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Hasebe, Masamichi

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THE USE OF PRIVATELY CONTRACTED ARMED SECURITY PERSONNEL (PCASP) TO DEFEND AGAINST THE THREAT OF PIRACY DIFFERENCES BETWEEN JAPAN AND THE UK

Masamichi HASEBE*

ABSTRACT

Whilst the exclusive right of legal jurisdiction over a ship on the high seas is reserved to the flag state, in practice, by virtue of the customary international law, the power to act against pirates has been extended to every member state; this is due to pirates being considered *hostie humani generis* – “the enemy of mankind” (Brownlie 1998). However, the United Nations Convention on the Law of the Sea (UNCLOS) limited their definitions of piracy to that being conducted on the high sea (Art. 101 of the UNCLOS). Accordingly, armed robbery against ships that take place within national jurisdiction cannot be dealt with by the UNCLOS as piracy cases, but can only be prevented by naval forces and/or coast guards of coastal states. However, due to lack of sufficient law enforcement capability of many developing coastal states, using private contracted armed security personnel (PCASP) on board has become a popular and practical means of protection in such jurisdictions. This paper examines the UK guidance on the use of PCASP and identifies possible legal risks. This is followed by a brief analogy of the new Japanese legislations and concluded by a comparison between the systems adopted in Japan and the UK.

Keywords: piracy, armed robbery, private contracted armed security personnel (PCASP), UK guidance, Japanese new legislations

* Visiting Professor, International Maritime Research Centre, Graduate School of Maritime Sciences, Kobe University, 3-11-17-705, Ebisuminami, Shibuya-ku, Tokyo, 150-0022, Japan
E-mail: 821261@gmail.com

1. BACKGROUND

1.1 Updated situation of piracy and armed robbery

According to International Maritime Bureau (IMB) of the International Chamber of Commerce (ICC), the total number of incidents of piracy and armed robbery against ships in 2013 has steadily declined to 264, which is an 11% decrease from 297 in 2012 and a 41% decrease from 445 in 2010 (ICC IMB 2014).

This successful decrease in the number of incidents stems mostly from a significant decrease in the number of attacks by Somali pirates. The reasons of this significant reduction are due to “the combined efforts of the navies in the region, along with the hardening of vessels, employment of privately contracted armed security teams and the stabilizing factor of the central government within Somalia” (ICC IMB 2014).

1.2 The traditional norm of piracy defined by the UNCLOS

Art. 100 of the UNCLOS calls on all states to cooperate in the repression of piracy as follows;

“All state shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”

According to Professor Thomas A. Walker, this Article reflects the historical “common interest of the European powers in protecting the fleets those were lifelines of their trade and their colonial empires.” Professor Ian Brownie therefore regards pirates as the enemy of the mankind- *hostie humani generis*.

Art. 105 of the UNCLOS further provides the right of every State to seize a pirate ship as follows;

“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed ...”

In addition, Art. 101 of the UNCLOS defines “piracy” as follows;

“Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft....”

The above cited articles make it very clear that armed robbery conducted within a national jurisdiction does not come under the scope of the UNCLOS. In other words, foreign navies cannot regard armed robbery conducted within national jurisdictions as piracy and therefore cannot take action against it based on the rights of every State in the UNCLOS.

Accordingly, it is primarily the responsibility of coastal states of relevant national jurisdictions to prevent armed robbery against ships. However, as the International Maritime Organization (IMO) rightly pointed out, “of the 558 attacks in West Africa which were reported to IMO over the past 10 years, ...80 per cent of these crimes took place within national jurisdictions, and even though some of the coastal states of West Africa lack maritime law enforcement capability, there is no void of authority, which has been the case in Somalia” (IMO MSC 92/18). Such lack of law enforcement ability of developing coastal states has been a grave problem for shipping industries and therefore they were forced to consider self-defense against armed robberies against ships.

