provided by Article 63 (1) of the FRONTEX Regulation, '[t]he Agency may acquire, either on its own or as co-owner with a Member State, or lease technical equipment to be deployed during joint operations, pilot projects, rapid border interventions, activities in the area of return, including return operations and return interventions, migration management support team deployments or technical assistance projects in accordance with the financial rules applicable to the Agency'.[20]

3. Privatising Policing at Sea and its Consistency with International Law

The increased employment of private assets and crew in maritime law enforcement, renders it necessary to determine whether this accords with international law. First, it must be ascertained whether coastal States are entitled to employ private assets for maritime law enforcement purposes (3.1.), before secondly turning to the question of how such law enforcement should be conducted under international law (3.2.) and concluding with an assessment of current practice (3.3.).

3.1 Delegation of Law Enforcement Powers to Private Actors

It is appropriate to begin with the Judgment of the International Tribunal for the Law of the Sea (ITLOS) in the *M/V Virginia G* case *(Panama v. Guinea Bissau)*.[21] In addressing the argument of the Applicant that under the UN Convention on the Law of the Sea (UNCLOS)[22] only warships may exercise enforcement powers (in that particular case, against an oil tanker bunkering fishing vessels in the EEZ of Guinea-Bissau) ITLOS clarified that '[i]n the view of the Tribunal, article 110 of the Convention cannot be interpreted to imply that it establishes a principle providing that under the Convention enforcement activities in the exclusive economic zone can only be exercised by a warship. The Convention leaves it for the coastal State to decide which authorities under its national law will be responsible for exercising enforcement activities pursuant to article 73, paragraph 1, of the Convention in accordance with general principles of international law referred to above'.[23]

It follows that it rests entirely upon the coastal State concerned which authorities under its national law are

18 ibid.

19 Information given after personal communication of the author with EFCA officials.

20 FRONTEX Regulation (n 6), art 63 (1).

21 *M/V 'Virginia G'* (*Panama/Guinea-Bissau*) (Judgment) [2014] ITLOS Reports 2014 p. 4.

22 Convention on the Law of the Sea (adopted 10 December 1982, entered in force 16 November 1994) 1833 UNTS 3 (UNCLOS).

23 *M/V 'Virginia G'* (n 21) para 345 (emphasis added).

to exercise enforcement powers at sea. Consequently, the coastal State may also delegate such powers to non-state entities. This is also acknowledged in the context of the law of international responsibility, particularly under the rules concerning the attribution of a certain conduct to States. Indeed, as early as the 1930 Hague Conference for the Codification of International Law, the German Government asserted that: 'when, by delegation of powers, bodies act in a public capacity, e.g., police an area … the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.'[24] In this vein, the International Law Commission (ILC) in its Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) recognised that possibility in Article 5 addressing the attribution to the State of conduct of bodies which are not State organs, but which are nonetheless authorised to exercise governmental authority.[25] In the words of the ILC, 'the article is intended to take account of the increasingly common phenomenon of parastatal entities, which exercise elements of governmental authority in place of State organs.'[26] The main prerequisite is that these entities are 'empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority'.[27]

According to the ILC Special Rapporteur Crawford, 'Article 5 has increased in relevance as the modern state has outsourced increasing numbers of what would classically have been considered 'government' functions, resulting in the creation of parastatal entities.[28] Such entities may be employed inter alia to 'control immigration and to run prisons, things that can only be done through the exercise of public powers of detention, arrest and so on.'[29] Such public powers of arrest and detention are also ascribed to private actors in the context of this article.

Therefore, a coastal State may lawfully grant policing powers in its EEZ to maritime security companies or NGOs. Significantly, also, while the term 'empowered by the law of that State' may entail that Article 5 requires a specific law enacted for the purpose of empowering a private entity to exercise elements of governmental authority, the more practical view is that 'a delegation or authorization by or under the law of the State' suffices.[30] This is in accordance with the general principle that the structure of the State and the functions of its organs are not, in general, governed by international law, being a matter within domestic jurisdiction.[31] Thus, it rests exclusively with each State to decide how State functions are to be delegated to its organs and to other 'parastatal entities' including NGOs or private security companies. Such delegation, for example, could

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24 League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, vol. III: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners (document C.75.M.69.1929.V), p. 90 (as cited in the ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 43) (ARSIWA Commentary).

