



Use of armed guards onboard ships and its legal ramifications

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Abstract

The paper attempts to analyse the issues related to the employment of armed guards in merchant ships. The International Maritime Organization (IMO) guidelines on use of armed guards in merchant ships are discussed. The need for having an international legal framework on the law relating to use of armed guards is examined in the light of the latest incident in India- *The Enrica Lexie* episode which led to the killing of two fishermen as a result of indiscriminate firing by the armed guards onboard the Italian ship.

Keywords: *Armed guards onboard ships, vessel protection detachments, conflict of jurisdiction, IMO guidelines.*

Introduction

The widespread increase in the Somali based pirate attacks in the Gulf of Aden compelled nation states to adopt various counter piracy measures (Treves, 2009). The counter piracy measures include naval and military operations in the region, adoption of ad hoc legal framework for unimpeded law enforcement by the UN Security Council, establishment of information sharing mechanisms use of armed guards onboard commercial ships and Promotion of Best Management Practice by the shipping industry. Though the number of successful attacks by Somali pirates has dropped significantly, the overall number of attempted attacks by Somali-based pirates is still growing.

Vessel Protection Detachments (VPD) and Private Maritime Security Companies (PMSC's) are being increasingly deployed to protect vulnerable vessels at sea. Vessel Protection Detachments are small teams of law enforcement officials comprising of uniformed military officials. France, Belgium, Netherlands, Russia are some of the nations which rely on VPD's to protect its vessels (Dubner and Pastorius, 2014). Private Maritime Security Companies are private contractors employed to provide security personnel, both armed and unarmed, onboard for protection against piracy (IMO, 2012). VPD and PMSC offer a quicker and successful on the spot protection against the threat of piracy.

Escalating costs of insurance and ransoms have forced shipping companies to rely more on VPD's and PMSC's. Germany and the US supports the use of PMSC's whereas France and Japan have prohibited their use.

The deployment of armed guards has triggered many legal issues like who shall be held responsible when the armed guards violate the criminal law of the coastal state or the port state. It has been doubted whether the very presence of armed guards goes against the concept of innocent passage laid down in UNCLOS. Whether the port state shall have jurisdiction to try the offence committed when there is an arbitrary use of force? Whether the master of the ship can be held responsible when there is a breach? These are perplexing legal issues to be solved at the international level. In the *Republic of Italy v Union of India, Enrica Lexie* case (A.I.R. 2012 S.C.2134) the security personnel mistook fishermen as pirates and fired them. The armed guards raised a contention that they had acted in their official capacity in firing the fishing boat and that they were entitled to sovereign immunity.

Armed guards are governed by the law of the state whose flag the ship is entitled to carry. Domestic laws have limitations in addressing the accountability issues raised by use of armed guards. When an attack occurs within the territorial waters of a country, a conflict of jurisdiction can arise between the flag state, coastal state and the states whose citizens are involved in the incident. The mounting pressure from the shipping industry made International Maritime organization (IMO) to come up with some guidelines on the use of security guards onboard ships.

The paper examines the following connected issues. Firstly it examines whether the rules provide for any guideline as to when force may be used. Secondly, it examines whether the rules addresses the issue as to who can be held responsible for illegal/indiscriminate use of force. Thirdly, the paper looks into whether the rules provide any solution for the conflict of jurisdiction that would arise in case of an illegal /arbitrary use of force by the armed guards. For analyzing these issues the IMO guidelines, UK guidelines and Indian Guidelines on use of armed guards onboard merchant ships are examined.

International norms on use of armed forces onboard ships

We do not have any international convention regulating use of armed forces onboard merchant ships. The UNCLOS do not contain any provision prohibiting use of armed guards. Whether use of armed guards can be treated as part of right to innocent passage would depend on the laws of the coastal state. Article 17 of UNCLOS recognizes the right to innocent passage through the territorial sea. Passage means not only actual passage through the territorial sea, but also stopping and anchoring in so far

as this is incidental to ordinary navigation. Passage shall not be treated as innocent if the activity includes 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 Nation and any other activity not having direct bearing on passage. In the landmark decision of *Corfu Channel* case (United Kingdom v. Albania, I.C.J. Reports 1949), the International Court of Justice held that so long as the passage is not a threat to the coastal state, it should be treated as innocent. Article 21 of UNCLOS requires all ships exercising the right of innocent passage through the territorial sea to comply with all such laws and regulations adopted by the coastal state. Some of the coastal states prohibit the carriage of weapons and armed forces on merchant ships through its territory. In such a case, the passage and use of force within its territorial limits can be considered a violation of Articles 19 and 21 of the UNCLOS.

IMO guidelines on use of armed guards

The IMO has issued separate guidelines for the ship-owners, the Private Maritime and Security Companies (PSMC's) and the port and coastal states. The IMO guidelines, 2012 issued to the ship-owners provide that the use of Privately Contracted Armed Security Personnel (PCASP) should not be considered as an alternative to Best Management Practices (BMP) and other protective measures. The flag state shall be consulted in their consideration of the decision to place PMSC's onboard and to ensure that all statutory requirements are complied with. The decision shall be taken after a thorough risk assessment and after ensuring all other practical means of self-protection have been employed.

