

4th Session of the IGWG on Private Military Security Companies
Presentation by Stuart Maslen, Researcher, University of Pretoria, on 29th April 2015

Introduction

Thank you, Chair, for extending this invitation to me to address you and the distinguished delegates this morning. I would like to take the opportunity to present some of the issues regarding use of force by private maritime security service providers, in particular with respect to counterpiracy operations, and how they might impact on the possible international regulatory framework governing private security companies.

As is well known, use of private security service providers to afford armed protection for major commercial shipping has increased manifold times in recent years, a reaction to a substantial piratical threat, especially in the Gulf of Aden and increasingly in the Gulf of Guinea, as well as much further afield. Further, and is generally accepted, despite the reference in UN Security Council Resolution 1851 of 2008 to “applicable international humanitarian law”, counterpiracy operations and measures are to be undertaken not within the realm of the law of armed conflict but the international law of law enforcement, a corpus of international law that combines international human rights law and general principles of domestic criminal law with international criminal justice standards.

While the use of armed private security has avowedly been an important factor in the reduction in successful acts of piracy and armed robbery at sea, it has not been the only factor in this reduction and it has not always been uncontroversial in its delivery. Bringing weapons on board a vessel has its own risks, absent any threat from pirates, both in terms of physical security to crew members and with respect to a state’s obligations under international law on the transfer of conventional weapons. Added to this is the obvious and significant risk of reckless and excessive use of force, including lethal force, by private security personnel in an environment where effective monitoring and oversight are exceptionally hard to ensure.

In carrying out their duties, a state’s law enforcement officials are required to use force only when necessary, and thereupon to employ only such force as is both necessary in the circumstances and proportionate to the threat. When considering resort to firearms, as Principle 9 of the 1990 Basic Principles on the Use of Force and Firearms makes clear, such officials “shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.” The tenets of this principle are reflected in international human rights law, especially with regard to respect for the right

to life and the right to freedom from cruel, inhuman, or degrading treatment. It does not allow for use of firearms purely to defend property when no threat to life exists.

Typically, as well as in legal theory, lawful use of force by any private maritime security service provider is generally more constrained: it is limited to acts carried out in defence of any person from unlawful violence. This may encompass lawful acts involving use of force when under imminent threat of attack either in self-defence or in defence of others. This basic position is, I would assert, not particularly contentious. However, the determination of whether any particular use of force in the maritime environment meets the legal criteria may well be, and it is widely appreciated that there is a lack of detailed guidance at domestic level on what is and is not lawful when potentially confronting a piratical threat. When combined with materially differing domestic criminal law thresholds for justified use of force in self-defence (and which continue to change within certain national jurisdictions as a result of legislation and/or jurisprudence) and given a lack of consensus as to which national law should determine legality, private security service providers can find themselves in a difficult situation.

A brief review of selected national jurisdictions exemplifies the problems. The UK's interim guidance on private maritime security services calls for only minimum necessary use of force and respect for the common law principles of self-defence whereby force should be reasonable, necessary, and proportionate. This is mirrored in the 2012 interim guidance offered by the International Maritime Organisation, which calls for use of "only that force which is strictly necessary and reasonable". Domestic case law in England and Wales and European Court jurisprudence indicates that the Article 2(2)(a) standard set in the 1950 European Convention on Human Rights ("use of force which is no more than absolutely necessary ... in defence of any person from unlawful violence") applies to the state as it does to individual self-defence. That law, as it stands, calls for an honest — but not necessarily a well-founded — belief that force is necessary in order to benefit from the self-defence justification.

In Australia, the justification is arguably more circumscribed: "The question to be asked ... is whether the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it ... he is entitled to an acquittal." In the United States, a notion of reasonableness similarly predominates: what a reasonable person would consider to be reasonable based on the prevailing circumstances. Of course, US citizens are generally entitled to be armed whereas UK citizens are not.

Certain states within the USA also have the castle doctrine, sometimes broadened to the "stand your ground" doctrine outside the home that was initially raised in the prosecution of George Zimmermann for the shooting to death of Trayvon Martin. In 2013, UK domestic law on self-defence was changed

to make use of force in a home or other dwelling only unlawful if it were “grossly disproportionate in the circumstances”. Further, according to 2010 jurisprudence in the Court of Appeal, in certain circumstances one may even start a fight or enter it willingly and still be able to rely on self-defence “when the tables have turned”. England and Wales also, though, has the 2007 Corporate Manslaughter and Corporate Homicide Act, which entered into force in 2008, and which could potentially cover private maritime security service providers where a gross breach of a relevant duty of care was established and that breach was attributable to the way the company was managed or organised by senior management.

