STUDENT NOTE

PMCs on the High Seas: The Solution to Somali Piracy or a Failure to Learn from History?

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"History repeats itself because no one was listening the first time."
—Anonymous

I. INTRODUCTION

The MV Faina, a Ukrainian vessel carrying soviet-era tanks, artillery, small arms, and other weaponry for delivery to the Kenyan government was hijacked en route by Somali pirates and released in February 2009 after a four and a half month long standoff in exchange for $3,200,000.[1] On April 8, 2009 the American flagged container ship Maersk Alabama was hijacked by pirates off the coast of Somalia, sparking a standoff between the pirates and the US Navy that ended only after Navy SEAL snipers shot three pirates.[2] In November 2009, a second group of pirates attempted another attack on the same vessel but was repelled by armed private security forces aboard the Maersk Alabama who returned fire during the pirates' assault.[3] In February 2011, an American yacht known as the Quest was hijacked in the same area; negotiations for the release of the four American hostages apparently went badly and the pirates executed all four of their captives before being boarded by American military personnel.[4]

In response to the sharp increases in piracy in recent years, particularly off the coast of Somalia, many governments are now making serious attempts to combat the growing threat to commerce at sea. Today, several governments have sent naval forces to the area in an attempt to protect vessels from hijacking and free hostages wherever possible; despite this, however, as of February 2011, there are currently 33 vessels and 712 hostages accosted by pirates in Somalia alone.[5] In the words of Shane Murphy, first mate of the Maersk Alabama shortly after being freed, "right now there are still ships being taken… It's time to put an

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[1] The Associated Press, *It pays to be a pirate: Somali pirates free Ukranian arms ship MV Faina in exchange for $3.2 million*, THE N.Y. DAILY NEWS (Feb. 5, 2009), http://www.nydailynews.com/news/national/2009/02/05/2009-02-05_it_pays_to_be_a_pirate_somali_pirates_fr.html (last visited Feb. 11, 2011).

[2] Alan Cowell, *Pirates Attack Maersk Alabama Again*, N.Y. TIMES (Nov. 18, 2009), http://www.nytimes.com/2009/11/19/world/africa/19pirates.html (last visited Feb. 11, 2011).

[3] *Id*.

[4] CNN Wire Staff, *Americans slain by captors on hijacked yacht; pirates killed, arrested*, CABLE NEWS NETWORK (Feb. 23, 2011), http://www.cnn.com/2011/WORLD/africa/02/22/somalia.us.yacht/index.html?hpt=C1 (last visited Feb. 11, 2011).

[5] International Maritime Bureau, Piracy News and Figures, International Chamber of Commerce, (Mar. 16, 2011), http://www.icc-ccs.org/piracy-reporting-centre/piracynewsafigures (last visited Feb. 11, 2011).

end to this crisis."[6] Despite all attempts to curb its rise, instances of piracy has now reached a record high.[7]

Recently, the solution proposed by many has been the hiring of private military companies (PMCs) to act not only as security guards, but to take on pirates in offensive operations under a revitalized system of Letters of Marque, becoming modern day privateers.[8] This proposal could have significant consequences to international peace and security and may already be precluded under international law. PMCs have proven difficult to govern while operating on land, where there are people around to monitor their activities; these command and control issues will only be compounded if private security forces are employed to operate independently at sea, where nobody would be present to witness their activities. This article argues that PMCs are insufficiently reliable to independently police the waters off the coast of Somalia without the potential for tremendous human rights abuses and should not be assigned such a task through the revival of the long-dead system of privateering.

In Section II, this paper addresses the historical institution of commercial piracy, why individuals turn to piracy and what the world faces today. Section III discusses private military solutions to piracy in the past and why they fell out of favor with the international community. Section IV examines the status of the private military company under international law and how such companies are presently regulated. Section V explores the potential consequences of utilizing private military companies on independent offensive operations to suppress piracy and addresses the arguments that have recently been made in favor of such use. Finally, Section VI concludes the paper with a discussion of why the issuance of Letters of Marque and Reprisal does not present a serious solution to the problems posed by Somali piracy.

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[6] Robyn Dixon, *Obama vows to fight piracy: Ship's 1st mate urges president to end 'scourge'*, CHICAGO TRIBUNE (Apr. 14, 2009), http://www.chicagotribune.com/news/nationworld/chi-pirates_14apr14,0,2942506.story (last visited Feb. 11, 2011).

[7] CNN Wire Staff, *Report: Piracy at a record high*, CABLE NEWS NETWORK (Apr. 14, 2011), http://www.cnn.com/2011/WORLD/africa/04/14/somalia.piracy.report/index.html?hpt=Sbin (last visited Apr. 14, 2011).

[8] *See e.g.* Theodore T. Richard, *Reconsidering the Letter of Marque: Utilizing Private Security Providers Against Piracy*, 39 PUB. CONT. L.J. 441 (Spring 2010); Robert P. DeWitte, *Let Privateers Marque Terrorism: A Proposal for a Reawakening*, 82 IND. L. J. 131 (2007); Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, J. MAR. L. & COM. 221, 252 (2009); William Young, *A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal*, 66 WASH. & LEE L. REV. 895 (2009); Ansel J. Halliburton, *Pirates Versus Mercenaries: Purely Private Transnational Violence at the Margins of International Law* (July 6, 2010), *available at* http://ssrn.com/abstract=1755214.

II. THE PROBLEM: PIRACY

Through scientific analysis of obsidian found in Crete, archaeologists believe commercial sea trading has existed there since at least 6,000 BCE.[9] Tools found on the same island indicate that sea travel by hominids dates back at least 130,000 years; meanwhile, evidence in Australia shows sea travel from that continent dating back at least 60,000 years.[10] Piracy, like crime and violence on land, undoubtedly appeared on the sea shortly after man's arrival.[11] Crete itself has been referred to as the cradle both of piracy and pirate hunting due to Homeric references to such practices on the island.[12]

Over thousands of years, the technology of seafaring and piracy evolved, as did the way states dealt with pirates; the combination of improved technology and opportunity for enrichment collided with the discovery and colonization of the Caribbean, leading to the "Golden Age of Piracy" from 1655-1725.[13] Far-flung Spanish commercial sea-lanes and official encouragement from the governments of France and England contributed significantly to the growth of piracy as a lucrative, though dangerous, commercial enterprise.[14] The situation was exacerbated by the rise of the practice of privateering. Often, privateers would be issued Letters of Marque, enabling them to lawfully raid enemy merchant vessels during one of the many conflicts of the period; but when such conflicts ended, the lure of large profits would often induce these formerly lawful raiders to continue their trade as pirates.[15] Similarly, the issuance of Letters of Marque to hunt down and eliminate pirate threats often backfired, with the crews of privateering vessels simply becoming pirates themselves.[16]

A. The State of Modern Piracy

Commercial piracy has spiked significantly since 2004, with the number of attacks increasing proportionally with the estimated average ransom payments

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[9] BENERSON LITTLE, PIRATE HUNTING 19 (2010).