The guidelines issued to the Private Maritime and Security Companies (PMSC's), 2012 recognizes that the decision to allow PCASP onboard ships is the prerogative of flag States. PMSC's shall seek the appropriate approval from the competent authorities in flag States, countries where the PMSC is registered and countries in which operations are conducted or managed, including countries through which PCASP's may transit. PCASP should have professional capability to ensure protection of persons and the ship against unlawful attack and should have a clear policy on the rules for the use of force based on the consideration of several scenarios and providing a graduated response plan. PMSC should have a policy and procedure governing the command and control of PCASP onboard a ship. All reasonable steps should be taken to avoid the use of force and, if force is used, that force should be used as part of a graduated response plan, in particular including the strict implementation of the latest version of BMP. The use of force should not exceed what is strictly necessary and reasonable in the circumstances and that care should be taken to minimize

damage and injury and to respect and preserve human life. PCASP's can use firearms against persons only in self-defence or in defence of others.

IMO, Revised Interim Recommendations (2012) for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel Onboard Ships in the High Risk Area, has identified the factors to be taken into account while framing laws and policies relating to embarkation and disembarkation of PCASP and security-related equipment. It requires the states not to establish policies and procedures which may hinder the continuation of maritime trade or interfere with the navigation of ships and should ensure that law and policies are consistent with international law.

The IMO guidelines do not address the issue as to who can be held accountable for deaths and destruction caused by illegal use of force. It is also silent as to how the conflict of jurisdiction that may arise in case of use of force could be resolved. Difficulties are bound to arise in proving that the security guards and the captain erred in reaching a decision as to use of force. Because in most of the cases the circumstances based on which the decision is taken is within the exclusive knowledge of the ship master and the security guards. Questions of facts can be judicially answered only if the question of jurisdiction is determined.

UK guidelines on the use of armed guards, 2013

The Interim Guidance issued by Department of Trade (UK) to Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances, 2013, stipulates that the ship's Master shall have the ultimate authority to decide whether armed guards are to be used on a particular voyage. The security team should be headed up by a security team leader who shall report directly to the ship's Master. The security team leader will be responsible for the operational control, deployment and discipline of the armed guards. The security team leader and the armed guards must operate in accordance with the command and control structure and standard operating procedures. Where the standard operating procedures do not cover specific circumstances, the security team leader and the armed guards should act in accordance with their professional judgment, the agreed command and control structure and within the applicable law. UK law recognizes the right of self-defence. The level of force used must be proportionate and reasonable in the circumstances as the defendant genuinely believed them to be. 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.

The guideline identifies the exceptional circumstances wherein

armed guards may be used. It provides that armed guards may be used when the ship is transiting the high seas through the High Risk Area (HRA). The vessel shall follow the latest Best Management Practices (BMP). Armed guards may be deployed if the ship master finds that BMP alone would be insufficient to protect against acts of piracy and that the use of armed guards would reduce the risk to the lives of those onboard the ship.

The UK rules further provide guidelines as to when force may be used. 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. If, with BMP ship protection measures in place, the threat persists, the use of reasonable force may be considered. The use of force should be a proportionate response to protect the safety of those onboard the ship.

Indian position

The guidelines issued by the Ministry of Shipping, Government of India provide that the primary function of PMSC shall be prevention of boarding of the pirates using the minimal force necessary (Ministry of Shipping, 2011, para 6.9). The PMSC should provide a detailed graduated response plan to a pirate attack as part of its teams' operational procedures. PMSC's are required to ensure that their personnel takes all responsible steps to avoid the use of force. The use of force shall not exceed what is strictly necessary and should be proportionate to the severity of threat and actual situation at hand at the material point of time. PMSC should require their personnel not to use firearms against persons except in self defence or defence of others against the imminent threat of death or serious injury. If force is used, it should be in a manner consistent with applicable law. The law of private defence as contained in the Indian Penal Code, 1860 provides that the force used shall be proportionate to the injury to be averted. Section 100 of Indian Penal Code, 1860 provides that the right of private defence would extend to voluntary causing of death, where there exist circumstances giving rise to reasonable grounds for apprehending either death or grievous hurt. International Tribunal for Law of Sea (ITLOS) considered the issue of use of force during arrest of ships in *M V Saiga* case [1999 ITLOS Rep, 10]. The issue involved in the case was whether the Guinean authorities had used excessive and unreasonable force in stopping, boarding and arresting *M V Saiga*, an unarmed tanker fully laden with gas oil. It was held that the use of force must be avoided as far as possible and, where force is inevitable, it must not go beyond what is reasonable and necessary in the circumstances. It was observed that considerations of humanity must apply in the law of the sea, as they do in other areas of international law. The requirement of giving warning signals before resorting to use of force was

also mentioned in the judgment. This principle can be applied to use of force by armed guards onboard merchant ships. Thus as per established rules of International law and the provisions of Indian Penal Code, use of force without giving warning signals is illegal.

