Save our souls – Considerations on the master’s post-incident obligations

by

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“To all who have to trust themselves to the sea it is of the utmost importance that the promptings of humanity in this respect should not be checked or interfered with by prudential considerations which may result to a ship or cargo from the rendering of the needed aid.”¹

1. Introduction

In the summer of 2012, a new provision of the Danish Weapons Act (våbenloven) came into force, granting easier access for shipowners to obtain a general license to carry weapons aboard vessels.² This was a central step in formally allowing privately contracted armed security personnel (PCASP) aboard Danish vessels. In a nutshell, the aim of the new regulation was to give shipowners more leeway in the fight against modern piracy, particularly in the Horn of Africa region, but potentially also in other areas of the world where piracy is an issue.³

The move towards using PCASP as a means of countering the threat of piracy is a tendency not only seen in the Danish context but also in other shipping nations, for example Germany.⁴ This development raises a number of concerns and it can be argued that this development is a step towards the

privatisation of maritime security. From the legal perspective, the deployment of PCASP on private vessels also raises various legal concerns: From the Danish perspective, the new regulation basically only addresses the question of when weapons (and PCASP) may be legally deployed on board a ship, but does not address other relevant questions, such as how those weapons might be used. For example, from the Danish point of view, this is a question primarily to be considered under the general provision of the Danish Criminal Code (straffeloven), namely the provision of self-defence (nødværge, § 13).

The various legal questions at stake in connection with the use of PCASP, are, however, often not exclusively determined by domestic regulation but under certain circumstances also with view to regulations in other legal systems, for example coastal states or other flag states, and international law.

This means that the maritime stakeholders have to keep a “cool head” and try to develop strategies for meeting this complex legal framework for the work of PCASP, for example done by developing procedures and guidelines. However, when analysing existing guidelines and internal Rules on the Use of Force (RUF) used by maritime stakeholders in connection with the protection of vessels, it is rather striking that some relevant questions are not addressed sufficiently or not at all. One of those neglected issues is the question of what can be called post-incident obligations, e.g. obligations following a lawful act of self-defence against a pirate attack. For example, the IMO interim guidance for shipowners, ship operators and shipmasters addresses various issues including the question of rules for the use of force (RUF) (Annex 5.13.-5.15.) and reporting and record keeping (Annex 5.16-5.19), but the question of any potential post-incident obligations is not raised at all.

Does this mean that there are no relevant obligations to be considered after a lawful act of self-defence against a pirate attack? The maritime stakeholders seem to think so and also in the international legal debate this question has somewhat been neglected. But is neglecting this question a sensible strategy for relevant maritime stakeholders? The answer to that question, according to this article, is clearly: No. The post-incident question is rather

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5 The development in connection with counter-piracy activities is also discussed under the headline Security Governance; referring to a collective approach of a number of state and non-state actors using different means and methods, see Hans-Georg Ehrhart/Kerstin Petretto/Patricia Schneider, 3.2. Beitrag des Instituts für Friedensforschung und Sicherheitspolitik an der Universität Hamburg (IFSH), in: Erhart et.al, Piraterie und maritimer Terrorismus als Herausforderung für die Seehandelssicherheit Deutschlands, 2013, p. 49 ff.

6 MSC.1/Circ.1405/Rev.2; Revised interim guidance to shipowners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the high risk area, 25.5.2012.
crucial and neglecting it is a faulty strategy that involves the unnecessary risk of criminal liability; mainly for the master of the vessel employing the PCASP.

The following considerations on the master’s post-incident obligations are partly based on my considerations presented in April 2013 to the Working Group 2 on Legal Issues of the Contact Group on Piracy off the Coast of Somalia (CGPCS). The first part of this article considers the question of post-incident obligations of the master from the point of view of international law. This perspective is relevant, because the legal framework provides certain obligations, which are subsequently crucial for regulation in domestic law. What this specifically means in the Danish context is analysed in the second part of this article. The final part of this article summarises the considerations and provides some concluding remarks.

2. The master’s post-incident obligations from the perspective of international law
The concept of one seafarer being obliged to assist another seafarer in distress is certainly not new and there is no serious doubt in the legal debate that “(t)he obligation on masters to render assistance at sea is one of the oldest and most deep-rooted maritime traditions”. It is not only a noble maritime tradition but also an established part of customary international law and today codified in different legal acts of international law.

But does this noble principle also apply in situations where the seafarer in distress is a pirate who has violently attempted to attack a vessel and the pirate’s distress situation is the result of lawful self-defence by PCASP?