25 ibid, art 5: 'The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance'.

26 ARSIWA Commentary (n 24) 43.

27 ibid.

28 J Crawford, *State Responsibility: The General Part* (CUP 2013) 127.

29 ibid 128

30 J Crawford, ILC, First Report on State Responsibility, 3, U.N. Doc. A/CN4/490/Add. 6 (24 July 1998); see also Schatz (n 4) 370.

31 See Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 2 (7).

be made by way of a public contract, such as that between Ecuador and Sea Shepherd Conservation Society.[32]

3.2 The Exercise of Law Enforcement Powers by Private Actors

Having clarified that under international law the coastal State may grant enforcement powers to actors like Sea Shepherd Conservation Society, the next question is how these powers are to be exercised. The short answer is no differently than where these powers are exercised by State organs. Both State organs and private actors are subject to the same legal framework governing law enforcement at sea.

Under UNCLOS and general international law, the exercise of enforcement powers at sea, including the power to board, search, and seize a vessel, is accorded to either warships or 'other duly authorized ships or aircraft clearly marked and identifiable as being on government service.'[33] As ITLOS underscored in the *M/V Virginia G* case, 'the Tribunal considers it important to reiterate that general international law establishes clear requirements that must be complied with by all States during enforcement operations, including those carried out pursuant to article 73, paragraph 1, of the Convention [fisheries-related]. These requirements provide, in particular, that enforcement activities can be exercised only by duly authorized identifiable officials of a coastal State and that their vessels must be clearly marked as being on government service.'[34]

It follows that any enforcement operation carried out by any other vessel than a warship, be it State owned or State authorised, must meet the following requirements: i) there must be 'due authorisation' by the State concerned to the vessel to exercise law enforcement powers and ii) the vessel and the boarding team must be 'clearly marked and identifiable' as being on such governmental service.

Accordingly, the vessel must be properly authorised by the coastal State to exercise law enforcement powers. Such powers are evidently governmental in nature since they pertain to the assertion of law enforcement powers at sea. As outlined, it is for each State to determine how this authorisation will be granted, yet it must be valid, and, as per any authorisation or consent in international law, the conduct to which it refers must be within the authorisation's scope and duration.[35]

The vessel must be clearly marked and identifiable as being on government service (in this context, law enforcement at sea), in order to lawfully interfere with the navigation of another vessel and exercise enforcement jurisdiction, such as boarding, inspection, diversion, crew detention.[36] Such law enforcement vessels usually bear distinctive national markings and fly specific ensigns. However, by contrast with the definition of warships under Article 29 UNCLOS 'neither government ownership nor 'the presence of a

32 See n 14 and corresponding text.

33 UNCLOS (n 22), arts 107, 110 (5), 111 (5), 224 (5).

34 *M/V 'Virginia G'* (n 21) para 342.

35 ILC, 'Report of the Commission to the General Assembly on the Work of its Thirty-First Session' (1979) Vol 2 Part Two Yearbook of the International Law Commission 112; see also ARSIWA Commentary (n 24) 73.

36 See UNCLOS (n 22), arts 107, 110 and 111.

commissioned officer' is expressly required'.[37] Thus, it follows that a private vessel chartered and authorised by the coastal state would meet these requirements,[38] provided that it bears distinctive markings that would make it identifiable as being on government, and specifically law enforcement, service. If that vessel does not bear these markings, no vessel is required to stop and be subjected to at-sea enforcement action.[39]

Significantly the crew must not necessarily display special ensigns, however any boarding team must be identifiable as being on government service. Noteworthy in this regard is again the *MV Virginia G* case, in which ITLOS underlined that '[a]lthough the information provided by the Parties is conflicting, it appears that the boats used by FISCAP inspectors [National Fisheries Inspection and Control Service] were clearly marked, inspectors who boarded the *M/V Virginia G* were dressed in a way identifying them as FISCAP officials and the Navy infantry were wearing military uniform'.[40]