1.3 The use of Privately Contracted Armed Security Personnel (PCASP)

The use of PCASP has been a controversial issue. It was widely believed among the IMO, Member States and shipping industries, that the risks of the use of PCASP largely outweighed the benefits; the use of PCASP was therefore strongly discouraged by 2011 (House of Commons 2011). Dr. Campbell McCafferty, head of Counter-Terrorism and UK Operational Policy at the Ministry of Defense observed at the Foreign Affairs Committee of the House of Commons that “like everywhere else, the more guns there are around, although there is a deterrent effect, you also have the increased opportunity or potential for the wrong people to be shot” (House of Commons 2011). Nautilus International, a crew members’ organization, also raised the fear that “the use of such guards on some vessels could mean that other vessels are selected for attack on the basis that they do not carry armed guards (for example, LNG carriers and oil tankers), thereby displacing rather than solving the problem” (House of Commons 2011).

Regardless of such criticisms, due to lack of law enforcement abilities of coastal developing states and an increased number of armed robberies against ships, the use of PCASP to defend against the threat of piracy and armed robbery has been regarded as a useful and popular practice among shipping industries. Major General Buster Howes OBE testified at the Foreign Affairs Committee of the House of Commons on 22 June 2011 and mentioned that “It is estimated that between 15% and 25% of vessels transiting the region already have PCASP on board, sometimes in violation of the flag states’ policies” (House of Commons 2011).

1.4 Changes to Flag States’ Policies

In December 2011 the UK changed its policy in response to prevailing practices by shipping industries and no doubt taking into consideration the fact that the majority of Private Maritime Security Companies (PMSC), which provided PCASP at the time, was UK companies. Since this policy change was followed by many leading shipping countries like Norway, Greece, and Japan, the majority of flag states changed their policies to legally allow PCASP on board (ICS/ECSA 2012).

2. INTERIM GUIDANCE TO UK FLAGGED SHIPPING ON THE USE OF ARMED GUARDS

The UK Government published the “Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances Version 1.1” in November 2011 and updated it to Version 1.2 in May 2013 (hereafter referred as “the Guidance”). Important points for discussion in this guideline are considered in this chapter.

2.1 The use of PCASP should be additional and exceptional

Various maritime industries and organizations, such as The Baltic and International Maritime Council (BIMCO), International Chamber of Shipping (ICS), International Maritime Bureau (IMB), have developed a guidance entitled “Best Management Practices for Protection against Somali based Pirates (BM4)” which suggests planning and operational practices for ship operators and Masters of ships transiting the High Risk Area (HRA) and plays an essential role in a ship’s defense measures against piracy. Para. 1.3 of the Guidance provides that “it has been seen that BMP alone is not always enough to effectively protect ships and their crews. The use of armed guards, as an additional layer of protection on top of BMP, has been shown to be a very effective means of defending ships from pirate attack.” Furthermore, there are the added requirements that the use of armed guards on board shall only be allowed “in exceptional circumstances and where it is lawful to do so.”

2.2 The use of PCASP can be allowed only in the High Risk Area

The exceptional circumstances under which armed guards may be employed for use on board UK flagged ships are as follows: (Para. 1.6)

- When the ship is transiting the high seas throughout the High Risk Area (HRA) (an area bounded by Suez and the Straits of Hormuz to the North, 10° S and 78° E); AND
- The latest BMP is being followed fully but, on its own, is not deemed by the shipping company and the ship’s master as sufficient to protect against acts of piracy; AND
- The use of armed guards is assessed to reduce the risk to the lives and wellbeing of those onboard the ship.

The number of actual and attempted attacks that happened in the HRA in 2013 is less than 38, which is 14% of the total 264 attacks reported across the globe (ICC IMB 2014). Therefore, the use of PCASP cannot be regarded as a panacea against armed robberies in the world, but as a special counter measure in the HRA. Accordingly, it may be discussed in the future whether the use of PCASP should also be allowed in other regions such as the Gulf of Guinea region, which accounted for 48 of the 264

incidents and where pirates are generally well armed similar to Somali pirates (IMO MSC 92/18).

