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Subject: International Regulation of Private Maritime Security Companies

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1. Purpose. To explore the regulation of private maritime security contractors (PMSC) and Privately Contracted Armed Security Personnel (PCASP) on board international shipping to defend the ship against Somali piracy in the Indian Ocean and Gulf of Aden. Key issues discussed include the authority for using PMSC, carriage of weapons on board commercial ships, and the use of force in self-defense.

2. Background. Over the past two years, the international shipping industry has turned toward the use of PMSCs to provide shipboard security against Somali pirate action groups (PAGs) operating in the "High Risk Area" of the Indian Ocean.[1] Shipowners and ship operators reluctantly turned toward the use of PMSCs to deter piracy attack after other responses—namely, coalition warship patrols and adoption of passive security shipping industry "Best Management Practices"—were insufficient to protect their ships and crews.[2] As the use of PMSCs rapidly expanded throughout 2011-12, however, the number of successful piracy attacks on international shipping in the Indian Ocean plummeted.[3] Consequently, private security has become an important and permanent feature of regional counter-piracy.

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[1] The HRA is set forth in the Best Management Practices as an area bounded by Suez, the Strait of Hormuz to the North (26ºN), 10°S and 78°E. Best Management Practices 4th ed, August 2011 (BMP4), *reprinted in* IMO Doc. MSC.1/Circ. 1339, Sept. 14, 2011, Annex, Ch. 2. The UK Maritime Trade Operations (UKMTO) voluntary Reporting Area is slightly larger, as it includes the Arabian Gulf. Somali pirate attacks have occurred at the farthest extremities of the HRA, including 78° E.

[2] Naval forces have disrupted more than 100 attacks, but tyranny of time, distance, and space means that there are insufficient warships and aircraft to monitor the entire High Risk Area. Naval destruction of PAG caches and cantonments on the beach helped reduce the capability of pirates to launch attacks against shipping.

[3] In 2009, there were 129 attacks and 52 hijackings, which produced a 28 percent success rate for the pirates. In 2010, there were 131 attacks and 51 hijackings—also a 28 percent success rate. In 2011, however, there were 139 attacks, but only 27 successful hijackings, which is a 16.2 percent rate of success. In 2012, there were 61 attacks and 14 successful hijackings, which is an 18 percent success rate. As of June 1, 2013, however, there have been no hijackings to date—a 0 percent rate of success. *See also*, Alaric Nightingale and Michelle Wiese Bockmann, *Somalia Piracy Falls to Six-Year Low as Guards Defend Ships*, BLOOMBERG BUSINESSWEEK, Oct. 22, 2012.

The use of PMSCs, however, raises numerous issues in international law, two of which are addressed in this paper: authority of commercial ships to carry weapons and authority of on board PCASP to use deadly force in self-defense. Generally, international regulations merely state that PMSCs and PCASP should comply with "applicable flag, coastal and port State legislation and relationships governing the transport, carriage, storage, provision and use of firearms, ammunition and security equipment…."[4] Given that the rules are often inconsistent, nonexistent, and in a state of flux, the guidelines typically raise more questions than they answer. Addressing and resolving questions on the carriage and use of firearms, therefore, is case-specific and fact-dependent.

The use of PMSCs by the shipping industry to protect merchant ships at sea is governed by civil and criminal law of self-defense, even when it is conducted simultaneously in areas being patrolled by warships. The use of contractors during armed conflict raises separate and distinct issues not relevant in the context of maritime piracy.

3. General Authority. The international law of the sea, as reflected in United Nations Convention on the Law of the Sea (UNCLOS), are silent on whether ships may carry weapons or use force in self-defense. Under Articles 92 and 94 of UNCLOS, flag States are presumed to exercise plenary authority over ships flying their flag. Article 92 refers to "exclusive flag State jurisdiction" on the high seas and Article 94 enumerates "duties of the flag State." The master of the ship retains, at all times "ultimate responsibility for the safe navigation and overall command of the vessel."[5] International guidelines also stipulate that the "Master remains in command and is the overriding authority on board" the ship.[6]

The United States has long had rules pertaining to the use of PMSCs and PCASP on board ships that fly its flag.[7] Similarly, the United Kingdom issued guidelines in November 2011.[8] Other flag states, such as India, as well as the large open registries or "flags of convenience," are disseminating guidelines.

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[4] 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, IMO Doc. MSC.1/Circ. 1405/Rev. 2, May 25, 2012, ¶ 5.12.1.