[10] John Noble Wilford, *On Crete, New Evidence of Very Ancient Mariners*, N.Y. TIMES, February 15, 2010, *available at* http://www.nytimes.com/2010/02/16/science/16archeo.html.

[11] LITTLE, *supra* note 9, at 19.

[12] *Id*. at 32.

[13] *Id*. at 170.

[14] *Id*.

[15] ALFRED P. RUBIN, THE LAW OF PIRACY (2nd ed. 1998) 122; LITTLE, *supra* note 9, at 170.

[16] LITTLE, *supra* note 9, at 10. Many infamous pirates, such as Captain William Kidd, actually got their start as pirate hunters but were lured away from privateering by the greater economic prospects of piracy. DANIEL SEKULICH, TERROR ON THE SEAS: TRUE TALES OF MODERN-DAY PIRATES 16 (2009); Richard, *supra* note 8, at 39.

paid by shipping companies to pirate groups.[17] Unlike the buccaneers and corsairs of ages past, pirates today target vessels they can hold for ransom, rather than those with goods they can steal and sell on their own (which, in practical terms, does not appear to be limiting to any great extent).[18] As noted previously, the spike in piracy has been largely centered on the Horn of Africa, where the absence of a functional government in Somalia has created a haven for factionalism and banditry of all sorts, particularly piracy due to Somalia's geographic locale.[19] The Transitional Federal Government, which has received wide international support, maintains very little practical control in the country beyond the capital city of Mogadishu and has been involved in heavy fighting to defend its capital from insurgent groups.[20]

Pirates leave the coast in small skiffs with just a few conspirators in each craft, often bringing along or capturing a larger fishing vessel to serve as a "mother-ship" for the cruise, sometimes reaching surprising distances from shore in the search for a potential target.[21] Various Somali clans compete for power and influence through piracy, which can provide a significant source of revenue to fund conflicts within the country, which has been embroiled in factionalism and civil war for decades.[22] The individuals directly involved in pirate expeditions tend to be motivated by personal financial gain (buying homes, cars, wives, etc. with the proceeds from successfully ransoming a pirated vessel), which is unsurprising in such a desperately poor country where few opportunities exist for legitimate income, though the influx of wealth to the country serves to prolong domestic conflicts.[23]

The proximity of lawless, clan-oriented Somalia and its pirates to major shipping lanes has created a crisis for global shipping companies, who have paid

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[17] ROGER MIDDLETON, MORE THAN JUST PIRATES: CLOSING THE SPACE FOR SOMALI PIRATES THROUGH A COMPREHENSIVE APPROACH IN THE INTERNATIONAL RESPONSE TO SOMALI PIRACY 18 (Bibi van Ginkel & Frans-Paul van der Putten eds., 2010).

[18] *Id*. at 15; KEES HOMAN & SUSANNE KAMERLING, OPERATIONAL CHALLENGES TO COUNTERPIRACY OPERATIONS OFF THE COAST OF SOMALIA IN THE INTERNATIONAL RESPONSE TO SOMALI PIRACY 67 (Bibi van Ginkel & Frans-Paul van der Putten eds., 2010).

[19] *Id*. at 13.

[20] David McKenzie, *U.N. official is 'hopeful' for Somalia*, CNN (Sep. 2, 2010), http://articles.cnn.com/2010-09-02/world/africa.u.n..somalia_1_somali-capital-transitional-federal-government-somali-people?_s=PM:WORLD (last visited May 12, 2011).

[21] Xan Rice, *US Navy Captures Somali Pirates' Mother Ship*, THE GUARDIAN (Apr. 1, 2010), http://www.guardian.co.uk/world/2010/apr/01/us-navy-captures-pirate-ship (last visited Apr. 11, 2011).

[22] Richard, *supra* note 8, at 39.

[23] Robyn Hunter, *Somali Pirates Living the High Life*, BBC NEWS (Oct. 28, 2006), http://news.bbc.co.uk/2/hi/africa/7650415.stm (last visited Apr. 11, 2011).

out millions of dollars in ransom fees directly or through insurance carriers.[24] Because of the threat the situation has caused to world trade, the international community has stepped in, with various states or international organizations providing their own naval contingents to prevent the capture of new vessels and, if possible, secure the release of captured vessels and crews.[25] While the international community certainly has not reached the point of desperation, several strategies have been pursued and have met varying degrees of failure, leading some to call for drastic changes to the international system in order to combat the pirate threat.

B. Why Pirates Go to Sea

Piracy is a crime driven by economics and opportunity. One of the predominant motivations to turn to piracy during its Golden Age in the Caribbean was the lack of economic opportunity and the tremendous wealth individuals could attain as pirates.[26] Pirates go to sea today for the same reasons their predecessors did in ancient Crete and the colonial Caribbean: "purely for financial gain."[27] Modern piracy occurs in particularly poor areas that happen to be strategically located along busy commercial routes; nowhere has this rise been more pronounced than off the horn of Africa, due to the legal void created by the failed state of Somalia, where criminals can commit piracy with little fear of interference by the local government.[28]

Despite this easily discernible pattern, some jurists have advocated abandoning the term "piracy" in favor of "maritime terrorism," grouping modern pirates together with the likes of al-Qaeda.[29] This has contributed to the popular hysteria about Islamic terrorism in the wake of 9/11 and media suggestions that Somali pirates are funneling money into international terrorism and that the motivation to attack shipping is connected to extremist religious beliefs rather than the desperate economic situation encouraging individuals to turn to piracy.[30] More levelheaded commentators have pointed out that while

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[24] International Maritime Bureau, Piracy News and Figures, International Chamber of Commerce, (Mar. 16, 2011), http://www.icc-ccs.org/home/piracy-reporting-centre/piracynewsafigures (last visited Feb. 11, 2011).

[25] HOMAN & KAMERLING, *supra* note 18, at 72.

[26] LITTLE, *supra* note 9, at 157.

[27] SEKULICH, *supra* note 16, at 19.

[28] J. PETER PHAM, THE FAILED STATE AND REGIONAL DIMENSIONS OF SOMALI PIRACY IN THE INTERNATIONAL RESPONSE TO SOMALI PIRACY 31 (Bibi van Ginkel & Frans-Paul van der Putten eds., 2010).

[29] Douglas R. Burgess Jr., *Piracy is Terrorism*, THE N.Y. TIMES, A33 (December 5, 2008).

