



CORSAIRS IN THE CROSSHAIRS: A STRATEGIC PLAN TO ELIMINATE MODERN DAY PIRACY

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INTRODUCTION:

*Hijacked on the High Seas,¹ Pirates Free Tanker After Ransom,² Pirates
Outmaneuver Warships off Somalia,³ U.S. Captain Is Hostage of Pirates,⁴—*

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¹ Greta Anand & John W. Miller, *Hijacked on the High Seas*, WALL ST. J., Jan. 29, 2009, at A1, available at <http://online.wsj.com/article/SB123335651246634995.html> (detailing the hijacking and negotiation process for the ransom and return of the crew and ship of a Connecticut-based company).

² Mohammed Ibrahim & Graham Bowley, *Pirates Free Tanker After Ransom*, N.Y. TIMES, Jan. 10, 2009, at A6, available at www.nytimes.com/2009/01/10/world/africa/10somalia.html (describing the release of a Saudi-owned supertanker for \$3 million after approximately two months of being held hostage).

³ Jeffrey Gettleman, *Pirates Outmaneuver Warships off Somalia*, N.Y. TIMES, Dec. 16, 2008, at A6, available at www.nytimes.com/2008/12/16/world/africa/16pirate.html (stating that despite the addition of more than one dozen international warships to the region, pirates are not deterred and are, perhaps, actually emboldened).

⁴ Mark Mazzetti & Sharon Otterman, *U.S. Captain Is Hostage of Pirates*, N.Y. TIMES, April 9, 2009, at A6, available at www.nytimes.com/2009/04/09/world/africa/09pirates.html (marking the first time that an American-crewed ship was seized by pirates in the

these are just a small sampling of the headlines concerning the treacherous situation created by the actions of Somali pirates in the Gulf of Aden during the final months of 2008 and the beginning of 2009. According to the International Maritime Bureau's (IMB) Piracy Reporting Centre (PRC), the number of maritime hijackings and hostage takings in 2008 far surpassed any previously recorded annual tally since the IMB was established in 1992.⁵ In 2008 there were 293 incidents of piracy worldwide, with pirates hijacking 49 ships, firing upon 46, and taking 889 crew members hostage. Between all of these incidents, 32 crew members were injured, 11 murdered, and 21 missing now presumed dead.⁶ The pirates have also become increasingly violent—they used guns in 132 incidents in 2008 as opposed to in only 72 the year before. And the attackers are also becoming more daring, attacking ships further from land and hijacking at every opportunity.⁷ This surge in piracy is largely due to the increased lawlessness in the Gulf of Aden, which, with 111 incidents, demonstrated over a 200% increase compared with 2007.⁸

There are several apparent reasons for this recent increase in piracy. First, piracy pays. In December of 2008 the United Nations ("U.N.") estimated that governments, companies and individuals paid as much as \$120 million in ransom to Somali pirates that year.⁹

area, but the 6th hijacking of a commercial ship that week). In fact, it is apparently the first time an American-flagged ship has been seized by pirates off Africa in approximately two centuries. Edmund Sanders & Julian E. Barnes, *U.S. Ship Captain Held By Somali Pirates*, L.A. TIMES, April 9, 2009, at A1, available at <http://articles.latimes.com/2009/apr/09/world/fg-somali-pirates9>.

⁵ The IMB is a specialized division of the International Chamber of Commerce and is based in the U.K.

⁶ While the number of times vessels have been fired upon, hijacked, and had hostages taken has increased dramatically, the number of persons injured and killed has remained relatively stable over the last five years. See Int'l Chamber of Commerce, Int'l Mar. Bureau, *Piracy and Armed Robbery Against Ships - Annual Report 2008*, at 13 tbls.7, 8 (Jan. 2009), available at http://www.icccs.org/index.php?option=com_fabrik&view=form&fabrik=18&random=0&Itemid=92 (electronic report available on request).

⁷ *Id.* at 26.

⁸ Int'l Chamber of Commerce, Commercial Crime Servs., *IMB Reports Unprecedented Rise in Maritime Hijackings*, Jan. 16, 2009, http://www.icccs.org/index.php?option=com_content&view=article&id=332:imb-reports-unprecedented-rise-in-maritime-hijackings&catid=60:news&Itemid=51.

⁹ Gettleman, *supra* note 3.

Somalia is a largely destitute country with a per capita GDP of \$600.¹⁰ It lacks a functioning government and is beset by tribal warfare. As a result, piracy appears to be one of the most promising career paths available. Entire clans and villages now subsist off piratical profits won at sea.¹¹ The U.N. Somalia Monitoring Group has recently reported that some pirate groups now “rival or surpass” the Somali government in terms of both military capabilities and resources.¹² The entire budget of Puntland, a region where one third of Somalia’s population lives, only approached 20% of piracy revenues gleaned from Somali waters in 2008.¹³

Second, while the “profession” has become increasingly lucrative, pirates have discovered that the danger of getting caught and held accountable is low. Most countries are unwilling to prosecute Somali pirates in their court systems despite the fact that pirates are recognized to be “enemies of mankind” and subject to universal jurisdiction.¹⁴ There have been several incidents where a country’s navy has captured pirates but has been unable or, more accurately, unwilling to hold or

¹⁰ CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK : AFRICA: SOMALIA (2009), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last updated May 14, 2009).

¹¹ Gettleman, *supra* note 3 (“Entire clans and coastal villages now survive off piracy, with women baking bread for pirates, men and boys guarding hostages, and others serving as scouts, gunmen, mechanics, accountants and skiff builders. Traders make a nice cut off the water, fuel and cigarettes needed to sustain such oceangoing voyages. Pirates are known as the best customers of all.”).

¹² U.N. Security Council, *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1811*, para. 122, at 12, U.N. Doc. S/2008/769 (Dec. 10, 2008), available at <http://www.unhcr.org/refworld/docid/494900240.html>.

¹³ *Id.* at para. 127.

¹⁴ Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain*, 80 NOTRE DAME L. REV. 111, 135 (2004).

prosecute them.¹⁵ Instead, the navy merely disarms and returns the captured pirates to shore, imposing at most a few days' delay on their activity, and more importantly, sending the message to pirates that punishment will be minimal if a first-world country captures them.¹⁶ In sum, piracy for Somalis is currently a high reward, low risk pursuit.

The current attempt at a solution—a cadre of international warships patrolling the Gulf of Aden from most of the world's leading powers¹⁷—is expensive and ineffective.¹⁸ While a similar tactic has been successful in the Strait of Malacca in Southeast Asia in recent years, the factors that have allowed for success there are not present in Somalia.¹⁹ The Strait of Malacca is much narrower,

¹⁵ Paulo Prada & Alex Roth, *On the Lawless Seas, It's Not Easy Putting Somali Pirates in the Dock*, WALL ST. J., Dec. 8, 2008, at A16, available at <http://online.wsj.com/article/SB122903542171799663.html> (detailing the Royal Danish Navy's capture of a group of Somali pirates in September 2008, and their subsequent release on land six days later, due to confusion about whether they would be able to convict them); Philippe Gohier, *Why Are We Setting Pirates Free?*, MACLEANS, Apr. 30, 2009, <http://www2.macleans.ca/2009/04/30/why-are-we-setting-pirates-free> (discussing the capture and unconditional release on April 25th of seven pirates by the Canadian vessel HMCS Winnipeg); Elise Labott, *Clinton Says Releasing Pirates Sends 'Wrong Signal'*, CNN, April 20, 2009, <http://www.cnn.com/2009/POLITICS/04/20/clinton.pirates> ("Because the crew was on a NATO mission and not working under the European Union, the Dutch crew lacked the jurisdiction to hold the pirate . . . NATO has not provided that authority.").

¹⁶ Kenya has recently agreed to try pirates, but it is difficult to evaluate the impact that this has had due to the newness of the arrangements. *Kenya 'Will Try Somali Pirates'*, BBC NEWS, April 16, 2009, <http://news.bbc.co.uk/2/hi/8003031.stm>.

