INTRODUCTION

On December 3, 1816, President James Madison stood before the American people and delivered his eighth and final annual message. While commemorating the nation’s fortieth year of independence, Madison congratulated the American people on the peace and respect they enjoyed abroad as a result of their defense of national rights against injustice. However, a triumph over a European power did not serve as the sole inspiration for this praise. Instead, it came at the end of a thirty-three year period of hostilities between the United States and the Barbary pirates of North Africa.

During that time, the Barbary pirates captured an estimated thirty-five American vessels and seven hundred sailors, with some sailors languishing in captivity for several years. Freedom for these Americans came at the cost of two wars, during which the United States Navy deployed its largest squadron to date and Marines flew the American flag over an occupied

* George Mason University School of Law, J.D. Candidate, May 2015; Research Editor, GEORGE MASON LAW REVIEW 2014-2015; Franklin & Marshall College, B.A. History & Government, magna cum laude, Phi Beta Kappa, May 2010. I would like to thank Professor Jeremy Rabkin for his guidance, as well as Kelsey Wilbanks, Brandon Gould, and my fellow members and editors for their helpful comments and hard work. I am especially grateful to my parents for their support and patience. Any remaining errors are my own.

2 Id.
3 JOSHUA E. LONDON, VICTORY IN TRIPOLI: HOW AMERICA’S WAR WITH THE BARBARY PIRATES ESTABLISHED THE U.S. NAVY AND SHAPED A NATION 239 (2005) (stating that the Senate ratified a treaty ending the hostilities on December 21, 1815).
5 MICHAEL B. OREN, POWER, FAITH, AND FANTASY: AMERICA IN THE MIDDLE EAST, 1776 TO THE PRESENT 75 (2007).
6 LAMBERT, supra note 4, at 8, 73.
7 Id. at 7.
8 Id. at 190.
foreign city for the first time. As a result of this success, “captives [were] delivered from servitude; and the ‘Star-spangled banner’ wave[d] freely in ‘every port of the civilized world.'”

The United States suppressed the Barbary pirates with its military forces through direct sea and land combat. Congress authorized offensive action to protect “commerce and seaman . . . on the Atlantic ocean, the Mediterranean and adjoining seas.” Congressional authorization permitted the president to subdue and seize pirate vessels and do all other acts he felt a state of war justified even though the Barbary pirates merely harassed, rather than crippled, American shipping. As a rationale for the conflict, Congress and the president cited the freedom of the seas and its importance to American independence.

In recent years, piracy has reemerged as a serious threat to the safety of all those who peaceably navigate the oceans. This has occurred most visibly in the Horn of Africa, where the political instability following the collapse of the Somali government in 1991 created fertile ground for piracy. The risk zone for pirate attacks covers an area the size of continental Europe, as it extends from East Africa to India. Somali pirates’ broad operational capability stems from their well-financed and sophisticated on-land infrastructure, which allows them to launch attacks with vessels using

9 Id. at 152-53; In Search of History: Pirates of the Barbary Coast (A&E HOME VIDEO 1998) (stating that the American flag flew over Derna, which is now in Libya).
10 LAMBERT, supra note 4, at 202.
11 In Search of History: Pirates of the Barbary Coast, supra note 9.
12 Act of Feb. 6, 1802, ch. 4, § 1, 2 Stat. 129, 130 (1802); Act of Mar. 3, 1815, ch. 90, § 1, 3 Stat. 230 (1815); JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RESEARCH SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 6-7 (2013) (noting that Congress used identical language in 1802 and 1815).
13 ELSEA & WEED, supra note 12, at 6.
14 LONDON, supra note 3, at 15.
17 Martin Murphy, Concerns, Consequences, and Resolutions to Somali Piracy, in PIRACY IN COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW, supra note 15, at 73, 74 (describing Somali piracy as the most substantial threat to peaceful movement by sea since World War II).
18 Tom Tulloch, Plague of Pirates—A Primer, in PIRACY IN COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW, supra note 15, at 45.
heavy weaponry, global positioning systems ("GPS"), and refined tactics. Since 2008, pirates have captured over 130 ships at an average ransom of $5 million per ship in 2011. States and private shippers have responded by increasing naval patrols, employing private security contractors, and altering shipping practices. During 2013, Somali pirates seized four vessels and attacked twenty-three vessels, and 145 vessels reported suspicious approaches. Between direct losses and deterrence and avoidance efforts, the World Bank recently reported that Somali piracy costs the global economy $18 billion annually.

Some commentators argue the law of war has no relevance for curbing piracy because pirates are not combatants, but ordinary criminals. As ordinary criminals, pirates are entitled to trial in a civilian court with equivalent procedural rights to citizens of the country in which they are tried. This Comment shows the flaws in this view. This Comment references the Barbary wars and other historical examples to illustrate that America’s founding generation treated pirates as military enemies, not common criminals. Despite substantial technological and military changes, the founders’ concept remains valid. With the framework of the past and the technology of the present, this Comment argues the United States may lawfully strike Somali pirates in their safe havens.

Two paradigms of modern international law—international humanitarian law ("IHL") and international human rights law ("IHRL")—govern the
use of force by states against nonstate actors. The United States’ killing of Osama Bin Laden provides a good illustration of the distinction. The United States applied IHL in the Bin Laden raid because it viewed Bin Laden as a military enemy/combatant within the armed conflict against al Qaeda. IHL allowed the United States to kill Bin Laden based on his status as a member of al Qaeda, even if Bin Laden posed no threat to United States forces when discovered. Bin Laden, rather than the Navy Seals, had the burden to clearly indicate he intended to surrender to avoid being shot. Alternatively, if IHRL governed the raid, the American forces would have acted like law enforcement officials. On a mission to capture Bin Laden, deadly force could only be used in self-defense to an imminent threat. This Comment argues Somali pirates can, and should, be dealt with according to IHL, just as Bin Laden was treated.

As in Madison’s time, freedom of the seas supplies a justification for applying IHL to pirates. Freedom of the seas is regarded as the first principle of modern international maritime law. This idea that “the open sea is free to the ships of all nations” has prevailed since the seventeenth century, as states recognize the sea is an essential avenue of communication and commerce. The laws of war and the law of the sea have developed in tandem to secure order on the oceans and prevent activities that threaten world trade. Piracy represents a critical disruption to the order that states seek to maintain, both in Madison’s time and now. Accordingly, freedom of the seas presents the same justification for attacking today’s Somali pirates as their Barbary brethren.

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32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
37 John B. Hattendorf, Maritime Conflict, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 98, 98 (Michael Howard et al. eds., 1994); see also Corfu Channel (U.K. v. Alb.) 1949 I.C.J. 4, 46 (Apr. 9) (individual opinion of Judge Alvarez) (identifying a merchant ship’s free passage through another state’s territorial sea as a right under international law because it promotes good relations between peoples).
38 Hattendorf, supra note 37, at 98.
39 Introduction to PIRACY IN COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW, supra note 15, at 17.
40 Id.
41 LONDON, supra note 3, at 15.
Admittedly, there are distinctions between today’s Somali pirates and the pirates of yesteryear. But these differences do not mean that nations should be deprived of the most appropriate tools to address an age-old problem. Despite deterrence efforts by states and the shipping industry, Somali pirates’ continued attacks on merchant vessels prove the current law enforcement framework does not eliminate Somali piracy as a danger to global commerce. Under the current law enforcement approach, states and shipping companies must act with constant vigilance at sea because their measures cannot thwart pirates’ support networks on land. This Comment argues Somali pirates are engaged in an armed conflict with merchant vessels and counterpiracy patrols, and the pirates may be attacked on land by military forces according to IHL. This action would be consistent with historical practice and would end the pirates’ presence at sea.

Part I of this Comment gives an overview of the history of piracy, showing how pirates were seen as military enemies, not just criminals. It also explains the origin of the phrase “hostis humani generis” and how states have historically treated pirates. Part II discusses changes in international law that switched pirates’ status from military enemies to civilians, but Part II also shows how piracy remained unique within international law. Part III traces the rise of Somali piracy in the twenty-first century and highlights some difficulties nations have encountered when trying to combat Somali piracy. Finally, Part IV argues that pirates may appropriately be defined as combatants and that states may wage war against pirates, their equipment, and infrastructure both on land and at sea.

I. BACKGROUND: PIRATES AS THE WORLD’S ENEMY

The world’s perception of pirates since antiquity frames the modern discussion of piracy and provides a foundation for applying IHL to Somali pirates. Over time, an actor’s lack of state sanction has distinguished piracy from other acts of violence on the high seas. Somali pirates also act without state sanction, placing them within the traditional parameters of

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43 Cédric Leboeuf, Operation Atalanta, in PIRACY IN COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW, supra note 15, at 225, 246.

44 Michael Bahar, Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations, 40 VAND. J. TRANSNAT’L L. 1, 31 (2007) (identifying acts of piracy carried out with state sanction as valid under the law of nations, but action without state sanction rendered the individual an enemy of all mankind).

45 Guilfoyle, supra note 27, at 144.
*hostis humani generis* as enemies of all mankind and legitimate targets for military force.  

A. *The Evolution of “Hostis Humani Generis”*

Pirates have an ancient presence in world history. Records exist of pirates disrupting the Pharaoh’s sea trade and launching attacks on trading centers, such as Troy. Even in the earliest days, society placed limits on what type of seaborne activity was acceptable. Later, the attitude toward piracy developed more fully, and a recognized treatment of pirates gained acceptance. Scholars consistently applied the same phrases toward pirates, and states uniformly treated pirates as military enemies who operated outside societal norms, even into the modern era.

1. Piracy from Antiquity to Blackstone

Laws on piracy date back to ancient Athens, making it one of the world’s oldest crimes. Gauged by the writings of Thucydides, Aegean peoples had a distinct definition of the conduct that rendered someone a pirate. Acts of piracy were not condemned when committed against foreign people, but piracy transformed into a reprehensible act if attacks were directed toward fellow citizens. However, the surge in trade and piracy that accompanied the rise of the Roman Republic after the fall of Carthage necessitated harsher treatment of pirates.