[30] *See e.g.*, Scott Baldauf, *Are Somalia's pirates linked to Al Qaeda?,* THE CHRISTIAN SCIENCE MONITOR, http://www.csmonitor.com/World/Africa/2009/1102/p06s08-woaf.html (last visited Apr. 10, 2011); Arnaud de Borchgrave, *Al Qaeda's Navy?,* THE WASH. TIMES, August

terrorists sometimes bring their ideological battles to sea, the problems of piracy and terrorism remain distinct.[31]

Financially driven crimes are difficult, if not impossible to successfully combat without addressing the underlying reasons leading individuals to the crime itself or the opportunities making that crime particularly lucrative. Wherever there is the opportunity to gain significant wealth with a reasonable opportunity to get away with it, crime will flourish; this was seen in the United States during prohibition. Despite the efforts of the federal government to stamp out the illegal trade in alcohol in the United States, the economic incentives to break the law due to the high markups of the now illegal beverages kept bootleggers and smugglers in business; by 1930, half of all federal prisoners were serving sentences for violations of the prohibition laws.[32] To effectively combat so-called mercenary crimes (those driven by economic incentives; ranging from bootlegging and fraud to piracy), the opportunity to commit and get away with the crime must be targeted, as well as the situation driving people to such criminality in the first place.[33]

As noted above, piracy is a crime inherently driven by the economic needs of a given population coupled with a certain level of lawlessness necessary to convince the desperate population that they can "get away with" being a pirate.[34] Much like American bootlegging and smuggling during prohibition, there is a clear opportunity to make large sums of money without a significant likelihood of prosecution. So long as the potential financial gains available through pirate activities outweigh the potential for death or imprisonment, people in Somalia will likely continue to engage in the activity.

17, 2009, http://www.washingtontimes.com/news/2009/aug/17/al-qaedas-navy/?page=1 (last visited Apr. 10, 2011); Faisal Darem, *Arab Officials Identify Link Between Somali Pirates and al-Qaeda*, AL-SHORFA, Nov. 16, 2010, http://www.al-shorfa.com/cocoon/meii/xhtml/en_GB/features/meii/features/main/2010/11/16/feature-01 (last visited Apr. 10, 2011).

[31] *See e.g.*, Little, *supra* note 9, at 273-274; RAND Corporation, *Increase In Piracy And Terrorism At Sea; Little Evidence Supports Fear That The Two Crimes Are Merging*, RAND.ORG, (June 5, 2008), http://www.rand.org/news/press/2008/06/05.html (last visited Apr. 10, 2011); U.S. National Security Council, *Countering Piracy off the Horn of Africa: Partnership and Action Plan* 6 (December 2008); Unattributed, *Pirates*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/world/para/pirates.htm (last visited Apr. 10, 2011).

[32] Ernest D. MacDougall et al., *Report of Committee on Mercenary Crime*, 23 Am. Inst. Crim. L. & Criminology 94, 98 (1932–1933).

[33] *Id.* at 99.

[34] *Id*.

C. The Current International Response

While no organization has managed to establish real control of Somalia since the government collapsed in 1991, several groups that have controlled large portions of Somali territory have attempted to stamp out piracy themselves. Though many news organizations have associated Islamic fundamentalism with Somali Piracy, the Islamic Courts Union, which assumed control of much of Somalia in 2006, was very active in combating piracy themselves by attempting to deny such criminals a place to live in impunity.[35] The continued spike in acts of piracy, however, demonstrates that the fledgling Islamic government was unsuccessful (at best) in its endeavors. The coalition Transitional Federal Government that now controls much of the country has attempted to continue this effort by seeking international funding for an official Somali Coast Guard to monitor and patrol Somalia's vast coastline for potential pirates.[36] Similarly Somaliland, an unrecognized breakaway republic in northern Somalia has already established its own coast guard, which has captured 84 pirates since its inception in 2007 under a meager annual budget of $200,000.[37]

At the same time, due to the ongoing inability of the Somalis to police their own waters, the international community has come together to attempt to secure the area themselves through various task forces. Several multinational naval forces have been established in efforts to police the coast in addition to independent, unilateral, naval interventions in the area; presently there are naval forces from the European Union (with heavy French participation), the United States, China, Russia, India, South Korea, Singapore, Malaysia, and Japan policing the waters off the coast of Somalia.[38] While the increased naval presence has undoubtedly prevented some piracy that would have otherwise occurred off the Horn of Africa, ships are still regularly taken. Unfortunately, due to Somalia's vast coastline, it has been impossible for the various naval contingents to adequately police the area, even though international cooperation has been fairly high.[39]

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[35] PHAM, *supra* note 28, at 38.

[36] Slobodan Lekic, *Somalia Wants a Coast Guard to Fight Rampant Piracy*, THE HUFFINGTON POST (Apr. 22, 2009), http://www.huffingtonpost.com/2009/04/22/somalia-wants-a-coast-gua_n_189947.html (last visited Apr. 11, 2011).

[37] Associated Press, *Somaliland Coast Guard Lacks Boats, Money and Equipment, but Catches Pirates Anyway*, WASH. POST (Apr. 4, 2011), http://www.washingtonpost.com/world/somaliland-coast-guard-lacks-boats-money-and-equipment-but-catches-pirates-anyway/2011/04/04/AFllLVcC_story.html (last visited Apr. 11, 2011)

[38] HOMAN & KAMERLING, *supra* note 18, at 72.

[39] *Id*. at 98.

Additionally, NATO forces in the area, along with EU forces patrolling the sea lanes along the Somali coast, have established the Internationally Recommended Transit Corridor (IRTC) and recommend convoying whenever possible to reduce the risk of hijacking.[40] Between seventy-five and eighty percent of shipping vessels passing through the region now take advantage of the IRTC, which provides 6-8 naval vessels to escort each group as well as continual air cover to discourage and repel pirate attacks.[41] Several countries also require their nationally flagged vessels to sail through the area as part of officially organized convoys which are provided with domestic naval escorts.[42] While this system would seem fairly comprehensive in and of itself and it would not be unreasonable to expect such a significant and well-coordinated naval presence would stamp out piracy in the area all together, it has not been the case. The area affected by Somali piracy is simply too large to effectively police; the area naval forces are capable of protecting, as a practical matter, is simply too small and while there are certainly safe areas along the route, there will always be hazardous areas so long as Somalia remains a lawless pirate haven, which is clearly illustrated by the continued increase in hijackings despite these measures.[43]

Due to the inability of naval forces to secure the area, several shipping companies have hired private security teams to guard vessels as they traverse dangerous waters. One such team, as mentioned in the opening of this article, successfully fended off the second pirate attack against the Maersk Alabama in 2009.[44] Competent private security forces tend to be very expensive and cannot be hired to protect every ship passing through dangerous waters, which limits this as a legitimate solution to the problem of modern commercial piracy.[45] Additionally, many of these companies, such as Xe Services (formerly known as Blackwater Worldwide), have already developed negative reputations for being "trigger-happy" or, at best, less than professional, in previous operations in Iraq.[46]

Because of the inability of the international forces to subdue pirate activity off the Horn of Africa, several authors, as noted above, have suggested

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[40] *Id*. at 83.
[41] *Id*. at 84.
[42] *Id*. Japan, South Korea, and India all utilize the IRTC but provide their own naval vessels to protect their commercial vessels rather than relying on NATO and EU forces that normally protect the route. Russia and China both require convoying and provide escorts but refuse to use the IRTC itself, instead each sails their own route approximately 5 miles north and south of the IRTC respectively.
[43] *Id*. at 101
[44] *See* Cowell, *supra* note 2.
[45] HOMAN & KAMERLING, *supra* note 18, at 82.
[46] *Id*.

that private security forces be given a much more significant role in policing the Somali coast. It has been argued that PMCs can provide an ideal tool in responding to international violence because they are able to operate more efficiently by avoiding the bureaucratic regulations experienced by conventional government forces.[47] However this position ignores the fact that these regulations are established to ensure that military operations are conducted properly, safely, and within the bounds of international law; it also avoids the obvious issue that this privatization solution was tried and failed to resolve issues related to piracy in the past.