¹⁷ Mark Mazzetti & Sharon Otterman, *Standoff With Pirates Shows U.S. Power Has Its Limits*, N.Y. TIMES, Apr. 9, 2009, at A1, available at www.nytimes.com/2009/04/10/world/africa/10pirates.html ("The Gulf of Aden, one of the world's busiest and most important shipping lanes, is patrolled by an anti-piracy flotilla from the European Union and an American-led coalition of ships, plus warships from Iran, Russia, India, China, Japan and other nations.").

¹⁸ Gettleman, *supra* note 3 ("More than a dozen warships from Italy, Greece, Turkey, India, Denmark, Saudi Arabia, France, Russia, Britain, Malaysia and the United States have joined the hunt. And yet, in the past two months alone, the pirates have attacked more than 30 vessels, eluding the naval patrols, going farther out to sea and seeking bigger, more lucrative game, including an American cruise ship and a 1,000-foot Saudi oil tanker.").

¹⁹ Michael Schuman, *How to Defeat Pirates: Success in the Straits*, TIME.COM, April 22, 2009, <http://www.time.com/time/world/article/0,8599,1893032,00.html>

and the surrounding governments—Indonesia and Malaysia—are, unlike Somalia, strong and highly motivated to keep their shipping lanes free from danger.²⁰ In contrast, the vastness of the Gulf of Aden and the limited resources and wills of most governments whose ships pass through the gulf ensure that Somali pirates face fewer obstacles than their Southeast Asian counterparts.²¹

In such an environment, a few shipping companies have hired security companies such as Blackwater to travel with them.²² When responding with full force, these private security forces have been successful in fending off attacks and saving lives and cargo on the ships they defend.²³ To date, however, these efforts have been limited because of concerns about legal liability arising from defensive action, as well as the potential for increased casualty and insurance rates. Under current international law, private security forces may lack legal immunity for actions taken against pirates.²⁴ Consequently, they hesitate to engage in the necessary proportional response to an attack, making them ineffective in stopping pirate attacks on the ships that they accompany. For example, in November 2008, Somali pirates successfully hijacked a chemical tanker flying the Liberian flag despite the presence of a security team aboard. The private forces failed to ward off the pirates due to an uneven match-up: they used non-lethal means, while the pirates attacked by wielding automatic weapons and rocket propelled grenades.²⁵

Moreover, pirates cannot simply be avoided. While major shipping companies have begun rerouting their ships via the Cape of

²⁰ *Id.*

²¹ *Id.*; Apparently the U.S. has introduced the use of drones to fight piracy with the likely aim of covering such a vast space. Although this new tactic suggests promise, it is not clear how effectively navy ships will be able to reach potential pirate ships that have been spotted. See Andrew Njuguna, *U.S. Uses UAVs to Hunt Somali Pirates on Shore*, NAVY TIMES, Feb. 15, 2009, http://www.navytimes.com/news/2009/02/ap_piracy_021509/.

²² August Cole, *Blackwater Plans Effort Against Piracy*, WALL ST. J., Dec. 3, 2008, at A11, available at <http://online.wsj.com/article/SB122826117332273945.html>.

²³ *Pirates Attack Spanish Fishing Vessel*, ASSOCIATED PRESS, Nov. 29, 2009, <http://www.foxnews.com/story/0,2933,577646,00.html>; Nicole Winfield, *Cruise Ship Fends Off Pirate Attack With Gunfire*, ASSOCIATED PRESS, April 26, 2009, <http://www.msnbc.msn.com/id/30419164>.

²⁴ See *infra* Part IV.C.1.

²⁵ Nicholas Kulish, *Legal Hurdles in West Slow Pursuit of Pirates*, N.Y. TIMES, at A8, Nov. 29, 2008, available at <http://www.nytimes.com/2008/11/29/world/europe/29pirates.html>.

Good Hope to avoid the Gulf of Aden and the Suez Canal,²⁶ this solution is significantly more expensive and may eventually encourage piracy elsewhere. According to a kidnap and ransom underwriter: "the success of the pirates off Somalia is also a key factor behind the risk in attacks elsewhere, in areas such as Nigeria and South America."²⁷ Further, if the Gulf of Aden was shut as a result of the piracy, many of the world's vessels would have to take longer routes, increasing freight rates, shipbuilding costs, and damaging the economies of many countries. Global piracy already costs transport vessels \$13–15 billion a year²⁸ and this number will only grow as shippers are forced to take yet more evasive action.

This note proposes that the solution to the rapidly escalating problem of piracy is for the U.S. government to issue the license equivalent of historical letters of marque to private actors, thereby granting them increased legal immunity and political approval to use force to protect private vessels against piracy. Letters of marque were legal commissions granted by Congress to private citizens granting them cover to engage enemies of the country. At the same time, it is important for the U.S. to regulate the forces that they sanction and this note will discuss the current state of such regulation. The legal background of authority to address pirates, emanating from customary, international, and municipal law demonstrates that, despite some potential hurdles, this proposed solution is a legally valid and efficient option.

After a survey of the applicable law on the question of ridding the seas of pirates, this note will review both legal academic literature and policy suggestions addressing how to appropriately resolve the crisis. The note will then present the proposal outlined above, suggesting refinement of what has already been discussed by other scholars, and defending it from foreseeable objections. Finally, the note concludes by noting how this argument fits into a larger discussion about how private military forces (PMFs) have historically performed, and can continue to perform, core functions

²⁶ *Pirate Attacks Forcing Shipping Companies to Change Routes*, CBC NEWS, Nov. 20, 2008, <http://www.cbc.ca/world/story/2008/11/20/pirates-somalia.html#ixzz0pG8IoWmL>.

²⁷ *Report of the Monitoring Group on Somalia*, *supra* note 12, at para. 130, at 28–29 (citations omitted).

²⁸ Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 75 (2007).

of U.S. national security. This note does not consider historical letters of marque to create an analytic framework or necessary precedent. Rather, they are discussed as a useful past analogy demonstrating that the use of PMFs to combat pirates should not be thought of as controversial from the standpoint of American law.

II. WHO CAN CAPTURE PIRATES?

A. Piracy Defined

Traditionally, pirates have been considered "*hostis humani generi*" (enemies of mankind),²⁹ because a pirate "commits hostilities upon the subjects and property of any or all nations, without regard to right or duty, or any pretense of public authority."³⁰ Despite this common understanding, however, there has never been a precise international agreement as to who exactly qualifies as a pirate under customary law. There exist questions of whether *animus furandi* (intent to rob) is a necessary element, or whether those belligerents acting against their own government for political purposes or against their own shipmates could equally qualify, even if their motive was not financial.³¹ This note limits itself to acts universally recognized as piracy, such as the armed boarding of ships for the purpose of robbery, hijacking, and/or kidnapping.³²

B. State Action

The early widespread condemnation of piracy, and the perception of it as a common problem, allowed for a unique understanding

²⁹ ALFRED P. RUBIN, *THE LAW OF PIRACY* 17 n.61 (2d ed., Transnational Publishers, Inc. 1998) (1988). This paraphrase was coined from the writings of Cicero.

³⁰ *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844) (quoting Justice Joseph Story).

³¹ Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Security*, 82 AM. J. INT'L L. 269, 272-73 (1988).

³² The earliest definition in the English language of the word "pirate" found in the Oxford English Dictionary of 1387 describes them narrowly and succinctly as "see theves [sea thieves]." See RUBIN, *supra* note 29, at 19-20 n.64. In the well-known American piracy case, *United States v. Smith*, Justice Story states that "[t]here is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature . . . all writers concur, in holding, that robbery . . . upon the sea, *animo furandi*, is piracy." See 18 U.S. (5 Wheat.) 153, 161 (1820).

that all nations had “universal jurisdiction” to capture, prosecute, and then execute pirates, regardless of where the acts of piracy occurred and who the victims were. In fact, piracy was *the* crime for which universal jurisdiction was created, and existed as the only crime to which this legal principle applied for hundreds of years.³³ Blackstone wrote that while offenses against ambassadors and bearers of safe-conducts could only be punished by the nation where the offense occurred, “every community hath a right . . . to inflict . . . punishment” upon pirates.³⁴

Recent international agreements have codified the customary understanding that pirates are subject to universal jurisdiction. The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 (SUA Convention),³⁵ to which the United States and 133 other nations are signatories,³⁶ applies to an attack against any non-military vessel and covers the type of piracy herein discussed—violent acts of ship seizure occurring in international waters.³⁷ Once these acts occur, the SUA Convention allows for states to establish jurisdiction over such piratical offenses when the offense is committed against a ship flying its flag or when one of its nationals is “seized, threatened, injured or killed.”³⁸ It further compels states in the territory where the act occurred to either

³³ Kontorovich, *supra* note 14, at 135.