The word “pirate” initially referred to sea raiders who literally warred with all their neighbors and possessed a substantial degree of political or-
ganization. Later, “pirate” took on a broader definition and applied to ordinary robbers who operated at sea. Bold pirates seized a young Julius Caesar and held him for ransom. Although they treated Caesar well in captivity, upon his release, Caesar returned with a flotilla and crucified the pirates. Only a few years later, the Roman general Pompey received full power from the Senate to wage war against pirates for three years, which ended in success. Pompey received great praise for his actions.

It was within this context that Cicero unequivocally condemned pirates as hostis humani generis. This condemnation represented a key development in the history of piracy because although the manner of the offense changed over time, the legal conclusion has remained the same. Hostis not only meant enemy; it meant enemy in the sense of a wartime foe who could be attacked and killed without a declaration of war or formal hostilities. This phrase also possessed a duality: pirates were both “enemies of all mankind” in the military sense and offenders of international criminal law. This gave pirates a status like unlawful combatants who could be treated militarily or criminally at the enforcing state’s convenience.

Cicero’s classification of pirates took hold in later generations with scholars explaining the implications of hostis humani generis and state laws validating the effect. The Swiss philosopher Emer de Vattel relied on the status of pirates to argue that other criminals ought to be treated identically.

Although the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule those villains, who,

55 Kontorovich, supra note 46, at 234-35
56 Id. (explaining that “enemies of all mankind” became a legal fiction because a person did not have to actually attack all mankind to be a pirate and be treated as an enemy of all mankind).
57 ABULAFIA, supra note 47, at 194.
58 Id.
60 Gaurier, supra note 15, at 29.
61 Id. at 31; Joel Christopher Coito, Comment, Pirates vs. Private Security: Commercial Shipping, the Montreux Document, and the Battle for the Gulf of Aden, 101 CAL. L. REV. 173, 199 (2013); Davey, supra note 51, at 1200.
62 Kontorovich, supra note 46, at 231, 234.
63 Id.
65 Ex parte Quirin, 317 U.S. 1, 31 (1942) (distinguishing between lawful and unlawful combatants).
66 Kontorovich, supra note 64, at 257.
68 Kontorovich, supra note 46, at 231.
by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundation of their common safety. Thus, pirates are sent to the gibbet by the first into whose hands they fall.69

Although Professor Eugene Kontorovich argues that this passage has been misconstrued to support arguments that an act’s “heinousness” sustains universal jurisdiction over the offender, he emphasizes that Vattel’s use of the phrase hostis humani generis signifies a call for direct executive action, presumably by the British Navy, acting in a military or policing role.70

Vattel’s advocacy for executive action, without judicial interference, finds further support by Vattel using the phrase hostis humani generis in a book focused on military operations.71 To Vattel, the indiscriminate nature of pirate attacks injured all nations and undermined the common safety, warranting an exceptional power to punish.72 Even today, piracy is recognized as the quintessential crime of customary international law.73 All nations’ universal jurisdiction over piracy meant that any capturing nation could punish a pirate, regardless of where the act was committed or whom the pirate targeted.74

Other preeminent jurists such as Sir William Blackstone used Cicero’s phrase hostis humani generis and acknowledged harsh treatment for pirates.75 In his Commentaries on the Laws of England (“Commentaries”), Blackstone noted the state of the law in his time and explained the basis for the hostis approach:

69 Id. at 230 (quoting EMERICH DE VATTEL, LAW OF NATIONS, bk. I, § 233 (1833)) (internal quotation marks omitted).
70 Id. at 231-32; RUBIN, supra note 50, at 202-03 (“Great Britain [assumed] a legal authority to protect shipping lanes in general . . . eliminating the need for direct injury to a British flag vessel or national to justify military action. Such military action could then be seen either as an option of policy unfettered by the usual legal restraints on the decision to go to war both in municipal law and international law, or as a mere enforcement action by a ‘policeman’ of the international order, or even by a ‘policeman’ of the British legal order as it was extended to all seas for the purposes of securing universal ‘rights’ to commerce as those ‘rights’ were perceived by British lawmakers.”).
71 Kontorovich, supra note 46, at 232 (“‘Hostis’ means ‘enemy’ in the military sense. . . . The term’s provenance has long been forgotten by all but a few scholars of piracy and the law of war, but it was certainly understood by Vattel, a close reader of Grotius.”).
72 Id. at 230-31.
74 Id.
75 ROBERT HAYWOOD & ROBERTA SPIVAK, MARITIME PIRACY 32-33 (2012) (noting Britain and the American colonies executed four to six hundred men between 1716 and 1726 under Britain’s harsh piracy law and sometimes left the corpses on display for up to two years); William Bradford, Barbarians at the Gates: A Post-September 11th Proposal to Rationalize the Laws of War, 73 MISS. L.J. 639, 868-69 & n.691 (2004).
The crime of piracy, or robbery and depredation on the high seas, is an offence against the universal law of society; a pirate being according to Sir Edward Coke, hostis humani generis. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him.\(^6\)

The English court subsequently embraced Blackstone’s characterization in 1817, when Lord Stowell declared, “pirates are ‘the enemies of every country, and at all times; and therefore are universally subject to the extreme rights of war.’”\(^7\)

2. British and American Application of “Hostis Humani Generis”

Professor Douglas Guilfoyle and other present-day scholars dismiss Blackstone’s position, describing it as “mere rhetoric and no basis upon which to consider the laws of armed conflict applicable.”\(^8\) Opposite this view, others argue that historical practice provides examples of states implementing measures that treated pirates with a harshness reserved for enemies of mankind.\(^9\) States relied upon pirates’ status as military enemies subject to universal jurisdiction to suppress piracy through a legal framework based on swift justice.\(^10\) This model differed sharply from that reserved for civilians.\(^11\)

If pirates found themselves back on land for trial, English law imposed unfavorable trial conditions wherein pirates appeared without counsel before a panel of commissioners that resembled a military tribunal.\(^12\) Parliament designed the process to speed up pirate prosecutions,\(^13\) which operated


\(^7\) Charles H. Norchi, Piracy and the Public Order of the Oceans, in PIRACY IN COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW, supra note 15, at 425, 426 (citation omitted).

\(^8\) Guilfoyle, supra note 27, at 152-53.

\(^9\) Rubin, supra note 50, at 206 (explaining that British law read hostes humani generis literally to make the laws of war apply to pirates, or at least those laws of war that favored the British Navy);


\(^11\) Id.
through Vice-Admiralty courts around the British Empire. Seven “commissioners” drawn from the ranks of naval officers and colonial officials—not ordinary judges or jurors—presided over these courts.

The case of Captain William Kidd illustrates how the scales were stacked against pirates, imposing a virtually nonexistent due process standard. At his trial, Kidd faced charges of murder and piracy. When he initially refused to enter a plea, the court stated it would find him guilty by default. He then asked for a delay and moved for dismissal, which were both denied, along with his request for counsel. During the two-day trial, before a separate jury for each charge, Kidd had to conduct his own cross-examinations of hostile witnesses and present his own defense. Unsurprisingly, Kidd was convicted and executed.

The United States also took a serious stance against piracy after the Revolution. In addition to its conflict with the Barbary pirates in the Mediterranean, the United States combated piracy around its shores. In response to a petition submitted by American shippers, Congress authorized the president to use military force against pirates operating in the Caribbean and Latin American coastal waters. Specifically, the authorization allowed

84 Id. In 1721, Parliament broadened the scope of piracy in England’s municipal law, extending the draconian trial procedures to “all persons who ‘trade[d] with any pirate, by trade, barter, or exchange.’” Burgess, supra note 79, at 312-13 (quoting another source). This opened the sea lanes and left most pirates “dead, hiding, or respectable.” Id.
86 Id. at 558-59.
87 Id. at 559 n.41.
88 Id. at 559.
89 Id.
90 Id.
91 Id.
92 Wallach, supra note 86, at 559.
95 ELSEA & WEED, supra note 12, at 7.
the president to instruct commanders of the “‘public armed vessels of the United States’ . . . to combat piracy, including attacking and seizing pirates and their vessels.”96 Pursuant to this authorization, President Monroe sent the Mosquito Fleet, a contingent of smaller vessels capable of sailing into the Caribbean’s shallow coastal inlets and lagoons, to eradicate pirate hideouts.97 During these operations, United States forces entered Spanish territory, most notably in Cuba and Puerto Rico, to suppress piracy.98

The United States’ post-Revolutionary military actions against pirates help illustrate Blackstone’s heavy influence over America’s founding generation.99 By assigning Congress the power to “Define and Punish” piracy, the Framers signaled that piracy was a foreign affairs issue beyond the competence of the individual states to handle.100 Further, one scholar suggests the Framers directly incorporated Blackstone’s views on piracy into the Constitution by adopting the phrase “offenses against the law of nations.”101 With this phrase, Blackstone identified piracy as a public wrong committed against the law of nations, which states had a duty to punish.102 The Constitution’s structure reinforces the Framers’ view of piracy as a foreign affairs issue dealt with through military force because the Define and Punish Clause103 is enumerated immediately before Congress’s power to declare war.104

The founding generation exhibited their concern for piracy by outlawing piracy in the first set of federal criminal statutes passed in 1790.105 These criminal statutes mirrored the definition of piracy that Blackstone used in the Commentaries106 and recognized the United States’ jurisdiction over acts of piracy that violated either the law of nations or the United States’ municipal law.107 However, the statutes sparked debate about the extent of

96 Id.
98 Boot, supra note 82, at 101.
101 Stephens, supra note 100, at 485, 488.
102 Id.
103 U.S. CONST. art. I, § 8, cl. 10.
104 U.S. CONST. art. I, § 8, cl. 11.
106 Id. at 1066.
107 Id. at 1065-66, 1068.
the United States’ ability to punish piracy.\textsuperscript{108} Chief Justice John Marshall insisted the United States’ piracy statute could not reach a foreign seaman on a foreign ship.\textsuperscript{109} After dialogue with Congress, the Supreme Court adopted Congress’s adamant position that the Government could exercise universal jurisdiction and punish a pirate irrespective of his or the victim’s nationality.\textsuperscript{110}

The ability to punish pirates with military force outside the United States’ territory did not confer any rights upon pirates under the law of war.\textsuperscript{111} Prior to the Civil War, the United States’ actions demonstrated pirates’ inferior status under the then-uncodified law of war.\textsuperscript{112} In 1863, Professor Francis Lieber drafted a code of conduct for soldiers, which the Lincoln administration promulgated as General Orders 100, \textit{Instructions for the Government of the Armies of the United States in the Field} ("Lieber Code").\textsuperscript{113} The Lieber Code was recognized as the first codification of regulations for the conduct of war by land.\textsuperscript{114} Even today, it forms the basis for most American and international regulations for the law of war.\textsuperscript{115} In this seminal work, Lieber explicitly identified pirates as an example of combatants who deserved no protections.\textsuperscript{116} According to Lieber,

Men, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder, or by raids of any kind, without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war, but who do so with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.\textsuperscript{117}

\textsuperscript{108} \textit{Id.} at 1061-75 (discussing the Supreme Court’s decisions and the resulting dialogue with Congress).