The following considerations help to clarify this question. More precisely, the question at hand is whether the master of the vessel employing the PCASP has any obligation to assist and/or rescue pirates in the situation that is described above. If it is concluded that there is indeed a post-incident obligation, the next question at hand is what does this obligation mean in more practical terms?

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7 Part of the considerations presented here are currently also published in a shorter (non-scientific) version in the inter-disciplinary shipping journal Mercator. The considerations in part 3 are partly based on the work of Sina Petersen, master student of law, also under publication in the same issue of Mercator.


9 On the development of this obligation in international law see Kenney/Tasikas (footnote 8), p. 148 ff.
2.1. An obligation to assist pirates in distress?

As stated above, the master’s obligation to render assistance at sea is an old and deep-rooted maritime tradition which is part of customary law and which is currently codified in a number of international legal acts: The UN Convention on the Law of the Sea (UNCLOS) article 98 (1), for example, requires that (my emphasis):

1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:
   (a) to render assistance to any person found at sea in danger of being lost;
   (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;

(…)

When analysing the obligation established by UNCLOS a number of issues should be noted:

- Firstly, the obligation established by UNCLOS is directed at states who “shall require” that the master of a ship acts accordingly if confronted with persons in distress or in danger of being lost at sea.
- Secondly, the provision refers to both the activity of rendering assistance (a) and rescue (b) which leads to the question of what the difference of both concepts are and what exactly the master’s obligations might be.
- Thirdly, the obligations established in the provision only refer to situations that require the activity of assistance or rescue (distress, in danger of being lost at sea) and not to any reasons for why those situations occurred.
- Finally, the obligation to render assistance or rescue is not without limitations, the master is obligated only “in so far as he can do so without serious danger to the ship, the crew or the passengers”.

Similar state obligations and concepts are also found in other international law, for example article 10 of the 1989 International Convention on Salvage. However, from the master’s point of view, the regulation in the International Convention for the Safety of Life at Sea (SOLAS, 1974/2006) is of particular interest. SOLAS regulates in V/33.1 that:

The master of a ship at sea which is in a position to be able to provide assistance on receiving information from any source that persons are in distress at sea, is bound to proceed with all speed to their assistance (…).

This obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found. (…).
One major difference to the regulation in UNCLOS, is that the recipient of this obligation is the master himself and not a state which subsequently “shall require the master” to provide assistance. This wording has initiated a legal debate as to whether this means that this provision indeed directly obliges the shipmaster; this would be rather unusual since in general (but not without exceptions) international law imposes obligations on states, not on individuals. However in the context of this article, that discussion is of rather academic interest, the issue at stake is that independently of whether the obligation directly obliges the master or not, it is quite clear that the enforcement of this obligation is left to the flag state. The flag state is obliged to enforce the duty to assist and if a master fails to meet that obligation it is the duty of the flag state to react accordingly. How the question of enforcement of duty is approached in the Danish legal system is analysed below.

2.1.1. The master’s obligation – the situation

When analysing the master’s obligation, which is established by SOLAS, it should be noted that the situation requiring the master to act is “persons are in distress at sea”, which leads to the question of what is distress at sea, and more precisely in our context, whether it can be argued that it is not within the concept of distress at sea, if the situation in question was provoked by the pirates’ own unlawful activity.

The understanding of the concept of distress at sea is the subject of a rather substantial legal debate, the main thrust of the concept can however be described as a situation where a ship or its crew “faces imminent danger”; where the situation is “of a grave necessity” and not just a situation of “inconvenience”. An analysis of the legal debate and case law shows that the concept of distress at sea has to be understood as a rather broad concept, where various situations might create distress, for example bad weather or technical problems. It is also accepted that “man-made” situations are also covered by the concept, for example if the situation was the result of “bad seamanship”. The main criteria for distress is a situation of “urgent neces-

11 Traumant (footnote 10), p. 473.
13 See for example v. Gadow-Stephani (footnote 12), p. 213ff. (217 ff.).
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situation”; the central person to assess the severity of the situation is the master (or any other person in command) of the vessel in question. The analysis of the concept of distress leads, in my opinion, to the conclusion that there is no reason to conclude that because the pirates’ unlawful activity provoked the situation, the situation cannot be covered by the concept of distress. In essence: The question of distress is primarily evaluated by the actual situation (is anyone in imminent danger at sea?), not by the reasons leading to this situation (why is someone in imminent danger at sea?).