³⁴ *Id.* (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *71)

³⁵ Int’l Maritime Org. [IMO], Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 672, 1678 U.N.T.S. 201 [hereinafter SUA Convention].

³⁶ U.S. Dep’t of State, Office of the Coordinator for Counterterrorism, *International Conventions and Protocols on Terrorism*, Apr. 30, 2007, <http://www.state.gov/s/ct/rls/crt/2006/83238.htm>.

³⁷ See SUA Convention, *supra* note 35, art. 3 (“Any person commits an offence if that person unlawfully and intentionally: seizes or exercises control over a ship by force or threat thereof or any other form of intimidation.”); *Id.* at art. 4 (“This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.”). Once these acts occur the Convention allows for states to establish jurisdiction over such piratical offenses when the offense is committed (among other instances) “against or on board a ship flying the flag of the State at the time the offence is committed; or during its commission a national of that State is seized, threatened, injured or killed.” *Id.* at art. 6.

³⁸ *Id.* at art. 6.

try the pirates or extradite them to countries that will.³⁹ Thus, under the SUA Convention, states have certain affirmative duties to either prosecute or extradite pirates.

Importantly, two other Conventions may have implications for state action against piracy. Article 107 of the U.N. Convention on the Law of the Sea (UNCLOS) appears to limit the ability to capture pirates to states using military force: "A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and *authorized* to the effect."⁴⁰ However, the United States has refused to ratify the treaty due to objections to certain other provisions,⁴¹ and thus is not bound by this requirement. Even if the United States were bound to follow UNCLOS as part of customary international law,⁴² the language of the Convention does not necessarily prove to be a hurdle to private action because it does not prevent the United States from authorizing private vessels to act in government service.⁴³

³⁹ See *id.* at art. 10.

⁴⁰ United Nations Convention on the Law of the Sea, Dec. 4, 1982, U.N. Doc A/Conf.62/122, 1833 U.N.T.S. 397, 21 I.L.M. 1245 (1982) (emphasis added) (entered into force Nov. 16, 1994) [hereinafter UNCLOS].

⁴¹ Richard G. Lugar, U.S. Leadership in the World and the Law of the Sea, Frequently Asked Questions About the Law of the Sea Convention, <http://lugar.senate.gov/sfrc/questions.html>, available at <http://webcache.googleusercontent.com/search?q=cache:g4jNHIH9wJ:lugar.senate.gov/sfrc/questions.html+Richard+G.+Lugar,+U.S.+Leadership+in+the+World+and+the+Law+of+the+Sea,+Frequently+Asked+Questions+About+the+Law+of+the+Sea+Convention&cd=1&hl=en&ct=clnk&gl=us&client=firefox-a> (President Reagan accepted all of the Convention's provisions except for those dealing with deep seabed mining.).

⁴² Bahar, *supra* note 28, at 10 n.28 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, at Pt. V, introductory note (1987)).

⁴³ Similar wording in the 1958 Convention on the High Seas, to which the United States is a party, also presumptively bans captures of pirates by non-military vessels. Article 21 reads: "A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect." In both of these Conventions the first part of the article is prohibitory, but the second suggests that the United States need not only utilize ships from its navy for the task of hunting pirates, but could *authorize* vessels to act in government service. See Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2313, 450 U.N.T.S. 82 [hereinafter High Seas Convention].

Even reading these provisions as denying the United States the right to authorize private *offensive* action, the inherent right to self-defense and even capture of pirate ships by non-military vessels was explicitly recognized by the Special Rapporteur,⁴⁴ when questioned by several countries' delegates during the drafting of the High Seas Convention.⁴⁵ Further, an 1819 U.S. law titled "Resistance of Pirates by Merchant Vessels," can be read to allow for a vigorous defense that involves capture and suggests that private forces can act as deterrents and enforcers against piracy:

The commander and crew of any merchant vessel of the United States, owned wholly, or in part, by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel so owned, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same; and may also retake any vessel so owned which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States.⁴⁶

This law, while not authorizing merchant vessels to patrol the waters for pirates, allows for forceful action to be taken in self-defense, including subduing and capturing pirates and reclaiming

⁴⁴ Special Rapporteur is a title given to individuals working on behalf of the United Nations who bear a specific mandate from the U.N. Human Rights Council (or the former U.N. Commission on Human Rights, UNCHR), to investigate, monitor and recommend solutions to human rights problems. See Wikipedia.org, Special Rapporteur, http://en.wikipedia.org/wiki/Special_Rapporteur (last visited June 2, 2010).

⁴⁵ *Summary Records of the 8th Session*, [1956] 1 Y.B. INT'L L. COMM'N 48, U.N. Doc. A/CN.4/SR, 434/1956. ("Mr. FRANCOIS, Special Rapporteur, said that the Government of the Union of South Africa had asked whether it should not be stipulated that a vessel which had repulsed the attack of a pirate might seize the pirate vessel pending the arrival of a warship. As he had stated in paragraph 140 of the addendum to his report (A/CN.4/97/Add.1), such a stipulation was unnecessary because provisional seizure of that kind was no more than legitimate self-defence.")

⁴⁶ 33 U.S.C. § 383 (2000).

property. Because it does not appear that the SUA Convention or UNCLOS prevent private vessels from taking defensive action nor bar governments from authorizing private ships to affect captures on its behalf, there is no international barrier to continued use of this law. What does pose a problem to implementation, however, is the current practical reality of the situation. Crews rarely use self-defense, and most are unarmed, meaning that most action against pirates is currently undertaken by state actors.

C. Letters of Marque Precedent – Private Citizens Enter the Mix

Historically, state navies shared the burden of protecting their country's interests at sea with the seafaring public. For example, letters of marque were legal commissions granted by Congress to private citizens. The letters licensed their participation in hostile actions against the military, commercial, and personal vessels of an enemy government and her people. The use of letters of marque is deeply embedded in the history of the United States. European countries licensed privateers beginning in the Middle Ages,⁴⁷ and the U.S. Constitution preserved that practice, explicitly granting Congress the power to "declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."⁴⁸ The United States actively and effectively exercised this privilege to employ privateers during the War of 1812 against England by commissioning several hundred privateers to capture enemy vessels and interfere with enemy commerce.⁴⁹ The number of privateer vessels dwarfed the mere twenty-two U.S. government ships, and captured eight times as many enemy vessels.⁵⁰ Letters of marque were also issued by the Confederacy during the Civil War, and were grudgingly accepted by the Union.⁵¹ The letters have also historically been issued to fight

⁴⁷ See Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1, 3 (2007).

⁴⁸ U.S. CONST. art. I, § 8, cl. 11.

⁴⁹ See Parrillo, *supra* note 47, at 3–4.

⁵⁰ *Id.* at 3.