[5] Baltic and International Maritime Council (BIMCO), Standard Contract for the Employment of Security Guards on Vessels (GUARDCON) (2012). BIMCO is the world's largest shipping industry association. The master's authority is defined in SOLAS XI-2 Reg. 8(1), which states: "The master shall not be constrained by the Company, the charterer or any other person from taking or executing any decision which, in the professional judgment of the master, is necessary to maintain the safety and security of the ship. This includes denial of access to persons (except those identified as duly authorized by a Contracting Government) or their effects or refusal to load cargo, including containers or other closed cargo transport unit." *See also* Annex I, European Regulation (EC) No. 725/2004.

[6] Int'l Org. for Standardization Publicly Available Specification (ISO/PAS) 28007, Ships and Marine Technology—Guidelines for Private Maritime Security Companies providing Privately Contracted Armed Security Personnel (PCASP) on Board Ships, 2012-12-15, ¶ 5.2.1(a) (ISO/PAS 28007:2012(E)).

[7] 33 CFR Part 104 and MARSEC Directive 104-6. Armed civilian security personnel who are U.S. citizens must meet requirements for licensure and bonding, certification, and training set forth in 18 U.S.C. § 922(g). Foreign citizens must meet a substantially equivalent standard and the requirements of all port states visited while the armed security remains onboard. The contracted security company must be appropriately licensed and bonded in a state and meet any requirements imposed by all foreign countries visited. *Id.*

[8] DEPT' FOR TRANSPORT, UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, INTERIM GUIDANCE TO UK FLAGGED SHIPPING ON THE USE OF ARMED GUARDS TO DEFENSE AGAINST THE THREAT OF PIRACY IN EXCEPTIONAL CIRCUMSTANCES, VERSION 1.1 (November 2011; Updated June 2012) [UK Guidance].

The Member States of the International Maritime Organization have issued guidance to ship operators and shipowners and recommendations to governments on the employment of private security at sea.[9] The International Standardization Organization (ISO) has also issued interim guidelines, which are adopted by IMO. Although these sets of regulations provide a broad basis for State action, they are relatively general and ambiguous.

4. Carriage of Weapons.

Generally, carriage of PCASP, firearms and security-related equipment is subject to flag State legislation and policy.[10] International guidelines state that ships carrying firearms and PCASP should comply with "applicable national laws relating to the procurement, carriage including export and import licensing, storage, use and disposal of firearms and security related equipment."[11] This rule, however, tends to beg the question, as flag States, coastal States, and port States have adopted a kaleidoscope of inconsistent national legislations and policies, which sometimes differ as much from one part of a State to another as they do among nations.[12] The fourth edition of the shipping industry "Best Management Practices" or BMP4 states that the carriage of firearms and PCASP are a matter for ship operators, in accordance with their voyage risk assessment and approval of the Flag State. Guidance by the Government of the UK, for example, states that armed guards should only be used on board a ship while transiting in the High Risk Area, although they may be embarked and disembarked at the "soonest safe, convenient, and lawful opportunity" outside the HRA.[13]

4.1 Carriage in Foreign Territorial Seas

It is unclear whether mere carriage of weapons and PCASP is inconsistent with the right of innocent passage. Some coastal States may assert authority or jurisdiction over PCASP on board ships conducting innocent passage in the territorial sea. India, for example, has issued Guidelines that state:

> Deployment of armed security guards on merchant ships does change the very paradigm of a merchant ship which is granted a liberty to transit the territorial waters of any state under the concept of "innocent passage." Further, a merchant ship arriving with weapons on board, in a commercial port of a coastal state, would also invoke concern for customs, police and other security agencies tasked with law enforcement and coastal security.[14]

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[9] *See* 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, IMO Doc. MSC.1/Circ. 1405/Rev. 2, May 25, 2012 and 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, Sept. 16, 2011.

[10] Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, MSC.1/Circ. 1406/Rev.1, Sept. 16, 2011, Annex, ¶ 2.

[11] ISO/PAS 28007, ¶ 4.2.4(b)(3).

[12] IMO Doc. MSC.1/Circ. 1405/Rev. 2, May 25, 2012, ¶ 1.2 (The absence of applicable regulation and industry self-regulation coupled with complex legal requirements governing the legitimate transport, carriage and use of firearms gives cause for concern). *See also* Revised Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, IMO Doc. MSC.1/Circ. 1408/Rev. 1, May 25, 2012.

[13] UK Guidance, ¶ 6.7.

