

National Regulatory Frameworks for On-Board Vessel Security: Some Key Issues

Douglas Guilfoyle

Professor, University College London (UCL)

Introduction

An increasingly prominent practice in counter-piracy has been the use of privately contracted armed security personnel (PCASP) in protection against piracy in the Indian Ocean “High Risk Area”.¹ There is no existing international mechanism governing maritime PCASP, although moves to create greater regulation are discussed in Section 3. Briefly, international instruments such as the Montreux Document² or the International Code of Conduct for Private Security Service Providers (ICoC) are “useful reference points for [PCASP], but are not directly relevant to” maritime piracy.³ The Montreux Document applies to private companies contracted by *states* during an *armed conflict* and, therefore, does not apply to PCASP retained by private parties in counter-piracy. The ICoC aims at the self-regulation of land-based security companies, and is not tailored to counter-piracy. Work on PCASP regulation has therefore been conducted by the International Maritime Organization (IMO), the shipping industry, flag states and port states, the latter two being the focus of this chapter.

Flag States

The most important law of the sea principles applicable to the position of flag states regarding PCASP are:

- the overriding authority of a ship’s master regarding all personnel and activities aboard his or her vessel; and
- the exclusive jurisdiction of the flag state over a vessel on the high seas (meaning that the decision whether to allow PCASP is one for the flag state and the law applicable to their activities on the high seas will be flag-state law).

The IMO guidance to flag states starts from the proposition that “the carriage of [PCASP] and their firearms ... is subject to flag state legislation” and the flag state decides “*if and under which conditions* this will be authorized” (emphasis added).⁴ Where a flag state considers it appropriate and lawful under national law to permit the use of PCASP aboard ships flying its flag, the IMO recommends having a policy addressing:

- “the minimum criteria ... with which PCASP should comply”;
- “a process for authorizing the use of [compliant] PCASP” by ship owners and operators;
- “the terms and conditions under which the authorization is granted and ... accountability for compliance”; and
- “references to any directly applicable national legislation pertaining to the carriage and use of firearms by PCASP ... and the relationship of PCASP with the Master while on board”.

It is not clear how many flag states authorize the use of PCASP, but does include the United States, the UK, Dominica and Liberia.⁵ The focus here shall be on the UK regulatory framework.

The UK government cooperates with the security industry in setting standards for PCASP through a partnership called the Security in Complex Environments Group. The most critical issues are:

- the licensing of PCASP to carry weapons;
- PCASP rules on the use of force; and
- the relationship between PCASP and the Master.

In the UK individual armed guards must hold a special authorization issued by the Home Office under s. 5 of the Firearms Act 1968. UK private maritime security companies (PMSCs) which provide PCASP services may also need export and trade control licenses in order to remove weapons from the U.K. or to move them across borders internationally.⁶ This complex process has been simplified after complaints from the private security industry. However, it illustrates the difficulties in relying on flag state laws that were never designed with PCASP in mind.

Regarding use of force, the IMO says PMSCs should have “a detailed graduated response plan” to pirate attacks and should require their personnel to:

- “take all reasonable steps to avoid” using force;
- use only strictly necessary and proportionate force; and
- “not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury”.⁷

Flag states will typically apply their national law of self-defense in assessing the lawfulness of PCASP actions.⁸ It is PMSCs who must draw up detailed rules to ensure their employees remain within the law. Guidelines to this end are provided in the BMICO model contract GUARDCON. This emphasizes that PMSC contracts with ship owners/operators should require attempting non-violent means first before providing for a graduated response, including:

- showing weapons and the intent to use them;
- firing warning shots;
- disabling fire against an attack craft's hull or engine; and
- using lethal force against people only as a last resort.⁹

Finally, the overall authority of the Master means he or she can always order PCASP to cease fire. However, the Master's order cannot over-ride an individual PCASP member's right to act in self-defense.¹⁰

Port and Coastal States

The key legal issues regarding PCASP and port and coastal states arise from the sovereignty of coastal states over their ports and, subject to rules on innocent passage, their territorial sea.

Bringing PCASP weapons into port

The shipping industry needs to know “whether and under what conditions” the embarkation and disembarkation of PCASP is permitted and what requirements must be complied with when a ship carrying PCASP arrives in, stays at, or departs from a port.¹¹ The IMO therefore recommends ports have, and publicize, policies and procedures dealing with the embarkation and disembarkation of PCASP and their weapons; and have similar rules for vessels calling in port.¹²

In each case national regulations on the “storage, security and control” of firearms are crucial; as

well as regulations stipulating what paperwork documenting flag-state authorization for PCASP or their equipment will be required.