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Id.} at 1071, 1074.

\textsuperscript{111} \textit{Rubin}, supra note 50, at 293-94 (stating that “unprivileged belligerents” were analogized to pirates); \textit{Bahar}, supra note 29, at 1319-20 (calling pirates and nonstate combatants close cousins who are both targeted by military assets).

\textsuperscript{112} See sources and accompanying text supra notes 93-99.


\textsuperscript{114} Howard, supra note 113, at 6; \textit{Rubin}, supra note 50, at 292.

\textsuperscript{115} Howard, supra note 113, at 6; Finkelman, supra note 113.


\textsuperscript{117} Gen. Order No. 100 § IV, pt. 82 (1863), available at http://avalon.law.yale.edu/19th_century/lieber.asp.
This analogy with pirates established that guerilla fighters—like pirates—had no claim to protections of ordinary criminal process, but neither were they covered by protections for prisoners of war under the law of war.  

Further, the Lieber Code specifically assigned pirates this status because, as nonstate actors, they operated impermissibly outside the accepted state framework. Although the Lieber Code did not use Cicero’s phrase *hostis humani generis*, it accepted the pirate’s unique status as outside the social compact of mankind and consequently eligible for harsh treatment.

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Throughout history, piracy has been recognized as a unique crime deserving harsh treatment. Although permissible in limited circumstances against foreigners in ancient times, the definition of piracy soon expanded to include all acts of robbery at sea by nonstate actors, who were condemned as *hostis humani generis*. From this point, pirates were situated within the laws of war and could be dealt with through military force. If captured and placed on trial, pirates received truncated due process rights compared to civilian criminals. Therefore, *hostis humani generis* amounted to more than mere rhetoric; it represented a uniquely harsh standard of treatment for pirates.

B. *The Pirate vs. Privateer Distinction*

Despite this firm stance against piracy, a fine line distinguished acceptable conduct from forbidden attacks against merchant shipping. States simultaneously licensed private individuals to attack the merchant

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119 RUBIN, *supra* note 50, at 294 (explaining that the term “piracy” was historically used to distinguish between privateers who fought under the laws of war and individuals who sailed without valid commissions); Dino Krisiotos, *The Contingencies of Piracy*, 41 CAL. W. INT’L L.J. 305, 315-16 (2011) (citing the Lieber Code as evidence that international law connected the validity of violence to the status and identity of the perpetrator of that violence).
124 Kontorovich, *supra* note 64, at 257.
125 See Boot, *supra* note 82, at 99.
127 Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1615 (2002) (“With sovereign authorization, a person engaged in reprisals would not (or at least should not) be treated like a pirate.”).
shipping of enemy states and recognized the licenses issued by enemy governments to attack their own ships. Although this increased risk to merchants, having state sanction turned an otherwise unlawful act of piracy into a lawful one of privateering.

Privateering, commissioning private vessels with letters of marque to attack enemy merchant ships during war, was a widespread state practice for centuries. Privateering began to decline in the mid-seventeenth century, but remained attractive for states because it provided the state with ships and men to fight at little cost. Privateers were incentivized by the opportunity for adventure and fortune. They could claim a portion of the riches of enemy merchants by presenting their lawful commission and the captured enemy property to a prize court.

Although the United States and European nations issued letters of marque authorizing privateering, this practice in no way diminished the effect of hostis humani generis. State sanction of the activity was pivotal. By virtue of occurring at sea, privateers had almost no direct supervision of their activities, but the requirement that the privateer present their captures to a prize court to receive payment meant any crimes committed against the merchant crew would likely come to light.

These checks existed as a well-understood and limited form of regulation, and possessing a valid commission did not excuse attacks on mer-

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128 Kontorovich, supra note 46, at 211 (“All nations acknowledged the right of other sovereigns to authorize privateering.”); id. at 214-15 & n.178 (recounting that the crew of a captured American privateer showed its commission to Newfoundlanders to avoid piracy charges during the Revolution).

129 Jeremy Rabkin & Ariel Rabkin, Navigating Conflicts in Cyberspace: Legal Lessons from the History of War at Sea, 14 CHI. J. INT’L L. 197, 204 (2013) (explaining that letters of marque increased a nation’s naval capacity, but a privateer’s guns were usually only powerful enough to target enemy merchant vessels).

130 Kontorovich, supra note 46, at 214 (“Privateering did not differ from piracy in the substantive nature of the conduct, but only in the attendant formalities.”).

131 Hattendorf, supra note 37, at 103-04.

132 Id.

133 Id. at 103; C. Kevin Marshall, Comment, Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars, 64 U. CHI. L. REV. 953, 965, 974-75 (1997).

134 Hattendorf, supra note 37, at 103-04; Marshall, supra note 133, at 974-75.


136 See Kontorovich, supra note 46, at 211, 214; Ramsey, supra note 127, at 1615 (“It was of course common ground that piracy and robbery were outlawed and severely punished.”).

137 Kontorovich, supra note 46, at 211.

138 Id. at 212.

139 Id. at 218.

chant vessels that were outside the commission’s scope.\textsuperscript{141} For example, when Captain Kidd “turned” from pirate hunter to pirate, he also had a letter of marque that authorized him to attack French vessels.\textsuperscript{142} At his trial, Kidd attempted to show that he only captured vessels he reasonably believed were French.\textsuperscript{143} The court rejected this defense and did not show Kidd any leniency.\textsuperscript{144}

This outcome demonstrates that failing to stay on the proper side of the piracy-privateering distinction brought harsh punishment.\textsuperscript{145} Further, states did not hesitate to independently examine the validity of a commission purportedly issued by another nation. The Supreme Court’s decision in United States v. Klintock\textsuperscript{146} illustrates this fact. In Klintock, the defendant sailed with a dubious letter of marque from an individual named Aury, who identified himself as the Brigadier of the Mexican Republic and the Generalissimo of the Floridas.\textsuperscript{147} Because the commission mentioned territory under Spanish control, but was not issued by the Spanish government, the Supreme Court determined the commission was invalid and provided no justification to seize vessels.\textsuperscript{148} Without a lawful commission that would have made the defendant a state actor, the Court upheld the piracy conviction.\textsuperscript{149}

According to custom, state sanction distinguished lawful privateering from unlawful piracy.\textsuperscript{150} While private citizens, in accordance with letters of marque, could engage in acts that would have otherwise been piracy,\textsuperscript{151} a sailor who acted as a nonstate actor became hostis humani generis. As

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\item \textsuperscript{141} Kontorovich, supra note 46, at 216 & n.190 (explaining that if a privateer exceeded his commission and brought a neutral ship to the issuing nation’s prize court, the act might not be piratical, but it would be illegal and the court might award restitution; but if a neutral nation captured this privateer during the act, he might be treated as a pirate (citing Talbot v. Janson, 3 U.S. (3 Dall.) 133, 154 (1795))).
\item \textsuperscript{142} Wallach, supra note 86, at 558-59 n.38.
\item \textsuperscript{143} Id. at 559 & n.41 & 46.
\item \textsuperscript{144} Id.
\item \textsuperscript{145} Kontorovich, supra note 46, at 217.
\item \textsuperscript{146} 18 U.S. (5 Wheat.) 144 (1820).
\item \textsuperscript{147} Id. at 149-50, 153.
\item \textsuperscript{148} Id. at 149-50. The U.S. attorney general argued that a pirate has no state and the pirate’s ship belongs to no nation because of hostis humani generis. This makes pirates and their ships outcasts from the society of nations, and all states have a tacit alliance against them. Because of this status the offense of piracy was punishable in all nations’ courts. Therefore, “the offence committed on board a piratical vessel, by a pirate, against a subject of Denmark, is an offence against the United States, which the Courts of this country are authorized and bound to punish.” Id. at 147-48. The Court accepted this argument. Colangelo, supra note 105, at 1064 & n.208.
\item \textsuperscript{149} See Ramsey, supra note 127, at 1615-16.
\item \textsuperscript{150} Hattendorf, supra note 37, at 103-04; Bahar, supra note 44, at 31 (identifying acts of piracy carried out with state sanction as valid under the law of nations, but action without state sanction rendered the individual an enemy of all mankind).
\item \textsuperscript{151} Kontorovich, supra note 46, at 214.
\end{itemize}
demonstrated by the treatment of Captain Kidd and the defendant in *Klintock*, action under color of commission did not trigger leniency.152

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Traditionally, states used their militaries to deal with pirates and treated them as military enemies,153 indicated by the phrase *hostis humani generis*.154 This allowed states to attack pirates on land to eliminate them as a threat on the sea.155 If captured pirates received a trial, the court applied less stringent due process standards than those reserved for civilians.156 However, a private individual who carried out piratical acts with state sanction under a letter of marque would not be subject to criminal prosecution.157

II. CHANGES IN THE INTERNATIONAL STANDARDS AND MODERN PIRACY

Starting in the mid-nineteenth century, state practice on the sea underwent several changes.158 This was followed by multiple efforts to codify the law of the sea in the twentieth century.159 However, by this time piracy had ceased to occur on a large scale and it no longer presented a systemic threat to freedom of the seas.160 This meant that although piracy was still included in codifications of the law of the sea, official frameworks did not envision piracy reemerging as significant problem.161

This Part describes several of the changes to the law of the sea and its treatment of piracy. Despite these changes, piracy continued to have a unique status under international law, in that states could more easily seize pirates than other criminals on the sea.162 This challenges the assertion that states cannot treat pirates as military enemies and must treat Somali pirates as ordinary criminals, rather than *hostis humani generis*.163