⁵¹ The Union did not accept the Confederacy as a separate nation and thus did not accept the letters as legally valid. However, the Union held off treating privateers as pirates because the Confederacy threatened to retaliate against the Union's prisoners of war if they did. See CRAIG L. SYMONDS, *LINCOLN AND HIS ADMIRALS* 42–44 (2008).

piracy.⁵² By 1704, an Englishman needed a commission from his government in order to legally “hunt” pirates.⁵³

When the Declaration of Paris—an international treaty proposing a ban on the use of privateers—came to the fore in 1856, the United States refused to sign it, reserving its right to issue letters of marque.⁵⁴ In fact, even after the Treaty of Paris was signed by all of the major European maritime states,⁵⁵ the United States passed further laws emphasizing its intent to continue to rely upon and approve letters of marque:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all domestic and foreign wars the President of the United States is authorized to issue to private armed vessels of the United States, commissions, or letters of marque and general reprisal in such forms as he shall think proper, and under the seal of the United States, and make all needful rules and regulations for the government and conduct thereof, and for the adjudication That the authority conferred by this act shall cease and terminate at the end of three years from the passage of this act.⁵⁶

⁵² See RUBIN, *supra* note 29, at 112 (“[I]n 1511 King Henry VIII . . . commissioned John Hopton to ‘seize and subdue all pirates wherever they shall from time to time be found; and if they cannot otherwise be seized, to destroy them, and to bring all and singular of them, who are captured, into one of our ports, and to hand over and deliver them . . . to our commissioners.’”). This tradition continued in the United States. See ARTICLES OF CONFEDERATION, art. VI, cl. 5 (prohibiting states from engaging in war or issuing letters of marque and reprisal “unless such State be infested by pirates”); see also Robert P. DeWitte, *Let Privateers Marque Terrorism: A Proposal for a Reawakening*, 82 IND. L.J. 131, 133 (2007) (“Government commissions encompassed objectives spanning broadly from protection of friendly merchant shipping, disruption of enemy shipping to battling enemy piracy.”).

⁵³ RUBIN, *supra* note 29, at 116.

⁵⁴ C. Kevin Marshall, Note, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 954 n.7 (1997).

⁵⁵ See RUBIN, *supra* note 29, at 198 n.231.

⁵⁶ An Act concerning Letters of Marque Prizes, and Prize Goods, ch. LXXXV, 12 Stat. 758 (1863) (This act was passed on Mar. 3, 1863, and provided that the authority it conferred would “cease and terminate” three years after its passage).

Moreover, even if one were to argue that the Declaration of Paris has become customary law, it is important to observe that many countries that signed it have continued the practice of issuing letters of marque in the modern era.⁵⁷

Despite Congress's plenary power to issue commissions, it usually has done so with certain restrictions. For example, during the Revolutionary War, Congress issued commissions but specifically warned privateers that any killing "in cold blood," maiming, or torturing would result in severe punishment, and further "warned that any act contrary to instructions might not only lead to forfeiting the bond but also to liability for damages."⁵⁸ Judicial oversight was maintained and privateers had to clear their captures in Prize courts as legitimately taken targets.⁵⁹ This tradition of judicial oversight began in England as early as the 1500s, when Queen Elizabeth authorized various high officials to license privateers to capture pirates while stipulating that no change in title or property could occur until the items had first been submitted to an English court for "condemnation" or some equivalent legal proceeding.⁶⁰ In addition to the power to Congress to issue letters of marque, the Constitution also bestowed upon it the power "To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."⁶¹ Privateers were historically also subject to

⁵⁷ See Jacob W.F. Sundberg, *Piracy: Air and Sea*, 20 DEPAUL L. REV. 337, 353 (1971) ("Even after Spain, in 1908, had acceded to the Declaration of Paris of 1856 which outlawed privateering in naval war between parties to the treaty, the opinion was advanced that it is perfectly possible under general international law to issue letters of marque."). The British navy utilized prize money to reward those who fought for them in World War II, with the British Prize Court in London awarding about \$40 million dollars. *Id.* at 354.

⁵⁸ Marshall, *supra* note 54, at 962 (noting that those who received commissions were required to post a bond promising not to depart from his commission to capture British vessels nor to depart from Congress's instructions).

⁵⁹ DeWitte, *supra* note 52, at 148 (citing HENRY SUMNER MAINE, INTERNATIONAL LAW 96 (2d ed. 1894) (1887) and HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW §§ 378-88 (8th ed. 1888) (1836)).

⁶⁰ See RUBIN, *supra* note 29, at 112.

⁶¹ U.S. CONST. art. I, § 8, cl. 10.

criminal prosecution if they exceeded their commissions.⁶² Further, those who were issued licenses had to post bonds as sureties.⁶³

D. In Practice

Currently, a handful of states are using their navies as the predominant mechanism to confront piracy. As is evident from the statistics previously extolled of consistent and yet more daring hijackings, this strategy is not working. The Gulf of Aden is simply too vast and contains too many vessels for the large naval warships of world powers to patrol with a consistent deterrent effect. For example, during the April 8, 2009 attack on the American-flagged vessel *The Maersk Alabama*, the closest naval patrol vessel was over 300 nautical miles away, meaning there was no way it could have arrived in time to prevent the attack.⁶⁴ Even the spokesperson for the U.S. Fifth fleet, which patrols the Arabian Gulf, Red Sea, Gulf of Oman and parts of the Indian Ocean,⁶⁵ acknowledged that “we patrol an area of more than one million square miles. The simple fact of the matter is that we can’t be everywhere at one time.”⁶⁶

Further, despite the fact that universal jurisdiction allows countries to arrest and prosecute any and all pirates aggressively, universal jurisdiction prosecutions for piracy are almost nonexistent. In fact, a leading scholar on the laws of piracy has found only a handful of universal jurisdiction prosecutions of pirates since the 1700s.⁶⁷ The reason for this dearth of prosecutions is clear: as rational, self-interested entities, countries are disincentivized to expend the time, treasure, and political capital in deterring, capturing, and trying pirates who do not affect their own commerce or citizens, creating a classic collective action problem. And even when countries do work together to construct judicial mechanisms to try pirates—as the

⁶² William R. Casto, *Regulating the New Privateers of the Twenty-First Century*, 37 RUTGERS L.J. 671, 679 (2006).

⁶³ Parrillo, *supra* note 47, at 48.

⁶⁴ Mazzetti & Otterman, *supra* note 4.

⁶⁵ Official website for The United States Fifth Fleet, <http://www.cusnc.navy.mil> (last visited Apr. 11, 2009).

⁶⁶ Mazzetti & Otterman, *supra* note 4.

⁶⁷ See RUBIN, *supra* note 29, at 326.

United States and Britain have recently agreed to do with Kenya⁶⁸ — the burden of maintaining and utilizing warships in the area still remains.

III. COMPETING THEORIES OF RESOLUTION

Proposals to address the pirate problem fall into two main schools of thought: regional coordination and private action. The approach to resolving the problem by utilizing the regional coordination of navies is currently the status quo in terms of both what is occurring on the ground and what the seeming majority of scholars suggest is the best way to subdue pirates in the modern world. This section will explain why the regional coordination approach fails, as well as the way in which the private market, acting under the auspices of the government and within certain restrictions, could more efficiently resolve this gap.

A. Regional Coordination of Navies

Michael Bahar, a Lieutenant in the U.S. Navy and previously Staff Judge Advocate for the *NASSAU* Strike Group, suggests that “the only key to successful maritime security over the vast oceans is multilateralism.”⁶⁹ He provides charts to illustrate a rather unsurprising correlation: the more pronounced the military presence in an area, the more freely ships will move through the region.⁷⁰ Mr. Bahar, within his conception of a military response, is cognizant of practicality. Though he strongly advocates the use of a public military force, he recognizes that it would be better to employ smaller, faster craft as opposed to the large traditional naval ships: “[a] complement of Marines or SEALs on smaller, faster (and obviously far less expensive) armored patrol boats would be the ideal” for anti-piracy missions.⁷¹ However the impetus behind this suggestion seems less to do with efficiency and rather more to do with the fact that large ships with intelligence-gathering capabilities would likely arouse the suspicions of regional coastal states. Regardless, if one

⁶⁸ Njuguna, *supra* note 21 (stating Kenya has been designated the forum for trial of several pirates).

⁶⁹ Bahar, *supra* note 28, at 7.

⁷⁰ *Id.* at 8.

⁷¹ *Id.* at 81.

were to stay solely within the military paradigm, Mr. Bahar's suggestion would be sensible. However, cabining the solution to the piracy quandary to the sphere of public force is unnecessarily limiting.