In addition, the private vessel authorised to conduct at-sea enforcement must adhere to requirements under general international law concerning enforcement jurisdiction. It has been consistently held by international courts and tribunals that the exercise of enforcement powers by any State in the maritime context is also governed by certain rules and principles of general international law, in particular the principle of reasonableness, including the principles of necessity and proportionality.[41] Further, the private vessels bound by the rules governing the use of force at sea, as framed by ITLOS in the *M/V Saiga II* case and confirmed in the M/V *Virginia G* case. According to ITLOS '[a]lthough the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law'.[42]

Finally, any enforcement operation at sea shall ensure the safety of navigation and the protection of

37 D Guilfoyle, 'Article 107' in A Proelss (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Beck/Hart 2017) 757; see also N Ronzitti, 'The Use of Private Contractors in the Fight against Piracy: Policy Options' in F Francioni and N Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (2011) 3.

38 T Treves, 'Navigation', in RJ Dupuy and D Vignes (eds), *A Handbook on the New Law of the Sea*, Vol. II (Brill 1991) 835.

39 Needless to say that a boarding operation which involves acts of violence by a non-identifiable/authorized private vessel on the high seas would fall squarely with the definition of piracy; see UNCLOS (n 22), arts 101, 107.

40 *M/V 'Virginia G'* (n 21) para 361.

41 *Duzgit Integrity Arbitration* (*Malta v. São Tomé and Príncipe*) (Award) [2014] PCA Case No 2014-07 para 209; *PCA, Arctic Sunrise Arbitration* (*Netherlands v. Russia*), (Award on the merits) [2015] PCA Case No 2014-02 para 198.

42 *M/V 'SAIGA'* (No. 2) (*Saint Vincent and the Grenadines v. Guinea*) (Judgment) [1999] ITLOS Reports 1999 para 155; see also *M/V 'Virginia G'* (n 21) paras 359-60. On the issue of use of force at sea see *inter alia* K Neri, 'The Use of Force by Military Vessel Protection Detachments' (2012) 51 Rev. droit pénal mil. droit guerr. 73, and E Papastavridis, 'The Use of Force at Sea in the 21st Century: Some Reflections on the Proper Legal Framework(s)' (2015) 2 JTMS 119.

the marine environment as provided for under Article 225 UNCLOS.[43]

3.3 Assessment of Current Practice

Against this backdrop, the article addresses the consistency of the use of private vessels and crew with international law.

First, as to the assets employed by Southern Cross Security and Sea Shepherd Conservation Society, it readily appears that there had been due authorisation by the coastal State concerned, in the form of contracts, to conduct fisheries enforcement operations. Moreover, in the case of Sea Shepherd Conservation Society's involvement in Ecuador, the inspection of the vessels suspected of being engaged in illegal fishing was conducted by law enforcement agents of Ecuador[44] 'shipriding' the NGO's vessel[45] Notably, also, the Constitutional Court of Ecuador held that the seizure of the Costa Rica-flagged longline fishing vessel *Maria Canela II* by the *RV Sirenian* was lawful, thereby confirming the domestic constitutionality of the partnership.[46] It is not clear, however, whether this was the case with respect to Southern Cross Security operations in Sierra Leone, since the private maritime security company was conducting the law enforcement operations.[47]

The problem with the law enforcement operations conducted by non-state entities seems to lie not in the authority and the identifiability of the boarding team and the inspectors, but in the identifiability of the private vessels. Apparently, the vessels employed by Southern Cross Security and Sea Shepherd Conservation Society lack the distinctive markings that would make them identifiable as being on government, and specifically law enforcement, service.[48] As such, this does not meet the identifiability requirement set out by UNCLOS and general international law. As ITLOS in the *M/V/*

43 *M/V 'Virginia G'* (n 21) para 372 'The Tribunal observes that, although article 225 of the Convention is found in Part XII of the Convention concerning protection and preservation of the marine environment, it has general application, as it states that '[i]n the exercise under this Convention of their powers of enforcement against foreign vessels', States shall observe the requirement of this article, namely: not to endanger the safety of navigation or otherwise create any hazard to a vessel, or bring a vessel to an unsafe port or anchorage, or expose the marine environment to an unreasonable risk. It follows from article 225 that all these requirements are applicable to enforcement activities undertaken pursuant to 73, para 1, of the Convention…'.

