

Floating Armories and Privately Contracted Armed Security Personnel on Board Ships: Balancing Coastal State Security Concerns Against Navigational Freedom

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Structured Abstract

Article Type: Research Paper

Purpose—Balancing navigational freedom against coastal State security concerns in the context of privately contracted armed security personnel (PCASP) on board ships and floating armories (FA) at sea.

Design, Methodology, Approach—A comparative analysis of the standpoint of the private maritime security industry and flag, port and coastal States alongside the role of the International Maritime Organization (IMO). The character of the territorial sea (TS) and the exclusive economic zone (EEZ) are examined in light of relevant maritime incidents and provisions of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS).

Findings—Maritime incidents demonstrate that FA and PCASP on board ships can be non-peaceful and can prejudice coastal State security. However, current regulations do not satisfy coastal State security concerns. To meet this lacuna, the role of the IMO is indispensable. Meanwhile, the “prior notification” requirement can be viewed as a precautionary measure of Maritime Domain Awareness. The resolu-

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tion lies in serving the cause for coastal State security through a functional interpretation of the ambiguous UNCLOS provisions regarding the prior notification requirement.

Practical Implications—The study contributes to the study of conflict management concerning coastal State security regulations levied on ships of third States—which otherwise enjoy the right to innocent passage in the TS and the high seas freedom of navigation in the EEZ.

Originality, Value—The topic has not largely been touched upon. This paper makes original contributions in drawing its independent resolution.

Keywords: coastal state security, exclusive economic zone, floating armories, freedom of navigation, innocent passage, maritime security, navigational freedom, piracy, privately contracted armed security personnel, territorial sea

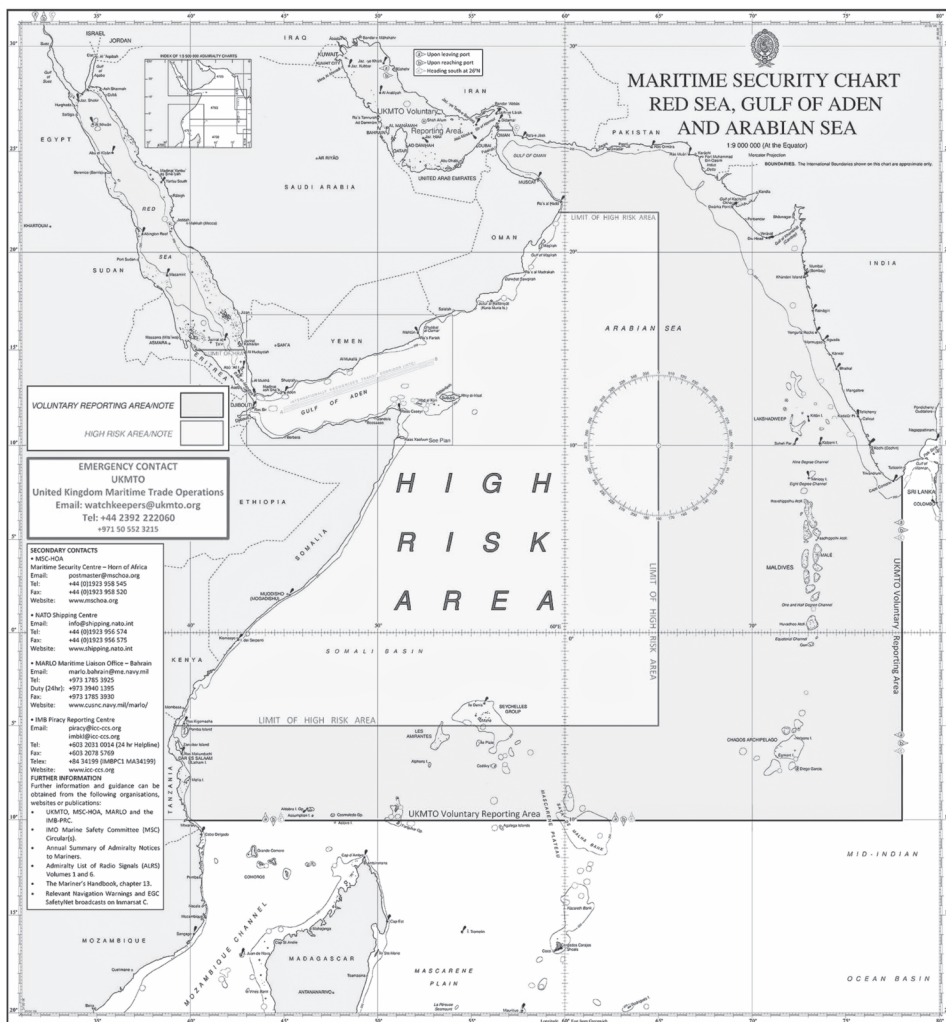
I. Introduction

The piracy affecting Somali waters caused tremendous losses to merchant vessels transiting the Gulf of Aden, a strategic link between the Mediterranean Sea and the Indian Ocean.¹ Maritime piracy and armed robbery against ships posed a grave risk to vessels and seafarers as they extended into the Red Sea, the Indian Ocean and surged off the west coast of Africa.² Such increase in violence and criminality at sea triggered various governmental and shipping industry initiatives for protection against them.³ Though joint-counter piracy efforts by the stakeholders resulted in a steady decline in pirate attacks, the United Nations Security Council expressed its concern over the ongoing threat of “resurgent piracy and armed robbery at sea” in the Gulf of Aden and the Somali Basin.⁴

A. *Effective Response to Piracy in the High Risk Area*

Warships began to increasingly serve as anti-piracy patrol tools in mid-2009 and this effort to tackle piracy in the Gulf of Aden was supported by the Multinational Task Force 151, European Union Naval Force, North Atlantic Treaty Organization and independent national naval patrols from China, Russia, India, etc.⁵ Further, to enhance better coordination, platforms like Shared Awareness and Deconfliction (hereinafter SHADE) for the States and the Maritime Security Centre—Horn of Africa (hereinafter MSCHOA) for the shipping industry, surfaced.⁶ In 2011, the International Maritime Organization (hereinafter IMO) adopted Best Management Practices (hereinafter BMP) developed under the auspices of the International Chamber of Shipping (hereinafter ICS) for the protection of Seafarers from Somali-based piracy.⁷ BMP assists ships in avoiding, deterring or delaying maritime piracy and armed robbery attacks at sea.⁸

For the purpose of BMP, an area within the designated Voluntary Reporting Area of the United Kingdom Maritime Trade Operations (hereinafter UKMTO)⁹



HRA in the Western Indian Ocean (United Kingdom Hydrographic Office, Maritime Security Chart Q6099).

where there is a considerable higher piracy risk and within which self-protective measures are most likely to be required is termed as a High Risk Area (hereinafter HRA).¹⁰ BMP application throughout the HRA helped in avoiding piracy by making it effective to determine the location of the operating pirates and prepare alternative travel routes based on circumstances influencing that area.¹¹

B. Emergence of Privately Contracted Armed Security Personnel and Floating Armories at Sea

The employment of Privately Contracted Armed Security Personnel (hereinafter PCASP)¹² through Private Maritime Security Companies/Contractors (hereinafter