[14] Ministry of Shipping, Government of India, Guidelines on Deployment of Armed Security Guards on Merchant Ships, ¶ 4 (August 2011).

The UK Guidance states that when ships are carrying firearms while in foreign territorial seas, "it is essential that the laws of [the] coastal State are respected and complied with."[15] Although the United Kingdom references the right of innocent passage in accordance with UNCLOS in cases in which passage is "not prejudicial to the peace, good order or security" of the coastal State, it also acknowledges that any "exercise or practice with weapons" during innocent passage may not be consistent with the regime. Therefore, shipping companies are directed to "take legal advice on the legal requirements" of coastal states whose territorial seas they transit, "even if firearms on board are security stored and comply with any requirements put in place by that State."[16]

My view is that carriage of firearms and PCASP is consistent with innocent passage and does not violate any prohibition set forth in Article 19 of UNCLOS, so long as the weapons and personnel are used solely for the purpose of self-defense against maritime threats. Article 27 of UNCLOS states that coastal States should not assert criminal jurisdiction over ships in innocent passage except, *inter alia*, if the actions on the ship constitute a crime, the consequences of which "extend to the coastal State," or "if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea." Presupposing that even if simple carriage of firearms constitutes a crime in the coastal State, mere innocent passage does not "extend to" the coastal State or "disturb the peace" or good order in the territorial sea. This view, however, is likely a minority perspective.

In 2011, an IMO circular contained a questionnaire on port and coastal state requirements related to PCASP on board ships transiting near the State or entering port.[17] In particular, the IMO's Facilitation Committee (FAL) recommended that coastal States bordering the Indian Ocean, Arabian Sea, Gulf of Aden and Red Sea, distribute information on their national legislation, procedures and best practices relating to the carriage, embarkation and disembarkation of firearms and security-related equipment through their territory and, as appropriate, rules concerning the movement of privately contracted armed security personnel:[18]

> The use of privately contracted armed security personnel on board ships may lead to an escalation of violence. The carriage of such personnel and their weapons is subject to flag State legislation and policies and is a matter for flag States to determine in consultation with ship owners, companies, and ship operators, if and under which conditions this will be allowed. Flag States should take into account the possible escalation of violence, which could result from carriage of armed personnel on board merchant ships, when deciding on its policy.[19]

Similarly, IMO Resolution 1044(27) urged coastal States to: "decide on their policy on the embarkation, disembarkation and *carriage* of privately contracted armed security personnel and of the firearms, ammunition and security-related equipment [author's italics]."[20] The 90th Session of the

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[15] UK Guidance, ¶ 6.8.
[16] UK Guidance, ¶ 6.9.
[17] IMO Doc. MSC/MSPWG 1/4/3, Development of Guidance on the Use of Privately Contracted Security Personnel on Board Ships, Sept. 12, 2011, Annex, IMO Doc. MSC-FAL/Circ.[2], Draft Questionnaire on Information on Port and Coastal State Requirements related to PCASP on Board Ships.
[18] Id., Annex, para. 5.
[19] IMO Doc. MSC.1/Circ.1333, Recommendation to Governments for preventing and suppressing piracy and armed robbery against ships, June 26, 2009, Annex, para. 7.
[20] Id., at ¶ 8(c)-(d).

IMO's Maritime Safety Committee also concluded that "ships entering the territorial sea and/or ports of a State are subject to that State's legislation."[21] India has gone even farther, proposing at IMO that both private maritime security contractors and members of the armed forces providing security or protection on board merchant ships transiting in a coastal state's EEZ be required to report "details" of their presence on the ship.[22]

5. Use of Force.

Generally, private security on board ships should take "reasonable steps to avoid and deter the use of lethal force."[23] PCASP should implement a "graduated approach," taking steps that are reasonable and proportionate, and that include non-lethal options, such as warning shots. Lethal forces should be used only in self-defense and be necessary and proportionate to the perceived threat.[24] In particular, the "decisions [made by the Master concerning the use of force] will be binding, without derogating from the inherent right of self-defense."[25] Furthermore, if the Master "judges that there is a risk to the safety of the ship, crew and or environment, he has the authority to order the security personnel to cease firing."[26] If the Master is not available, the senior officer in command on the ship assumes the Master's authority.