While multilateralism suggests a spirit of harmony and a collective bolstering of strength, it is not clearly the most practical or cost-effective way to resolve the piracy problem. Utilizing public navies geared for war to fight against criminals with simplistic motives of robbery and plunder does not necessarily make sense. The public weal is only so great, and assigning the precious resources of an already over-stretched U.S. military that is fighting wars on multiple fronts is not the only, or for that matter, the best solution. Most importantly, it has so far proven to simply not work. In April 2009, the first American-crewed ship was hijacked (at least the 6th commercial ship that week) off the Horn of Africa, demonstrating that pirates continue to operate with near impunity despite the vigorous efforts of many nations to deter them with naval warship patrols.⁷² Thus, relying entirely upon the military not only wastes resources but also leads to poor results.

Prior to the emergence of the current crisis, certain scholars had also suggested that regional coalitions be employed to stamp out piracy, not purely because they would be the most effective, but because of concerns about using any non-public force. One scholar has promoted the use of regional coalitions subsidized by an international shipping tax.⁷³ He expresses concern that arming private ships would lead to further injury and death, and thus defensive measures should be left to the military.⁷⁴ Another scholar finds the use of public force preferable to the use of private security forces because he is concerned that defensive arming will spur an arms build-up, port laws would prevent entry of armed ships, and that costs of training crews would be prohibitively high and that cargoes could explode in shoot-outs.⁷⁵

⁷² See Mazzetti & Otterman, *supra* note 4.

⁷³ Lawrence J. Kahn, *Pirates, Rovers, and Thieves: New Problems with an Old Enemy*, 20 TUL. MAR. L.J. 293, 325 (1995).

⁷⁴ *Id.* at 325.

⁷⁵ Terence Fokas, *The Barbary Coast Revisited: The Resurgence of International Maritime Piracy*, 9 U.S.F. MAR. L.J. 427, 447-48 (1997).

All of this latter scholar's concerns are addressed by the strategic plan herein proposed. First, worry that arming private ships would cause an arms race with pirates is irrational because it suggests that ships should never defend themselves. Here, pirates are already using machine guns and RPGs and there is no guarantee that the crew will not be harmed even if they make an immediate surrender. Although pirates have a vested interest in keeping the crew unharmed in order to ransom their lives along with the ship, there have been incidents in the recent past where crews have been hurt or murdered by pirates despite not offering any resistance.⁷⁶ There is no evidence to suggest that a defensive response will result in higher crew casualties, and certainly principles of deterrence would suggest the reverse. If ships were to consistently sail unprotected, pirate aggressors would only be further emboldened with the knowledge that they could capture a ship with impunity, since there would be no chance it or its escort would fire upon them as they approach. In any case, employing third parties to do the defensive maneuvering can significantly deflate this concern because ships and their cargo can effectively stay out of any potential clash. Given the presence of an armed escort, pirates would be foolish to attack them. In regards to training, private forces would already be trained, and thus they would already have the requisite knowledge and experience to avoid encounters and minimize the loss of life and cargo.

The argument that American shippers should rely upon a multilateral force is very unattractive because each country has a vested interest in protecting its own citizens. An organized defensive force seems nearly impossible given that the situation is subject to a serious collective action problem. It is far better for American shippers and crew not to have to depend upon China or Denmark to provide for their safety on the high seas and instead to be able to rely upon the security provided by an individual private escort. Lastly, the idea of a nebulous global shipping tax is poorly thought out—

⁷⁶ *Piracy and Armed Robbery Against Ships*, *supra* note 6, at 56-57 (reciting an attack where a fishing master was shot offering no resistance); Tansa Musa, *Pirates Kill Greek Sailor, Rob Crew off Cameroon*, REUTERS, Jan. 26, 2009, <http://www.reuters.com/article/latestCrisis/idUSLQ478339> (detailing the murder of a Greek shipping captain off the coast of Cameroon in late January 2009).

having an international organization distribute the tax to “bolster anti-piracy naval patrols” will likely bring enormous administrative costs, face a backlash from shippers co-opted into it, and be subject to the corruption and mismanagement that has historically plagued international organizations.

B. Private Security

Despite the problems suggested by the scholars discussed above, several writers have nonetheless advocated the use of private security forces. One writer argues that the U.N. should authorize a bounty hunter system to control piracy.⁷⁷ While this note endorses the idea of employing private forces, the U.N.-sanctioned bounty hunter proposal is misguided. It seems unrealistic that the U.N. would ever sanction, let alone issue, a bounty hunter resolution. The number of states with conflicting agendas and values would simply overwhelm any attempt to successfully pass such a resolution. Additionally, even if the U.N. were to somehow agree to such a system, the pitfalls of allowing bounty hunters to roam the seas capturing suspected pirates far outweigh the benefits. A bounty hunter by nature seeks out and aggressively goes after criminals. This type of system would dramatically increase the likelihood of needless casualties and false identifications. After all, pirates are not in fact pirates until they commit an act of piracy, and seeking out potential pirate crews simply would not work. The private security teams I propose would perform merely a defensive function, accompanying ships and defending them from impending attack. There would be no mistake that they are in fact defending against pirates when the ship is attacked. Needless potentially fatal expeditions to find and capture suspected pirates would not occur.

More closely aligned to what this note suggests, but applied to the problem of terrorism, is the suggestion of bringing back letters of marque to fight terrorism.⁷⁸ Robert DeWitte’s piece reviews certain problems of employing such a system and proposes a regulatory structure to limit these issues. By utilizing a

⁷⁷ See generally Brooke A. Bornick, Comment, *Bounty Hunters and Pirates: Filling in the Gaps of the 1982 U.N. Convention on the Law of the Sea*, 17 FLA. J. INT’L L. 259 (2005).

⁷⁸ DeWitte, *supra* note 52.

regulatory framework similar to what he outlines⁷⁹ for monitoring the implementation of traditional letters of marque, but also increasing its robustness and applying it to a more circumscribed authorization of action, my proposal will deliver a higher level of comfort and decreases the likelihood of any abuses arising out of a private security initiative. The next section will lay out the specifics of my proposed private security retainer system.

IV. THE CASE FOR A RETURN TO THE USE OF PRIVATE SECURITY AT SEA

In order to address the collective problem of piracy in an efficient manner that would avoid the use of U.S. armed forces and thus increase public support, the United States should revive its prior practice of issuing letters of marque. Specifically, the United States should subsidize (to the extent determined by Congress)⁸⁰ and regulate the hiring of private military forces (PMFs) to accompany American commercial ships on their voyages through the treacherous waters of the Gulf of Aden. Through carefully constructed contracts and rigorous regulation and oversight, the U.S. can leverage the private sector's desire

⁷⁹ DeWitte suggests that Congress adapts the requirements of various states in regards to bounty hunters, such that privateers must "hold a high school diploma; exceed twenty-one years of age; pass a drug test, psychological examination, and written examination; and complete a training program" among other things, like not being a convicted felon. *Id.* at 146. He further suggests that all privateers be registered with Congress. He then proposes that there be judicial review of whether the capture was lawful and hence whether a reward should be paid. *See id.* at 146-48. The system I advocate would of course be different in that the privateers would be paid ahead of time on retainer and would not actually capture pirates, but merely deter them. The judicial system would exist simply as a check should any suspect armed conflict occur. However, the requirements of basic competence and clean backgrounds, similar to those required by the military, are an important idea.

⁸⁰ Whether and to what extent the government is willing to subsidize these ventures is right now being debated by Congress, most recently in the Senate hearing *Piracy on the High Seas: Protecting Our Ships, Crews and Passengers: Hearing Before the S. Comm. on Commerce, Science, & Transportation*, 111th Cong. (2009), available at <http://commerce.senate.gov/public/index.cfm?p=Hearings>.

and funds to deter piracy while still demonstrating its commitment to eliminating piracy as a world power.⁸¹

A. Employing Private Actors for Security Work is Already an Established Norm

Despite its past use of private actors in military endeavors, by the beginning of the 20th century the West became mainly, if not entirely, reliant on professionalized, bureaucratized public armies.⁸² Although much of the world has come to expect the state to have a monopoly on the use of force, the use of private actors has never entirely died out, and, in fact, has experienced resurgence in recent years. While not employing letters of marque specifically, the United States has utilized private contractors to achieve security goals in several conflicts over the past two decades.⁸³ Most recently, during the United States' presence in Iraq, it has employed private, profit-seeking security companies to protect its forces in battle, guard sensitive structures and persons, train the Iraqi army and interrogate captured fighters.⁸⁴ In the first Gulf War, the ratio of private contractors to public soldiers was 1:100, in the current Iraq war it is 1:10.⁸⁵

This use of private forces in military endeavors is not confined solely to the United States; it is a common tool employed by many other countries.⁸⁶ In fact, these firms can and have operated in over 50 countries at the same time.⁸⁷ The prolific and consistent use of PMFs, most often on behalf of states, suggests that their use is generally accepted and has become a legitimized norm in warfare and peacekeeping missions. The occasional media outcry over alleged abuses has caused some anxiety but has not halted states from employing these forces.