PMSC)¹³ and Vessel Protection Detachments (hereinafter VPD)¹⁴ was another international response to tackle the scourge of maritime piracy and armed robbery against ships. However, the unwillingness of the coastal States off the West African coast to tolerate a third party's PCASP usage on board ships made such operation cumbersome in that region.¹⁵ Moreover, due to the inability of private security to deter pirate attacks occurring in the territorial waters of the West African coast, in comparison to the High Seas as in the case of the HRA in the western Indian Ocean, the PCASP usage boomed in the latter region.¹⁶

PMSC pre-position PCASP and weapons at key ports of the coastal States in the Red Sea or Indian Ocean to support the prompt embarkation of clients' vessels.¹⁷ To store weapons and accommodate personnel, PMSC employ commercially available Floating Armory (hereinafter FA) vessels that operate as static or mobile offshore logistics facilities.¹⁸

Determination of the number of PMSC currently operating in the Indian Ocean region has been difficult due to the lack of a central registry for their licensing or qualifications.¹⁹ However, it has been estimated that as of 2012, more than 140 PMSC specializing in anti-piracy operations have been operating off the Somali coast.²⁰

An increase in PCASP usage noted a decrease or temporary disappearance of pirates, thereby enhancing a peaceful transit through the Somali waters.²¹ Additionally, the international community witnessed a failure in piracy attempts due to the presence of armed security where the military was not involved.²² This surfaced the efficiency and cost-effective result of employing PCASP on board merchant vessels, thereby instigating a boom in their usage.²³

Nevertheless, the lack of concrete regulations governing operation of VPD, FAs and PCASP on board merchant ships created problems. For example, in February 2012, two Italian marines on board an Italian-flagged commercial oil tanker, *Enrica Lexie*, killed two Indian fishermen on suspicion of piracy which resulted in a diplomatic fallout between India and Italy.²⁴

In addition, controversy persists pertaining to the size and type of vessels that can be used to store weapons.²⁵ In 2013, an FA ship, *MV Seaman Guard Ohio*, owned by AdvanFort, a U.S.-based PMSC, was impounded and the crew and armed guards aboard were detained after it entered Indian territorial waters with illegal arms without adequate permission.²⁶

Prominently, the crime of piracy is a breach of *jus cogens* and the employment of PCASP on board vessels is a means of defense against *bona-fide* pirates or terrorists who are *hostis humani generis*, or enemies of all mankind.²⁷ However, acts of PCASP can certainly not be unreasonable or unjustified.²⁸ Neither can they result in sudden panic and unprovoked use of force at the first sight of an approaching boat or dinghy.²⁹

In the light of the above background, this paper seeks to balance navigational freedom against coastal State security concerns. In attempting to do so, Section II studies the industry self-regulations applicable to private maritime security service providers. Section III reflects on the IMO's contributions as a guide and a recommendatory

body to PMSC, shipowners, coastal, port and flag States. Section IV analyzes the security concerns of coastal States contrasting the right of innocent passage in the territorial sea (hereinafter TS) and the freedom of navigation in the exclusive economic zone (hereinafter EEZ) guaranteed under the United Nations Convention on the Law of the Sea, 1982 (hereinafter UNCLOS). Having reviewed all these aspects, Section V encapsulates the intended balance.

II. Industry Self-Regulation

Industry self-regulation is a regulatory process designed by private actors outside the governmental decision-making arena.³⁰ It is a voluntary form of sectoral governance that implies the requirement of decisive cooperation among industry stakeholders. Nevertheless, despite existing concerns pertaining to its accountability, credibility and enforceability, industry self-regulation retains the capacity to compete with or supplement national regulatory norms.³¹

Today, PMSC self-regulation is primarily in the form of several soft law instruments such as codes of conduct established by industry trade associations.³² Commonly, when terms of a code of conduct are incorporated into a contract with a supplier, they become legally binding as *de facto* minimum standards.³³ Considering especially that States have been rather slow-paced in regulating or developing regulations for private maritime security activities, PMSC self-regulation functions as a potential source of global governance and a medium for raising standards in this industry.³⁴ Thus, it is critical to gauge their role and effectiveness.

A. Montreux Document

The “Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict” (hereinafter Montreux Document) is an inter-governmental document established by the efforts of the Swiss Government and the International Committee of the Red Cross in 2008.³⁵ The international legal obligations under the Montreux document are cultivated from international humanitarian law, human rights agreements and customary international law.³⁶ It carves a non-exhaustive list of good practices positioned for peacetime, thereby evidencing that it is not strictly confined to armed conflict.³⁷ Precisely, it reiterates that States are not relieved of their international obligations despite PMSC’s private nature.³⁸

Though the Montreux Document is non-binding and was drafted to apply to private security services provided on dry land, it is also “meant to provide practical guidance in other contexts,” inclusive of protecting merchant shipping against piracy.³⁹ Its character, therefore, gives it a prospective rather than a reactive regulatory approach towards PMSC.⁴⁰ Notably, States such as the Bahamas, the Marshall Islands and Cook Islands have signified the Montreux Document’s provisions in their recommendations to the IMO.⁴¹

B. International Code of Conduct

The “International Code of Conduct for Private Security Service Providers” (hereinafter ICoC) was adopted in 2010.⁴² It builds on the foundations of the Montreux Document⁴³ and is a set of principles for private security providers formulated by the multi-stakeholder initiative convened by the Swiss government.⁴⁴ It has a two-fold operation covering principles of conduct and principles of management of the private security personnel.⁴⁵ Since it signifies the necessity of developing independent governance and oversight mechanism as well as responsible administration of the Code,⁴⁶ the ICoC Association (hereinafter ICoCA) has been created.⁴⁷

Currently, ICoC has over 700 signatory companies⁴⁸ endorsing their responsibility to uphold the rule of law, human rights and clients’ interests.⁴⁹ It enjoys some force of statutory and/or contractual obligation on the private security providers. This is evident from the fact that various national and international regulatory initiatives require ICoC compliance or ICoCA membership either as a matter of law or as a prerequisite for obtaining private security contracts with a State or an international organization.⁵⁰ Besides, not only do States consider it as model for PMSC compliance of industry regulations⁵¹ but also its usage could serve as a basis for the IMO to develop more formal guidelines regulating PCASP deployment on board merchant ships.⁵² Appreciably, the views of the international community are hardening an essentially “soft law” approach towards ICoC.⁵³

C. Best Management Practices

After the IMO resolved to implement BMP,⁵⁴ the Maritime Security Committee (hereinafter MSC) drew attention to the revised version of the BMP, i.e., BMP4, to keep them “alive, relevant, dynamic and updated.”⁵⁵ BMP4 strongly recommends applying BMP throughout the HRA⁵⁶ and outlines that non-observance of BMP prescriptions advances severe consequences.⁵⁷

BMP4 refers to three fundamental requirements, *viz.* registration at MSCHOA, reporting to UKMTO and implementation of Ship Protection Measures.⁵⁸ Notably, BMP4 supports unarmed PMSC usage, but does not endorse or recommend the general usage of armed PMSC.⁵⁹ However, it recommends armed/unarmed PMSC usage only pursuant to voyage risk assessment by ship operators and subject to flag States’ approval.⁶⁰

Interestingly, when considering armed guards, BMP4 asserts deployment of VPD as the recommended option to protect vulnerable ships.⁶¹ It expresses that armed PMSC is only an “additional layer of protection” and not an alternative to BMP.⁶² Subsequently, it recommends the presence of guards on board vessels to be included in the reports of UKMTO and MSCHOA—who are marked as the key contacts for Naval or military organizations.⁶³

Notably, where BMP recommendations were followed, cases of successful pirate attacks were reduced.⁶⁴ Significantly, BMP recommendations have been reflected in the national regulations of popular ship registries such as Panama⁶⁵ and Liberia.⁶⁶

Thus, BMP is an integral industry regulation of precautionary nature that can best protect ships against pirate attacks.