2.3 The Master's authority, command and control

According to SOLAS XI-2 regulation 8(1), "The Master shall not be constrained by the Company, the charterer or any other person from taking or executing any decision which, in the professional judgment of the Master, is necessary to maintain the safety and security of the ship". This includes denial of access to persons (except those identified as duly authorized by a Contracting Government) or their effects and refusal to load cargo, including containers or other closed cargo transport units. The ship's Master, therefore, has the authority to ultimately decide whether or not armed guards are used on a particular voyage (Para.5.1). As set out at Para.3.16, the contractual agreement between the shipping company and the PMSC should include a clearly defined command and control structure which confirms the Master's authority over the operation of the ship and the safety and security of its passengers, cargoes and crew (Para 5.2).

BIMCO issued a standardized contract "GUARDCON", which is a contract for the use of private military security companies (PMSCs) to provide armed/unarmed security services on board merchant vessels. Sub-clause 8(a) of Section 4 of GUARDCON endorses the above-mentioned Master's authority and provides that, "the Master shall, at all times, throughout the duration of this Contract and the performance of the Security Services, have and retain ultimate responsibility for the safe navigation and overall command of the Vessel. Any decisions made by the Master shall be binding and the Contractors undertake to instruct the Security Personnel accordingly."

At the time of having drafted Clause 8, BIMOCO consulted with the UK Crown Prosecution Service (CPS) which "cautioned against allowing the Master to be involved in the decision to open fire in case he should fall foul of the rules on "joint enterprise" and be tainted by the actions of the security personnel" (BIMCO 2012b). "GUARDCON also acknowledges that the Master of a merchant vessel does not have the necessary expertise to command a team of armed guards in the use of firearms or necessarily to decide upon situations where a graduated response by the guards is appropriate. Clause 8 does not require the Master to invoke the Rules for the Use of Force (RUF), which is consistent with the advice given by the CPS above to avoid the risk of "joint enterprise". If the Master was to invoke the RUF and the guards, acting on his orders, unlawfully fatally injure a third party, the Master could be exposed to criminal liability" (BIMCO 2012b).

The Explanatory Notes of GUARDCON further clarifies that "Sub-clause 8(b) deals with the assessment by the security team leader of threats to the vessel. If, in the team leader's professional opinion, the threat warrants a graduated response from the security guards, he has to advise the Master or, in the Master's absence, the officer of the watch, that he intends to invoke the RUF. During the development of GUARDCON, the Sub-committee discussed various scenarios that might impact on

the obligation of the team leader to advise the Master – in particular in the case of a surprise attack where there might not be time to advise the bridge team. However, the experience of Somali pirates' attacks indicates that with vigilant bridge and security teams there is always forewarning of an attack and therefore there should always be time for the guards to make the bridge team aware of their intentions" (BIMCO 2012b).

However, the report of Ince & Co pointed out that "security companies still seek to insert contract clauses which appear to provide that the Master may not have overall control or the final decision in whether weapons will be deployed and used. That decision may rest with the security team, on terms that the Master only need be consulted 'if there is time'. The justification is that, if faced with a lethal threat, the right to self-defense outweighs the Master's overall responsibility to his crew and the environment. In other words, the Master may not have full control of a key area of the vessel's security, something which impacts directly on the safety of the crew and the vessel itself. Indeed there may be a contractual obligation for him to obey 'security' instructions from the guards" (Ince & Co 2011)

Accordingly, sub-clauses 8 (c) and (d) of the GUARDCON provides that "Each of the Security Personnel shall always have the sole responsibility for any decision taken by him for the use of any forces, including targeting and weapon discharge, always in accordance with the Rules for the Use of Force and applicable national law....Nothing in this Clause compromise each of the Security Personnel's right of self-defense in accordance with applicable national law" (BIMCO 2012). Para.5.6 of the UK Guidance also provides that "the decision to use force must lie with the person using force. Neither the Master nor the security team leader can command a member of the security team against that person's own judgment to use force or to not use force" (DfT 2013).