44 See n 12.

45 Typically, a 'shiprider' is a law enforcement agent of one State who is authorized to embark on a law enforcement vessel of another State with the purpose to expand the enforcement jurisdiction capacity of the latter State. In the present case, the coastal State authorities are embarked on the private platform in order to exercise enforcement powers in their respective EEZ. On shipriders see *inter alia* M Williams, 'Caribbean Shiprider Agreements' (2000) 31 University of Miami Inter-American Law Review 163; I Tesfalidet, 'Shiprider Institution: Questions of Jurisdiction and State Responsibility' in E Papastavridis and K Trapp (eds), *La Criminalité en Mer/Crimes at Sea*, (Martinus Nijhoff 2014) 609.

46 Constitutional Court of Ecuador, Judgment of 12 October 2001, No. 349–2001–III–SALA–RA, Case No. 005–2001–RA; Constitutional Court of Ecuador, Judgment of 25 October 2001, No. 350–2001–III–-ROOM–RA, Case No. 491–2001–RA, as reported by Schatz (n 4) 339.

47 To reiterate, 'police officers were allocated by the government to SCS's patrol vessel upon SCS's request but remained 'under the tactical command of […] SCS security contractor personnel'; see n 7.

48 See, e.g., pictures of *Yoshka*, formerly *Sirenian*, which is currently employed in Galapagos National Park by WWF at <https://seashepherd.fandom.com/wiki/Yoshka> accessed 11 June 2022.

Virginia G case clarified, 'enforcement activities can be exercised only by duly authorized identifiable officials of a coastal State *and that their vessels must be clearly marked as being on government service*'.[49] Hence, the identifiability of the officials alone does not suffice; the vessel must also be identifiable as on government service.

The EFCA-employed *Lundy Sentinel* appears to meet the due authorisation and identifiability criteria under international law for both the vessel and the boarding team.[50] Indeed, under the EU Regulation 2019/473 amending EFCA's founding Regulation, the latter Agency 'may acquire, rent or charter the equipment that is necessary for the implementation of joint deployment plans' (Article 9 (2)) or 'specific control and inspection programmes' (Article 10 (2)).[51] Member States are responsible to make available the means of control and inspection to be committed to a joint deployment plan,[52] or to specific control and inspection programmes to be determined by the Commission in concert with Member States.[53] Such control and inspections may be carried out by 'Union inspectors', as included in the list referred to in Article 79 of Regulation (EC) No 1224/2009,[54] in accordance with relevant EU Regulations.[55] Hence, the employment of inspectors on board the *Lundy Sentinel* meets the due authorisation and identifiability requirements under UNCLOS and general international law. Also, the *Lundy Sentinel* bears the requisite external markings to be identified operating under EU service.[56]

In conclusion, the use of private assets in law enforcement at sea is admittedly a welcome development, which could enhance law enforcement capacity, in particular of developing States and significantly contribute to the fight against transnational organised crime at sea. This use, however, remains subject to the strict rules of general international law, including UCNLOS, which set out, amongst others, that the vessel and the boarding team must be duly authorised by the coastal State concerned and clearly identifiable as being on government law enforcement service. It seems these criteria have not been met in all cases.

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49 *M/V 'Virginia G'* (n 21) para 342 (emphasis added).

50 See n 16.

51 Regulation (EU) 2019/473 of the European Parliament and of the Council of 19 March 2019 on the European Fisheries Control Agency [2019] OJ L 83, 25.3.2019, p. 18–37 (EFCA Regulation), arts 9 (2) and 10 (2).

52 ibid, art 15 (1).

53 See art 95 of the Council Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Union control system for ensuring compliance with the rules of the common fisheries policy, amending Regulations (EC) No 847/96, (EC) No 2371/2002, (EC) No 811/2004, (EC) No 768/2005, (EC) No 2115/2005, (EC) No 2166/2005, (EC) No 388/2006, (EC) No 509/2007, (EC) No 676/2007, (EC) No 1098/2007, (EC) No 1300/2008, (EC) No 1342/2008 and repealing Regulations (EEC) No 2847/93, (EC) No 1627/94 and (EC) No 1966/2006 [2009] OJ L 343, 22.12.2009, p. 1 (EU Fisheries Compliance Regulation).

54 ibid, art 79.