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152 *Klintock*, 18 U.S. (5 Wheat.) at 153; Wallach, supra note 86 at 559 & n.41.
153 See Gaurier, supra note 15, at 29; WOMBWELL, supra note 94, at 35-49.
154 Kontorovich, supra note 46, at 231, 234.
155 Boot, supra note 82, at 101.
156 *Id.* at 99.
157 Ramsey, supra note 127, at 1615.
162 See Rabkin & Rabkin, supra note 129, at 211 & nn.52-53.
163 Guilfoyle, supra note 27, at 152-53.
A. \textit{The Declaration of Paris}

In 1856, the major European powers gathered to negotiate peace terms after the Crimean War.\footnote{Hattendorf, supra note 37, at 108-09.} Among other things, the peace conference issued the Declaration of Paris, which proclaimed that privateering should now be considered unlawful.\footnote{Guisado, supra note 158, at 124.} This declaration eliminated the legal line between government-sponsored private seizures and the unsponsored seizures that rendered perpetrators “enemies of mankind,”\footnote{Id. The United States did not sign the Paris Declaration because it could not agree to ban privateering. However, the Union did not employ privateers during the Civil War. Hattendorf, supra note 37, at 109.} but the declaration occurred within the context of broader changes.\footnote{See Hattendorf, supra note 37, at 109.} The ban on privateering did not condemn all state-sanctioned seizures.\footnote{Id.} It still allowed naval seizures of contraband goods, even if the goods were carried to the enemy nation on a neutral ship.\footnote{Id.} Therefore, this declaration restricted the use of force at sea to a state’s official naval forces\footnote{See Declaration of Paris, Apr. 16, 1856, available at http://avalon.law.yale.edu/19th_century/decparis.asp (“Privateering is and remains abolished . . . .”).} and continued the condemnation of private acts of violence.\footnote{Burgess, supra note 79, at 294, 314-15.}

B. \textit{The Harvard Draft Convention}

In 1932, the faculty of Harvard Law School decided to codify and present certain subjects in international law in response to a parallel effort by the League of Nations.\footnote{ROBIN GEISS \& ANNA PETRIG, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN 37-38 (2011).} The Harvard Draft Convention (“Harvard Draft”) suggested more stringent standards for nations to obey when capturing pirates.\footnote{Kontorovich, supra note 64, at 253.} The Harvard Draft’s most significant suggestion was that pirates needed a full trial or court martial and that anything less was “inconsistent with the spirit of modern jurisprudence.”\footnote{Id. at 257; see also Saoirse de Bont, Murky Waters: Prosecuting Pirates and Upholding Human Rights Law, 7 J. INT’T L. & INT’T REL. 104, 115 (2011).} This view conflicted with the conclusion reached by the committee of experts officially commissioned by the League of Nations, who supported summary proceedings against pirates.\footnote{Kontorovich, supra note 64, at 257 n.108.}
The Harvard Draft’s recommendation for full trials or courts martial came at a time when many believed that piracy, like the international slave trade, had either ceased to exist or, at worst, decreased to a minimal level that did not require international focus. After peaking in the seventeenth and eighteenth centuries, piracy seemed to disappear in the nineteenth and twentieth centuries. Due to the paucity of state practice and the lack of international or municipal cases, the Harvard Draft’s authors actually lamented the difficulty they faced in drafting the section on international piracy without adequate guidance. The authors attributed this difficulty to the reality that “large-scale piracy disappeared long ago.” As a result, the authors announced draft articles covering “the moot area of piracy,” anticipating that the articles would be updated as necessary.


176 Kontorovich, supra note 160.
177 Z. Oya Özçayir, Port State Control, in PIRACY IN COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW, supra note 15, at 249, 265-66.
178 BREWER, supra note 161, at 5.
179 Id. (quoting another source) (internal quotation marks omitted).
182 Anderson, supra note 135, at 60-61.
184 Sooksripaisarnkit, supra note 181, at 279.
185 Compare Convention on the High Seas, art. 15, Apr. 29, 1958, 450 U.N.T.S. 11, with UNCLOS, supra note 183, art. 101. The UNCLOS definition is considered the universally accepted definition of piracy. Jill Harrelson, Comment, Blackbeard Meets Blackwater: An Analysis of International Conventions that Address Piracy and the Use of Private Security Companies to Protect the Shipping Industry, 25 AM. U. INT’L L. REV. 283, 286 (2010). UNCLOS defines piracy as (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
UNCLOS reserves the high seas for peaceful purposes and restricts the instances where warships may interfere with merchant vessels. UNCLOS gives piracy greater attention and allows states broader authority to combat piracy than other types of disturbances. Article 110 authorizes warships that encounter a foreign ship on the high seas to board it if reasonable grounds exist for suspecting the ship is engaged in piracy, among other unlawful activities. Although UNCLOS includes other circumstances where a state may exert control over a vessel, unlike piracy, these additional scenarios require that the warship have some type of connection to the vessel.

Several other articles elaborate on a warship’s rights and responsibilities when dealing with pirate ships. Specifically, when on the high seas, Article 105 allows every state to seize a pirate ship or aircraft, arrest the pirates, seize the property on board, and determine the penalties to be imposed. Once pirates and vessels are seized, states may only handle piracy through the criminal justice system, unless pirates are killed in self-defense.

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

UNCLOS, supra note 183, art. 101.

186 UNCLOS, supra note 183, art. 88.
187 Rabkin & Rabkin, supra note 129, at 210-11.
188 See id. at 210-11 & nn.52-53.
189 UNCLOS, supra note 183, art. 110. Other circumstances include when a ship is (1) engaged in the slave trade; (2) conducting unauthorized broadcasting and the warship’s flag state has a connection with the ship; (3) without nationality; or (4) of the same nationality as the warship even though the ship is flying a foreign flag or refusing to show its flag. Id.
190 Article 110 seems to treat piracy and slavery identically, but Article 99 only allows states to punish slave ships that are authorized to fly the state’s flag or unlawfully use the state’s flag. UNCLOS, supra note 183, arts. 99, 110. Also, only the flag state may suppress illicit traffic in narcotic drugs or psychotropic substances. Id. art. 108. The remaining categories, found in Article 110(1)(c) and (e), also require the warship to have a connection to the ship, with stateless ships as the only exception. Id. art. 110.
191 Rabkin & Rabkin, supra note 129, at 211 n.52 (identifying Articles 101-07 as the relevant provisions).
192 UNCLOS, supra note 183, art. 105 (applying universal jurisdiction). See generally Murphy, supra note 159, at 281-85 (defining universal jurisdiction).
193 UNCLOS, supra note 183, art. 105; Kontorovich, supra note 64, at 253 (“Yet Article 105 makes clear that prosecution itself is not obligatory.”).
194 Kontorovich, supra note 64, at 257 & n.110 (synthesizing various conventions and concluding that since pirates are viewed as civilians under modern international law, naval forces are prohibited from killing pirates except in situations of immediate self-defense).
In one sense, UNCLOS expands the definition of piracy because it abandons the requirement that the actor have the intent to steal.\(^{195}\) This allows piracy to encompass “violence-at-sea” and not just “robbery-at-sea.”\(^{196}\) However, the UNCLOS requirement that the act be “for private ends”\(^{197}\) leads many to conclude politically motivated attacks do not constitute piracy.\(^{198}\) For this reason, the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA”) covers politically motivated hijackings.\(^{199}\) Despite the similarity between piracy and politically motivated hijackings, the SUA does not apply universal jurisdiction.\(^{200}\) Instead, the SUA requires a connection between the prosecuting nation and the perpetrator, including that: (1) the offense was against a ship flying the state’s flag; (2) the offense occurred in the state’s territory; (3) the offense was committed by a national of the state; or (4) a national of the state was a victim of the offense.\(^{201}\)

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Despite the apparent shifts in the international law’s treatment of piracy, very little has substantively changed in the past two centuries. A number of states abolished privateering through the Declaration of Paris,\(^{202}\) but this treaty did not address piracy.\(^{203}\) Subsequently, the Harvard Draft Convention purported to codify international law on piracy,\(^{204}\) but its drafters acknowledged that their work dealt with a largely moot topic\(^{205}\) with inade-

\(^{195}\) Guisado, supra note 158, at 132.

\(^{196}\) Id.

\(^{197}\) Guilfoyle, supra note 27, at 149 (“The common wisdom is that politically motivated acts cannot be piracy as they are not committed for private ends. In my view the correct dichotomy is not private–political but private–public. Thus, all violence lacking state sanction (public violence) is violence for private ends. The ‘private ends’ requirement only emphasises [sic] the point that states cannot commit piracy.” (citation omitted)).

\(^{198}\) de Bont, supra note 174, at 110-11.

\(^{199}\) Dutton, supra note 73, at 205 (explaining that the SUA was drafted in response to the Achille Lauro incident, where Palestinian terrorists hijacked an Italian cruise liner). Under the SUA, a person commits a prohibited offense when he or she: (1) “seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;” (2) “performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;” or (3) attempts to do either act above. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, art. 3, Mar. 10, 1988, 1678 U.N.T.S. 221 (1998) [hereinafter SUA].


\(^{201}\) SUA, supra note 199, art. 6. The SUA applies the jurisdictional principles of territoriality, nationality, and passive personality. See generally, Murphy, supra note 159, at 276-78.

\(^{202}\) See Declaration of Paris, supra note 170 (“Privateering is and remains abolished . . . .”).

\(^{203}\) Burgess, supra note 79, at 314.

\(^{204}\) Geiss & Petrig, supra note 172, at 37-38.

\(^{205}\) Dubner, supra note 180, at 46-47.
quate state practice to support its novel requirement of full trials for captured pirates. Later in the twentieth century, states incorporated the Harvard Draft Convention’s articles on piracy into multilateral treaties that comprehensively defined the law of the sea. Piracy retains a special status within these treaties, showing that pirates should not necessarily be treated the same as other criminal threats.