Since there is a possibility that a developing coastal state's legislation maybe applicable in a possible criminal case, it is understandable that Masters and shipping industries would want to avoid criminal exposure as much as possible. However, as a private contract based on the industries' guideline GUARDCON cannot override the Master's authority provided by SOLAS, a plaintiff injured by PICASP's operation may be able to pursue the Master's criminal liability relying not on GUARDCON but on SOLAS. A possible revision of SOLAS might have to be considered in the near future if the majority of Member States wishes to avoid such criminal risk for the Master.

2.4 Permits and Licenses for storage, handling and movement of firearms

According to the Explanatory Notes of GUARDCON, "there is concern in the industry that an apparent sizable number of private maritime security firms are operating without the necessary permits and licenses to transport and carry weapons. The consequence of contractors failing to have the required permits and licenses effectively makes the carriage of weapons illegal, the consequences of which could

result in significant delays to the vessel” (BIMCO 2012b). In response to this concern, GUARDCON contains a comprehensive clause dealing with permits and licenses which place a strict obligation on the contractors to ensure that they meet all such requirements.

As already explained in section 2.2, according to the UK Guidance, “armed guards should only be used while transiting the HRA. It is recognized though that the security team and their firearms must embark before entering the HRA, and disembark after leaving it. Whilst not in the HRA, firearms should be safely and securely stored on board the vessel. The embarkation and disembarkation of the firearms should take place at the soonest safe, convenient and lawful opportunity outside of the HRA and in accordance with the legal requirements of the State where this takes place”(Para. 6.8).

Para.6.9 of the Guidance provides that “When transiting foreign territorial seas with firearms onboard, it is essential that the laws of that coastal state are respected and complied with. Section 3 of Part II of the United Nations Convention on the Law of the Sea (UNCLOS) allows vessels the right to innocent passage through the territorial seas of a coastal state, where passage is not prejudicial to the peace, good order or security of that state. Activities which are classified in UNCLOS as prejudicial to the peace, good order or security of a State include any exercise or practice with weapons. Shipping companies should therefore consider the need to take legal advice on the legal requirements of a state whose territorial seas they are transiting even if firearms onboard are securely stored and comply with any requirements put in place by that state.” (Para.6.10)

Para.6.12 of the Guidance also provides that “When embarking or disembarking firearms, ammunition and other security related equipment at a foreign port; or calling at a foreign port with such items onboard (but not disembarking them), it is essential that the laws of that port State are respected and complied with (Para. 6.11). Prior to the voyage, the PMSC must seek clarification from the port state on their laws and requirements regarding the possession, embarkation and disembarkation of firearms, ammunition and other security related equipment; and the embarkation and disembarkation of security personnel. All laws and requirements of the port state must be respected and complied with fully.”

A guide for PMSCs by Holman Fenwick Willam assumes that “whilst it is acknowledged that GUARDCON sets a high standard, the requirement for PMSCs to have all applicable licenses in place is not new, the challenges for the PMSC are understanding and responding to continuing changes in these requirements, and managing the application process, which can be lengthy” (Holman 2012)

2.5 A step by step approach for defending against ships

The UK guidance provides that “where a potential pirate threat is identified, the ship’s Master must first follow the advice included in BMP and take appropriate and reasonable steps to reduce the potential for a situation where it may be necessary to use

force, for example by maintaining maximum speed to get away from the pirates (Para.8.1). If, with BMP ship protection measures in place, the threat persists, the use of reasonable force may be considered where this would be a proportionate response to protect the safety of those on board the ship.” (Para. 8.2)