55 Arts 80 and 81 of the EU Fisheries Compliance Regulation and arts 102-104 and 122 of the Commission Implementing Regulation (EU) No 404/2011 of 8 April 2011 laying down detailed rules for the implementation of Council Regulation (EC) No 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy [2011] OJ L 112, 30.4.2011, p. 1–153.

56 As art 102 (1) Implementing Regulation 404/2011 sets out, 'any vessel used for control purposes including surveillance shall display so as to be clearly visible, a pennant or a symbol as shown in Annex XXVIII'.

4. Immunities and International Responsibility Issues

The use of private actors in the maritime context, in the form of private vessels, may also give rise to questions concerning the immunities, if any, of such vessels, as well as questions related to the international responsibility of the States or the EU that employ them.

4.1. Immunities

Under general international law, including the international law of the sea, warships and other vessels owned or operated by a State and used on government and non-commercial service enjoy immunities from the exercise of any enforcement jurisdiction by a foreign State.[57] For example, on the high seas, Article 96 UNCLOS, which is reflective of customary law, sets forth that '[s]hips owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State'.[58] This provision applies to the EEZ pursuant to Article 58 (2) UNCLOS and thus, effectively, to any maritime area beyond the territorial sea. Insofar the latter zone is concerned, Article 32 UNCLOS posits that '[w]ith such exceptions as are contained in subsection A and in articles 30 and 31, nothing in this Convention affects the immunities of warships and other government ships operated for non-commercial purposes'.[59] As to in-port enforcement, UNCLOS is silent, yet it is widely acknowledged that warships and state vessels enjoy similar immunities and privileges under general international law,[60] and also, for contracting parties, under the 1926 Brussels Convention.[61] The immunity of warships and government ships used only on government non-commercial service is further upheld by Article 236 UNCLOS, exempting such vessels from the application of UNCLOS provisions on protection and

57 Domestic courts have recognised the immunity of State-owned or operated vessels since the early nineteenth century, see *inter alia The Schooner Exchange v. McFaddon*, 11 US 116 (1812); *The Prins Frederik* [1820] 4 Dods. 451 (UK); *The Charkeih* [1873] LR 4 A&E 59 (UK); Court of Appeal, *The Parlement Belge* [1880] 5 PD 197 (UK). See also J Crawford, 'Execution of Judgments and Foreign Sovereign Immunity' (1981) 75 Am. J. Int. Law 820, 862 as well as art 16 (2) of the United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted on 2 December 2004, not entered into force yet, but largely considered as reflective of customary international law); see on art 16, D Guilfoyle, 'Article 16', in R O'Keefe and others (eds), *The United Nations Convention on Jurisdictional Immunities of States and their Property* (OUP 2013) 259.

58 UNCLOS (n 22), art 96 (emphasis added).

59 ibid, art 32 (emphasis added).

60 The general principle of immunity of state vessels at ports was recognised as early as in 1928 by the Institut de Droit International (IDI); see art 26 of Règlement sur le régime des navires de mer et de leurs équipages dans les ports étrangers en temps de paix, <www.idi-iil.org/idiF/resolutionsF/1928_stock_02_fr.pdf> accessed 11 June 2022.

61 International Convention for the Unification of Certain Rules Concerning the Immunity of State-owned Ships, 10 April 1926, LNTS 176, 199 and its 1934 Additional Protocol art (1) of the latter refers to 'ships of war, State owned yachts, patrol vessels, hospital ships, fleet auxiliaries, supply ships and other vessels owned or operated by a State and employed exclusively at the time when the cause of action arises on Government and non-commercial service' and stipulates that 'such ships shall not be subject to seizure, arrest or detention by any legal process, nor to any proceedings in rem'; see also *Detention of Three Ukrainian Naval Vessels* (*Ukraine v. Russian Federation*) (Provisional Measures Order) [2019] ITLOS Reports 2018-2019, paras 93, 96-97.

preservation of the marine environment.[62]

For present purposes the question is whether the vessels employed by coastal States or the EU fall within the definition of state vessels, as set out above.