⁸¹ The U.S. clearly has a vested interest in eliminating piracy to ensure that its trade continues unimpeded and its citizens are safe abroad.

⁸² Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV 135, 148 (2005).

⁸³ *Id.* at 148.

⁸⁴ Parrillo, *supra* note 47, at 2.

⁸⁵ Dickinson, *supra* note 82, at 149.

⁸⁶ *Id.* at 138.

⁸⁷ P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, 42 COLUM. J. TRANSNAT'L L. 522, 522 (2004).

B. The Benefits of PMFs

States employ PMFs mainly to defray costs, increase manpower and decrease exposure of their soldiers to the hazards of war. When the United States became an imperial power in the 1890s, the government found privateering inadequate and abandoned the practice.⁸⁸ Privateering was abandoned because of changes in technology, pressure from foreign governments, and the decline of U.S. merchant shipping.⁸⁹ Now, however, the national security establishment may see it as a useful tool.

There are several reasons why the United States might desire to keep its military out of the battle against pirates. First, without a major investment and revamping of its naval capacities, the U.S. will not be able to effectively deter pirates. The United States will have to replace or augment its current fleet of hulking ships (built for intense battles on the open sea against other large fleets) with smaller boats capable of covering large distances in small amounts of time and engaging in quick battles against pirates. The recent example with the Maersk Alabama proves the point—the U.S. sent three mammoth naval warships to square off against a tiny ship with four pirates.⁹⁰ While the navy eventually prevailed, if the Alabama had employed a private security escort initially it is unlikely that it would have ever been hijacked and the safety of its crew and captain would never have been a question of great national anxiety. Not only would a private security force be able to deter attacks by actual physical force, but it is quite likely that pirates will seek to avoid attacking ships when they are being escorted by such forces.

PMFs would likely be able to requisition the necessary smaller boats and materials more efficiently than the U.S. government, and sell them on the market once no longer needed. The government, as a large bureaucracy, is inherently more slow-moving in such acquisitions due to budgetary approval processes and political considerations.⁹¹ The

⁸⁸ Parrillo, *supra* note 47, at 11.

⁸⁹ *Id.*

⁹⁰ *Rescued U.S. Captain to Reunite with Maersk Crew in Mombassa*, FOX NEWS, Apr. 14, 2009, <http://www.foxnews.com/story/0,2933,515576,00.html>.

⁹¹ This proposition is supported by commissioned studies, independent reports, and has been explicitly acknowledged by senior officials. See Shelley Roberts Econom, *Confronting the Looming Crisis in the Federal Acquisition Workforce*, 35 PUB. CONT. L.J. 171, 206–

type of hefty economic investment involved in maintaining behemoth warships like the ones the U.S. is currently using in this conflict could be avoided by hiring PMFs.

Second, utilizing PMFs makes economic sense in these circumstances not just in terms of equipment, but more importantly in terms of personnel. Donald Rumsfeld, the former Secretary of Defense, has stated as much, saying "it is clearly cost effective to have contractors for a variety of things that military people need not do, and that for whatever reason other civilians, government people, cannot be deployed to do."⁹² For the military, recruiting and properly training soldiers to battle pirates could take months or years with much longer deployment lead times than the PMFs would need. Each new soldier recruited by the government requires an enormous long-term investment in the form of training, salaries, and extended benefits. PMFs, on the other hand, can quickly recruit personnel with the requisite expertise from a "global pool of former military [officers] and fill short-term contracts with finite costs."⁹³ The cost savings accomplished by the PMFs structure and capabilities will be passed on to the U.S. government because the huge number of firms and intense competition will assure prices are kept down.

In general, utilizing private forces would introduce a level of flexibility that the government simply does not have. The government can

07, 211 (2006) (detailing the challenges that the Department of Defense faces in procurement and contracting after reforms were rashly pushed through); *Inefficient Procurement Operations Cost the Government Billions of Dollars Annually, Says New Report from Aberdeen Group and Government Computer News*, BUSINESS WIRE, May 20, 2004, available at http://findarticles.com/p/articles/mi_m0EIN/is_2004_May_20/ai_n6036057/ ("In the public sector bureaucracy is getting in the way of sound and efficient procurement and supply management practices," said Tim Minahan, Aberdeen's senior vice president of supply chain research."). A recent speech by Secretary of Defense Robert M. Gates to Senators detailed why the Department faces inherent structural challenges to economic thrift: "A risk-averse culture, a litigious process, parochial interests, excessive and changing requirements, budget churn and instability and sometimes adversarial relationships." Jim Garamone, *Procurement Reform Must Be a Priority, Gates Tells Senate*, AMERICAN FORCES PRESS SERVICE, Jan. 27, 2009, <http://www.defense.gov/news/newsarticle.aspx?id=52838>.

⁹² Donald Rumsfeld, Sec'y of Defense, Remarks to the John Hopkins, Paul H. Nitze School of Advanced International Studies (Dec. 5, 2005), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=1361>.

⁹³ Doug Brooks & Jim Shevlin, *Reconsidering Battlefield Contractors*, 6 GEO. J. INT'L AFF. 103, 103, 106 (2005).

authorize contracts with PMFs that employ them only on a short-term basis, allowing the government to sever its financial commitments quickly, reducing or eliminating the need for the presence of a more expensively maintained public uniformed force.

Not only does this scenario free resources for conflicts that more urgently require the sophistication of the public navies, but it is perhaps more politically digestible domestically, since it removes the chance that members of the U.S. military will be wounded or killed on the front lines battling pirates. President Clinton was able to intervene and halt the ethnic cleansing in Kosovo in part because his reliance on private contractors in supporting roles reduced the number of troop deaths at risk.⁹⁴

Moreover, in this situation, the U.S. government would almost certainly decrease its expenses further by involving shipping companies in the payment of contractors. Shipping companies, as previously discussed, are currently making enormous outlays in ransoms and insurance expenditures, as well as bearing the costs of diverted routes. It is appropriate, and would ultimately be cost effective, for these companies to share in the costs of hiring PMFs. The exact breakdown of payment should be hashed out between Congress and the American shipping industry, but both will be motivated to come to an agreement since each party will ultimately save in its investment. Negotiations will likely be smoother because the interests of the U.S. and its shippers are more clearly aligned as compared to the U.S. and multiple countries that often have difficulty working together because of underlying tensions or motivations.

C. Negative Implications for Using PMFs

1. LACK OF ACCOUNTABILITY

There are legitimate concerns that PMFs may commit human rights violations if employed to combat pirates. There have been incidents in the recent past where employees of American-backed PMFs have acted not only negligently but also criminally. Participation in the depraved treatment of prisoners in Abu Grahیب and the exploitation of young girls in the Balkans are perhaps the most

⁹⁴ Dickinson *supra* note 82, at 191–92.

infamous examples of such misbehavior.⁹⁵ In both instances the perpetrators escaped any type of liability.⁹⁶

It should be noted however that the historical de-privatization of warfare occurred not due to humanitarian concerns but rather as the result of an increasingly dominant national security establishment.⁹⁷ Nonetheless, since abuse in security operations has occurred in the past and has the potential to occur in the future, vigorous regulation is an absolute necessity. While a number of scholars have suggested that international organizations and laws are needed to regulate contractors,⁹⁸ others believe that U.S. law could and should be what regulates the conduct of American-commissioned PMFs operating overseas.⁹⁹

Currently, the international regulatory laws that apply to PMF firms are ambiguous. Under international law, selling military services as an independent contractor is defined as mercenary activity and is prohibited by various treaties.¹⁰⁰ However, the definitions

⁹⁵ See Casto, *supra* note 62, at 673–74; Dickinson, *supra* note 82, at 139.