D. Industry Guidelines

In 2011, “Industry Guidelines for the Use of PMSC as Additional Protection in Waters Affected by Somali Piracy” (hereinafter Industry Guidelines) were developed by BIMCO, ICS, INTERCARGO, INTERTANKO, OCIMF, IG P&I Clubs.⁶⁷ They serve as a guide to shipping companies that decide to engage PMSC or any additional protection against piracy and/or armed attack.⁶⁸ Much like BMP, they recognize the usage of non-lethal means of self-protection as the industry’s responsibility and subject to risk analysis, prefer VPD for protecting vulnerable merchant ships when considering armed guards.⁶⁹

Industry Guidelines provide a selection criteria founded on commercial due diligence for engaging PMSC.⁷⁰ This includes checking the criminal background, employment history and military background of the PMSC personnel, i.e., PCASP, along with assessing their medical, physical and mental fitness.⁷¹ They require PMSC’s sound understanding of the relevant UNCLOS sections, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the International Convention for the Safety of Life at Sea including the International Ship and Port Facility Security Code.⁷² Also, PCASP are required to be acquainted with the appropriate principles or guidelines or rules for the use of force.⁷³ Besides, they provide that PCASP are to be trained to safely operate on different vessels transiting in the marine environment and handle equipment such as weapons, where armed.⁷⁴

Industry Guidelines indicate the unlikeliness for the risk analysis to determine the onboard security team size to be less than four personnel.⁷⁵ They provide for the inclusion of a Team Leader and recommend one PCASP to be qualified as a team medic.⁷⁶ They make it a prerequisite to clearly define, document and discuss the command and control structure between the Ship Operator, Master and the PMSC Team Leader.⁷⁷ Subsequent provisions signify responsible and consistent management of weapons and ammunition on board through documenting compliance of the relevant legislative requirements.⁷⁸ Also, they provide for record-keeping and reporting of circumstances where weapons are discharged.⁷⁹ In addition, the owners are to ensure, for themselves and their personnel, maintenance of an insurance coverage that is non-prejudicial to the ship owners’ insurance coverage.⁸⁰

Importantly, the industry asserts governmental responsibility for ensuring freedom of navigation on the high seas and the protection of the right of innocent passage.⁸¹ Also, PMSC are to provide a detailed plan of their proposed security team deployment in compliance with flag state requirements including, *inter alia*, their conceptual understanding of the “right of innocent passage” in territorial waters and the extent of compromising this right as opposed to the freedom of navigation on the high seas.⁸² Considerably, various flag States like India, Liberia and the United Kingdom (hereinafter UK) have regulations that complement and are consistent with the Industry Guidelines.⁸³

E. GUARDCON Standard Contract

GUARDCON is an agreement for the hiring of services of private maritime security guards, armed or unarmed, on ships.⁸⁴ It was developed by BIMCO to assist the industry, and in particular shipowners and their P&I Clubs.⁸⁵ In 2012, BIMCO issued the latest version of the GUARDCON and forwarded it to the 90th session of the Maritime Safety Committee (hereinafter MSC).⁸⁶

GUARDCON provides for responsibilities and liabilities of parties, dealing especially with insurances and the potential use of force on board ships.⁸⁷ Significantly, it is not limited to the current HRA and can be employed within any geographical area agreed between the owners and the contractors.⁸⁸ It has a multi-functional character since it can be used for both single and multiple transits.⁸⁹ Its provisions do not substitute the exercise of due diligence and are negotiable.⁹⁰ It is a confidential document with an exception to the other party's prior written consent or the request of a government or its agency to the extent required by law.⁹¹

GUARDCON stipulates for the contractors to provide a security team comprising of at least four suitably qualified, trained and experienced security personnel, including a team leader.⁹² The security team's profile includes protecting and defending the vessel during the transit against any "actual, perceived or threatened acts" not only limited to piracy but also extending to "violent robbery and/or capture/seizure."⁹³ It signifies BMP measures and procedures and requires the owners to liaise with the UKMTO and MSCHOA accordingly.⁹⁴

Despite its provisions, GUARDCON disclaims any guarantee as to the vessel's security during the provision of security services.⁹⁵ It only attempts to raise security companies' standards for insurance coverage for risks as well as permits and licenses for the lawful transport and carriage of weapons.⁹⁶

III. IMO Guidance and Recommendations

IMO, a specialized United Nations agency, addresses issues relating to international shipping by adopting uniform rules and standards for the shipping industry.⁹⁷ It aims to mandate safe and secure trade and travel by sea by managing and mitigating possible threats to maritime security.⁹⁸ For this purpose, it has been developing suitable regulations and guidance through the MSC with inputs from IMO's Facilitation Committee and Legal Committee.⁹⁹ Being operationally based on the consensus of its Member States, it is an extremely effective decision-making platform.

In 2011, "piracy and armed robbery against ships" was included in the agenda of MSC's 89th session.¹⁰⁰ This session approved Interim Recommendations for flag, port and coastal States and Interim Guidance to shipowners, ship operators, and shipmasters regarding PCASP usage on board ships in the HRA.¹⁰¹ In 2012, MSC's 90th session revised these interim recommendations and further agreed on the Interim Guidance to PMSC providing PCASP on board ships in the HRA (hereinafter

MSC.1-Circ.1443).¹⁰² These documents are to be conjunctively read along with the “Questionnaire on information on port and coastal State requirements related to PCASP on board ships”¹⁰³ and other IMO recommendations and guidance for preventing and suppressing piracy and armed robbery against ships.¹⁰⁴

Notably, IMO neither endorses nor condemns carriage of arms and PCASP usage on board ships.¹⁰⁵ It directs the responsibility on individual flag and coastal States to determine the legality, appropriateness of and conditions for PCASP usage.¹⁰⁶ Therefore, reviewing IMO’s contribution in this field is significant.

A. Revised Interim Recommendations for Flag States

“Revised Interim Recommendations for Flag States Regarding the Use of PCASP on Board Ships in the HRA” (hereinafter MSC.1-Circ.1406-Rev.3) resulted from three revisions of the interim recommendations for flag States that were approved at the 89th MSC session.¹⁰⁷ MSC.1-Circ.1406-Rev.3 does not endorse or institutionalize PCASP usage on board vessels.¹⁰⁸ Instead, it urges flag States to consider the possibility of escalation of violence resulting from the usage of firearms and carriage of armed personnel on board vessels.¹⁰⁹ It also requires flag States to clarify the national policies pertaining to the carriage of armed security personnel to the masters, seafarers, shipowners, operators and companies.¹¹⁰

MSC.1-Circ.1406-Rev.3 recommends flag States position a PCASP authorization policy, including conditions for such authorization.¹¹¹ It primarily suggests flag States consider the appropriateness of PCASP usage under national legislation.¹¹² Secondly, if determined appropriate, it recommends the establishment of a policy that, *inter alia*, includes a minimum criteria for PCASP compliance, possession of valid accreditation certification by PMSC for PCASP employment and a procedure for authorizing PCASP usage that meet minimum flag States requirements.¹¹³ It suggests that such policies may also directly refer to the applicable national laws relating to the PCASP’s carriage and use of firearms along with the obligation to report and keep records.¹¹⁴ The requirements of MSC.1-Circ.1406-Rev.3 are embodied in various national regulations such as those in India, Liberia, the UK and Panama.¹¹⁵

B. Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters

“Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of PCASP on Board Ships in the HRA” (hereinafter MSC.Circ.1405-Rev.2) indicates the application of flag State jurisdiction to ships using PMSC and PCASP.¹¹⁶ MSC.Circ.1405-Rev.2 states that PCASP usage is not an alternative to BMP and other protective measures.¹¹⁷ It suggests shipowners ensure flag State consultation early in their consideration of PCASP usage and recommends such consideration only after a thorough risk assessment.¹¹⁸

MSC.Circ.1405-Rev.2 suggests determining not only the security team size before their deployment on board but also an appropriate hierarchy in its compo-

sition, i.e., the appointment of a Team Leader.¹¹⁹ Notably, it recommends the master report to the appropriate military authorities the intended transit or transiting of the ship carrying PCASP, firearms and security related equipment through the HRA.¹²⁰ In addition, it holds the shipowners and ship operators responsible for familiarizing this guidance to the master and the crew.¹²¹

MSC.Circ.1405-Rev.2 recapitulates the provisions of Industry Guidelines pertaining to PMSC selection, command and control structure, responsible management of firearms and ammunition, the rules on the use of force and the obligation to report and keep records.¹²² Appreciably, States such as India, Liberia, Panama and the UK have incorporated its provisions.¹²³

C. Revised Interim Recommendations for Port and Coastal States

“Revised Interim Recommendations for Port and Coastal States Regarding the Use of PCASP on Board Ships in the HRA” address the need for the development of a regulatory regime specifically for port and coastal States.¹²⁴ They particularly urge coastal States bordering the Indian Ocean, Arabian Sea, Gulf of Aden and Red Sea to put in place relevant policies and procedures which are consistent with international law.¹²⁵ They also advocate for governments to refrain from establishing policies that “interfere with the navigation of ships” or hinder or are capable of hindering “the continuation of maritime trade.”¹²⁶

Importantly, they encourage governments to consider factors pertaining to “embarkation,” “disembarkation” and “vessel calling” prior to developing national policies and related procedures concerning PCASP usage on board vessels.¹²⁷ These considerations include requiring PCASP identification; storage, security and control of firearms and security related equipment—proposed for embarkation and those retained on board—coupled with notifications and documentation of their embarkation and disembarkation.¹²⁸ Also, if applicable, they require documentation denoting the authorization of PCASP, firearms and security related equipment.¹²⁹

D. Interim Guidance to Private Maritime Security Companies

MSC.1-Circ.1443 sets out interim guidance to PMSC.¹³⁰ Since it considers restriction of the Montreux Document to situations of armed conflict and the ICoC to land-based security companies, it disregards their direct applicability to PMSC.¹³¹ Therefore, it intends to meet, in the interim, the necessity for regulating PCASP usage on board ships transiting the HRA.¹³²

MSC.1-Circ.1443 recognizes a flag State’s right to not authorize PCASP usage on board ships.¹³³ It highlights coastal State sovereignty enjoyed within the TS subject to the rule of innocent passage under UNCLOS and other rules of international law.¹³⁴ It acknowledges exclusive flag States jurisdiction on the high seas over ships carrying PCASP on board and their consequent duties under UNCLOS.¹³⁵ Importantly, it

reaffirms the subjective nature of PCASP deployment and advises PMSC to seek “appropriate” and “applicable” approvals from competent authorities in flag States, countries where PMSC is registered and countries in which operations are conducted or managed—including countries through which PCASP may transit.¹³⁶

MSC.1-Circ.1443 suggests PMSC operate with the awareness, understanding, reflection and consideration of the applicable laws of “flag, port and coastal States” regarding the “transport, carriage, storage and use of firearms and security-related equipment and the use of force.”¹³⁷ They are also required to have a “sound understanding” of the piracy situation and piracy threat in the HRA in addition to the latest BMP version, specifically for ship protection measures.¹³⁸

MSC.1-Circ.1443 mirrors the provisions of Industry Guidelines and MSC.Circ.1405-Rev.2 pertaining to selection, size, composition and equipment, vetting and training of PCASP, command and control structure, responsible management of firearms and ammunition, insurance, rules on the use of force and reporting and record-keeping of circumstances where firearms have been discharged.¹³⁹ Therefore, flag State regulations complementing provisions of Industry Guidelines and MSC.Circ.1405-Rev.2 are substantially in line with MSC.1-Circ.1443.¹⁴⁰

IV. Coastal State Authority

Since FAs and PCASP on board ships majorly operate in international waters, jurisdiction over them is largely vested in flag States—whose laws and policies in this regard fluctuate from an outright prohibition to recommending their usage.¹⁴¹ However, a flag State’s exclusive jurisdiction is not absolute and there are several occasions where other States are granted, in varying degrees, a share of the flag State’s legislative or enforcement jurisdiction.¹⁴² Particularly, coastal States may decide to regulate international shipping in order to address a certain concern.¹⁴³ Coastal State jurisdiction over foreign merchant ships may not only be territorial or rather zone-based, but may also derive from international agreements and/or established international standards and practices.¹⁴⁴

Today, there are differing opinions concerning the extent of coastal State jurisdiction for regulating innocent passage enjoyed by foreign vessels in the TS and the high seas freedom of navigation in the EEZ.¹⁴⁵ This is more so in the case of ships that transit a coastal State’s TS or EEZ while carrying PCASP on board. In 2011, IMO’s Facilitation Committee particularly urged coastal States bordering the Indian Ocean, Arabian Sea, Gulf of Aden and Red Sea to “raise awareness of their relevant national legislation, policies and procedures relating to the carriage, embarkation and disembarkation of firearms and security-related equipment through their territory and the movement of PCASP.”¹⁴⁶ While certain States like Spain, the Islamic Republic of Iran and Israel do not have any particular procedure or specific requirement for the transit of ships carrying PCASP on board through their TS and/or Contiguous Zones, other States like India, Maldives and Australia require an advance notification.¹⁴⁷

States are no longer strangers to terrorism-related incidents emanating from

the maritime domain and hence, there is a necessity for them to accumulate coordinated efforts for the prevention of threats to their security or sovereignty.¹⁴⁸ Precisely, this is evidenced by the development of national policies applying Maritime Domain Awareness (MDA).¹⁴⁹ For example, Canada and the U.S. incorporated MDA within their national policies to detect, deter and defeat potential threats to their sovereignty, security and safety.¹⁵⁰

Considerably, it is interesting that India seeks advance information, as a measure of MDA, concerning navigation of FAs and vessels carrying PCASP in its TS and EEZ. This view is discussed below.