III. THE PMCS OF YESTERYEAR: PRIVATEERS

The idea of using private, armed vessels in offensive operations to combat piracy is, of course, not a new one. When piracy was at its historical height, the so-called Golden Age of Piracy, concerned governments often turned to private individuals who sought to earn bounties and prize rights to pirate vessels through Letters of Marque.[48] Those who turned to privateering often had little or no experience as mariners, instead fugitive criminals, deserters, former Cromwellian soldiers and other renegades with experience in the horrors of combat sought their fortunes at sea, where few would be around to question their pasts; [49] these experienced fighters made the prospect of engaging pirates a much more palatable prospect for the mariner aboard the ship, though such men also created an atmosphere of desperation to take prize vessels as quickly as possible.[50]

The privateering tradition originally had little or nothing to do with piracy, but instead served as a form of legally sanctioned revenge for slights by foreign nationals.[51] Quickly, privateering expanded to a legally sanction form of pillage, where private, armed vessels were essentially given a license to plunder the merchant vessels of foreign nationals during times of war, disrupting enemy shipping while enriching the granting state's own economy during the conflict.[52]

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[47] Young, *supra* note 8, at 911.

[48] LITTLE, *supra* note 9, at 157.

[49] *Id*.

[50] *Id*. See also, Richard, *supra* note 8, at 412 (chronicling Captain William Kidd's privateering expedition which, after failing to find any pirates for eleven months, turned instead to piracy themselves in order to make the money the crew originally expected to gain from capturing pirate vessels).

[51] Cooperstein, *supra* note 8, at 223 (describing the first English "Letter of Mark" which licensed an English captain to seize any Portuguese ships he encountered for five years; he was permitted to keep all proceeds until his claim was satisfied, while excess amounts were to be presented to the king).

[52] DAVID J. BEDERMAN, PRIVATEERING, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Oct. 2008).

The use of privateers to combat piracy was a secondary, though important, function of Letters of Marque.

A. Historical Problems Associated with Privateering

As one might imagine, the rather unsavory group of individuals that tended to be attracted to a career in privateering led to more than a few problems for the institution of privateering—not to mention the governments that employed them. Even in the eighteenth century, extreme brutality did not always make for good public relations. Anti-piracy privateers often developed reputations for brutality rivaling if not exceeding the worst of the pirates they hunted.[53] While this could certainly have a deterrent value in its own right, the idea of marauding men looking for trouble would have almost certainly been unnerving for common mariners, even if the targets of those marauders was not—presently—the merchants themselves.

Unlike traditional naval forces, privateers and mercenaries do not take or follow orders from a government, nor is there much legitimate use for such men in peacetime. Privateering could be an extremely lucrative occupation in times of war, and it was often difficult to stop these experienced raiders from continuing to plunder the ships of a former enemy after hostilities ended.[54] Whereas naval forces continue to be paid regardless of whether a nation remains at war or resumes peaceful coexistence with its neighbors, the privateer, like the mercenary, has no legal means of income once a war is over.

Machiavelli once commented that "war makes thieves and peace hangs them."[55] Never has this been more directly applicable than to privateering, which legally sanctioned a form of piracy during times of war, while those same governments expected their newly minted buccaneers to return to a peaceful existence once hostilities ceased regardless of the lack of economic opportunity for crews with little experience in more "peaceful" trades. Charles Johnson pointed this out directly in stating that "privateers in time of war are a nursery for pirates in time of peace."[56] This propensity to create future criminals and add to the problem of piracy rather than contribute to a valid solution eventually led to privateering's fall from grace and eventual ban.

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[53] LITTLE, *supra* note 9, at 184.

[54] RUBIN, *supra* note 15, at 122 (describing an English privateer crew that continued plundering Dutch merchant vessels after its Letter of Marque expired with the end of hostilities concluded the Second Anglo-Dutch War in 1667; the crew was prosecuted for piracy and hanged. See also, LITTLE, *supra* note 9, at 10, noting that economic incentives often led privateer crews to continue plying their trade as pirates once peace resumed).

[55] LITTLE, *supra* note 9, at 10.

[56] *Id*.

B. The Fall of Privateering as an Accepted Practice

Before there were any formal attempts to end the practice of privateering, the many problems related to private naval forces had caused the practice to precipitously fall from favor on its own. Many governments had signed bilateral agreements barring the use of privateers against one another by the early 19th century, and even if one did not exist, many states simply opted not to use such forces unilaterally in order to avoid the unnecessary complications such forces tended to cause after conflicts ceased.[57] While the decision of states with powerful navies, such as the United Kingdom and France, to avoid privateering can be explained by the fact that their navies were "more than adequate to the task of blockading [enemy] commerce" (i.e. that privateering was unnecessary to augment existing naval forces), states with weak navies, such as Russia, unilaterally declared they would not use privateering when hostilities broke out, indicating a general avoidance of the practice by states regardless of military strength, indicating a general unease about the practice.[58] Commerce raiding by professional naval forces, on the other hand, remained an acceptable practice up until after the end of the Second World War, when the Geneva Conventions barred attacks against civilian property, which would include merchant vessels.[59]

While the United States Constitution specifically grants congress the power to issue Letters of Marque and Reprisal,[60] it has not done so since the War of 1812.[61] In fact, the government of the United States was so concerned with maintaining its neutrality during the Napoleonic Wars, federal legislation was passed disallowing American citizens from validly accepting Letters of Marque and Reprisal from foreign belligerents, effectively turning Americans who participated in privateering into pirates, subject to the penalty for piracy (usually death, which served as an effective deterrent to Americans seeking to enter the privateering profession).[62] At the same time, the increasing proliferation of bilateral agreements not to allow citizens to engage in privateering indicates the international community of the nineteenth century's growing distaste for the practice of privateering.

C. International Prohibitions Against Privateering

The Crimean War brought the problem of privateering to the forefront of European thought, with each major belligerent unilaterally declaring not to

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[57] Cooperstein, *supra* note 8, at 245.
[58] *Id*.
[59] *Id*. at 252.
[60] U.S. CONST. ART. 1 SEC. 8.
[61] Young, *supra* note 8, at 907.
[62] Cooperstein, *supra* note 8, at 244.

engage in privateering at the beginning of the war and diplomatic pressure exerted by the belligerents upon neutrals in an effort to ensure privateering did not appear during the conflict.[63] Because of the efforts of the belligerents, privateering did not make any significant appearances during the conflict, however this apparently did not allow the international community to breathe a collective sigh of relief and move on to other issues. Instead the formation of an international agreement to ban the practice of privateering became a central issue at the Paris peace negotiations following the end of hostilities, eventually leading to the multilateral agreement known as the Declaration of Paris, which begins with the grandiose statement: "privateering is and remains abolished."[64]

While Russia had in fact sought privateers abroad, no Americans ever accepted a Russian Letter of Marque and privateering did not pose a significant problem to any of the belligerents throughout the Crimean War.[65] While it may seem odd that a sweeping international prohibition of a war practice would be born of a conference completely unrelated to the subject of the prohibition, such was the case at the Congress of Paris in the Spring of 1856, which resulted in a peace treaty ended the war and a subsidiary document banning the practice of privateering for the signatories.[66] This significant concern seemed to stem largely from the flurry of diplomatic communications at the beginning of the war as non-belligerents attempted to secure protection for themselves and their merchants during the war, which often included promises not to allow their citizens to engage in privateering for either side. Barring the practice outright through the Declaration of Paris appears to have been a simpler alternative to negotiating with every other maritime power in the world to protect shipping at the beginning of every future conflict.