2.1.2. The master’s obligation – the duty
When accepting that the pirates in post-incident situations are in distress at sea, the next question is what specific obligations arise from the distress situation. As stated above, international law uses both the concept of rendering assistance and of rescue and UNCLOS names both concepts. However, SOLAS only stipulates that the shipmaster “is bound to proceed with all speed to their assistance”.

Again, the concepts of assistance and of rescue are subject to a substantial legal debate which can be summarised as follows: The concept of assistance is a relatively broad concept and covers a large range of possible activities. It is a concept that allows the master, as Kenney and Tasikas put it: “to consider the circumstances of each distress case and take the most prudent and practical action to relieve the distress of those”. This means basically two important things:

- Firstly, assistance covers a variety of possible acts depending on the specific situation at hand, and
- secondly, it is the master in the light of the specific situation, who determines which actions are to be taken. In his assessment of the situation various factors can be considered.

In contrast to the concept of assistance, the concept of rescue is rather narrow and more specific. The International Convention on Maritime Search and Rescue (SAR Convention) defines rescue as “an operation to retrieve persons in distress, provide for the initial medical or other needs, and deliver them to a place of safety.”

14 See v. Gadow-Stephani (footnote 11), p. 225 ff. 267 ff., who makes a distinction between danger for human life on board (Notstands-Seenot) and danger for vessel and cargo (Notwendigkeits-Notstand).
15 Kenney/Tasikas (footnote 8), p. 151 ff.
16 Kenney/Tasikas (footnote 8), p. 151.
This means basically that *rescue* is an activity which results in bringing the crew/vessel to safety. The difference in the understanding of *assistance* and *rescue* means that it is important to determine whether the master has an obligation to both *assist* and to *rescue* or simply an obligation to *assist*. In the legal debate, despite the fact that UNCLOS names both activities in the context of the master, it is argued that the duty to provide assistance is directed at masters; while the obligation to rescue is only directed at states. This point of view is in accordance with the SOLAS provision, which directly places an obligation on the master and, as stated above, obliges the master to “*proceed with all speed to their assistance*” without mentioning an obligation to rescue.

### 2.2. What does the duty to render assistance mean in practice?

When accepting the fact that there is a duty on the master to render assistance in post incident situations, the next question is what does this mean in practice? Does international law really require that the master picks up the very same people who violently attacked his vessel just a few moments ago?

The key to answering this question is the recognition that rendering assistance is a broad concept that does not necessarily require the rescue of the people in distress, but may include many other acts in the specific situation. Furthermore, the duty to assist is not unlimited, which was stated above in connection with UNCLOS’ provision: The master only has to render assistance in “*so far as he can do so without serious danger to the ship, the crew or the passengers*”. Such limitation is less clearly defined in SOLAS V/33.1; here the master more generally has to render assistance if he is “*in a position to be able to provide assistance*”. Furthermore, SOLAS V/33.1 emphasizes that “*(t)his obligation to provide assistance applies regardless of the nationality or status of such persons or the circumstances in which they are found.*” On the other hand, the final sentence of SOLAS V/33.1 accepts that situations may arise where the obligation to assist might be unreasonable:

If the ship receiving the distress alert is unable or, in the special circumstances of the case, considers it unreasonable or unnecessary to proceed to their assistance, the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress, taking into account the recommendation of the Organization, to inform the appropriate search and rescue service accordingly.

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18 See Kenney/Tasikas (footnote 8), p. 157 f.
19 Kenney/Tasikas (footnote 8), p. 151, 156 ff.
This means that the answer to the question of the specific obligation in our scenario does not necessarily obligate the master to pick up the pirates in distress – the master has to take the specific situation into account and act accordingly. It seems to be common sense – and is accepted by international law – that the master, whose main duty is the responsibility to ensure the safety of his own vessel and crew at all times, cannot be obligated when the consequence would endanger his own vessel or crew.

So, if the master in the specific situation at hand has reasons to believe that “picking up” the pirates would endanger his crew or vessel, for example because once on board the pirates might again try to hijack the vessel or if there is reason to believe that there are other pirates in the region and there is an urgent need to get away, he is not obligated to act in this way. But there might be other possible options and these must also be considered.

The obligation to consider all of the options to assist is emphasised by the SOLAS requirement that “the master must enter in the log-book the reason for failing to proceed to the assistance of the persons in distress”. This means that simply ignoring the question of providing possible assistance is not an option. The master must reflect on the question of assistance and must give a sufficient reason in the log-book for why he did not provide assistance if this was the case. And this could prove rather difficult in practice: One option, which most likely will always be expected of the master, and which can be considered as an act of assistance, is stated in SOLAS: “inform the appropriate search and rescue service accordingly”. In the context of the Horn of Africa/Indian Ocean region, this may mean, for example, informing the international forces who are operating in the region.