A. The Indian Security Imperative

India's stance arises from its security concerns triggered not only by the increased presence of floating armories near its coastline but also by its past experience. Maritime traffic, in an attempt to avoid the HRA-related additional war risk premium, has become increasingly intimate to the Indian coastline, which is the largest in the western Indian Ocean, and this, consequently, has interfered with the Indian shipping and fishing fleets.¹⁵¹ Also, India's geographical positioning in a region with active operation of terrorist groups has exposed it to various terrorist attacks.¹⁵² Moreover, India is still being confronted by concerns of possible terror attacks proceeding from its coasts.¹⁵³

To India, a "security incident" in its TS is constituted when PCASP or VPD encounter pirates or when they mistake fishing boats in its EEZ for pirate skiffs and use force against them.¹⁵⁴ India questions the very legality of FAs being termed as "merchant ships," since it regards FA operations as being dissimilar to those of merchant ships.¹⁵⁵

I. MSC.94/14/2

In 2014, India's submission to MSC sought development of guidelines for regulating FAs.¹⁵⁶ It highlighted the "nebulous area" exposed by FAs supplying PCASP to cargo ships.¹⁵⁷ It estimated the operation of approximately 18 FAs carrying over 7,000 weapons on the high seas.¹⁵⁸ Importantly, India asserted that the presence of FAs close to the Indian coasts raises security concerns, especially in case of their illegitimate operation in the absence of an international regulatory mechanism concerning PCASP usage on board merchant vessels.¹⁵⁹

India substantiated its security concerns by illustrating the detention of *MV Seaman Guard Ohio*, a special purpose vessel manned with excessive number of armed guards, where the police seized 35 assault rifles and 5,680 rounds of ammunition.¹⁶⁰ It also underlined the 1991 explosions to demonstrate that past terror attacks paved their way through the sea borders into India.¹⁶¹ Further, it instanced the 2011 terrorist attacks where the 10 responsible *Lashkar-e-Taiba*¹⁶² terrorists entered Mumbai via sea, killing as many as 175 people and injuring 291.¹⁶³

Drawing from these security concerns, India contended the existence of a coastal State's inherent right to protect its marine environment up to its EEZ.¹⁶⁴ Conse-

quently, it deemed it “imperative,” within the larger framework of MDA, to “mandatorily” share with the concerned coastal State authorities the details of PCASP on board ships that sail through its EEZ or the FAs transiting or operating in such waters.¹⁶⁵ However, MSC deliberations did not support this proposal.¹⁶⁶

II. MSC.97/19/11 and MSC.98/15/2

In 2016, India proposed the development of an international regulatory framework for FAs, as a new output.¹⁶⁷ This submission analyzed the “largely *bona-fide* concerns” arising, *inter alia*, from the non-availability of pertinent FA details, ambiguous insurance and charterparty requirements, lack of port State control and adequate industry standards, lack of clarity in stakeholders’ liabilities and in applicability of international treaties, standards, guidelines and IMO Conventions/Codes to FAs.¹⁶⁸

Building on this submission, India proposed “draft guidelines on FAs” at MSC’s 98th session to assist Member States, shipowners, ship operators and seafarers on the usage of merchant ships as FAs (hereinafter MSC.98/15/2).¹⁶⁹ MSC.98/15/2 seeks to ensure FAs’ safety and security.¹⁷⁰ Significantly, it attempts to define FAs as “cargo ships, often anchored in international waters and used to store weapons, ammunitions and related equipment such as body armour and night vision goggles.”¹⁷¹ It, further, categorizes them as under:

1. companies that operate armories for storage: companies provide the resources, ships, armoury facilities and other logistics supports; weapons are transferred by the company providing the security personnel, such weapons are stored for the period of time that the related personnel are using the facilities of the armoury;
2. complete service providers: companies that operate storage facilities, but also provide weapon systems for rent by security personnel undertaking operations; and
3. fully integrated security service provider: the company provides logistics, ships, operators, weapons and ammunition directly.¹⁷²

MSC.98/15/2 requires FAs to obtain flag State permission along with other applicable documentation and certification under international law.¹⁷³ It also requires documentation of arms licensing and record keeping of all FA transactions.¹⁷⁴ Importantly, it requires the “nearest coastal State” to be informed about all activities of an FA anchored/stationed in international waters, until its departure from such location and discontinuation of all activities.¹⁷⁵ It also assigns the discretion to coastal States to direct and provide the frequency of periodical reporting.¹⁷⁶ Significantly, MSC.98/15/2 requires advance communication to the coastal State of the entry of private armed guards and foreign-owned firearms into ports or TS.¹⁷⁷

B. *The Right of Innocent Passage of Floating Armories and Ships Carrying Privately Contracted Armed Security Personnel on Board*

Coastal States retain authority over their TS, subject to the right of foreign ships to innocent passage. The concept of innocent passage is based on freedom of navi-

gation.¹⁷⁸ UNCLOS signifies that foreign vessels possess the right of innocent passage provided such passage is not prejudicial to coastal States' "peace, good order or security."¹⁷⁹ The determination of what these terms constitute has been left to the discretion of coastal States.¹⁸⁰ However, to be innocent, it is requisite that the passage is "continuous and expeditious" and it conforms with UNCLOS and other rules of international law.¹⁸¹ Moreover, to determine its innocence, the "manner" in which passage is carried out is important.¹⁸²

UNCLOS provides a non-exhaustive list of prejudicial activities for determining whether a foreign vessel's passage is innocent.¹⁸³ There is difference of opinion regarding the acts covered within the ambit of this list.¹⁸⁴ Besides, to regulate innocent passage, coastal States enjoy discretion to adopt laws and regulations.¹⁸⁵ Also, to prevent "non-innocent" passage, coastal States have the right to take "necessary" steps, which can include stopping, visiting, inspecting, diverting from the TS, detaining as well as forcing foreign ships involved in "non-innocent passage" to a coastal port for the institution of legal proceedings.¹⁸⁶

Nonetheless, coastal States are to refrain from imposing requirements that are discriminatory against foreign ships or have the practical effect of denying or impairing the right of foreign ships to innocent passage.¹⁸⁷ But, this right may be interfered with in certain instances for the protection of a coastal State's "security," including weapons exercises.¹⁸⁸ However, the interpretation of the concept of "security" is subjective.¹⁸⁹ For example, the *Corfu Channel Case* confirmed the right of warships to "innocent passage" without previous authorization in peacetime as an international custom.¹⁹⁰ However, state practice in this regard appears to be variable.¹⁹¹

The right of innocent passage is also tested in case of ships carrying hazardous substances. Many States have claimed a right to exclude such shipments from their TS while some contentiously propose a prior notification requirement for such transits.¹⁹² Nonetheless, international shipping witnessed a recent development of Ship Reporting Systems (hereinafter SRS) and Vessel Traffic Service (hereinafter VTS), which concern a coastal States' right to request information from a ship in its coastal waters.¹⁹³ This development may have been arguably derived from a coastal State's prescriptive powers under UNCLOS.¹⁹⁴

Evidently, UNCLOS enables coastal States to undertake deterrent and preventive measures to restrict passage of foreign ships which are not innocent. Besides, national laws demonstrate that the regime of innocent passage can only be interfered with in situations where coastal State interests override flag State interests.¹⁹⁵ Likewise, foreign vessels in a coastal State's TS must conform to the coastal State's navigational security legislation.¹⁹⁶

Interestingly, the presence of a military element in a ship operation appears to suggest a shift from their peaceful character to a threatening one. For example, the U.S. agent Elihu Root argued in the *North Atlantic Coast Fisheries Arbitration* that warships did not have the right to pass through the TS "without consent ... because they threaten. Merchant ships may pass because they do not threaten."¹⁹⁷ Accordingly, the operational nature of FAs and PCASP on board ships raises suspicions regarding their prejudicial nature to innocent passage in various circumstances. For

instance, PCASP practicing with weapons and/or ammunitions through drills, manouvering or weapons testing/firing, etc., on board ships transiting a coastal State's TS would qualify as "exercise or practice with weapons."¹⁹⁸ Such practice would change their character, thereby deeming their passage as "non-innocent."¹⁹⁹ Besides, if PCASP embark, disembark and load or offload weapons and/or ammunitions on board ships within a coastal State's TS, such acts would potentially imply "taking on board a military device"; thereby, qualifying their passage as "non-innocent."²⁰⁰