A concern for the shipping industry has been that if regulations are poorly distributed or frequently changed, it undermines the ability of vessel owners/operators to plan voyages and comply with port state law. There is surprisingly little relevant information available through international organizations. The World Customs Organization conducted a survey in 2011 of national regulations concerning weapons entering port on foreign ships: it attracted only 17 responses. Of these, the only Indian Ocean region respondents were Mauritius and the Seychelles.¹³

A related issue is the use of “floating armories”. Some states have expressed concern that certain “private security companies having logistical platforms situated close [outside] ... the territorial sea of a state, in order to embark and disembark PCASP and firearms” without entering territorial jurisdiction. There would seem little basis to repress such activities under the law of the sea, although if such a vessel were found within a coastal state’s 24 nautical mile contiguous zone, inspection of the vessel by coastal state authorities could be justified on the basis of jurisdiction to prevent infringement of customs laws. Preventative action, however, probably would not extend to seizing the vessel or weapons aboard. However, states such as Sri Lanka (at the port of Galle), have themselves turned to privately-contracted “floating armories” and require ships intending to enter port to store their weapons at such a facility and pay for the service.

Passage of PCASP through the territorial sea

A thornier issue is the passage of PCASP through the territorial sea. The IMO Maritime Safety Committee concluded in 2012 that “ships entering the territorial sea and/or ports of a state are subject to that state’s legislation”.¹⁴ Ships entering the territorial sea but not proceeding to port ordinarily enjoy a right of innocent passage and the coastal state “should not” exercise criminal jurisdiction over such a ship unless:

- its acts disturb “the good order of the territorial sea”; or
- it conducts one of several prohibited activities including “any exercise or practice with weapons of any kind”.¹⁵

In my view, the mere carriage of weapons through the territorial sea without calling at port does *not* violate innocent passage. However, in the event weapons are fired within a territorial sea, even in self-defense, a coastal state might well argue it was entitled to assert criminal jurisdiction over such an event.

Conclusion

States are rightly cautious about the implications of the use of PCASP. However, each potentially affected state needs a clear regulatory framework setting out whether PCASP will be permitted aboard their ships (in the case of flag states) or within their ports (in the case of coastal states). Affected states need to consider whether their existing laws are adequate or whether new regulations are needed. The law of the sea itself allocates *exclusive* authority to each flag state to decide whether PCASP will be allowed on vessels flying its flag and to each port state to decide whether foreign-licensed weapons will be permitted in its ports. In the territorial sea, coastal states will not be justified in interfering with a vessel that is not proceeding to or departing from port unless it commits some outward act disturbing the good order of the territorial sea.

Endnotes

¹ See: Best Management Practices for Protection against Somali Based Piracy, Version 4 (August 2011) (BMP 4), para 2.4; in IMO Doc. MSC.1/Circ.1339 (14 September 2011), Annex.

² Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (2008).

³ Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, IMO Doc. MSC.1/Circ.1443 (25 May 2012), para 2.1.

⁴ Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, IMO Doc. MSC.1/Circ.1406/Rev.1 (16 September 2011), para 2.

⁵ See: U.K. Department for Transport, “Interim Guidance to U.K. Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances”, Version 1.2 (May 2013); James Kraska, “International Regulation of Private Maritime Security Companies”, Naval War College Information Paper 13-4 (2013); Liberia, “Use of Armed Security on Board Vessels”, IMO Doc. MSC 89/18/6 (8 March 2011).

⁶ See the flowchart in: House of Commons Foreign Affairs Committee, “Piracy off the coast of Somalia”, HC 1318 (5 January 2012), Evidence Annexe, p. 67.

⁷ IMO Doc. MSC 90/28 (31 May 2012), paras 20.10.7-8.

⁸ See e.g. U.K. Interim Guidance, paras 8.7-15.

⁹ GUARDCON, Guidance on Rules for the Use of Force (Annex).

¹⁰ U.K. Interim Guidance, para 5.6.

¹¹ Revised Interim Recommendations for Port and Coastal States, IMO Doc. MSC.1/Circ.1408/Rev.1 (25 May 2012), para 4.

¹² *Ibid*, para 7. See also: IMO Doc. MSC.1/Circ.1333 (26 June 2009), para. 7.

¹³ See: <http://www.wcoomd.org/en/topics/facilitation/activities-and-programmes/firearms.aspx>

¹⁴ IMO Doc. MSC 90/28 (31 May 2012), para 20.11.

¹⁵ Articles 17, 19 and 27, UN Convention on the Law of the Sea 1982; note U.K. Interim Guidance, para. 6.10.

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