

Comments of the

International Organization of Masters, Mates and Pilots (MM&P)

Marine Engineers' Beneficial association (MEBA)

American Maritime Officers (AMO)

Seafarers International Union (SIU)

Sailors Union of the Pacific (SUP)

Marine Firemen's Union (MFOW)

**Before the
United States Coast Guard**

**In the Matter of
Request for Comments on
Policy regarding standard rules for the use of force for
self-defense of vessels of the United States**

Docket No. USCG-2011-0012

February 25, 2011

The International Organization of Masters, Mates, and Pilots (MMP), the Marine Engineers' Beneficial Association (MEBA), the American Maritime Officers (AMO), the Seafarers International Union (SIU), the Sailors Union of the Pacific (SUP), and the Marine Firemen's Union (MFOW) represent substantially all the officers and crew of United States flagged merchant ships engaged in international trades. Our members serve on U.S. ships operating off the coast of Somalia and areas of the Indian Ocean subject to the scourge of piracy and are exposed to the risks of being held hostage under appalling conditions, with threats of bodily injury or death at the hands of pirates. In 2009, the *Maersk Alabama*, manned by our members, was attacked off the Somalia coast and the ship's master was held hostage under threat of death until rescued by the U.S. Navy using deadly force. Shortly after the *Maersk Alabama*

incident the U.S. flagged *Liberty Sun*, also manned by our members, was attacked with the stated intention of destroying the ship and its crew in retaliation for the action taken against the pirates in the *Maersk Alabama* incident. Because of the continuing risk that piracy poses for our members and our paramount concern for their safety, we welcome this opportunity to comment on establishing a USCG policy regarding standard rules for the use of force for self-defense of vessels of the United States.

Overview

Any consideration of standard rules for the use of force for self defense of vessels has to take into account the ongoing situation off the coast of Somalia and the Indian Ocean, as well as U.S. statutes regarding the rights of U.S. merchant ships to oppose and defend against attempted acts of piracy¹, the intent of Congress in enacting new legislation limiting liability for the consequences of the use of force against acts of piracy², and statutory and common law rights to self defense.

The number of ships attacked, the number of ships captured and the number of crew members held hostage continues to increase. The amount of ransom payments is increasing along with the length of time crew members are held hostage. The level of violence is escalating with pirates torturing crew members and killing them in cold blood. The impact of ransom payments is having an effect on the economy of Somalia that is institutionalizing piracy as a way of life. The impact on the global economy of piracy in the area is estimated at \$7 to \$12 billion per year and the threat to ships and crews is placing the viability of the trade route from Asia to Europe via the Suez Canal in jeopardy. Apart from our concern over the safety of ships and crews there is a significant threat to the global economy, and a threat of piracy financing international terrorism.

The present strategy employed by naval forces and the current Best Management Practices (BMP) employed by merchant ships can be improved to reduce the escalating threat of piracy to ships' crews and the global economy, or to reducing the distortions to the Somalia economy that contribute to its continuance as a failed State. But, currently, it appears the rules of engagement adopted by the military command and the shipping industry make piracy a relatively risk free and profitable venture for organized criminal activity operating out of Somalia.

¹ **33 USC § 383. Resistance of pirates by merchant vessels**

The commander and crew of any merchant vessel of the United States, owned wholly, or in part, by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel so owned, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same; and may also retake any vessel so owned which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States.

² **46 USC § 8107. Use of force against piracy**

The right to self defense under Port Security Advisory (3-09)

PSA (3-09) is intended to restate the existing law of self defense and to illustrate how self defense principles should be applied to the issue of piracy. PSA (3-09) defines deadly force (“any force that is likely to cause great bodily harm or death”) and great bodily harm (“an injury to the body that results in unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty”). PSA (3-09) advises that mariners may only use deadly force when the mariner has a reasonable belief that the aggressor poses an imminent danger of causing great bodily harm to themselves or others. Because this advisement on the use of deadly force actually allows less force to be used than American common law and the statutory law of most states, the Coast Guard should develop standard rules for the use of force for self-defense of vessels of the United States when on the high seas that permit the use of deadly force by any means, including armed resistance, when the master, mariner, embarked personnel including security personnel, or individuals who use force, or authorizes the use of force, reasonably believes the vessel or a mariner is being subjected to an “act of piracy” as defined in 46 USC § 8107 (c) ³.