The IMO Guidance to the shipping industry states that PCASP should not use firearms except in self-defense or defense of others.[27] Furthermore, armed security should "take all reasonable steps to avoid the use of force. If force is used, it should be in a manner consistent with applicable law. In no case should the use of force exceed what is strictly necessary and reasonable in the circumstances. Care should be taken to minimize damage and injury and preserve human life."[28]

Under U.S. law, seafarers have the right to use force, up to and including deadly force, in self-defense and defense of others. The ship's master and crew have authority to actively "oppose and defense against any aggression, search, restraint, depredation, or seizure, which shall be attempted," pursuant to a piratical attack.[29] Self-defense is recognized by the U.S. Coast Guard from common law and historical usage as "the means the act of thwarting an attack upon oneself, another person, or both by using force, up to and including deadly force."[30] Force may be used if the seafarers are in imminent danger—which is present where there is a reasonable belief that the attackers have the means and opportunity to inflict great bodily harm or death on the individual or others in the vicinity.[31] Non-deadly force may be used to prevent theft or intentional damage to or destruction of property, including a U.S.-flagged vessel.[32] Warning shots are a signal under U.S. law and not

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[21] IMO Doc. MSC 90, Report of the Maritime Safety Committee on its Ninetieth Session May 31, 2012, para. 20.11.
[22] IMO Doc. MSC 90/20/16, Piracy and Armed Robbery against Ships: Armed Security Personnel on Board Ships, Submitted by India, Mar. 27, 2012.
[23] ISO/PAS) 28007, ¶ 5.3(b).
[24] ISO/PAS) 28007, ¶ 5.3(e).
[25] ISO/PAS 28007, ¶ 5.3(e).
[26] ISO/PAS 28007, ¶ 5.3(f).
[27] IMO Doc. MSC.1/Circ. 1405/Rev. 2, May 25, 2012, ¶ 5.15.
[28] IMO Doc. MSC.1/Circ. 1405/Rev. 2, May 25, 2012, ¶ 5.14.
[29] 33 U.S.C. § 383.
[30] United States Coast Guard, Dep't of Homeland Security, Port Security Advisory (3-09), Guidance on Self-defense or Defense of Others by U.S.-Flagged Commercial Vessels Operating in High Risk Waters, June 18, 2009, ¶ 2.
[31] USCG Advisory 3-09, ¶ 2.d.
[32] Non-deadly force may include maneuvers by the vessels, deployment of sonic blasts, use of firehoses, or the use of disabling fire. USCG Advisory 3-09, ¶ 3.c.

considered a use of force.[33]

The United Kingdom also authorizes the use of force to repel pirates. Deadly force may be used in self-defense or defense of another, but force must be proportionate and reasonable under the circumstances."[34] Force also may be used for the prevention of a crime, such as piracy.[35] The United Kingdom has adopted a graduated response to the use of force. Each stage of the response ladder should be "reasonable, proportionate and necessary to the threat."[36] Furthermore, measures to display capability to use force, such as making firearms visible or issuing verbal warnings or warning shots, should be "implemented in such a way so as not to be taken as acts of aggression."[37] The law in England and Wales stipulates that a "person may use force which is reasonable in the circumstances as they genuinely believed them to be…."[38]

6. Conclusion.

The carriage and use of firearms for use in self-defense may be authorized by the flag State. Within the territorial sea of a foreign state, however, some coastal States may assert jurisdiction over commercial vessels that transit in innocent passage while carrying weapons or PCASP on board. The text of UNCLOS suggests that coastal States may exercise civil jurisdiction over such ships if such carriage constitutes a crime, the consequences of which "extend to the coastal State," or "is of a kind to disturb the peace of the country or the good order of the territorial sea."[39] The meaning of these provisions, however, lack clarity, and make uncertain the right to carry weapons while in innocent passage.

Similarly, the use of firearms in self-defense is surrounded by ambiguity. Presumably, the law of self-defense of flag State of the vessel controls the application of armed force. Other States, however, may also claim jurisdiction over cases involving the discharge of weapons or the application of deadly force. The State of persons injured or killed may claim passive personality jurisdiction over PCASP who use deadly force. Likewise, coastal States and port States also may claim jurisdiction in cases involving the use of force.

**The views expressed are those solely of the author and should not be understood as necessarily representing those of the U.S. Department of Defense or any other government entity.