3. The master’s post-incident obligations from the perspective of Danish law

As stated above, the master’s obligation to render assistance under international law has to be enforced through the legislation of the flag state. However, it seems that not all flag states are fully willing to implement the obligation in domestic legislation or to enforce this obligation in cases where masters fail to react accordingly.20 One way flag states can try to ensure obedience is to criminalise the master’s passiveness in situations of the distress.21

Before moving to the question of the master’s criminal liability it should be noted that the question of “post incident” obligation forms the perspective of Danish law (and most likely also in other jurisdictions) is not necessarily

20 Davies (footnote 10), p. 112 ff.
21 See Jason Parent, No duty to save lives, no reward for rescue; Is that truly the current state of international salvage law?, 12 Ann. Surv. Int'l & Comp. L. 87 2006, p. 94.
exclusively directed at masters. For example, under certain circumstances, the guard might be criminally liable if he did not attempt to help the injured pirate afterwards. It is, to illustrate the point, a similar situation for any citizen who has rightfully defended himself against an unlawful attack, and has subsequently, for example, an obligation to call an ambulance. However, this article focuses only on the specific obligations of the master and does not focus on the question of criminal liability of others.

3.1. Criminal liability of the master under Danish law
Danish criminal law criminalises certain acts of passiveness; this means that the law expects the person to act in a certain way and if the person fails to act accordingly, he can be prosecuted. In the context of the question of not rendering assistance the criminalisation in section 253 of the Danish Criminal Code (straffeloven) is of specific relevance (my emphasis):

“A person will be punished with a fine or imprisonment up to two years if he, besides the fact that it was possible for him without specific danger or sacrifice to himself or others, (…)
2) fails to undertake the necessary steps (…) which are posed on him (påbudt) to take care of shipwrecked person persons or persons subjected to a similar accident (…).”

When analysing this provision the first issue to be noticed is that the provision is demanding action is situations of shipwrecked or similar situations. This wording indicates that the provision indeed is dealing with situations of distress. However, the second issue to be noticed is that the criminalisation of the master’s failure to render assistance to persons in distress at sea is dependent on that the duty to assist being made mandatory in a specific regulation (are posed on him; påbudt). This means that there is no general obligation to act established by section 253; the specific duty expected of the master depends on the wording of the required specific regulation.
Such a relevant specific regulation is the Safety at Sea Act (søsikkerhedsloven) from 2007 which in general regulates safety procedures aboard Danish vessels. Article 30 of the Safety at Sea Act reads as follows:

“if, in the event of a collision or in the event that the ship as a result of its navigation or in a similar way causes damage to another ship or persons or goods on board, and where it may be done without particular danger to the ship itself, its crew and passengers, the master of the ship fails to afford the other ship and its crew and passengers all the assistance possible and necessary to rescue it from the danger that has arisen (…)”.

When analysing this regulation two aspects should be noted: firstly, the provision does not establish an unlimited duty to assist; assistance must be given in so far as this can be “done without particular danger to the ship” or persons on board. Thus, the provision emphasises the principle that is also manifested in international law: own safety first. Secondly, it is striking that the question of assistance is only raised in the situation of a collision (between two ships), or if the ship as a result of its navigation or in a similar way has created a situation of distress. This means that the situation must be caused by the ship or its navigation, which must consequently mean that if the situation of distress is not caused by the ship or its navigation, this provision does not establish criminal liability of the master should he fail to provide assistance to persons in distress at sea.

Does this means that there is no specific regulation which in more general terms deals with the master’s responsibility to render assistance to persons at distress at sea? This conclusion would be in line with the above stated general tendency to refrain from implementing the duty to assists in national law seen by other countries.

However, in the Danish contexts things are more complex: Regulation B, rule 33 of the Danish Maritime Authority\(^\text{24}\) regulates “emergency situations – duties and procedures” at sea. Regulation B, which is part of Danish law, uses the exact translation of SOLAS article 33, and invokes therefore a general obligation to render persons in distress at sea assistance – not limiting the need of assistance to particular persons or situations.

This leads to an interesting conclusion – a master sailing under the Danish flag is made directly criminal liable under international law regulation. This is rather atypical because normally international law would be implemented through formal legislation and not, as in this case, through a ministerial order which basically is the translation of international law.