By 1894, "Spain, Mexico, and the United States [were] the only commercial states of importance which have thus far failed to [ratify the Declaration of Paris], the two former being restrained by the refusal of the latter."[67] The United States refused to accede to the treaty when Great Britain refused to accept the proposed amendment that would forbid all attacks on commercial shipping and, out of fear that they would be at a disadvantage if they went to war with the United States, neither Spain nor Mexico found themselves willing to declare a ban on a practice themselves.[68] This concern

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[63] *Id*.

[64] *Id*. at 245. The initial parties to the declaration were the United Kingdom, France, Russia, Prussia, Austria, Sardinia, and Turkey, though many other states subsequently acceded to the declaration as well. *Id*.

[65] Charles H. Stockton, *The Declaration of Paris*, 14 AM. J. INT'L L. 356, 357 (1920).

[66] *Id*. at 361.

[67] Theodore S. Woolsey, *The United States and the Declaration of Paris*, 3 YALE L. J. 77, 77 (Feb. 1894).

[68] *Id*. at 78.

soon abated, however, and Spain and Mexico soon acceded to the Declaration of Paris on their own in 1908 and 1909 respectively.[69] It is important to note, however, that the usefulness of the practice was quite dubious at the time and the myriad bilateral treaties, barring the practice between specific states, already in existence by the late nineteenth century demonstrated a clear and widespread distaste for the practice.[70]

As described above, the overwhelming majority of maritime states acceded to the treaty in the late nineteenth and early twentieth centuries, with the United States being the only significant outlier. The United States government has never actively opposed the idea that the principles embodied in the Declaration of Paris, which was adopted by nearly all significant maritime states throughout the world, has become customary international law. At the same time, several authors have recently suggested that because the U.S. Constitution expressly grants congress the power to issue Letters of Marque and Reprisal and the United States never ratified the treaty banning the practice, the ban on privateering embodied in the Declaration of Paris should not be considered binding upon the United States.[71]

However, this understanding of customary international law as well as the interplay between international law and the actions of states is staggeringly flawed. While it is unsurprising that ideologically motivated individuals would characterize the United States Constitution as the law of *every* land, it is simply not the case. The document might be held with a great deal of esteem within the United States (and rightly so), but it has no discernable effect on the development of customary international legal norms. The almost universal ratification of the Declaration of Paris more than a century ago and the disappearance of Letters of Marque and reprisal from the international stage create a strong presumption that a customary international law norm has been established, which would be binding upon the United States regardless of any provisions in the United States Constitution, just as it would bind every other state in the world.

Customary international law is defined as legal principles developed through the general and consistent practices of states over time and followed

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[69] Stockton, *supra* note 64, at 362.

[70] *Id*. at 81.

[71] *See e.g.* Cooperstein, *supra note 8,* at 251; Young, *supra* note 8, at 928; DeWitte, *supra* note 8, at 149. These authors all acknowledge that a customary international law norm has almost certainly been established, however they still advocate for the United States to breach this prohibition because it is presumably allowed under the municipal law of the United States through the constitutional grant of power to congress for the issuance of "Letters of Marque and Reprisal."

with a sense of legal obligation.[72] The United States Constitution recognizes the role of international law in the Supremacy Clause, noting that treaties "shall be the supreme law of the land."[73] While the constitution does not expressly mention customary international law, the U.S. Supreme Court expressly recognized the binding applicability of customary international law in the United States in the famous case *The Paqueta Habana*.[74] In its decision, the Supreme Court found that a rule of customary international law exists barring the capture of coastal fishing vessels.[75] Because of this customary international prohibition, the court held that the capture of Spanish coastal fishing boats by US Navy ships during the Spanish-American War (1898) was inherently unlawful and that restitution must be paid to the owners of the vessels even though this law was established "independently of any express treaty or other public act."[76]

The Paqueta Habana decision unequivocally recognized customary international law as binding upon the United States, as it was considered binding in deciding the legality of prize captures under international law in federal courts deciding matters of admiralty law. [77] It may also be particularly important to note that the decision applied directly to the acts of U.S. Navy ships, showing that the acts of the United States, through its agents, are still governed by international law—even in American courts, which often ignore international obligations. At the same time, it has been argued that international law should not actually be considered binding upon the United States because, if congress chose to, it would be able to violate this norm without interference from U.S. courts on behalf of aggrieved foreign plaintiffs.[78] While it is true that congress may act in a manner contrary to international law and that U.S. courts will not overturn domestic legislation for breaching international legal norms,[79] this certainly does not mean that the actions of the United States government would be without consequence. Breaching international legal norms could significantly damage international relations, individuals acting upon the offending law could potentially be prosecuted in foreign criminal courts or subject to civil sanctions, or the behavior could even lead to litigation against the United States before international forums such as International Court of Justice or the International Tribunal for the Law of the Sea.

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[72] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW Sec. 102(2).
[73] U.S. CONST. ART. VI.
[74] *The Paquete Habana*, 175 U.S. 677, 707 (1900).
[75] *Id*.
[76] *Id*. at 708.
[77] *Id*. at 714.
[78] John R. Kennel, *International law as part of United States law*, 48 C.J.S. INT'L LAW SEC. 3 (Mar. 2011).
[79] *See e.g.*, *Munoz v. Ashcroft*, 339 F.3d 950 (9th Cir. 2003).

IV. PMCs UNDER INTERNATIONAL LAW

Much as the United States and its actions do not exist in a vacuum, the PMCs are also subject to increasing levels of international scrutiny. Globalization and increased public access to information and, coupled with the increased concern for human rights over the last century, the acts of governments as well as private actors such as PMCs, corporations, international organizations, or even private individuals has increasingly become the subject to a push for the applicability of international legal norms.[80] Principles of human rights have developed considerably since the end of the Second World War and have an increasing potential to directly impact individuals, leading to potential international liability for actions of non-state actors despite the lack of full international legal capacity.[81]

Unlike the mercenaries and privateers of old, today's PMCs see themselves as professionals and seek legitimacy and respect rather than actively fostering a reputation for brutality.[82] Today's PMCs provide a variety of services, including combat roles, in conflicts all around the world on behalf of governments seeking to supplement their own military strength.[83] This new generation of corporate contractors cringes at the suggestion that they are more susceptible to overreaction or more likely to commit human rights violations.[84] The executives heading these companies are seeking to expand the role of PMCs by expanding into new areas and working with a wider variety of clients.[85] Interestingly, HART, a British PMC, has worked for the Transitional Federal Government in Somalia as a coast guard to ensuring foreign fishing vessels pay for licenses to access in Somali waters.[86] As noted in Section II, illegal fishing in Somali waters has often been cited as one of the early causes of the rise in Somali piracy (as a matter of retaliation); some pirates even refer to themselves as the coast guard when ransoming ships, claiming to be impounding the vessels

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[80] MARKUS WAGNER, NON-STATE ACTORS, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (May 2007).