What is also lacking — and this is not a lacuna that can be filled in the proposed international regulatory framework itself in my view — is a detailed code on use of force in the maritime environment. In 2012, the Geneva Academy of International Humanitarian Law and Human Rights proposed the following guidelines.

When a suspected pirate vessel, such as a skiff, is spotted coming towards the ship, an auditory or visual signal should be given to the vessel to stop or change course away from the ship, using internationally recognised signals. Flares may be employed. An acoustic warning may also be given, for example using the Long Range Acoustic Device (LRAD). A ship’s master should be fully informed of these actions, and wherever possible should be the person to authorize them.

Sounding the ship’s alarms/whistle serves to inform the ship’s crew that the ship is under attack from pirates and, importantly, demonstrates to any potential attacker that the ship is aware of the attack and is reacting to it. In addition to the emergency alarms and announcements for the benefit of the vessel’s crew the ship’s whistle/foghorn should be sounded continuously to demonstrate to any potential attacker that the ship is aware of the attack and is reacting to it. Should the suspicious vessel continue on a course towards the ship, attempts should be made to shake it off, for example by increasing the ship’s speed and directing a course away from the vessel. Should these attempts fail, a variety of actions may be taken, such as firing tracer rounds as warning shots across the bows of the oncoming vessel. These should be aimed no closer than 50 metres and no further than 100 metres from the suspicious vessel when it is at a distance of about one kilometre from the ship. As the US Coast Guard and the Department of Homeland Security have made clear, a warning shot “means a signal to a vessel to stop. The term does not include shots fired as a signal that the use of deadly force is imminent, a technique that should not be employed.”

It is only after these actions fail that the ship under threat may, as a last resort, use force against the suspicious vessel or its personnel. A distress signal and report of piratical attack should already have been made. The primary function of the private security service provider’s security team must be to prevent illegal boarding of the ship and to protect the lives of those on board, using the minimum

force necessary to do so. By now, the crew should be safely locked into the ship's citadel. Wherever possible, "less-lethal" weapons and tactics should first be employed, such as the use of acoustic weapons or dazzling lasers or, at closer range, water hoses.

If these actions are unsuccessful, firing into the suspicious vessel's engine block or hull may be considered. It is suggested that this should be countenanced when the vessel is some 500 metres away from the ship (and only if it is still on a course towards the ship). If all the above efforts have failed to stop the vessel and its intent remains clearly hostile, use of firearms may now be countenanced. Intentional lethal force may only be used in self-defence or defence of others on board the ship and where such force is strictly unavoidable in order to protect life. Offensive use of firearms or a rocket-propelled grenade (RPG) launcher within the weapon's operating range by persons on the vessel, against the ship or its crew, may thus give rise to the right to use such lethal force. The decision to use firearms must rest with the person using force and must only be taken where he or she believes there is an imminent risk to human life. Only armed individuals with clearly hostile intent may be targeted. Firearms with optical enhancements (not only iron sights) should be used.

As soon as, but only if, it is safe to do so, there is a legal duty to rescue any person, including suspected pirates, who may be at risk of drowning. There is also an obligation to report any deaths or serious injuries during an engagement with suspected pirates. Even if no one is killed or injured, a report of the engagement should be made as a matter of good practice; if the attack is repelled, this will allow other ships in the area to be apprised of the risk.

Beyond the use of force in self-defence or defence of others to dissuade a piratical attack, and as the Working Group has justly acknowledged, certain functions involving use of force are inherent to the state. This, I would argue, includes the core law enforcement function of arrest — "constabulary powers" in the terminology of the United Kingdom — and a concomitant power to use force in order to effect a lawful arrest. To some extent, however, these powers are, implicitly at least, delegated in the maritime environment. Whether or not private security service providers have been granted constabulary powers, the reality of the circumstances may be that they need to use them. This leads to concerns about treatment of suspected pirates in detention — another manifestation of force — and respect for the fundamental right to habeas corpus.

Finally, as recognised explicitly in UN Security Council Resolution 2184 of November 2014, it is painfully evident that the solution to the problem of piracy lies on land not on the sea. But while that solution seems distant, use of armed private security service providers looks likely to continue, with all the risks that this entails for all those present in the maritime environment.