The guidelines issued by Ministry of Shipping require foreign merchant vessels visiting Indian ports with armed security guards are required to follow certain guidelines (Ministry of Shipping, 2011, para 7.5). All armed security guards are required to be in possession of valid arms licenses issued by the flag administration of the vessel. All foreign vessels visiting Indian ports shall secure their firearms and ammunition in a secured 'strong room' when entering Indian territorial (12 nautical miles offshore) waters. Vessels transiting the Indian EEZ (200 nautical miles offshore) and carrying armed security must make reports to Indian Coast Guard and Navy. The foreign vessels shall make a complete declaration of security personnel and weapons within 96 hours of entering Indian EEZ. The guidelines require all Indian ships visiting foreign ports to comply with similar rules and regulations of the coastal state.

Conflict of jurisdiction

Jurisdiction over a criminal act is vested upon the territorial state where the crime is committed. A criminal act committed onboard a ship often leads to overlap of jurisdictional claims. The question of jurisdiction at sea is addressed under the UNCLOS convention. Article 92 of UNCLOS provides that the flag State shall have 'exclusive jurisdiction' over crimes occurring onboard. Article 27 provides that the criminal jurisdiction of the coastal State can be exercised onboard a foreign ship passing through the territorial sea only in limited circumstances like where the 'consequences' of the crime extends to the coastal State or likely to disturb the peace of the State or the good order of the territorial sea.

In the *Enrica Lexie* case, conflicting claims were raised by the Government of India and The Republic of Italy. The crime was alleged to have been committed in the contiguous zone. UNCLOS divides the maritime zones into territorial waters, Contiguous zone and Exclusive Economic Zone. UNCLOS provides that a coastal State shall enjoy only sovereign rights and not sovereignty over the Exclusive Economic Zone. The Indian government claimed jurisdiction over the crime on the basis of the Maritime Zones Act, 1976, which extended the application of its Code of Criminal Procedure, 1973 to the contiguous zone and the Exclusive Economic Zone. The Act defines contiguous zone as an area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline. The Act empowers Central Government

to exercise such powers and take such measures in the contiguous zone as it may consider necessary for the security of India, and matters relating to immigrations sanitation, customs and other fiscal matters.

The Supreme Court of India held that the Parliament has authority to make laws, which are applicable to persons, who are not corporeally present within the territory of India when such persons commit acts which affect the legitimate interests of this country. The principle that the jurisdiction over the crime belongs to the country where the crime is committed cannot be accepted as an absolute principle any more. States can claim jurisdiction over offenders who are not physically present within and offences committed beyond the territory of the State whose legitimate interests are affected.

International Law recognizes different forms of extra-territorial criminal jurisdiction such as the objective territorial claim, active personality principle, the passive personality claim, the security claim, and the universality claim (Ryngaert, 2008). The objective territoriality jurisdiction recognizes the 'next port' to have jurisdiction over the crime. The 'next port' may claim jurisdiction on the basis that the 'effect' of the crime need to be dealt with in that State. The active personality claim is based on the principle that when criminal act is committed by a citizen, the State has the power to prosecute that citizen, no matter where the crime took place. Under the passive personality principle, the victim's State claims a right to prosecute. The Universality principle is based on the nature of crime. Every state has authority to prosecute 'heinous' crimes. All these principles were developed to confer extra-territorial jurisdiction over crimes whose effects are felt in territories beyond the residential borders of the offenders. The above mentioned principles can be adopted to solve the issue of conflict of jurisdiction arising out of use of armed guards.

The past decade has witnessed a sharp increase in acts of piracy on the high seas off the coast of Somalia which necessitated the deployment of armed guards onboard ships. It is gratifying to note that flag states are against widespread securitization of commercial shipping and armed protection is allowed only within the limits of specific maritime high risk areas. The legal issues arising out of use of armed guards highlighted above need to be solved at the international level. UNCLOS is silent as to the issue of deployment of armed guards onboard ships. The IMO guidelines with respect to use of force, call for a graduated and proportional response to pirates which seems to be an acceptable approach. The IMO recommendations are not intended to override the implementation and enforcement of the national legislation of a State or to interfere with that State's rights under international law. An international legal

framework is the need of the hour. This would help nation states in following a consistent and coherent approach in drafting rules and policies on use of armed guards. The accountability gap could be filled addressed by having clear rules for use of force. The international framework shall establish clear rules as to the conditions to be satisfied before using force. It is suggested that firing of warning shots, sounding of alarm signals and use of hoses or evasive maneuvering may be imposed as mandatory requirements to be complied with before resorting to use of force. The issue of multiplicity of jurisdictions could be resolved by applying the principles of extra territorial jurisdiction recognized in international law. Vessels were deployed with armed guards as a response to the menace of Somali piracy and the international community saw the kind of violence and hostilities created by the armed men on vessels. Though the IMO guidelines are not legally binding, it can be viewed as a benchmark for drafting an international framework and for resolving the potential legal issues arising from use of private security force onboard vessels.

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