The Use of Deadly Force Permitted by PSA (3-09) Is not as Extensive as the Use of Deadly Force Permitted at Common Law

Congress recognizes the danger mariners face from pirates on the high seas; nearly 200 years ago, Congress authorized U.S. merchant ships and crews to use force to resist aggression by pirates against their vessels. Despite this recognition, the United States Coast Guard has advised mariners in PSA (3-09) that their right to use deadly force in self defense is not as extensive as the right to use deadly force under common law in most U.S. jurisdictions. Because U.S. ships and mariners need greater, not lesser, self defense rights at sea, the Coast Guard should establish rules that authorize deadly force in defense of the vessel as intended by Congress in 33 USC § 383.

Since the general introduction of firearms, the common law has recognized that one is not “required to retreat when he is assailed in a place where he has a right to be.” ⁴ Likewise, one may defend his domicile or his property to the extent of taking life, when necessary in defense of his property.⁵ Although any American would be justified in using deadly force to protect his home or property, PSA (3-09) advises that only non-deadly force should be used in defense of

³ **46 USC § 8107. Use of force against piracy**

(c) DEFINITION.—For the purpose of this section, the term ‘act of piracy’ means any act of aggression, search, restraint, depredation, or seizure attempted against a vessel of the United States by an individual not authorized by the United States, a foreign government, or an international organization recognized by the United States to enforce law on the high seas.

⁴ Laney v. United States, 294 F. 412, 415 (D.C. Cir. 1923)

⁵ Id. (citing Beard v. United States, 158 U.S. 550 (1895))

the vessel or in defense of property the master and crew are authorized to protect. Of course, it is impossible for a mariner to retreat from attack when he is at sea. At the same time, the vessel is the mariner's domicile and contains all the property with which the mariner travels. The Master is charged with the protection of both the vessel and a ship's cargo—often valuable military and humanitarian aid owned by the U.S. government. Faced with these realities, mariners or embarked security forces must be able to use deadly force in defense of the vessel; if pirates are permitted to board a vessel with only non-lethal resistance because the pirates were not actively threatening the crew with imminent death or great bodily harm, it will often be too late for the vessel and too late for the crew.

In addition to the use of deadly force in defense of a mariner's domicile, PSA (3-09) fails to address the use of deadly force when the mariner has a reasonable fear of kidnapping. Because PSA (3-09) only advises mariners to use deadly force when faced with a threat of great bodily harm, a mariner who reasonably fears he will be kidnapped for ransom is not entitled to use deadly force. This is a serious oversight because ransoming vessels and crew is the main motivation behind pirate attacks off the Somalia coast.⁶ Indeed, when the Maersk Alabama was attacked in 2009, the pirates were unable to seize the ship due to the valiant efforts of the crew; however, the attackers kidnapped the Master as they fled the vessel.⁷ Although the threat of kidnapping, which under present conditions may lead to torture or murder, is serious and very real, mariners or security personnel would not be permitted to use deadly force to prevent their own kidnapping or kidnapping of the crew under current guidelines.

PSA (3-09)'s oversight in not permitting the use of deadly force under threat of kidnapping is especially glaring given that many U.S. jurisdictions explicitly authorize the use of deadly force to prevent kidnapping.⁸ A person would have the right to use deadly force to prevent their own kidnapping in many jurisdictions, but under PSA (3-09), a mariner would be expected to allow themselves to be kidnapped provided they would only be held as a prisoner and eventually ransomed back—this absurd result illustrates the need for stronger rules for self defense of ships on the high seas, rules that address the dangerous and harsh realities our members face every day.

The right to defend the ship against piracy is broader than the common law right to self defense.

Notwithstanding the discussion of the common law right to self defense discussed above, which is the minimum base line right to protect life and property, a U.S. flagged ship and its

⁶ See Stephanie McCrummen & Ann Scott Tyson, Navy Kills Three Pirates, Rescues Ship Captain, WASH. POST. (Apr. 13, 2009) (noting that pirates have earned millions in ransom in recent years).