[81] *Id*. Non-state actors, for example, do not have the capacity under international law to sign treaties or pursue a case before certain international tribunals, such as the International Court of Justice. However, as demonstrated by the Nuremberg Trials, the International Criminal Tribunal Former Yugoslavia, and other international criminal courts, non-state actors may still be the subjects of certain international legal norms. *Id*.

[82] P.W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 45 (2003); Ryan M. Scoville, *Toward an Accountability-Based Definition of "Mercenary*," 37 GEO. J. INT'L L. 541, 543 (2005–2006).

[83] Benedict Sheehy & Jackson N. Maogoto, *The Private Military Company—Unravelling the Theoretical, Legal & Regulatory Mosaic*, 15 ILSA J. INT'L & COMP. L. 11 (2008).

[84] SINGER, *supra* note 81, at 217.

[85] ROBERT YOUNG PELTON, LICENSED TO KILL: HIRED GUNS IN THE WAR ON TERROR 297 (2007).

[86] *Id*. at 288.

instead (with no apparent thought given to their own lack of institutional authority to do so as individuals who intend to personally pocket the ransom fees).[87]

A. PMCs as Non-State Actors

As noted above, PMCs are non-state actors, and do not have full legal personality under international law. Because of this classification, PMCs are not traditionally considered the subjects of international law, meaning they cannot enter into international agreements affecting international law, cannot sue in international courts such as the International Court of Justice, etc.[88] However, due to the rise of human rights and international humanitarian law over the last century, it would be impossible to say that non-state actors cannot be considered, at the very least, the objects of international law. While human rights law traditionally applied only to states and the actions of the agents of states, it is clear that in some cases relevant international law will be applied directly to individuals; this is illustrated particularly by the extension of jurisdiction of the International Criminal Tribunal for Rwanda to non-state actors who violated human rights during that conflict.[89]

This is significant because it expands the potential for liability if non-state actors such as PMCs do in fact breach human rights norms or the requirements of international humanitarian law, assuming an international tribunal is established after a given conflict. This could be a powerful tool in prosecuting breaches committed by PMCs when offenses are committed in failed states such as Somalia. The potential for prosecution when offenses are committed can have an important deterrent effect on PMCs which, when coupled by effective supervision may reduce the potential for violations of human rights norms.

However it is also important to note that the establishment of an international tribunal with jurisdiction over a given conflict is, generally, an unlikely event and is normally reserved for only the most egregious situations (such as the genocides in Rwanda and the Former Yugoslavia).[90] Under the current state of international affairs, a PMC can operate under the assumption

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[87] Robyn Hunter, *Somali Pirates Living the High Life*, BBC NEWS (Oct. 28, 2006), http://news.bbc.co.uk/2/hi/africa/7650415.stm (last visited Apr. 11, 2011).

[88] WAGNER, *supra* note 79.

[89] NAVANETHEM PILLAY, INTERNATIONAL CRIMINAL TRIBUNALS AS A DETERRENT TO DISPLACEMENT IN HUMAN RIGHTS AND FORCED DISPLACEMENT 262 (Anne F. Bayefsky & Joan Fitzpatrick, eds. 2000).

[90] *See e.g.*, Andrea Birdsail, *The International Criminal Tribunal for the former Yugoslavia—Towards a More Just Order?*, 8 PEACE CONFLICT & DEVELOPMENT 1, 9 (Jan. 2006). Describing the process in establishing the ICTY and the concerns of states that concerns for state sovereignty be a primary consideration.

that no prosecutions will ever be brought against them because of the difficulties and expenses related to establishing an international tribunal over a given matter. Where states such as Somalia lack the rule of law sufficient to bring human rights violators to justice under municipal law, there is little deterrent to such behavior by PMCs operating in their territory. PMCs are still considered a new object of international law and few international rules appear to directly apply to them in a concrete, uncontroversial way, leaving a significant regulatory gap and uncertainty regarding which rules actually apply in which situations.

B. Relevant Treaties

With the exception of the Declaration of Paris, which bars PMCs from being employed as "privateers," few international rules directly correlate to the activities of PMCs. Even the rules established to govern the use of mercenaries appear not to be directly applicable to today's PMCs. The few treaties that address mercenaries at all were born of an older, outdated concept of mercenaries as independent soldiers of fortune rather than the "corporate warriors" of today. A vast throng of authors and academics have convincingly argued that the few existing treaties that could conceivably be applied to PMCs were born of outmoded ideas of the classical mercenary and the post-colonial African experience and there is little relevance to today's corporate PMCs; some sort of international regulation is needed to fulfill this void.[91]

While the resounding call from legal and foreign policy scholars to create a functional regulatory system to govern the behavior of PMCs is undeniable, no serious efforts to develop a useful framework has been pursued by any government and no treaties have yet been enacted. One particularly practical and potentially useful proposal to govern PMCs was presented by an American military officer, Major Todd S. Milliard.[92] This proposed convention requires that states monitor PMCs incorporated in their territory and report to the UN High Commissioner for Human Rights when there has been credible evidence of human rights violations or other serious crimes perpetrated by PMC employees.

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[91] *See e.g.*, Bernard O'Meara Barrie, *Private Military Firms and Mercenaries: Potential for Liability Under International Law*, 12 TILBURG FOREIGN L. REV. 324 (2004-2005); James M. Doty, *International Law and Private Military Firms*, 25 GPSOLO 38 (2008); Sheehy & Moagoto, *supra* note 82, at 1; Sarah Franklin, *South African and International Attempts to Regulate Mercenaries and Private Military Companies*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 239 (2008); Dino Kritsiotis, *Mercenaries and the Privatization of Warfare*, 22 FLETCHER F. WORLD AFF. 11 (1998); Sarah V. Percy: *This Gun's for hire: a new look at an old issue*, 58 INT'L J. 721 (2002–2003); Ryan M. Scoville, *Toward an Accountability-Based Definition of "Mercenary"* 37 GEO. J. INT'L L. 541 (2005–2006); Todd S. Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies* 176 MIL. L. REV. 1 (2003).

[92] Milliard, *supra* note 91, at 87.

Domestic legislation would be required under the convention to criminally prosecute any such violations and if the state is unwilling or unable to do so, the ICC would be granted jurisdiction over the matter.[93] While this convention could present an adequate control over PMCs, only time could tell; nonetheless, it is a mere proposal at this point, and under the current state of affairs, PMCs operate with little or no international regulation and only sparse regulations under the municipal law of various countries (if the issue is addressed at all in said country).