First, they must be 'government vessels' or 'vessels owned or operated by a State'. As Guilfoyle states, '[t]he phrase 'owns or operates' should be broadly interpreted'.[63] Indeed, the words appear to be taken from the Brussels Convention, and the ILC suggested that: '[t]he expression 'a State which operates a ship' covers also the 'possession', 'control', 'management' and 'charter' of ships by a State, whether the charter is for a time or voyage, bare-boat or otherwise.'[64] This is also in line with the Protocol to the Brussels Convention which confirmed that the words 'operated by a State' (exploités par lui) included vessels chartered by a State 'whether for time or voyage'.[65] Accordingly, an NGO vessel chartered by a coastal State to patrol its waters meets the above criteria. Also, a vessel, like *Lundy Sentinel*, which is chartered by the EU, *in casu* by its Agency, EFCA, pursuant to the relevant authorisation granted by Member States,[66] would also fall within this definition.

Second, the vessels concerned shall be 'used only on government non-commercial service'. The terms 'government non-commercial' sets forth a strict cumulative test.[67] According to Guilfoyle, 'the critical question is obviously by what test 'commercial' (non-immune) service is to be assessed. The standard test under public international law is one of the nature of the act in question: whether a State is exercising powers or rights any other legal person could (acts *jure gestionis*) or is acting in the course of sovereign authority (acts *jure imperii*). On this approach only acts *jure imperii* will enjoy immunity'.[68] Thus, the decisive criterion is not whether the vessel is a State vessel, but rather the purpose of its use.[69] Law enforcement is *i* a public function. Hence, in the present context, all the vessels used either by the coastal States or the EU, are employed on 'government non-commercial service'.

In light of the above this article asserts that, when employed for law enforcement purposes, the private vessels under scrutiny enjoy immunities from the enforcement jurisdiction of other States in all maritime zones, including foreign ports and territorial seas and the high seas. Such vessels cannot be boarded without the permission of the commanding officer, and it is argued that immunity

62 UNCLOS (n 22), art 236.

63 D Guilfoyle, 'Article 96' in A Proelss (ed) (n 37) 719.

64 ILC, Report of the International Law Commission: Draft Articles on Jurisdictional Immunities of States and their Property with Commentaries (1991) UN Doc. A/46/10, GAOR, 46th Sess., Suppl. 10, 13, 51-52 (art16).

65 1934 Protocol to the Brussels Convention (n 61) art 1.

66 EFCA Regulation (n 51), art 9 (2) and 10 (2).

67 Guilfoyle (n 63) 719.

68 ibid 719.

69 See per this functional test Barnes (n 37) 253, who includes in the definition 'other vessels serving a public function: coastguard vessels, icebreakers, customs and immigration vessels, public operated hydrographic survey and research vessels, royal and presidential ships'.

applies to both the vessel and to personnel, weapons, stores or other property onboard the vessel.[70] Regarding the personnel, it is of relevance to allude to the ongoing work of the ILC on the 'Immunity of State Officials from foreign Criminal Jurisdiction'.[71] In his second report, the ILC's then-Special Rapporteur Kolodkin noted an 'agreement in the doctrine on the question of the category of persons enjoying immunity *ratione materiae*: all State officials are meant, irrespective of their position within the structure of the organs of State power'.[72] In its commentary to the provisionally adopted definition of 'State official', the ILC recognised in this regard that 'what is important is the link between the individual and the State, whereas the form taken by that link is irrelevant. The Commission considers that the link may take many forms, depending upon national legislation and the practice of each State'.[73] Thus, even if the vessel is not treated as a 'unity' for immunities purposes, there is room to assert that the personnel employed by the State or the EU to patrol the sea, although not a State or EU official, fall within the category of persons enjoying immunity *ratione materiae*.[74]

4.2. International Responsibility

The final question this article addresses is that of international responsibility, specifically whether the conduct of the private assets may give rise to international responsibility of either the coastal or flag State or the EU.

It is well known that the law of international responsibility has been developed and codified by the ILC. The main text and point of reference is the ARSIWA, which has not taken the form of a treaty, yet it is considered by courts and commentators to be whole or in large part an accurate codification of the customary law of state responsibility.[75] The ARSIWA was followed in 2011 by the ILC Articles on the Responsibility of International Organizations (ARIO).[76] Both ARSIWA and ARIO are based on the notion of 'internationally wrongful act', that is a breach of an international obligation which may be attributed to a particular State or organization and gives rise to its responsibility.[77] Therefore the first and foremost question that must be addressed is whether the conduct of the private assets

70 ibid 253; see also the US Navy, *The Commander's Handbook on the Law of Naval Operations* (2007) para 2.1.1; art 1 of the Additional Protocol of the 1926 International Convention for the Unification of Certain Rules Concerning the Immunity of State-Owned Vessels (24 May 1934) LNTS 179, 199, which refers to cargoes aboard vessels.