⁷ Id.

⁸ E.g., V.T.C.A., Penal Code, § 9.32 (authorizing the use of deadly force to prevent an aggravated kidnapping); see Rue v. State, 288 S.W.3d 107, 110 (Tex. Ct. App. 2009) (instructing the jury that it should find the defendant not guilty if he shot the victim in order to prevent an aggravated kidnapping).

crew under 33 USC §383 may oppose and defend against any aggression, search, restraint, depredation, or seizure attempted by pirates. The opposition and defense of the ship is not limited to common law principles of self defense. There is no need to wait until the pirates are actually onboard and the crew is in eminent danger of death or bodily harm. There is no confusion in splitting legal hairs to determine when defense of the ship is authorized. It recognizes the reality that a high speed skiff with boarding ladders approaching your ship in the middle of the Indian Ocean manned by a crew waving AK-47's and RPG's is not intent on a social visit. 33 USC §383 should be construed liberally and in conjunction with 46 USC §8107 (a)⁹ to include individuals embarked as security guards.

Recognizing the military type arms used by pirates against merchant ships and the possible escalation of the type of weaponry used, embarked private security personnel who are properly trained should be permitted to carry on board and use military type weapons not permitted under U.S. laws for civilian ownership and use.

The responsibility of governments

It has consistently been the position of the maritime unions that the suppression of piracy is primarily a government responsibility using embarked military security detachments under rules of engagement enforced by military command and control procedures. It is our understanding that the German shipping community and German Navy are in discussions to provide such protection to German flagged ships. Such a practice provides protection that is consistent in nature and under the sovereign protection and diplomatic immunity of the flag state. It is still our position that embarked U.S. military security teams are the most efficient use of military assets assigned to suppression of piracy and a legally sound basis for protecting U.S. flag ships from pirates.

In the absence of a willingness of the military to provide such protection, ships are left with the need to rely on contracted private security teams. To attain some level of consistency and adherence to rules of engagement it is recommended that the USCG establish a vetting process that reviews the security team's training and qualifications.

The United States Should Provide Legal and Diplomatic Support to Individuals Alleged to have Violated the Rights of Pirates

⁹ 46 USC § 8107. Use of force against piracy

“(a) LIMITATION ON LIABILITY.—An owner, operator, time charterer, master, mariner, or *individual* who uses force or authorizes the use of force to defend a vessel of the United States against an act of piracy shall not be liable for monetary damages for any injury or death caused by such force to any person engaging in an act of piracy if such force was in accordance with standard rules for the use of force in self-defense of vessels prescribed by the Secretary. (Emphasis added)

As explained above, the Coast Guard should revise its guidance in PSA (3-09). Merely updating the guidance, however, may not sufficiently protect U.S. mariners and private security personnel from criminal or civil liability in foreign jurisdictions when they oppose and defend against piracy accordance with U.S. law. Regardless of where on the high seas it is, a U.S. Flag vessel applies United States law because the ship “is deemed to be a part of the that sovereignty [whose flag it flies].”¹⁰ Thus, the American common law principles of self defense and the right to oppose and defend against piracy under 33 USC §383 will apply on U.S. Flag vessels, and U.S. Flag mariners and private security personnel should be able to use those defenses permitted under U.S. law. In the event that a U.S. ship owner, mariner or security personnel faces civil or criminal liability in a foreign jurisdiction for their lawful use of force, the U.S. government must be prepared with diplomatic and legal assistance to ensure U.S. law is applied to actions taken by U.S. ships. “There can be no doubt” that it is a “privilege of a citizen of the United States . . . to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas.”¹¹ At the very least, it is an obligation of the United States to ensure only its laws are applied to its citizens on U.S. flag vessels on the high seas. The U.S. should have a reaction procedure in place to be implemented and coordinated by the relevant U.S. agencies in the event that a ship is detained by a port state after an incident.

¹⁰ Lauritzen v. Larsen, 345 U.S. 571, 585 (1953) (alteration in original).

¹¹ Slaughter-House Cases, 83 U.S. 36, 79 (1873).