C. Monitoring and Regulating PMCs on Land

While there is little or no international regulation of PMCs today, they remain subject to various municipal laws (which, of course vary from one country to the next). In the United States, PMCs are regulated by the Arms Export Control Act (AECA) which governs the sale of goods or services by the US government or private companies to foreign entities.[94] The AECA requires that contractors register with the government and acquire a license for each contract over $1,000,000.[95] Unfortunately, like most municipal regulations of PMCs, the AECA lacks "teeth" to enforce many of its enumerated regulations.[96] The AECA regulatory scheme does not provide a practical method for congress to oversee whether contractors actually stick to the promises they make or whether they are otherwise behaving improperly.[97]

It is widely believed that MPRI, the American PMC that contracted with the Croatian government to teach "leadership seminars", went beyond this license and actually violated the UN arms embargo during the conflict in the former Yugoslavia by providing practical military training to Croatian forces.[98] Though teaching practical military skills had been barred by the UN Security Council arms embargo, after several months of MPRI leadership seminars (ostensibly about leadership and the role of the military in an emerging democracy), the Croatian military launched Operation Storm, crushing Serbian forces and (somewhat unsurprisingly) fighting in a distinctly western manner.[99] Despite the glaring discrepancies in what MPRI claimed it was doing in Croatia and what appeared to change in the Croatian army as a result, there were no mechanisms to determine if any excesses had occurred.

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[93] *Id*. at 90.
[94] Matthew J. Gaul, *Regulating the New Privateers: Private Military Service Contracting and the Modern Marque and Reprisal Clause*, 31 LO. L. A. L. REV. 1489, 1512 (1997–1998).
[95] *Id*.
[96] *Id*. at 1516.
[97] *Id*. at 1520.
[98] Milliard, *supra* note 91, at 14.
[99] *Id*.

Additionally, the US government has enacted a statute granting military courts authority over American PMCs under the Uniform Code of Military Justice.[100] Unfortunately, this statute is limited to PMCs who contract directly with the department of defense; contracting with the Department of State, Department of Homeland Security, a foreign government, or any other entity would allow PMCs to avoid potential liability.[101] Additionally there are no reporting mechanisms in order to enforce accountability among those contractors who do fall within the narrow scope of UCMJ jurisdiction under the statute.[102]

In the past, privateers were governed by a loose system of licensing with very little practical oversight. Letters of Marque and Reprisal were specifically limited to noted belligerents in a conflict; however the desire for increased profits enticed many privateers to overstep the bounds of their licenses and attack neutral ships.[103] Privateers who exceeded the bounds of their license would not be afforded diplomatic protection by the US government.[104] Furthermore, prizes seized in such an excessive attack would be forfeited and the privateer would be liable for interest and other damages to the aggrieved merchant.[105] However, as noted previously, these safeguards, as well as the customarily required bond payment when the Letter of Marque was issued, failed to adequately control privateers or avoid the excessive use of force, particularly because there was never any direct oversight.[106]

Today's PMCs have been involved in a wide variety of alleged excesses. One of the most egregious was the 2007 shooting of seventeen Iraqi civilians at Nisour Square in Baghdad; the FBI investigated the deaths and concluded that fourteen constituted "unjustifiable acts of excessive force" on the part of Blackwater Worldwide (now known as "Xe Services") contractors.[107] Though no evidence was ever found indicating that the contractors had been fired upon

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[100] Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. §§ 3261-67 (2000).
[101] *Id*.
[102] P.W. Singer, *The Law Catches Up To Private Militaries, Embeds*, DEFENSETECH (January 3, 2007), http://defensetech.org/2007/01/03/the-law-catches-up-to-private-militaries-embeds/ (last visited Apr. 18, 2011).
[103] Gaul, *supra* note 93, at 1503.
[104] John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 251 (1996).
[105] C. Kevin Marshall, *Putting Privateers in Their Place: The Applicability of the Marque Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 976 (1997).
[106] Richard, *supra* note 8, at 433.
[107] Daniel Richey, *Federal judge rules Blackwater shooting suit can proceed in state court*, JURIST LEGAL NEWS AND RESEARCH SERVICES, INC. (Jan. 27, 2011), http://jurist.org/paperchase/2011/01/federal-judge-rules-blackwater-shooting-suit-can-proceed-in-state-court.php (last visited Apr. 18, 2011).

(even after investigations by the Iraqi government, the Department of Defense, and the FBI), the jumpy contractors fired incessantly into the crowd even after their own superiors repeatedly called on them to cease fire; one contractor only stopped shooting when disarmed at gunpoint by a fellow contractor.[108] Iraq and Afghanistan have both banned certain PMCs for alleged excesses, but prosecutions are often difficult or impossible, particularly given the international character of most PMCs, which enables them to remove their personnel from a country and avoid prosecution.[109] At the same time, there is no system in place to observe the behavior of PMCs on a daily basis, so it is easy to imagine that excesses, particularly those of a less egregious nature, may normally go unreported.

V. CONSEQUENCES OF WIDESPREAD PMC USE AT SEA

Two of the main problems in combating piracy in Somalia have been the country's vast shoreline and lack of a stable, effective government.[110] Given the problems monitoring PMCs on land, where they can be directly observed by municipal police forces and excesses can be reported by civilians or officials alike, one can only imagine that these problems would only be compounded if PMCs took freely to see to hunt down and stop pirates. Coupled with the incidences of excessive force and overreaction on land, the clear international prohibition against privateering, and a complete lack of oversight/reporting under the current regulatory system, it would appear that while privateering could conceivably address the problem of piracy, it could also become an unmitigated human rights disaster.

It has been argued that if privateering is banned under customary international law, such a ban should only be applied to privateering in the context of raiding the merchant shipping of a belligerent state and that Letters of Marque for the purposes of anti-piracy operations should still be allowed.[111] While this argument seems like a bit of a stretch, the rest of the Declaration of Paris specifically relates to blockading and commerce raiding, which could lend support to this interpretation.[112] Due to this ambiguity regarding the extent that privateering is in fact banned under international law, it seems likely that a

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[108] SIMON CHESTERMAN & ANGELINA FISHER, CONCLUSION: PRIVATE SECURITY, PUBLIC ORDER IN PRIVATE SECURITY, PUBLIC ORDER 222 (Simon Chesterman & Angelina Fisher eds., 2009).

[109] Daniel Richey, *Federal judge rules Blackwater shooting suit can proceed in state court*, JURIST LEGAL NEWS AND RESEARCH SERVICES, INC. (Jan. 27, 2011), http://jurist.org/paperchase/2011/01/federal-judge-rules-blackwater-shooting-suit-can-proceed-in-state-court.php (last visited Apr. 18, 2011).

[110] HOMAN & KAMERLING, *supra* note 18, at 98.

[111] Richard, *supra* note 8, at 438.

[112] NATALINO RONZITTI, THE LAW OF NAVAL WARFARE: A COLLECTION OF AGREEMENTS AND DOCUMENTS WITH COMMENTARIES 64 (1988).

government, particularly one as powerful as the United States, could issue Letters of Marque for the express, limited purpose of pirate hunting. At the same time, contracts could simply be issued for such purpose without specifically calling it "privateering" to avoid falling under the auspices of the Declaration of Paris so long as sufficient arguments were made that the contracts avoided the practices described in the ban.