71 See further information at <https://legal.un.org/ilc/guide/4_2.shtml> accessed 11 June 2022.

72 R Kolodkin, Special Rapporteur, Second Report to the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction, U.N. Doc. A/CN.4/631, *Yearbook of the International Law Commission 2010*, Vol. II (Part 1), p. 402.

73 International Law Commission, 'Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction', provisionally adopted by the International Law Commission, in 'Report of the International Law Commission on the Work of its 66th Session' (5 May – 6 June and 7 July – 8 August 2014) U.N. Doc. A/69/10, p. 235.

74 *The M/V Enrica Lexie Incident* (*Italy v India*) (Award) [2020] PCA Case No. 2015-28 paras 873-4.

75 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*) (Judgment) [2007] ICJ Reports 2007, 43 para 401; and Crawford (n 28) 43.

76 Draft Articles on the Responsibility of International Organizations and its Commentaries, ILC Report, Sixty-Third Session (2011) UN Doc A/66/10, 50-170 [hereinafter: ARIO].

77 See ARSIWA (n 24), arts 1, 2; ARIO (n 76), arts 3, 4.

can be attributed to the States or the EU under international law.

Regarding coastal States, like Sierra Leone or Ecuador who have employed the services of Southern Cross Security or Sea Shepherds Conservation Society respectively, the provision of ARSIWA which might find application to the conduct of these NGOs is that of Article 5 concerning the 'conduct of persons or entities exercising elements of governmental authority'. Under Article 5, '[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance'.[78] As was stated above, the said NGOs were empowered via contracts by the relevant coastal states to perform functions of governmental authority, in this instance, law enforcement. Hence, all acts that had been performed in that capacity were attributable to the coastal state.

In the alternative, namely if there had been no empowerment by those states or the acts under scrutiny were not included in the scope of empowerment, there is still room for attribution to the coastal state concerned pursuant to Article 8 ARSIWA, according to which 'the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.[79] For present purposes, it is possible that, when coastal state's law enforcement officers embark the private vessel,[80] they may instruct the Master of that vessel or other crewmembers to perform certain acts or omissions. In that case, Article 8 ARSIWA would apply and thus these particular acts or omissions would be attributable to the coastal state and, if they constitute a violation of an international obligation of that state, the state will incur international responsibility. In all cases the conduct of embarked officers would be directly attributable to the coastal state.

A final comment is that the flag State of the private vessels seems not to incur any international responsibility, since there is no obvious basis for the attribution of the conduct of these vessels to their respective flag States under Articles 4 to 11 ARSIWA. That said, this is without prejudice to the possibility of the flag state incurring international responsibility from its failure to comply with its own due diligence obligations under international law related to the conduct of those vessels flying their flag.[81]

With respect to the responsibility of the EU for the conduct of *Lundy Sentinel*, or in the future for the conduct of other private vessels employed by EFCA or FRONTEX, evidently, the most perplexing question is whether the allegedly wrongful conduct is to be attributed to the EU itself or to the Member State

78 ARSIWA (n 24), art 5.

79 ARSIWA (n 24), art 8; see also *Genocide case* (n 75) paras 398-408.

80 See text to n 12.

81 Request for Advisory Opinion submitted by the Sub-Regional Fisheries Commission, (Advisory Opinion) [2015] ITLOS Reports 2015 para 124; Re such due diligence obligations concerning search and rescue at sea see E Papastavridis, 'Rescuing Migrants at Sea and the Law of International Responsibility', in T Gammeltoft-Hansen and J Vedsted-Hansen (eds), *Human Rights and the Dark Side of Globalisation: Transnational Law Enforcement and Migration Control* (Routledge 2017) 161, 165-7.

involved in the Joint Deployment Plans or other inspection programmes. The most relevant rule is set out, mainly, in Article 6 of ARIO, under which 'the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization'.[82]