III. FAILINGS UNDER THE CURRENT SYSTEM: PROPOSALS FOR AN IMPROVED LEGAL FRAMEWORK TO COMBAT SOMALI PIRACY

The international community should be commended for its efforts to develop wide-ranging multilateral treaties, such as UNCLOS, which create an international consensus about the definition of piracy. Codification provides clarity and equal standards, and it allows states to formally accept codified provisions. Although these aspects of codification are beneficial, there is risk that the agreed-upon standard will be too rigid to handle a new situation, thereby constraining states’ ability to respond.

Modern piracy exemplifies this concern. Today’s nations operate within conventions that were adopted when large-scale piracy appeared to be a relic. These conventions have proven wholly inadequate to handle the scale and type of piracy that has emerged off the coast of Somalia.

In particular, these conventions deny nations the most effective measures to combat piracy. States have expended significant resources to police the Gulf of Aden and Indian Ocean, but except for a single European Union (“EU”) airstrike against pirates’ onshore supplies in 2012, states have limited themselves to acting on the sea in immediate self-defense or to protect third parties. Antipiracy conventions impose this artificial constraint.

206 BREWER, supra note 161, at 5.
207 de Bont, supra note 174, at 115; Kontorovich, supra note 64, at 257.
208 Özcayir, supra note 177, at 267-68.
209 See Rabkin & Rabkin supra note 129, at 211 & nn.52-53.
211 Id.
212 Cf. Kontorovich, supra note 64, at 259; Passman, supra note 116, at 17 (suggesting that the drafters of the Geneva Conventions did not consider piracy a significant problem because neither the Third nor the Fourth Geneva Convention mentions piracy).
This Part describes the threat of Somali piracy and state and private efforts to combat this threat. The next Part proposes treating piracy under an IHL framework to more effectively protect freedom of the seas.

A. The Somali Pirate Threat

Piracy is, and always has been “a crime of opportunity that is sustainable only in places that offer a combination of rewarding hunting grounds, acceptable levels of risk, and proximate safe havens.”216 Because Somalia’s geography and politics offers attractive opportunities, limited state opposition, and an endless supply of desperate recruits, piracy continues “to present significant financial and operational challenges to international trade.”217 Further, industry experts warn that any declines in piracy may be easily reversed.218

Somalia’s location allows pirates operating from its shores to substantially impact global trade.219 The Suez Canal bypasses Africa and provides the shortest sea route between southern Asia and Europe/eastern North America, making it one of the world’s busiest shipping lanes.220 Over 50 percent of the world’s container traffic and 8 percent of the world’s oil and gas supply passes through the canal.221 The approximately twenty-two thousand ships using this route must pass through a choke point at the Gulf of Aden, which is between eighteen and 150 miles wide when adjacent to Somalia’s northern coast.222 Puntland, a semi-autonomous state in northeast Somalia, has coastline on both the Gulf of Aden and the Indian Ocean.223

Due to a weak government and favorable location, Puntland is regarded as the epicenter of Somali piracy.224 Although the Gulf of Aden’s geography is most conducive to piracy, Somali pirates have greatly expanded the

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216 TERRY MCKNIGHT & MICHAEL HIRSH, PIRATE ALLEY: COMMANDING TASK FORCE 151 OFF SOMALIA 54 (2012).
217 AM. INST. OF MARINE UNDERWRITERS, supra note 16, at 3.
218 Madsen et al., supra note 25, at ii.
219 Tulloch, supra note 18, at 42.
220 Murphy, supra note 17, at 81.
222 Id.; Abdirahman Mohamed Mohamud (Farole), The Piracy Problem: The Puntland Perspective, Foreword to PIRACY IN COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW, supra note 15, at 13, 13.
224 Muhumed, supra note 223; Puntland Profile, supra note 219. Some scholars even suggest Puntland is complicit in pirate activities. Yvonne M. Dutton, Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?, 34 FORDHAM INT’L L.J. 236, 272 (2011).
scope of their operations. The risk zone for attacks now covers an area the size of continental Europe, ranging from Madagascar in the south to as far east as India.

Generally, pirates attack a vessel with a crew of five to nine men in a small, high-speed boat. Pirates board as quickly as possible and use assault rifles and rocket-propelled grenades to subdue the crew. Then, pirates anchor the captured ship off the Somali coast and begin ransom negotiations to release the ship and its crew. Successful ransoms, totaling approximately $213 million since 2011, have allowed pirates to upgrade their technology. In addition to heavier weaponry, the pirates use GPS, satellite phones, and open source intelligence such as shipping industry blogs to locate ships. For example, technologically savvy pirates may hack the shipping industry’s Automatic Identification System to identify and track potential targets. The pirates have also seized merchant or fishing vessels to use as mother ships. This strategy allows pirates to remain at sea for longer periods and carry out operations farther from the Somali coast.

The extent of Somali pirates’ operations is even more surprising given the typical pirate’s characteristics. Most pirates come from the inland hill regions of Somalia. They have never been to sea and most cannot
swim. More than anything, Somali pirates are opportunists who exploit Somalia’s weak government for financial gain. The pirates either impose themselves on coastal communities or live in hideouts within valleys, mountains, or along the vast, poorly monitored coastline. Even though these pirates may not be seasoned sailors, evidence suggests they receive training from the Islamist insurgent group al-Shabaab. The pirates also operate within well-developed, hierarchical enterprises, where pirate gangs amount to private armies that are headed by criminal kingpins, backed by investors or corrupt officials. This hierarchical enterprise provides a structure where a captured ship is brought near the coast, and the pirates are resupplied and replaced by fresh pirates throughout ransom negotiations.

Profit motive drives Somali pirates who hope to escape Somalia’s extreme poverty. These conditions provide a vast supply of men with a lev

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238 McKnight & Hirsh, supra note 216, at xii.
239 Id. at 38, 40 (explaining that once successful, a pirate buys a Toyota Land Cruiser and one pirate group calls itself Puntland Private Equity).
240 Id. at 43, 48.
241 Hearing I, supra note 19, at xii (“Somali pirates typically operate from well-equipped and well-armed bases ashore.”); Mohamud, supra note 222, at 15.
243 Norchi, supra note 77, at 426-27; Dutton, supra note 73, at 212.
244 McKnight & Hirsh, supra note 216, at 16.
245 Id. at 41-43; Kontorovich, supra note 160, (“A single seizure can earn each pirate $150,000. (In Somalia, per capita GDP is $600 and male life expectancy is around 47 years.”).
246 Tulloch, supra note 18, at 48-49 (“The ‘threat’ of incarceration in a western or even regional prison is of virtually no deterrent to pirates who are willing to venture into the far reaches of the ocean and risk death for a big payoff.”).
247 London, supra note 3, at 46 (“Money is the God of Algiers, and Mohamed their prophet.”).
248 “4 INT’L. DICTIONARY OF HISTORIC PLACES: MIDDLE EAST AND AFRICA 651 (Trudy Ring et al. eds., 1996); Burgess, supra note 79, at 298 n.23 (2006) (citing Rubin, supra note 50, at 1).
250 McKnight & Hirsh, supra note 216, at 3; see also Dutton, supra note 73, at 216-17 (providing various examples of the culture of impunity that exists for pirates).
equacies of the current antipiracy system, this belief is largely correct. To mitigate harms to international commerce, nations must increase their efforts to deter pirates and convince them that piracy is not a “good job.”

B. The Current Global Efforts to Limit Somali Piracy

The international community has responded to Somali piracy with a fractured, ad hoc, and ultimately ineffective approach.\textsuperscript{251} When nations finally recognized the need for concerted action against Somali pirates, the pirate organizations were acting as increasingly sophisticated private armies.\textsuperscript{252} States have undertaken several efforts to combat Somali piracy, such as sending naval forces to the region to disrupt pirate activities and capturing and prosecuting pirates found on the ocean.\textsuperscript{253} Shipping companies also have implemented preventive measures, including hiring armed guards onboard their vessels.\textsuperscript{254} However, these state and private responses to piracy each have shown their limitations.

1. Multinational Naval Counterpiracy Patrols

Since 2008, three multinational bodies and independent state forces have conducted counterpiracy operations off the coast of Somalia.\textsuperscript{255} The EU launched its first naval operation, Naval Force (“NAVFOR”) Somalia—Operation Atalanta, in December 2008.\textsuperscript{256} Its mission includes protecting the World Food Program’s aid shipment to Somalia\textsuperscript{257} and merchant vessels by “employ[ing] the necessary measures, including the use of force, to deter, prevent and intervene in order to bring an end to acts of piracy and armed robbery which may be committed in the areas where they are present.”\textsuperscript{258} The EU has authorized this operation until December 2016.\textsuperscript{259}

\textsuperscript{252} Hearing I, supra note 19, at xii (“[Somali pirates] have . . . at least one ‘pirate academy’ to train new recruits.”); Norchi, supra note 77, at 426.
\textsuperscript{254} Id.
\textsuperscript{255} de Bont, supra note 174, at 126.
\textsuperscript{256} About Us, EU NAVFOR SOMALIA, http://eunavfor.eu/home/about-us/ (last visited Dec. 27, 2013).
\textsuperscript{257} LAUREN PLOCH ET AL., CONG. RESEARCH SERV., R40528, PIRACY OFF THE HORN OF AFRICA 27 (2011).
\textsuperscript{258} Id. (quoting another source) (internal quotation marks omitted).
In addition, the U.S. Navy established Combined Task Force 151 ("CTF-151") in January 2009. CTF-151’s sole mission is to conduct anti-piracy operations in the Gulf of Aden and Indian Ocean. The number of states participating in CTF-151 fluctuates, but in total, it places about twenty-four ships in the region.


Despite these sustained commitments, many have questioned the cost-effectiveness of current naval patrols as well as their lenient practices that continue the cycle of piracy.

a. Naval Patrols As Cost-Effective Measures?

Naval patrols come at significant cost for their questionable efficacy. Conservative estimates place costs for these three counterpiracy missions at $1.09 billion in 2012 alone. In reality, these costs are likely much higher; a senior military representative disclosed that the operating costs for EU NAVFOR alone amount to $1.96 billion a year. Fuel and other daily operational costs for surface vessels and reconnaissance aircraft account for nearly all of these costs. Due to these high costs, some experts have questioned states’ willingness to continue naval counterpiracy operations.