⁹⁶ Casto, *supra* note 58, at 673.

⁹⁷ Parrillo, *supra* note 47, at 14.

⁹⁸ See Maj. Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1, 79–84 (2003) (proposing a draft international convention and accompanying domestic safeguards that will serve to recognize and regulate state-sanctioned PMFs); Singer, *supra* note 87 at 540 (suggesting that national efforts are/would be ineffective in regulating PMFs and arguing that an international regulatory body is needed).

⁹⁹ See generally Casto, *supra* note 62 (advocating American law as the proper source of regulation of PMFs); Dickinson, *supra* note 82 (reviewing domestic administrative law regulations and mechanisms that could be applied to regulating private conduct abroad). Cf. Virginia Newell & Benedict Sheehy, *Corporate Militaries and States: Actors, Interactions, and Reactions*, 41 TEX. INT'L L.J. 67, 100 (2006) (suggesting that “major inroads in the regulation of PMFs” could be made “without waiting for international consensus or relying on a cumbersome and lengthy international treaty process” by relying on “the four or five key PMF host states to enact uniform regulations”).

¹⁰⁰ See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47(1), June 8, 1977, 1125 U.N.T.S. 3 (“A mercenary shall not have the right to be a combatant or a prisoner of war.”); see also Patrick Cullen, *Keeping the New Dogs of War on a Tight Leash*, CONFLICT TRENDS, June 2000, at 36, 37, available at http://www.accord.org.za/downloads/ct/ct_2000_1.pdf?phpMyAdmin=ceeda2df659e6d3e35a63d69e93228f1 (citing various treaties that prohibit mercenary activity: (1) Article 47 of the 1977 Additional Protocol I of the Geneva Conventions; (2)

those treaties employ include a series of “vague, albeit restrictive, requirements, such that it is nearly impossible to find anyone in any place who fulfills all of the criteria, let alone a firm in the PMF industry.”¹⁰¹ If a government authorizes the contract, the private military force can claim that its actions are sanctioned by the state and are thus not subject to various international treaty requirements.¹⁰²

International law is also somewhat ambiguous with respect to individuals employed by these firms. There is no actual ban on their participation. However, alarmingly, the law seems to leave open the possibility that individuals working under U.S. government contracts may be exposed to treatment as unlawful combatants if apprehended on the battlefield. The 1949 Geneva Conventions suggested that so long as mercenaries were part of a legally defined armed force, they were entitled to POW protection.¹⁰³ By contrast, Article 47 of Protocol I of the Geneva Conventions, written in 1977, indicates that a mercenary is not entitled to the rights of a legal combatant or that of a POW. There exists the distinct risk that civilian employees of PMFs, if captured while operating in the field, could be considered unlawful combatants and thus liable to prosecution as war criminals.¹⁰⁴ This is because they are arguably not non-combatants under the 1949 Convention Relative to the Protection of Civilian Persons in Times of War¹⁰⁵ nor are they necessarily lawful combatants under the POW Convention. However, the definition used for mercenary in the 1977 Conventions seems to leave some wiggle room for officially sanctioned contractors such that they could be excluded from the definition of mercenary (and hence unlawful combatant) since they are

the Organisation of African Unity (OAU) Convention for the Elimination of Mercenarism in Africa of 1977; and (3) the United Nations International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989 (which is yet to be ratified)).

¹⁰¹ Singer, *supra* note 87, at 524.

¹⁰² *Id.* at 533.

¹⁰³ *Id.* at 526–27 (citing Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, available at <http://www.irct.org/instruments/intlhumanlaw.htm>).

¹⁰⁴ *Id.* at 534.

¹⁰⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 103, art. 4.

“sent by a State which is not a Party to the conflict on official duty.”¹⁰⁶ Ultimately, the uncertainty of the international law as applicable to PMFs and their employees creates something of a legal black hole.

Thus, there are two problems inherent in the use of PMFs: 1) deterring misbehavior through sound regulation and 2) preventing captured PMFs themselves from being mistreated. The U.S. has attempted to take the necessary and appropriate steps to create a firm baseline on how to approach the regulation of the PMFs it sanctions. Like with privateers historically, the legal framework should not only decrease the likelihood of abuses committed under the government’s authorization, but also give PMFs POW status if captured while fulfilling their mandate.

Currently, in order to operate under the auspices of American authority, the PMFs must pass through a licensing system.¹⁰⁷ However, unlike letters of marque, which must be issued by Congress, licenses issued to PMFs for contracts of less than \$50 million do not even require congressional notification let alone approval.¹⁰⁸ This threshold should be lowered in order to allow the U.S. to exert greater control over who receives a license and thus positively influence the training received. For example, the U.S. refused to issue a license to a PMF to operate in Equatorial Guinea until the nature of the engagement included human rights training, which the PMF eventually agreed to.¹⁰⁹ Having this type of bargaining leverage for licenses will likely help the government reduce the chance of future human rights violations.

a. Municipal Law

In addition to the initial licensing hurdle, Congress has designed municipal restrictions that apply to the conduct of PMFs. In 2000 Congress passed the Military Extraterritorial Jurisdiction Act (MEJA)¹¹⁰, which criminalized any acts by Department of Defense

¹⁰⁶ Singer *supra* note 87, at 528 (citing the Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Internationals Armed Conflicts, art. 47, June 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391).

¹⁰⁷ Newell & Sheehy, *supra* note 94, at 94 (referring to the United States’ Arms Export Control Act and International Transfer of Arms Regulations).

¹⁰⁸ *Id.* at 94.

¹⁰⁹ *Id.* at 95.

¹¹⁰ 18 U.S.C. § 3261.

civilian employees and contractors and their subsidiary employees that would be felonies under federal law if committed within the United States.¹¹¹ The MEJA initially allowed contractors employed by another department such as the Department of the Interior or the CIA to skirt prosecution.¹¹² However the PATRIOT Act closed this loophole to some extent by applying the MEJA to individuals and entities hired by other domestic federal agencies and departments, as well as facilities run by the U.S. overseas.¹¹³ Nonetheless, scholars have suggested that due to certain provisions of the MEJA, many PMFs may yet remain unregulated.¹¹⁴ Put simply, attempting to regulate contractors through civilian criminal law was not effective.

b. Military Law

Private contractors may be more likely to commit abuses not because they are motivated by profit, but rather because they lack other incentives or disincentives to act appropriately. As one scholar argues “the distinguishing feature of the U.S. Navy was not the absence of the profit motive. Rather, it was the tempering of the profit motive with the carrot of promotion and the stigma of dishonor.”¹¹⁵ The best way to limit potential PMF abuse is to more closely match the motivations of those who work for the public military.

In a bid to more firmly assert jurisdiction over the behavior of PMFs, the U.S. has very recently sought to apply military justice. On October 17, 2006 Congress expanded the applicability of the Uniform Code of Military Justice (UCMJ) to cover contractors engaged alongside U.S. forces in armed combat.¹¹⁶ It remains

¹¹¹ Casto, *supra* note 62, at 684.

¹¹² The Act refers solely to actors in some way employed by the Department of Defense in its discussion of Regulations and Definitions. 18 U.S.C. §§ 3266–67.

¹¹³ Dickinson, *supra* note 82, at 187.

¹¹⁴ See Casto, *supra* note 62, at 686.

¹¹⁵ Parrillo, *supra* note 47, at 30, 34–35 (noting that, though a proceeding was to be initiated by the privateer captain, it was to be carried out by a court-martial of at least five naval officers holding at least the rank of lieutenant and that this requirement, in addition to the naval officers’ feeling that trying privateers was beneath their dignity, meant that privateersmen were prosecuted at a much lower rate than were naval personnel).