It can be argued that any conduct by the EFCA, including by its officials when operating as Union inspectors on board the *Lundy Sentinel* in accordance with Article 19 of EFCA Regulation,[83] or the relevant conduct of FRONTEX and its officials in the future, would fall within the scope of Article 6 ARIO, thus being attributable to the EU. Also, the conduct of other EU inspectors seconded to the EU and operating on board *Lundy Sentinel*, or of the private crew of that vessel, would equally trigger the application of Article 6 ARIO, as these persons qualify as EU 'agents'. Under Article 2 (d) ARIO, 'agent of an international organization' means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts'.[84]

Alternatively, if there is no legal basis for the direct attribution to the EU of the conduct of private assets and personnel employed by EU,[85] there is room for indirect responsibility. Under Chapter IV of ARIO, an organisation may be held responsible if it aids or assists a State in committing an internationally wrongful act (article 14), or if it directs and controls a State in the commission of such an act (article 15), or if it coerces a State or another organization to commit an act that would, but for the coercion, be an internationally wrongful act (article 16).

The most pertinent provision seems to be that of article 14 of ARIO, that is 'aid or assistance'.[86] This article provides that: '[a]n international organization which aids or assists a State or another international organization in the commission of an internationally wrongful act by the State or the latter organization is internationally responsible for doing so if: (a) the former organization does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that organization'.[87]

EFCA, for instance, under its current Regulation, is mandated to 'coordinate control and inspection by Member States related to the control and inspection obligations of the Union; and coordinate the deployment of the national means of control and inspection pooled by the Member States concerned in accordance with this Regulation'.[88] Also, 'for the purpose of operational coordination, the Agency

82 ARIO (n 76), art 6.

83 EFCA Regulation (n 51), art 19.

84 ARIO (n 76), art 2 (d).

85 See ARIO (n 76), art 7 according to which '[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct', which however seems of no pertinence here.

86 ARIO (n 76), arts 36-37; A Reinisch, 'Aid or Assistance and Direction and Control between States and International Organizations in the Commission of Internationally Wrongful Acts' (2010) 7 IOLR 63-77.

87 ARIO (n 76), art 14.

88 EFCA Regulation (n 51), arts 3 (a) and (b).

shall establish joint deployment plans and organise the operational coordination of control and inspection by Member States'.[89] Hence, from the moment that EFCA becomes aware of the wrongfulness of the conduct of the Member States, where it continues to actively facilitate the relevant operations, there are sound reasons to hold the EU an 'accomplice', provided that the relevant international obligation breached had been also incumbent upon the EU.

5. Conclusion

States or international organisations have increasingly made recourse to new models to combat transnational organised crime at sea. Amongst these models the use of private vessels and crew, by coastal States and the EU, to patrol their waters looms large. This article has shed light on the legal framework governing the use of private assets and address questions regarding its consistency with international law.

Indeed, the practice of various coastal States in Africa and Latin America to outsource the policing of their EEZ to NGOs, like the Southern Cross Security and Sea Shepherd Conservation Society, as well as the use of private assets by EU Agencies (EFCA and, in the future, FRONTEX) to curb transnational organised crime at sea including IUU fishing, was put into question. Notwithstanding its innovative character, the use of private vessels, either by States or the EU, remains subject to the general principles governing law enforcement at sea. In particular, both these vessels and the personnel employed to inspect foreign fishing vessels must have the requisite due authorisation by the State concerned, and must be identifiable as being on government, law enforcement, service. While this seems to be the case for EFCA *Lundy Sentinel's* activities, there are serious doubts over Southern Cross Security and Sea Shepherd Conservation Society's employment in fisheries enforcement operations.

In addition, it was made clear that private vessels and their employment are subject to the rules concerning immunities and responsibility under international law. In particular, these vessels enjoy immunities under international law, as 'vessels operated by States and used only on government non-commercial service'. Their conduct may give rise to the responsibility of either the coastal State concerned or the EU under the relevant rules of the law of international responsibility.

As a general conclusion, it is submitted that international law provides a clear and adequate legal framework for the regulation of the contemporary privatisation of policing at sea, in the form of States and international organisations (currently only the EU) outsourcing police powers to, or chartering, private vessels.

89 ibid, art 5 (2).