260 Bellish, supra note 253, at 15.
261 PLOCH ET AL., supra note 257, at 25.
262 Id. (stating that the nations involved in CTF-151 include the United States, the United Kingdom, Canada, Denmark, France, Germany, Greece, Italy, the Netherlands, Pakistan, Saudi Arabia, Spain, South Korea, Turkey, and Yemen, with other countries, such as Russia, China, and India communicating with CTF-151, but not fully coordinating).
263 Bellish, supra note 253, at 14.
264 Id.
266 Bellish, supra note 253, at 17.
267 Id. at 15.
268 Id. at 15, 17-18 ("Approximately 94.5% of the total cost was spent on surface vessel and reconnaissance aircraft deployment.").
Naval deployments only have a limited effect on deterring Somali pirates. Due to the sheer size of the area where pirates operate, the number of naval vessels deployed is woefully inadequate. No more than thirty warships have been deployed at any one time to patrol an area the size of continental Europe. Experts suggest a minimum of fifty warships are needed to effectively patrol the Gulf of Aden alone. This means that navies get only symbolic value for their substantial operating costs. Tellingly, merchants using these sea lanes still pay higher insurance premiums because the areas patrolled are still considered war zones by insurers. African military leaders also complain that multilateral naval missions merely “swat[] the bee” of Somali piracy.

The U.S. Department of State has acknowledged that maintaining a constant presence in the region is essential to decrease successful Somali pirate attacks. This is because the combination of lucrative payoffs and limited alternative job prospects creates an economic incentive that mere arrest will not disrupt. Unfortunately, this pattern reappears in other impoverished areas, and the rise of piracy on Africa’s west coast opens a second front that will likely stress the already-minimal naval presence in the Indian Ocean region. The United Nations (“UN”) has already called for

271 McKnight & Hirsh, supra note 216, at xix.
272 Murphy, supra note 17, at 80.
273 Id.
274 Id.; Boot, supra note 82, at 104 (“Most of the naval ships now stationed off the Horn of Africa are not convoying merchant vessels, hunting down pirate ships, or bombarding pirate lairs. Instead, all they are authorized to do is float around in an attempt to deter pirates from striking and respond to distress calls when they do strike. These are fools’ errands when undertaken by a dozen or so ships scattered across an area four times the size of Texas.”).
276 Kraska, supra note 120, at 216 (stating that at a multilateral exercise in September 2011, which included Burundi, Kenya, Rwanda, Tanzania, and Uganda, military leaders of several states complained about the effectiveness of naval patrols).
278 Id.
joint counterpiracy patrols in West Africa and begun working on a military framework.  

Insufficiently robust rules of engagement further diminish the effectiveness of these antipiracy patrols.  
Naval vessels may only target pirates when acting in immediate self-defense.  
Further, even if a naval vessel comes across a hijacked ship with hostages aboard, it can only take limited action.  
The USS Carter Hall incident in June 2007 illustrates this phenomenon.  
Although the Carter Hall received authorization to destroy empty pirate skiffs trailing behind the captured MV Danica White, the captain was denied permission to enter Somali waters in pursuit of the pirates.  
Consequently, the Carter Hall could only fire warning shots and watch the pirates pilot the Danica White into Somali waters.  
UNCLOS compelled the Carter Hall to stop its pursuit because it does not allow military vessels to pursue pirates into another nation’s territorial waters.  
Recognizing this handicap, the UN Security Council passed a resolution in June 2008 that removed this obstacle as applied to Somalia.

b. “Catch and Release” and the Sustainability of Prosecutions

Although naval forces have more limited capabilities in hostage situations, warships could still disrupt Somali pirates actively loitering in the sea lanes or attacking a vessel.  
Despite their unquestioned authority to arrest individuals engaged in piracy activities, capture and prosecution have not occurred with regularity.  
Instead, navies follow a program referred to as

281 Boot, supra note 82, at 105.
282 MacLaren, supra note 214, at 354.
283 McKnight & Hirsh, supra note 216, at xviii.
284 Id. at xv-xviii.
285 Id.
286 Id.
287 Territorial waters extend up to twelve nautical miles from a state’s coast. UNCLOS, supra note 183, arts. 3, 105, 107 (providing that a state’s warships may only seize a pirate ship on the high seas or in any other place outside the jurisdiction of any state).
289 Wedgwood, supra note 215 (recounting that a German naval helicopter interrupted a pirate attack, but then released the pirates because they had not attacked a German merchant ship or injured any German citizens).
290 See McKnight & Hirsh, supra note 216, at 3-5 (stating that people captured two hundred miles from shore with weapons, boarding ladders, and no fishing gear were only “suspected pirates,” and out of two dozen nations participating in the antipiracy mission, only the United States, United Kingdom, and Denmark could make arrests); see also Samuel Shnider, Universal Jurisdiction Over
“catch and release.” Under this policy, naval forces board suspected pirate vessels, throw weapons and boarding equipment overboard, and gather the suspects’ biometric data. As the title suggests, navies then either leave the suspected pirates with enough food and fuel to return to shore, or even give them a ride back to the Somali coast.

The decision not to arrest suspected pirates, even when apprehended in the midst of an attack or fleeing the scene with bullet cases lining their boat, stems from a variety of factors. Some European governments have instructed navies not to make arrests out of fear that pirates will make asylum claims when brought to stand trial. Pragmatically, ships also have limited space to detain suspected pirates, and taking a pirate to port or transferring him to the seizing state could divert already-limited resources from patrols. Also, there are few convenient forums for a piracy trial; the capturing nation’s courts are likely located far from where the offense occurred. The global nature of ocean transit, in which perpetrators, victims, and witnesses have many nationalities, further complicates the logistics of piracy trial. Although these complications do not completely bar pirate prosecutions within the EU and the United States, these states often reserve


Id.

McKnight & Hirsh, supra note 216, at 24-28.

Remarks by Douglas Guilfoyle, 105 AM. SOC’Y INT’L L. PROC. 546, 548 (2011) (summarizing the practical problems with pirate prosecutions as a lack of evidence, no applicable domestic law, no place to send the pirates, no arrangements for posttrial transfer, and a lack of political will).

Anderson, supra note 135, at 62; Dutton, supra note 73, at 200; Guisado, supra note 158 at 149 (stating that Denmark and the UK have ordered their navies to release suspected pirates to avoid potential asylum claims).

McKnight & Hirsh, supra note 216, at 24-28.

Guilfoyle, supra note 292, at 141.

Dutton, supra note 73, at 225.

See id. at 224; Kontorovich, supra note 64, at 265 (noting that a U.S. court held an entire crew for months as material witnesses in an SUA case and dismissing this option for Somali piracy because this would paralyze international commerce more than the underlying piracy); Jeff Davis, Missing Witnesses Stall Piracy Cases, DAILY NATION (Oct. 12, 2010), http://www.nation.co.ke/News/Missing%20witnesses%20stall%20piracy%20cases/-/1056/1031650/-/fmxwb8z/-/ (“The problem is witnesses. Sometimes you have to adjourn a case for up to four times.”).
prosecutions for cases where their national interests have been harmed directly.\textsuperscript{302}

As a consequence, piracy prosecutions occur relatively infrequently.\textsuperscript{303} Of the 770 pirates detained by EU NAVFOR between December 2008 and 2011, only ninety-three have been sent to court.\textsuperscript{304} A June 2013 UN report noted instances of naval forces capturing repeat offenders who had previously been released after no host state was willing to prosecute.\textsuperscript{305} The report estimated that over 90 percent of pirates apprehended would be released without prosecution and cautioned that this impunity encourages piracy by making the risk-reward ratio for the pirates negligible.\textsuperscript{306}

The international community’s effort to imprison pirates in Somalia, Kenya, and the Seychelles has increased the number of prosecutions, but this “regional solution” raises other concerns.\textsuperscript{307} Regional prosecution and imprisonment entails significant burdens on both the capturing nation and the detaining nation.\textsuperscript{308} The regional states must be incentivized to continue to participate, and there are instances where Kenya and the Seychelles refused to accept suspected pirates because their penal systems are simply overwhelmed.\textsuperscript{309} In particular, Kenya’s prison system suffers from extreme overcrowding and allegations of torture.\textsuperscript{310} Although torture in prisons may provide a slight deterrent effect, torture will likely only cause more friction in interstate relations that inhibits cooperation on piracy.\textsuperscript{311} Puntland’s justice system has different problems. Experts note convicted pirates often

\textsuperscript{302} de Bont, supra note 174, at 141; see, e.g., Tony Karon, \emph{Why New York Is No Place to Try Somali Pirates}, \emph{TIME} (Apr. 21, 2009), http://content.time.com/time/world/article/0,8599,1892895,00.html.

\textsuperscript{303} Ian Drury, \emph{Failure to Prosecute Pirates Beggars Belief, Say MPs as It’s Revealed 90% of All Suspects Are Freed Without Trial}, \emph{DAILY MAIL} (Jan. 5, 2012), http://www.dailymail.co.uk/news/article-2082450/Failure-prosecute-pirates-beggars-belief-say-MPs-revealed-90-suspects-freed-trial.html (“Nine out of ten piracy suspects detained by the Royal Navy and other maritime forces in the Gulf of Aden or Indian Ocean are released without trial . . . ”).


\textsuperscript{305} UN REPORT, supra note 236, at 6.

\textsuperscript{306} Id.

\textsuperscript{307} Id. at vi-x. This phenomenon was facilitated by nations like the United States and Great Britain making agreements with those countries to accept captured pirates. Katherine Houreld, \emph{AP Impact: Security Firms Join Somali Piracy Fight}, USA TODAY (Oct. 26, 2008), http://usatoday30.usatoday.com/news/world/2008-10-26-2583935117_x.htm. The UN has also played a significant role. de Bont, supra note 174, at 112-13; Guisado, supra note 158, at 143.

\textsuperscript{308} de Bont, supra note 174, at 141.

\textsuperscript{309} Mike Pflanz, \emph{Royal Navy May Have to Set Pirates Free}, \emph{TELEGRAPH} (Jan. 18, 2012), http://www.telegraph.co.uk/news/uknews/defence/9023768/Royal-Navy-may-have-to-set-pirates-free.html.