The analysis above indicates that the operational nature of FAs and merchant ships carrying PCASP is capable of compromising coastal security, especially within a coastal State's TS. Moreover, the absence of uniform international regulations invokes presumptions of their misuse. In such scenarios, the tendency of coastal nations to resort to precautionary and defensive measures is demonstrated by the *MV Seaman Guard Ohio Case*.²⁰¹

C. Freedom of Navigation in EEZ for Floating Armories and Ships Carrying Privately Contracted Armed Security Personnel on Board

EEZ exhibits a *sui generis* character. It differs from the high seas and the TS and is distinctly regulated. UNCLOS demonstrates the navigational rules in the EEZ and protects the freedom of navigation therein for all States.²⁰² Additionally, the EEZ regime under UNCLOS imports the provisions relating to the high seas and other pertinent rules of international law, subject to their compatibility with Part V of UNCLOS.²⁰³ However, a coastal State's right to prescribe certain laws and regulations for foreign-flagged ships in its EEZ is a subject of controversy.²⁰⁴

UNCLOS accords coastal States with "sovereign rights" in the EEZ for the purpose of exploring, exploiting, conserving and managing all resources, i.e., living and non-living economic resources.²⁰⁵ Interestingly, coastal States and other States exercising their rights and duties in a coastal State's EEZ are to reciprocate "due regard" to each other's rights and duties.²⁰⁶ It is noteworthy that coastal States have far reaching jurisdiction for taking "necessary measures" to ensure compliance of their laws and regulations enacted for exercising their sovereign rights and regulating ship-based pollution.²⁰⁷

Besides, there is no limitation or particular requirement on the range of enforcement measures that a coastal State can avail for itself.²⁰⁸ This inevitably raises concerns of a coastal State's likelihood to unjustifiably interfere with the freedom of navigation in its EEZ.²⁰⁹ Therefore, it becomes practicable to gauge the reasonableness of measures that a coastal State may construe as "necessary" to employ against any actual interference to its sovereign rights in its EEZ. Justifying and determining reasonableness of a particular measure is largely dependent on the relevant facts of each case.²¹⁰

However, State practice tends to indicate the expansion of coastal State powers in the EEZ. For instance, Brazil, Bangladesh, Malaysia, India and Pakistan do not permit foreign military exercises or manouvers without consent within their EEZ.²¹¹ Accordingly, it is argued that "a new norm of customary international law appears

to have emerged that allows coastal States to regulate navigation through their EEZ based on the nature of the ship and its cargo.”²¹²

In 2011, India mandated all Indian and foreign commercial merchant vessels with armed guards and weapons to provide a Pre-Arrival Notification for Security (hereinafter PANS) prior to their entrance and transit through the Indian EEZ and the Indian Search and Rescue Region.²¹³ Interestingly, India’s claim for PANS was only vindicated a year later with the *Enrica Lexie Case* where the court observed,

There is no gainsaying the fact that the effect and consequences of such a gruesome act ensues in the territory of India. This incident has a direct bearing on the lives and livelihoods of that section of Indian population engaged in fishing ... this incident has instilled in the fishermen community of India a sense of fear and insecurity about the safety and security of their lives at sea.²¹⁴

This incident firmly demonstrated that, under the guise of freedom of navigation, the poorly regulated PCASP on board merchant ships possess the capability of interfering in a coastal State’s rightful engagement of economic activities in its EEZ. Such instances underline that the security aspect of the EEZ cannot be discounted while focusing on economic aspects.

The *Enrica Lexie Case* unfolds the conflict between freedom of navigation of FAs and ships carrying PCASP and the rights and jurisdiction of coastal States in their EEZ. Considerably, the resolution for such conflict, as per the contemplation of UNCLOS, is to be founded on equity, relevant circumstances, respective interests of the parties involved and the whole international community.²¹⁵

V. Conclusion

The fragility of world security has dramatically amplified in the recent years. Moreover, Section IV manifests that for a State like India, which has to bear the contemporaneous reality of its neighborhood, terrorist threat perceptions are inevitably provoked. Therefore, to achieve preparedness for tackling matters that threaten national security or sovereignty, it becomes integral to strengthen information sharing between both the private and public sector. This would in turn assist States in developing effective emergency response capabilities. National implementation of MDA, as illustrated in Section IV, appears as an attempt in the same direction.

Sections II and III predominantly indicate that PCASP are to be employed as a last resort for protecting merchant vessels. They also demonstrate that the current regulations are not universal. They only satisfy flag States but not coastal States. However, the consequences of proliferating operations of FAs and PCASP on board merchant vessels do not only extend to the shipping industry and flag States, but also impact the States within whose maritime zones they transit. Considerably, such operations challenge the security of coastal nations in the absence of uniform international regulatory and policing mechanisms.

Section IV evidences that “military uses” within coastal maritime zones by themselves create a presumption of serving non-peaceful purposes, let alone the case of merchant vessels carrying PCASP during transits. Also, the PCASP practice of carrying arms on board merchant ships prompts speculations concerning their intent. Therefore, it is predictable that coastal States might employ precautionary measures such as a “prior notification” requirement to secure peace and stability. However, UNCLOS does not specifically incorporate a prior notification regime; but the lack of an express provision creates ambiguity and room for the possibility of imposing this requirement.

Observably, the requirement of prior notification is not unprecedented. As a duty, prior notification is not novel and is promoted among other instruments.²¹⁶ The development of SRS and VTS, as pointed in Section IV, reveals that prior notification is a facet of confidence against environmental concerns of coastal States. Analogically, its attributes can help settle coastal State security concerns. Besides, its usefulness is ushered by its capacity to not only mitigate presumptuous apprehensions but also to secure a course of action to combat coastal emergencies. For example, a prior notification could be a coastal State’s tool to inform and prepare the fishermen and coastal community for non-interference in the prospective operation of FAs and vessels carrying PCASP through its TS and/or the EEZ; thereby, to ultimately avoid security incidents like the one encountered in the *Enrica Lexi* case.

Nonetheless, the analysis drawn under Section IV exhibits that the prior notification requirement is contentious and rests on three premises. Firstly, past experiences have created mistrust among States resulting in lack of confidence at the slightest presumption of threat. Owing to seek assurance against such presumptions, the coastal State requirement of prior notification emerged. This requirement demonstrates traits of confidence-building measures.

Secondly, there exists a jurisdictional conflict between flag and coastal States. The diminishing character of the coastal State jurisdiction from its TS to EEZ against third States’ navigational freedom creates controversy. Though a coastal State must not “hamper” a third State’s innocent passage, this obligation is to be construed in proportion of its competing interests and those of the general maritime community. On the contrary, it remains settled that the freedom of navigation has never been absolute. It is qualified in a coastal State’s EEZ by “due regard” to its rights and duties which arise not only from UNCLOS but also from national laws and regulations.²¹⁷

Thirdly, the controversy of applying the prior notification requirement is furthered by its contemporary unilateral character, which goes against the traditional importance given to the protection of navigational freedom. This exhibits that unilateral law enforcement measures of coastal States that surpass UNCLOS specifications will generally be open to challenge. Their sustenance would, consequently, depend on consistent or unified state practice. To procure such consistency, it becomes essential for a coastal State’s unilateral measures to be founded on necessity and proportionality so that they are justifiably integrated in the maritime community.