3.2. The use of Regulation B, rule number 33 – the case of U2004.1949V

The question of the range and use of Regulation B, rule number 33 has been tested in a court decision from 2004 (U 2004.1949V). The facts of that case can be summarised as follows:

The defendant was the master of a Danish vessel navigating in Thai Waters at the time of the incident in question (1996). The master had at the time reported to the relevant Thai Authorities, and recorded in the vessel log-book, that the Danish vessel had spotted a shipwrecked fishing vessel in the water. The master had ordered the vessel to stop and had circulated around the shipwreck for a while to search for persons distressed at sea. According to

\(^{24}\) Søfartsstyrelsens Forskrift B, BEK nr. 506 af 06/05/2011, Regel 33 ”Nødsituationer – forpligtigelser og procedurer”.
the master’s report no persons were found and the Danish vessel continued on its planned route. These reports were signed by a witness S, who at the time of the incident was a crewmember on the Danish vessel. However, many rumours surrounded the incident and in 1999 the shipping company initiated an investigation into the incident, prompting witness S to write a report about the incident.

Witness S confirmed the rumours by admitting that the Danish vessel had indeed located five fishermen in the waters around the shipwreck but the master deliberately chose not to render assistance to the persons in distress at sea. The witness explained that he had signed the report back in 1996 because he felt forced to do so by the master of the vessel but afterwards the witness had felt remorse for what had really happened.

The case included some technical issues in connection with the question of whether or not certain regulations were applicable at certain times. However, in our context those questions can be neglected. The central question in connection with the case from our point of view is this: If the master was held liable under section 253, no. 2, and from which specific regulation the duty to assist was extracted in this context. The court found the master guilty of violating section 253, no. 2; however, it confirmed that article 30 of the Safety at Sea Act regulation aims at situations of a collision. The court, however, confirmed that (the, at the time of the judgement, applicable version of) the Danish Maritime Authority’s regulation B is a sufficient basis to establish the obligation demanded by section 253, no. 2.

This means in its consequence that SOLAS’ obligation is part of the Danish legislation and therefore directly relevant for masters of Danish vessels. Failure to meet the obligation to render assistance is therefore punishable under section 253, no. 2 of the Danish Criminal Court with view to Danish Maritime Authority’s regulation B, rule 33. In this context, it is irrelevant whether the vessel in a position to render assistance was involved or not involved in the other vessel’s situation of distress.

4. Concluding remarks
When first presenting to seafarers the idea that there is a duty to assist pirates in distress after those very same pirates had attempted to attack their vessel, the reaction is often one of disbelief and flat out rejection. From the seafarers’ point of view it seems to be just another example of those “bloody lawyers living in cloud cuckoo land”. And it might be quite understandable that, at first glance, it seems to be a provocative concept, that you are obligated to assist the very persons who just moments ago tried to violently attack you and your vessel. Furthermore, one could argue that the

question of rendering assistance to pirates in distress from a practical point of view is only of academic interest. If the situation occurs and no assistance is rendered, it can be assumed that the pirates are lost at sea and nobody will ever know what happened far away from shore, assuming that the PCASP and the vessel’s crewmembers stay silent on the matter. However, one lesson learned from decision U1999.1949V, is that while there might be a sense of solidarity aboard a vessel when things go wrong, so that people agree to keep quiet, it is not certain that every crewmember will be able to maintain this lie for the rest of his or her life. This might also be the case in situations related to piracy. We have, for example, seen that a video was released on “YouTube” showing an incident which led to discussions on the extensive use of force by PCASP.26

Furthermore, when considering post incident obligations, one should be kept in mind that international law does not expect the impossible of the master. The safety of the master’s vessel and crew is the key duty at all times. But there is an obligation to render assistance in situations of distress – even to pirates who have just unlawfully attacked a vessel. Ignoring the question of post-incident obligations is therefore a flawed strategy. The actors in the field should be aware of the issues at stake and consider what kind of acts of assistance may be rendered in different situations without endangering their own vessels, especially when considering employing PCASP on board.

If the distress situation does occur, it is the master who must evaluate the specific situation and act accordingly. The shipmaster does have room for a certain amount of discretion and he has no obligation to take any serious risks. But the point is that he has to consider what can be done to assist without involving risks. Turning a blind eye and sailing away is not a sensible strategy and it is a strategy that can – at least under Danish flag state regulation – lead to the shipmaster being held criminally responsible afterwards. In fact, it could result in a situation where the pirates are lost at sea and the master ends up in prison.