\textsuperscript{310} James Thuo Gathii, \emph{The Use of Force, Freedom of Commerce, and Double Standards in Prosecuting Pirates in Kenya}, \emph{59 AM. U. L. REV.} 1321, 1358-59 (2010).

\textsuperscript{311} de Bont, supra note 174, at 133-37 (indicating potential complications from regional states’ poor human rights records).
either walk out of Puntland prisons or bribe officials to secure their release.312

Other regional states, such as Mauritius, have recognized that Somali-based piracy destabilizes the entire Indian Ocean region.313 This instability impacts these nations’ economies, most notably in the tourism and fishing industries.314 To alleviate some of the burden placed upon Kenya and the Seychelles to prosecute Somali-based pirates, Mauritius signed a transfer agreement on July 14, 2011 with the EU.315 This agreement stipulated that Mauritius would prosecute pirates apprehended by EU NAVFOR in Mauritian courts.316 As of 2012, Mauritius had not yet accepted a pirate for prosecution, but a summary of global piracy prosecutions from 2006 to 2012 indicates that other regional states have begun to prosecute pirates.317

Although these agreements are a positive step toward combating piracy, responsibility for apprehending pirates still rests upon the developed nations who commit their naval forces to the region.318 Indicating the multinational naval forces’ inability to effectively monitor the vast Somali coastline, the EU identified the creation of a national Somali coast guard as a key step in counterpiracy operations.319 Funding a Somali coast guard, however, has barely reached the discussion stage.320 Even with Western aid, the effectiveness of other Somali maritime security institutions, such as Puntland’s coast guard, is questionable.321

312 Isanga, supra note 213, at 1277.
313 Sulakshna Beekarry, Legal, Political and Strategic Initiatives of Mauritius, with Special Focus on Collaboration Between Developed and Developing Countries, in MARITIME SECURITY AND PIRACY: GLOBAL ISSUES, CHALLENGES AND SOLUTIONS 3, 3 (Bimal N. Patel & Hitesh Thakkar eds., 2012).
314 Id.
315 Id. at 4-5.
316 Id. at 4.
317 AM. INST. OF MARINE UNDERWRITERS, supra note 16, at 4-5.
320 Id.
321 MCKNIGHT & HIRSH, supra note 216, at 192-94 (noting that Puntland’s coast guard used poor-quality vessels and Great Britain determined that much of the material assistance it provided to these forces ended up under pirate control); Mark Mazzetti & Eric Schmitt, Private Army Formed to Fight Somali Pirates Leaves Troubled Legacy, N.Y. TIMES (Oct. 4, 2012), http://www.nytimes.com/2012/10/05/world/africa/private-army-leaves-troubled-legacy-in-somalia.html?_r=1&.
2. Private Security Contractors and Other Forms of Self-Help

To fill the gaps in the international response to piracy, shipping companies have resorted to self-help measures by entering into contracts with private security contractors.\(^{322}\) Although the United States and some commercial shippers have endorsed armed guards as necessary for any vessel navigating in the Somali region,\(^{323}\) this represents a drastic shift in the principle that navies provide security at sea.\(^{324}\) More cautious parties worried that arming merchant ships would only create more danger for mariners.\(^{325}\) Specifically, opponents feared armed guards and pirates would engage in an arms race, increasing the likelihood that a merchant ship might sink during a pirate attack.\(^{326}\)

The U.S. Department of State emphasizes that an “arms race” has not materialized.\(^{327}\) Instead, it points out that armed guards serve as an effective deterrent because pirates often disengage when they discover an armed merchant vessel.\(^{328}\) But armed guards, who operate outside government command and control, are subject to firearm restrictions and liabilities that traditional naval forces are not.\(^{329}\) This creates uncertainty for the armed guards, which may diminish their effectiveness.

India’s arrest of twenty-five private security contractors and their ten-man crew in October 2013 for carrying “illegal” arms and ammunition highlights this uncertainty.\(^{330}\) These guards were employed by AdvanFort, a

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\(^{323}\) Coito, supra note 61, at 176-77; Kelly, supra note 277 ("[T]he U.S. government has mandated that U.S.-flagged merchant vessels transiting the high risk area conduct a risk assessment with specific consideration given to supplementing onboard security with armed personnel.").

\(^{324}\) Murphy, supra note 17, at 79.

\(^{325}\) Kelly, supra note 277 (foreseeing an arms race between pirates and the armed guards onboard vessels).

\(^{326}\) International Piracy on the High Seas: Hearing Before the Subcomm. on Coast Guard & Mar. Transp. of the H. Comm. on Transp. & Infrastructure, 111th Cong. 27 (2009) [hereinafter Hearing II] (statement of Captain Phil M. Davies, Director, Oil Companies International Marine Forum) (refusing to support armed guards or other private forces on vessels due to their likelihood to significantly increase the risks of personal injury, fire, explosion, and escalation of conflict); Houreld, supra note 307.

\(^{327}\) Kelly, supra note 277.

\(^{328}\) Id.

\(^{329}\) Harlow, supra note 322, at 565, 585-90 (rejecting using the private sector to protect shipping because it creates a legal “minefield,” noting the private sector lacks standards for training and use of force, faces civil and criminal liability arising out of the use of force, and must comply with diverse firearms restrictions in any port a ship docks).

Washington D.C.-based security contractor that provides counterpiracy protection, and carried licensed weapons aboard a vessel owned by AdvanFort. An international incident between India and Italy also shows that even military forces on merchant ships may face liability if they mistakenly attack a state’s fishermen. In this case, two Italian marines deployed on an Italian-flagged oil tanker to provide security allegedly mistook Indian fishermen for pirates, opened fire, and killed two of the fishermen. Subsequently, the tanker docked in an Indian port for several days, and Indian authorities detained the marines and charged them with murder. This occurred even though India supports antipiracy efforts, and its navy helps patrol the Indian Ocean region. Incidents like these cause some critics to argue the “armed guards cure” worsens the piracy problem by creating new complications for ship owners.

3. Combating Somali Piracy Ashore

Collectively, naval patrols, prosecutions, and armed guards advance the fight against piracy, but the threat persists. As recently as November 331 Jha & Reals, supra note 330.

332 Id.


334 Id.

335 Id.


337 N.K. Kurup, Armed Guards Cure Is Worse than Piracy Curse, HINDU BUS. LINE (Feb. 27, 2012), http://www.thehindubusinessline.com/todays-paper/tp-logistics/article2936215.ece (reporting that the “[International Maritime Organization] and the International Chamber of Shipping do not see armed guards as a solution to piracy”).

338 Kelly, supra note 277.

12, 2014, Somali pirates have attacked merchant vessels off the Somali coast. Also, even if deterrence measures limit attacks against bigger vessels that can afford armed guards, pirates merely direct their attention to smaller vessels. Attacks against smaller ships often get excluded from piracy statistics and do not appear in a nation’s news cycle, unless its nationals are involved.

Due to Western nations’ failure to end piracy, “the effect on East Africa has been devastating—tantamount to a blockade.” Within Somalia, honest Somalis have difficulty exporting their livestock, one of Somalia’s chief exports. These negative effects even extend to landlocked nations such as Uganda, where piracy has led to a shortage of consumer goods and rapid inflation.

Somali pirates operate through a sophisticated land infrastructure that some believe outclasses regional state powers. Scholars estimate Somali pirates’ revenues in 2009 at $82 million, which dwarfs the $16 million annual revenues for the Puntland government. Pirate networks include organized kingpins, who reside in Puntland or Kenya and receive proceeds from ransom payments, as well as large groups like the Somali Marines, whose criminal enterprise resembles a military structure.

When not on the

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McKNIGHT & HIRSH, supra note 216, at 43 (explaining that pirates now frequently attack small boat operators who sail between Kenya and Somalia, and these small boat operators previously sailed untouched).

Hurlburt & Seyle, supra note 279, at 4.


Kraska, supra note 120, at 216.

Hurlburt & Seyle, supra note 279, at 10.

Kraska, supra note 120, at 215; Press Release, World Bank, Ending Somali Piracy Will Need On-Shore Solutions and International Support to Rebuild Somalia (Apr. 11, 2013), http://www.worldbank.org/en/news/press-release/20130411/ending-somali-piracy-will-need-on-shore-solutions-and-international-support-to-rebuild-somalia (“Since 2006 East African countries have seen a marked decline in tourist arrivals and fishing yields. In the booming tourism sector, spending in East Africa since the surge in pirate activities has grown 25 percent more slowly than in other sub-Saharan African countries. Similarly, exports of fish products from piracy-affected countries compared to other regions have dropped by 23.8 percent since 2006, in part due to falling production. Total catches of tuna in the Western Indian Ocean have declined by 26.8 percent as vessels relocated to safer fishing grounds.”).

See Norchi, supra note 77, at 426-27.

Dutton, supra note 200, at 1130.


Dutton, supra note 73, at 212 n.79.
sea attacking vessels, pirates reside in inland villages, outside the reach of a navy’s surface ships. However, navies can use aerial reconnaissance, such as drones, to closely monitor pirates’ inland activities.

The Somali pirates’ persistence signals that although piracy can be managed at sea, the problem is best solved on land. Recognizing that current offshore polices to deter piracy are ineffective or unsustainable, military leaders abroad have argued that attacking pirates on land would be humane, efficient, and prudent. Armed forces in East Africa believe that, with the appropriate resources, they could attack the pirates’ “beehive” on land and end the piracy problem within a few months. Mirroring this perspective, U.S. Marine Corps Brigadier General David W. Coffman repeatedly reminded CTF-151’s commander that an aerial attack against the pirate village would “fix your pirate problem in about fifteen minutes.” Although CTF-151 never followed through, Rear Admiral Terry McKnight acknowledged that the U.S. military has seriously contemplated this approach.