“The security team’s function is to prevent illegal boarding of the vessel in order to protect the lives of those onboard, using the minimum force necessary to do so (Para.8.3). The PMSC must have in place, and agree with the shipping company upon, rules for the use of force that the armed security personnel will operate within. These rules must be based upon the applicable laws governing the use of force. All members of the armed security team must fully understand the rules for the use of force and comply with them (Para 8.4). These rules should provide for a graduated response, each stage of which is considered to be a reasonable, proportionate and necessary response to the threat; and which at no point will needlessly escalate a situation. Any measures to display capability to use force (e.g. making firearms visible, verbal warnings, warning shots etc.) should be implemented in such a way so as not to be taken as acts of aggression (Para 8.5). Having and complying with rules for the use of force may serve to reduce the risk of armed guards acting unlawfully. However, in the event that criminal charges (e.g. in respect of offences related to unlawful killing or assault) are brought to court, proving that one acted within the agreed rules for the use of force would not in itself serve as a defense. It would be for the enforcement agencies and then the court to decide whether the force used in the particular case was lawful.” (Para 8.6)

2.6 UK legislation regarding the use of force

The UK guidance further provides that “the criminal law of England and Wales and of Northern Ireland applies onboard UK registered ships on the high seas. There may also be circumstances where Scots criminal law applies. Any force used by armed guards must comply with the relevant domestic law (Para.8.7). In addition to the applicable law of the UK, other countries may also have a right to assert jurisdiction over a case and apply their own national laws governing the use of force. This may depend upon the particular circumstances of a case (for example where the offence took place, the nationality of the victim and / or the nationality of the alleged perpetrator).” (Para 8.8)

“Under the law in England and Wales, a person may use force which is reasonable in the circumstances as they genuinely believed them to be for the purposes of, for example: self-defense, defense of another, defense of property and prevention of crime (Para. 8.9). The law does not preclude the use of lethal force – including through the use of legally held firearms - when acting in self-defense or protecting the lives of other people, but a person can only use force that is proportionate and reasonable in the circumstances as they genuinely believed them to be. Care should be taken to minimize injury and to respect and preserve human life (Para. 8.10). If a person believes a threat is imminent, it is not necessary for them to wait for the aggressor to strike the first

blow before using reasonable and proportionate force to defend themselves and / or others.” (Para. 8.12)

“Reasonable and proportionate force may be used in the prevention of crime, which includes the prevention of acts of piracy. “Prevention of crime” is to be taken to mean the prevention of a particular crime that is in progress. It does not include the general proactive disruption of crime (i.e. vigilantism). If armed guards sighted a pirate skiff (i.e. a skiff obviously equipped to undertake acts of piracy), but there was nothing to indicate that the skiff was actively undertaking an act of piracy, it would be illegal for armed guards to use force against them (Para. 8.13). It is for the enforcement agencies and then the court to determine whether the degree of force used by a person was reasonable by reference to the relevant circumstances.” (Para 8.14)

3. JAPANESE LEGISLATION

Special laws and regulations which enable an owner of Japanese flagged vessel to use PCASP were authorized in November 2013. The scope of the Japanese legislation appears to be narrower than that of the UK and a greater level of Ministerial authorization is required in Japan. Firstly, the Japanese legislation limits not only the applicable area (= HRA), but also the type of vessels which could be regarded as vulnerable to pirates’ attacks. Secondly, a shipowner, who wishes to use PCASP, must submit a security planning to the Minister of Land, Infrastructure, Transport and Tourism and receive ministerial authorization for each vessel and each voyage. Thirdly, whereas no governmental licensing system regarding PSMCs and PCASP exist in the UK, Ministerial licenses both for PSMCs and PCASP are required in Japan.

There is, however, no official guidance concerning possible legal issues considered in Section 2. Accordingly, a shipowner of a Japanese vessel may have to draft a security plan by referring to various international guidances including GUARDCON. Whilst the UK guidance clearly provides the types of situation and legal justification under which the use of force is legally permitted (Para. 8.9), no such guidance currently exists in Japan.

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