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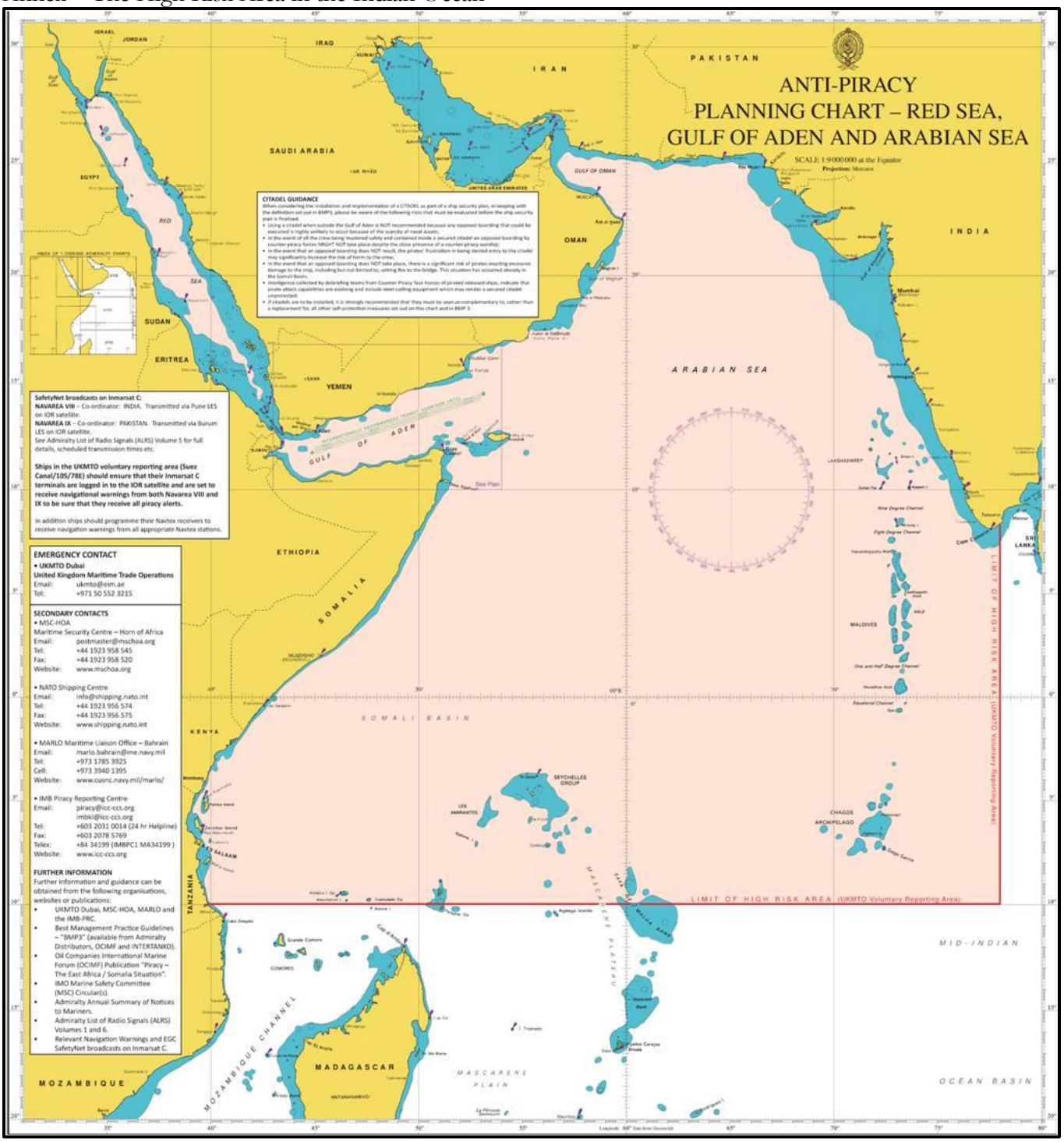
[33] USCG Advisory, 3-09, ¶ 3.g.
[34] UK Guidance, ¶ 8.10.
[35] UK Guidance, ¶ 8.13.
[36] UK Guidance, ¶ 8.5.
[37] UK Guidance, ¶ 8.5.
[38] UK Guidance, ¶ 8.9. There are variations in the law of self-defense among the three jurisdictions of the United Kingdom (i.e., England & Wales, Northern Ireland, and Scotland). "In England & Wales (and Northern Ireland) the decision about whether a person used reasonable force will be assessed in the context of the circumstances as the accused genuinely believed them to be (even if he or she was mistaken as to the true circumstances). Under Scots law, a person will only be able to claim self-defense (which includes defense of another) if that person believed that he/she (or a third party) was in imminent danger and had reasonable grounds for that belief." UK Guidance, ¶ 8.7 and note 12.
[39] UNCLOS, Article 27 1(a) and (b).

Annex – The High Risk Area in the Indian Ocean[40]



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