Besides, safeguarding national security is integral against the claim for another State's freedom of navigation. In the process of avoiding encroachment of either claims and to establish a stable parity between Flag States and coastal States, the scope of freedom of navigation appears to be fading. This is reflected by evolving state practice that conditions freedom of navigation in the maritime zones of a coastal State to certain limitations as compared to their existence on the high seas. Moreover, Section IV reveals that law enforcement in the maritime domain appears to be no more zonal but rather functional.

In the contemporary maritime security context, the operation of FAs or ships carrying PCASP does not primarily serve the interests of coastal States—which may have to be in the constant fear of facing its potential adverse impacts. Understandably, it is fair to evaluate that the balance of convenience favors coastal State interests. Hence, in the interest of maintaining coastal security and to secure confidence of coastal States, there should be cooperation towards respecting measures that enhance MDA. This would be consistent with the UNCLOS desire to establish a legal order for the seas and oceans through international communication.²¹⁸

Today, balancing navigational freedoms against national interests is *sine qua non*. Therefore, while industry self-regulation and flag State regulations may be useful in the interim, there is a necessity for firm demarcation of coastal State regulations pertaining to operation of FAs and PCASP on board merchant ships within their maritime zones. Also, given the IMO's role as substantiated in Section III, utilizing it as a forum for developing concrete coastal State regulations becomes indispensable. Ergo, until this is achieved, rectifying the ambiguity in UNCLOS and interpreting it to serve the coastal State cause is not only practicable and favorable but also equitable.

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134. *Ibid.*, Annex, para 1.1.
135. *Ibid.*, Annex, para 1.2.
136. *Ibid.*, Annex, para 1.3, para 5.1 and para 5.3.
137. *Ibid.*, Annex, para 3.3. and 5.3.
138. *Ibid.*, Annex, para 3.7.
139. *Ibid.* See also “Industry Guidelines” and “MSC.Circ.1405-Rev.2.”
140. ISMG, 2011; MSA, 2011; PMA Resolution, 2012; IMO, 2012.
141. “Jurisdiction Over a Vessel on High Seas Resides Solely with the State to Which the Vessel Belongs.” See Nigel P. Ready, “Nationality, Registration and Ownership of Ships” in D.J. Attard (ed.), the *IMLI Manual on International Maritime Law*, vol. II (Oxford University Press, 2016). This requirement extends the right to the individual States possess the unilateral right to fix conditions for the purposes of granting nationality, registration of ships in its territory and for the right to fly its flag. See United Nations Convention on the Law of the Sea (Montego Bay, adopted on Dec. 10, 1982, entered into force on Nov. 16, 1994) 1833 UNTS 3 (hereinafter “UNCLOS”), Art. 91. Besides, the flag States have the obligation to effectively exercise their jurisdiction and control over administration, technical and social matters over ships that fly their flag. See UNCLOS, Art. 94. Countries like France, Japan and Netherlands have a prohibitive stance concerning PMSC usage while USA, UK and Spain, among others, hold a permissive stance. See Anna Petrig, “The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates,” 2013, 62 *Int’l & Comp. L.Q.* 667. See also OBP, “Introduction to Private Maritime Security Industry,” *OBP*, 2011, http://oceansbeyondpiracy.org/sites/default/files/pmsc_map_final_6.pdf, accessed April 30, 2019.
142. Arnd Bernaerts, *Bernaerts’ Guide to the 1982 United Nations Convention on Law of the Sea* (Trafford Publishing, 2006), p. 46.
143. Johnson, 2004, p. 12.
144. Rüdiger Wolfrum, “Freedom of Navigation: New Challenges,” in Myron H. Nordquist, Tommy Thong Bee Koh, John Norton Moore (eds), *Freedom of Seas, Passage Rights and the 1982 Law of the Sea Convention* (Martinus Nijhoff Publishers, 2009), p. 79, <https://doi.org/10.1163/ej.9789004173590.i-624.31>.
145. James Kraska, “International Law and the Future of Indian Ocean Security” in John Garofano and Andrea J. Dew (eds), *Deep Currents and Rising Tides: the Indian Ocean and International Security* (Georgetown University Press, 2013), p. 238.
146. IMO, Questionnaire on Information on Port and Coastal State requirements Related to Privately Contracted Armed Security Personnel on Board Ships MSC-FAL.1/Circ.2, 22 September 2011, para. 3 and 7.
147. IMO “Private Armed Security.”
148. Joseph Franco and Romain Quivoovij, “Terrorist Threats from the Maritime Domain:

Singapore's Response" *RSIS Commentary*, October 10, 2014, p. 197, <https://www.rsis.edu.sg/wp-content/uploads/2014/10/CO14197.pdf> accessed December 18, 2018.

149. Maritime Domain Awareness has been defined as "the effective understanding of any activity associated with the maritime environment that could impact upon the security, safety, economy or environment." See IMO, Amendments to the International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual, MSC.1/Circ.1367, 24 May 2010, Annex, Section I (2).

150. in 2004, Canada's National Security Policy established Coastal Marine Security Operations Centers for identifying maritime activities that represent a potential threat to sovereignty, security and safety of Canada and Canadians. See Transport Canada, "Marine Security Operation Centres," *Government of Canada*, <http://www.tc.gc.ca/eng/marinesecurity/operations-269.html>, accessed December 18, 2018; "The Heart of the Maritime Domain Awareness program is accurate information, intelligence, surveillance, and reconnaissance of all vessels, cargo, and people extending well beyond our traditional maritime boundaries." See U.S. Department of Homeland Security, "National Plan to Achieve Maritime Domain Awareness for the National Strategy for Maritime Security," *U.S. Department of Homeland Security*, October 2005, https://www.dhs.gov/sites/default/files/publications/HSPD_MDAPlan_0.pdf, accessed December 18, 2018.

151. Vallabu, 2016.

152. Neeraj Chauhan, "India 3rd Largest Terror Target After Iraq and Afghanistan: U.S. Report," the *Times of India*, July 23, 2017, <https://timesofindia.indiatimes.com/india/india-3rd-largest-terror-target-after-iraq-and-afghanistan-us-report/articleshow/59719216.cms>, accessed May 2, 2018.

153. Abhijit Singh, "The Changing Face of Maritime Terrorism," the *Strategist*, March 3 2017, <https://www.aspistrategist.org.au/changing-face-maritime-terrorism/>, accessed December 18, 2018.

154. IMO, "Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on Board Ships" submitted by India, <http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Documents/PCASP/India.pdf>, accessed December 18, 2018.

155. IMO, Work Programme: Proposal for the development of an International Regulatory framework for "Floating Armories," as a new output" submitted by India, MSC 97/19/11, August 19, 2016, para 26.

156. IMO, Piracy and Armed Robbery against Ships: Regulating "floating armories" submitted by India, MSC 94/14/2, August 19, 2014.

157. *Ibid.*, para 1.

158. *Ibid.*, para 4.

159. *Ibid.*, para 4.

160. *Ibid.*, para 2.

161. The 1991 attacks were caused by the huge consignment of arms and explosives brought from Dubai-Karachi to the Indian west coast, killing 257 people and injuring over 700. See *Ibid.*, para 3.