PMCs have been hired to conduct maritime operations at various times by all three governments currently claiming control over Somalia.[113] These contracts have met varying degrees of success; however piracy has continued to climb in the region unabated.[114] At the same time, the problem of Somali piracy is primarily detrimental to foreign governments, not to Somalis themselves; the United Nations has reported that one of Somalia's current de facto governments has actually colluded with the pirates, indicating that the shaky governments of Somalia cannot be relied upon to police the area, at least not for the time being.[115] Furthermore, as the problem is primarily not one for foreign governments, it should be no surprise that the governments on land are more focused on consolidating their power domestically than protecting international shipping. PMCs have also been employed by foreign governments and corporations to escort vessels passing by the Horn of Africa or as guards aboard the vessels.[116] No such uses appear particularly problematic because the contracts indicate limited range and uses of private contractors, in other words PMC personnel are not free to roam vast areas to fulfill the contract and are instead observable by other individuals as they are on land.

There is certainly some question about the appropriate level of armaments a ship may carry while remaining a civilian merchant vessel. However, there is no major belligerent activity presently occurring which would place merchant vessels at risk of any practical consequences of being classified as legitimate military targets if they carried defensive armaments. Because of this lack of applicability to the present problems posed by Somali piracy, the level of armament which might reclassify a merchant vessel as a combatant will not be discussed, as it would be better suited to a separate article.

If PMCs were instead awarded broad contracts to engage pirates, as a Letter of Marque implies, allowing them to freely rove the area and undergo offensive operations, there would be no witnesses or observers to keep track of PMC activities. Pirates cannot be attacked or killed on sight; much like navies operating in the area, PMCs would not be able to engage suspected pirates

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[113] Richard, *supra* note 8, at 443.
[114] *Id*.
[115] *Id*. at 446.
[116] *Id*. at 448.

unless they observed the pirates committing an act of piracy.[117] This would place PMCs searching for pirates in a particularly unnerving position: being in a foreign sea surrounded by potential hostiles. While most Somali fisherman are armed to defend themselves in their own lawless country,[118] PMCs would remain unaware as to which might act aggressively toward them. Given the hotheaded reactions of some PMCs in Iraq, such as the Nisour Square incident, it is highly likely that unjustifiable aggression, almost certainly with tragic results, would accompany any roving, aggressive, anti-piracy role for PMCs.[119]

VI. CONCLUSIONS

There are many more ways one could address the problem of modern piracy. Though it has never completely disappeared from the world stage, the recent spike in piracy and its prominence in the news have been fueled largely by the anarchic void created by the failed state of Somalia. There are a variety of military solutions using either public or private armed forces in addition to the oft-ignored option of addressing the underlying problems in pirate havens leading the local population to the practice of piracy in the first place.

The knee-jerk reaction to pursue a military solution in order to combat piracy is akin to applying a Band-Aid to a hemophiliac's open wound. This wound will not heal on its own; instead, it will continue to bleed until the underlying problem is addressed. In this case the problem leading to piracy in Somalia is the utter lawlessness and lack of economic opportunity in Somalia itself, coupled with the country's position along major shipping lanes, allowing Somalia's opportunistic form of piracy to grow rapidly.[120] Addressing the economic problems within Somalia and enhancing public order and the rule of law could deter individuals from turning to piracy. If the economic need to turn to extremes, such as acts of piracy, in order to provide an income is reduced and the likelihood of being caught and prosecuted for such a crime is increased by reestablishing the rule of law in Somalia, the incidences of piracy would likely decline precipitously.

Thus far, it has proven too difficult to establish a stable, functional government in Somalia; short-term solutions include the use of PMCs in an attempt to secure the waters off the Somali coast but this cannot achieve a permanent resolution.[121] In the meantime, PMCs provide services as guards escorting vessels passing by the Somali coast, augmenting the international

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[117] *Id*. at 442.
[118] HOMAN & KAMERLING, *supra* note 18, at 69.
[119] CHESTERMAN & FISHER, *supra* note 107, at 222.
[120] MIDDLETON, *supra* note 17, at 14.
[121] HOMAN & KAMERLING, *supra* note 18, at 80.

forces that have established a short, but useful safe zone.[122] Convoying and escorts have undoubtedly been a useful addition to the area, but given the lack of improvement in the piracy rates off the Somali coast, more undoubtedly needs to be done.

The solution proposed by several authors, to bring back Letters of Marque, would not solve the problems posed by piracy. Like convoying, the existing escorts, and the international naval presence, a resurgence of privateering does not present a magic cure all that will resolve the problems posed by piracy. Instead of resolving the situation off the Somali coast, it appears, given the lack of oversight and past problems created by PMCs, that unsupervised PMCs, roving the African coast in search of pirates could compound the problem by abusing fisherman and creating an increase in anti-western sentiments among Somalis (assuming that, as one might expect, Somalis would blame the west for the PMCs that suddenly appear along the coast and begin threatening pirates and peaceful fishermen alike).

Privateering and letters of marque constituted the employ of private individuals to attack enemy shipping, essentially nationally recognized pirates (so long as their quarry was limited to the enemies of their employer-state).[123] Cruisers were hired as private pirate hunters; however they often eventually became pirates themselves.[124] Neither, however, addressed underlying problems associated with piracy. Similarly the use of private military companies would utterly fail in this regard. Rather than solving the problem of piracy directly, it would serve only as an expensive Band-Aid to reduce the losses associated with the underlying problem of failed states and extreme poverty along shipping lanes that created the problem in the first place.

Military solutions, public or private, do not resolve the underlying problems associated with piracy, which stem from the same societal issues as gang-related crime on land.[125] The use of military force will undoubtedly be necessary to protect shipping before order can truly be restored in affected areas, but to consider such force alone to be the solution to piracy would ignore the reasons piracy remains an attractive source of income. Such ignorance caused the Golden Age of Piracy to last for 65 years (1655-1725), where at its heights pirates were so brazen they took to land and sacked Spanish colonial cities; large-scale piracy remained even after this "Golden Age" ended and remained a notable threat to global commerce until 1830.[126]

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[122] *Id*.
[123] LITTLE, *supra* note 9, at 8.
[124] *Id*.
[125] HOMAN & KAMERLING, *supra* note 18, at 103.
[126] LITTLE, *supra* note 9, at 199.

History has shown that piracy, like crime on land, has always been and will continue to be a problem so long as man continues to take to the sea. The key is to determine how to most effectively and affordably suppress piracy by defending shipping lanes while also addressing underlying problems that encouraged piracy to begin with. The use of private military companies to defend shipping lanes could potentially protect shipping from the pirate threat, but the cost of focusing solely on such an approach could cause significant human rights abuses without resolving the underlying causes of the pirate threat. The idea that PMCs should be set loose to roam freely looking for pirates entails too many risks for any responsible state to pursue, even if an effective argument can be made that the practice is not, in fact, blatantly illegal. PMCs are not offensive weapons, they cannot take the fight to the pirates, and they cannot be expected to effectively police Somali waters when the world's greatest naval powers have failed.