¹¹⁶ *Id.* at 3.

somewhat unclear whether PMFs hired to deter piracy would be subject to the UCMJ under this 2006 statute, as there has yet to be an interpretive ruling on its meaning or constitutionality.¹¹⁷ However, Congress could easily expand its jurisdiction to cover PMFs by making the language plainer. This would be the most elegant and efficient way to treat PMFs: apply the same restrictions on their behavior via the UCMJ, and thus accordingly award them the same privileged POW status if they end up captured during a conflict with another force.

Some have raised constitutional questions regarding whether civilians could really be tried in a court-martial under this new law¹¹⁸ based on the Supreme Court case *Reid v. Covert*,¹¹⁹ which denied the military the ability to try a U.S. citizen abroad in a court-martial, and the U.S. Court of Military appeals judgment in *United States v. Averette*,¹²⁰ which denied the ability to try a civilian in a court-martial outside a time of declared war.¹²¹ Despite the qualms raised by these precedents it is not obvious that the new law will be shot down by the Court.

There is a strong historical precedent for applying military law to those operating on behalf of the government at sea. In 1812, Congress subjected all privateers to courts-martial and the criminal code of the U.S. Navy in order to keep them in check.¹²² It is easy to see why Congress was motivated to do this as much in the past as it has been in the present. Having the security forces' behavior subject to the UCMJ would align the disincentives for poor behavior that

¹¹⁷ Peter W. Singer, *Frequently Asked Questions on the UCMJ Change and Its Applicability to Private Military Contractors*, THE BROOKINGS INSTITUTION, Jan. 12, 2007, http://www.brookings.edu/opinions/2007/0112defenseindustry_singer.aspx

¹¹⁸ Anna Manasco Dionne, Note, "In Time of Whenever the Secretary Says": *The Constitutional Case Against Court-Martial Jurisdiction over Accompanying Civilians During Contingency Operations*, 27 YALE L. & POL'Y REV. 205 (2008).

¹¹⁹ 354 U.S. 1 (1957).

¹²⁰ 41 C.M.R. 363 (1970).

¹²¹ Ian Kierpaul, Comment, *The Mad Scramble of Congress, Lawyers, and Law Students After Abu Ghraib: The Rush to Bring Private Military Contractors to Justice*, 39 U. TOL. L. REV. 407, 412-13 (2007).

¹²² Parrillo, *supra* note 47, at 33-35. However, this discipline could only be applied on the ship by the captain and then only after the ship encountered at least five naval officers holding at least the rank of Lieutenant to carry out the court-martial. Due to the infrequency of such a scenario, it seems that privateersmen were prosecuted at a much lower rate than naval personnel.

PMFs have with those of public soldiers. While the incentives may still be somewhat divergent—honor versus profit—many public soldiers are looking not only to serve their countries but also to advance their careers just like those employed by PMFs. Thus, this regulation would go a long way to bringing the motives of PMFs into closer harmony with those of soldiers.

c. Civil Law

A further way to regulate PMFs is through civil law. Not only is there precedent for military justice for private actors at sea, but civil remedies were also prevalent. Prize courts had the power to hold privateers liable for injury to property resulting from negligence, personal torts against the people on board, and losses due to capture without probable cause, as well as a host of other wrongs.¹²³

Today, private contractors can be sued under the Alien Tort Claims Act and can also be subjected to municipal contract or tort remedies.¹²⁴ A further way to regulate PMF misconduct would be through contract clauses threatening suspension or outright firing if certain breaches occur.¹²⁵ Together with the new UCMJ coverage, these remedies would provide PMF employees with strong motivations to stay on the right side of the law.

2. International Uproar

Despite the fact that PMFs are utilized by many countries all over the world, using them in this context could create a potentially sensitive political backlash. All countries govern the seas, and hunting pirates is a communal responsibility. A number of the world's powers have sent their naval ships to the Gulf of Aden and begun working together to try to stem the tide of hijackings. Some will argue that introducing PMFs will increase the volatility of the situation and corrupt any cohesive effort.

These concerns are likely to be disingenuous, as the use of PMFs would enhance the end goal of stopping piracy in the Gulf. If the U.S. chooses to contract with PMFs in an effort to fight a common enemy

¹²³ *Id.* at 36.

¹²⁴ Dickinson, *supra* note 82, at 235.

¹²⁵ See Casto, *supra* note 62, at 699.

to the benefit of every law abiding citizen worldwide, then that is its own prerogative. Ultimately, other countries may not need to have their warships there at all, as shipping firms will likely be drawn to participate in a program that grants them enhanced protection.¹²⁶

Additionally, any concerns raised by the Somali “government”¹²⁷—the only real party with the potential to have any mishaps with its citizens—would have no legal bearing on such a strategy. While many countries have port laws that prohibit armed ships from docking, PMFs need not stop in Somali harbors. Regardless, an objection is unlikely since the Somali government has repeatedly asked for help over the course of the last year, going so far as to allow international warships to enter its territorial waters at will in the pursuit of pirates.¹²⁸

America is often a first mover and leader in delicate situations that involve potential loss and unpleasant externalities, but demand action. For example, the U.S. launched the Marshall Plan after WWII to get the world back on its feet, President Reagan ordered the U.S. military into

¹²⁶ This note is only proposing that the U.S. license protection for American ships, however, should the endeavor be successful, other countries may decide to follow our lead and do the same for their ships.

¹²⁷ See CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK : AFRICA: SOMALIA* (2009), *supra* note 10. While Somalia has an interim government in place as of 2004, it does not exercise control over much of the country’s territory, there is no functioning central legal system, and there are myriad clans and militias that lay claim to large areas within the country and do not recognize the validity of the interim government. *Id.*

¹²⁸ See United Nations Security Council Resolution 1851 (2008) (noting the “several requests from the TFG for international assistance to counter piracy off its coast, including the letter of 9 December 2008 from the President of Somalia requesting the international community to assist the TFG in taking all necessary measures to interdict those who use Somali territory and airspace to plan, facilitate or undertake acts of piracy and armed robbery at sea, and the 1 September 2008 letter from the President of Somalia to the Secretary-General of the UN expressing the appreciation of the TFG to the Security Council for its assistance and expressing the TFG’s willingness to consider working with other states and regional organizations to combat piracy and armed robbery off the coast of Somalia” and further “decides that for a period of twelve months from the date of adoption of resolution 1846, States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate *in Somalia*, for the purpose of suppressing acts of piracy and armed robbery at sea”) (emphasis added).

Panama to eject Manuel Noriega despite the fact that many other countries used and relied on the Panama Canal for world commerce, the U.S. led the charge to free Kuwait in the first Gulf War and intervened in Kosovo where genocide was taking place. While perhaps not initially, other countries will hopefully be relieved that the U.S. is once again using its ingenuity to address a tragedy of the commons situation. This is because the success of PMFs will mean they can eventually remove the need for putting their navies and treasuries at risk to address this issue (after evaluating the U.S.'s success they can either utilize their own similar system or make a deal with the U.S. for their ships' protection). As for the U.S., bearing the burden of subsidizing the PMFs may at first seem unappealing, but as analyzed earlier in this note, the economic and efficiency incentives are attractive, and it would merely amount to a shift in how resources are spent in the U.S.'s approach to combating piracy.

IV. CONCLUSION

A cheap and effective solution to the dangerous and costly problem of piracy exists in the use of PMF protection. The presence of private forces will send attackers fleeing,¹²⁹ and after a period of time their consistent use will start to serve as a deterrent, discouraging even the contemplation of an attack by pirates. By taking a close look at its past, the U.S. can build on the techniques and tactics that have proved successful against smarter and better-equipped pirates than the ones plaguing ships today. While the U.S. now has a much greater public military force, using it in every situation possible is not the proper strategic response. Hopefully, with the issuing of commissions, the Maersk Alabama will be the last American ship hijacked for another 200 years.

¹²⁹ Winfield, *supra* note 23 ("An Italian cruise ship with 1,500 people on board fended off a pirate attack far off the coast of Somalia when its Israeli private security forces exchanged fire with the bandits 'After about four or five minutes, they tried to put a ladder up,' Pinto told Sky TG24. 'They were starting to climb up but we reacted, we started to fire ourselves. When they saw our fire, and also the water from the water hoses that we started to spray toward the Zodiac, they left and went away.'").