162. *Lashkar-e-Taiba* (Urdu: "Army of the Pure") also spelled *Lashkar-e-Tayyiba* or *Lashkar-e-Toiba* is an Islamist militant group which begun in Pakistan. See Mary Sissan. "Lashkar-e-Taiba: Islamist Militant Group," *Encyclopaedia Britannica* <https://www.britannica.com/topic/Lashkar-e-Taiba>, accessed December 18, 2018.

163. IMO, 2014, para 3.2.

164. *Ibid.*, para 8.

165. *Ibid.*, para 8.

166. IMO, Report of the Maritime Safety Committee on its Ninetieth Session, MSC 90/28, May 31, 2012, para 20.7.

167. IMO, 2016.

168. *Ibid.*, para 16, 19, 17, 21 and 25.

169. IMO, 2017.

170. *Ibid.*, Annex, para 1.

171. *Ibid.*, Annex, para 2

172. *Ibid.*, Annex, para 2.

173. *Ibid.*, Annex, para 11.
174. *Ibid.*, Annex, para 4 and 12.
175. *Ibid.*, Annex, para 6.
176. *Ibid.*, Annex, para 6.
177. *Ibid.*, Annex, para 6.
178. Yoshifumi Tanaka, the *International Law of the Sea* (2nd edn., Cambridge University Press 2015), p. 86.
179. UNCLOS, Art.19.
180. MH Nordquist et al. (eds), *United Nations Convention on the Law of the Sea 1982: a commentary* (Martinus Nijhoff, 1995) vol. II., p. 167.
181. Innocent passage may include stopping and anchoring as far as it is incidental to ordinary navigation or as rendered necessary by force majeure or by distress. See UNCLOS, Art.18 (2) and Art.19.
182. *Corfu Channel Case (Merits) (United Kingdom v. Albania)* [1969] ICJ Rep 4, 30; Tanaka, 2015, p. 88.
183. UNCLOS, Art.19 (2). the “non-exhaustive” character of Art 19 (2) is determined by the words “any other activity not having a direct bearing on passage.” See UNCLOS, Art.19 (2) (1). See also Tanaka, 2015, p. 88.
184. Johnson, 2004, p. 69.
185. This is in respect of navigational safety, environmental protection and resource conservation in addition to preventing infringement of their customs, fiscal, immigration or sanitary laws and regulations. See UNCLOS, Art. 21 (1). “Such laws and regulations shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards.” See UNCLOS, Art. 21(2).
186. UNCLOS, Art. 25 (1); Kari Hakapää, “Innocent Passage,” *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2015), para 19.
187. UNCLOS, Art. 24 (1).
188. UNCLOS, Art. 25 (2); K. Hakapaa and E. J. Molenaar, “Innocent Passage—Past and Present,” *Marine Policy* 23 (2) (1999), p. 131, [https://doi.org/10.1016/S0308-597X\(98\)00032-3](https://doi.org/10.1016/S0308-597X(98)00032-3).
189. Hakapaa and Molenaar, 1999, p. 131.
190. *Corfu Channel Case*, 1969, 28, para 3.
191. Japan admits the right of innocent passage for foreign warships but the passage of foreign warships carrying nuclear weapons through its territorial sea as not innocent. See a Kanehara, “The Japanese Legal System Concerning Innocent Passage of Foreign Vessels 1990–1998,” the *Japanese Annual of International Law* (1999), p. 105. See also Tanaka, 2015, p. 88. China and India insist on permitting passage of foreign warships through their territorial sea only after receiving a prior notification by such foreign State. India also includes submarines and other underwater vehicles within the ambit of warships. See Division for Ocean Affairs and Law of the Sea, “Declarations and Statements,” the *United Nations*, October 29, 2013, https://www.un.org/depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratificatio, accessed December 18, 2018. See also the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act 1976, Art. 4 (1) and 4 (2). on the Contrary, United States of America and the then Union of Soviet Socialist Republics agreed in 1989 that “all ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.” See “Uniform Interpretation of Rules on International Law Governing Innocent Passage” [23 September 1989] 28 ILM 1444. the UK deems it essential for ships “transiting Foreign Territorial Seas with Firearms Onboard” to respect and comply with coastal State laws and views “any activities which are classified in UNCLOS as prejudicial to the peace, good order or security of a State” to include “any exercise or practice with weapons.” See Department of Transport, “Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances,” para 6.9, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/480863/use-of-armed-guards-to-defend-against-piracy.pdf, accessed May 2 2019.
192. Hakapaa and Molenaar. 1999; Nordquist, 1995, p. 208.
193. UNCLOS, Art. 21; Hakapaa and Molenaar, 1999.

194. *Ibid.*
195. *Ibid.*
196. Anne Bardin, “Coastal State’s Jurisdiction Over Foreign Vessels,” *Pace International Law Review* 14(1) (2002), p. 27.
197. RP Anand, “Transit Passage and Overflight in International Waters” in J.M. Van Dyke, L.M. Alexander, and J.R. Morgan (eds.), *International Navigation: Rocks and Shoals Ahead?* (Honolulu, Law of the Sea Institute, 1988), p. 125.
198. UNCLOS, Art. 19 (2) (b).
199. *Ibid.*
200. UNCLOS, Art. 19 (2) (f).
201. the *State Rep. by the Inspector of Police, “Q” v. Mariya Anton Vijay* [2015] 9 SCC 294.
202. This is subject to relevant UNCLOS provisions. See UNCLOS, Art. 58 (1).
203. UNCLOS, Art. 58 (2).
204. Johnson, 2004, p. 97.
205. UNCLOS, Art. 56. However, this is subject to compliance with UNCLOS provisions. See UNCLOS, Art 56 (2).
206. UNCLOS, Art. 56 (2). Such States are to comply with the laws and regulations adopted by the coastal State “in accordance” with the provisions of UNCLOS and other compatible rules of international law. See UNCLOS, Art. 58 (3).
207. UNCLOS, Art. 73, Art. 73(1) and Art. 220; Wolfrum, 2009, p. 79.
208. D.P. O’Connell, the *International Law of the Sea* (Oxford University Press, 1984) vol. II, p. 578; Johnson, 2004, p. 119.
209. DJ Attard, the *Exclusive Economic Zone in International Law* (Oxford University Press, 1987), p. 179.
210. *Ibid.*
211. Division for Ocean Affairs and Law of the Sea, “Declarations and Statements,” *United Nations*, October 29, 2013, https://www.un.org/depts/los/convention_agreements/convention_declarations.htm#Bangladesh%20Upon%20ratification, accessed December 18, 2018.
212. Jon M. Van Dyke, “The Disappearing Right to Navigational Freedom in the EEZ,” *Marine Policy* 29 (2005), p. 107, 121, <https://doi.org/10.1016/j.marpol.2004.08.004>.
213. ISMG, 2011, para 7.2, 7.3 and 7.5.4
214. *Massimilano Latorre v. Union of India*, 2012 SCC Online Ker 31944, para 37.
215. UNCLOS, Art. 59.
216. Basel convention requires the exporting state to give prior notice to transit state of any proposed movement of hazardous wastes. See Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel, opened for signature on 22 Mar. 1989, entered into force on May 5, 1992) 1673 UNTS 126, Art. 6.
217. *M/V “Saiga” (No 2) (Saint Vincent and the Grenadines v. Guinea)* (Merits, Judgment of 1 July 1999) ITLOS Reports 1999, para 121.
218. UNCLOS, preamble.

Biographical Statement

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