The EU, acting through EU NAVFOR’s Operation Atalanta, became the first military force to attack pirates on shore when it conducted an air-strike in May 2012. This strike only involved a single attack helicopter, which destroyed “known pirate supplies.” After receiving the Somali government’s approval, the EU forces carried out the attack to disrupt and prevent pirates from getting out to sea. EU NAVFOR identified these

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351 See McKnight & Hirsh, supra note 216, at 4.
353 Barker, supra note 318 (attributing the decrease in Somali pirate activities to land operations by Kenyan troops and the seaborne counterpiracy operations).
354 Press Release, World Bank, supra note 346 (“[H]eavily-armed naval patrols and better security onboard commercial shipping . . . are effective only as long as they stay in force.”).
355 Kraska, supra note 120, at 216-17.
356 Id.
357 Id.; McKnight & Hirsh, supra note 216, at 198-99.
358 Id. (“In fact, [conducting aerial attacks against pirate villages] was not very far off from plans already on the shelf. . . . The proposal to strike targets ashore has gone up and down the chain of command, but not a single commander has signed the documents ‘approved’ as of this date.”).
359 MacLaren, supra note 214, at 354.
360 Gettleman, supra note 352.
362 Gettleman, supra note 352 (“European officials said it was likely that there would be more strikes in the future. ‘This is a fantastic opportunity,’ said . . . a spokeswoman for the European Union’s
prevention efforts as crucial to “removing [pirates’] impunity ashore and to further the success of counterpiracy operations.” Although it recognized the pirates’ right to life, the EU forces conceded the pirates’ status as *hostis humani generis* complicates that right.

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Despite significant expense, counterpiracy patrols off the Somali coast and self-help measures do little to remove pirates’ impunity and piracy’s economic impact. Reliance upon a law enforcement framework has fostered “catch and release” practices, which produce questionable results. Ultimately, the law enforcement framework ignores the reality that piracy is a land-based problem best solved by IHL. Somali piracy will persist until states apply this approach.

IV. APPLYING IHL TO SOMALI PIRACY

Although the shipping industry and various nations have increased their efforts to limit piracy’s effects on global commerce, the problem persists off the East African coast. Exhibited by the EU’s recent airstrike, the existence of an armed conflict allows naval forces to directly engage Somali pirates on sea and land as military enemies, without first attempting to capture the pirates.

Some scholars questioned the legality of the EU’s airstrike against Somali equipment. For IHL to apply, an armed conflict must exist. Un-
fortunately, “armed conflict” has no settled definition in international law, and determining whether an “armed conflict” exists is difficult when the opposing forces are not state forces.\footnote{374} This is because the required “minimum level of intensity” and the groups having a “minimum amount of organization” are hard to gauge.\footnote{375}

Regardless, Somali pirates and their supplies are legitimate military objectives according to IHL.\footnote{376} Specifically, Somali pirates may be attacked because they are (1) organized armed groups, and (2) operating in an armed conflict. Consistent with the historical treatment of pirates and other noninternational criminal threats, like terrorists and narcotics traffickers, airstrikes against the land bases from which pirates launch attacks would be justified under IHL, provided attacks are militarily necessary and proportional.

This Part identifies the contours of noninternational armed conflict (“NIAC”) and briefly states how classifying Somali pirates as part of a NIAC imposes fewer restrictions on any military response. This Part will then show that the United States may apply IHL to Somali pirates because these pirates satisfy the required elements of being organized armed groups who participate in an armed conflict. The Part concludes with a discussion of the feasibility of carrying out land attacks on Somali pirates.

A. Defining Noninternational Armed Conflict and Its Actors

Somali pirates operate within a NIAC and may be targeted by the U.S. military. Somali pirates do not fit within the definition of an international armed conflict. Further, Somali pirates are not civilians based on their characteristics and conduct.\footnote{377} Based on these determinations, the rules of NIAC apply, which are much less restrictive on what the U.S. military may do compared to the rules of international armed conflict.

In international law, armed conflict is classified as either international or noninternational, and different sets of rules govern based on this classifi-
cation. Whereas Common Article Two of the Geneva Conventions deals with international armed conflicts, NIACs are governed by the Geneva Conventions’ Common Article Three and Additional Protocol II (“AP II”). These provisions for NIACs establish minimum protections for civilians and members of armed forces who have laid down their arms or are placed hors de combat. According to Hamdan v. Rumsfeld, an armed conflict’s status as international or noninternational depends upon the affiliation of the armed conflict’s participants, not the conflict’s geographic scope. Since Somali pirates are nonstate actors, Hamdan dictates that Somali pirates may not be part of an international armed conflict.

In contrast to international armed conflicts, NIACs have minimal rules governing military conduct. Common Article Three is devoted solely to protecting the physical integrity of “[p]ersons taking no active part in the hostilities” and prohibits conduct such as murder, hostage taking, and torture. Although Common Article Three provides these minimal protections, it does not offer any protection to civilian property. This lack of safeguards would allow the U.S. military to attack pirates and their equipment with less concern of damaging nearby civilian property or infringing upon the Geneva Conventions’ articles outside of Article Three.

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378 INT’L COMM. OF THE RED CROSS, supra note 375, at 1, 5.
380 Id. at 66-68; HANDBOOK, supra note 371, ¶ 11.6, (defining hors de combat as “[c]ombatants who have been rendered incapable of combat . . . by wounds, sickness, shipwreck, surrender, or capture”).
382 In Hamdan, the Supreme Court stated that the U.S. military’s global campaign against al Qaeda is not an international armed conflict under Common Article Two of the Geneva Conventions. Instead, the fight against al Qaeda is a NIAC governed by the Geneva Conventions Common Article Three. Id. at 629-32; Geoffrey S. Corn, Self-Defense Targeting: Blurring the Line Between the Jus ad Bellum and the Jus in Bello, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY, supra note 31, at 57, 62 (“[T]he Court created a simple equation: if the government treats the struggle against al Qaeda as an armed conflict, it must be either international or non-international within the meaning of the Geneva Conventions.”).
384 INT’L COMM. OF THE RED CROSS, supra note 373, at 1 (“A more limited range of rules apply . . .”).
385 Geneva Convention IV, supra note 383, 6 U.S.T. at 3518, 3520, 75 U.N.T.S. at 288, 290; see also INT’L COMM. OF THE RED CROSS, supra note 373, at 26 (identifying that Article 3 is identical in all four Geneva Conventions)
AP II “supplements and develops . . . Article 3 without changing the conditions of its application,” but AP II includes “still rather modest rules.” During drafting, the participating states struck “all the rules dealing with the conduct of hostilities” and reduced the number of articles, in part to give greater respect for national sovereignty. As a result, militaries operating in NIACs have fewer restrictions and details to guide them.

Further, some scholars assert that because the United States never ratified AP II and AP II is not customary international law, AP II does not bind the United States. Despite this debate over the United States’ obligations, even AP II’s limited restrictions do not prevent the United States from attacking Somali pirates on land.

AP II distinguishes between armed forces, organized armed groups, and civilians who do not directly participate in hostilities. According to the International Committee of the Red Cross, these three categories are mutually exclusive (i.e., individuals who belong to “organized armed groups” cannot be civilians). A member of an organized armed group may be attacked based on his membership status, regardless of whether that particular member is directly participating in the armed conflict.

The definition of an organized armed group requires two elements. “Armed” merely means having the capacity to carry out attacks. To be “organized,” the armed group must have a degree of structure that allows

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388 Id. at 1335. However, the states did keep the rules for quarter and “retained the general principle that the civilian population and works and installations containing dangerous forces should be protected.” Id.


390 E.g., Michael N. Schmitt, The Status of Opposition Fighters in a Non-International Armed Conflict, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY, supra note 31, at 119, 138 n.3 (recognizing the exception that AP II Article 13.2’s prohibition on attacking civilians is customary international law). But see Jean-Marie Henckaerts, Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict, 87 INT’L REV. RED CROSS 175, 188 (2005) (concluding that many of AP II’s provisions are customary international law, and thus binding on states that have not ratified AP II).


392 Schmitt, supra note 390, at 128; see also BOOTHBY, supra note 377, at 434 (defining “fighters” as members of armed forces and dissident armed forces or other organized armed groups; civilians are all persons who are not “fighters,” creating a mutually exclusive definition for all persons possibly affected by a NIAC).

393 Schmitt, supra note 390, at 128.

394 Id. at 131.
the group to act in a coordinated manner, but this structure need not be hierarchical or implemented formalistically. Further, for IHL to apply, organized armed groups must operate in a NIAC. Somali pirates meet all of these elements.

B. Somali Pirates Are Organized Armed Groups

Somali pirates satisfy the criteria for an organized armed group because they have the capacity to carry out attacks and act in a coordinated manner. Somali pirates are nonstate actors who attack vessels within Somalia’s territorial waters and on the high seas. Pirates use heavy weapons, such as rocket-propelled grenades, antitank rocket launchers, and automatic rifles. This certainly gives pirates the capacity to carry out attacks, thus meeting the “armed” requirement.

Somali pirates also operate within organizations with bosses and masterminds. Although outside observers may struggle to define the exact structure of pirate organizations, pirate groups’ leaders are often wealthy elites and warlords who employ hundreds of pirates. Some of these groups, such as the Somali Marines, have a hierarchical military structure. Other pirate groups are established businesses that allow investors to purchase stock in the enterprise.

Somali pirates maintain a complex support infrastructure as well. Somali pirates launch from well-equipped and well-armed onshore bases, and, as of 2011, pirates even had at least one “pirate academy” to train recruits. Pirates have refined their tactics by utilizing larger mother ships to

395 Id. at 130 (identifying al Qaeda as an organized armed group, but noting that other terrorists groups are separate “organized armed group[s]” unless they affiliate with al Qaeda).
396 The structure may be flat or decentralized, and the members do not need explicit ranks, distinctive emblems, established bases, or particular recruitment styles. Id. at 129 (acknowledging that non-military organized armed groups exist).
397 INT’L COMMITTEE OF THE RED CROSS, supra note 375, at 5.
398 Guilfoyle, supra note 27, at 144.
399 S.C. Res. 1846, Preamble, U.N. Doc. S/RES/1846 (Dec. 2, 2008) (identifying that Somali piracy occurs in Somalia’s territorial waters and on the high seas); see also Isanga, supra note 213, 1290 (noting that piracy occurs outside states’ territorial waters and naval vessels need to pursue pirates into the territorial waters).
400 Coito, supra note 61, at 216.
401 Guilfoyle, supra note 27, at 145.
402 Hearing I, supra note 19, at xii.
403 Dutton, supra note 73, at 212 n.79.
404 McKnight & Hirsh, supra note 216, at 46.
405 Hearing I, supra note 19, at xii.
achieve greater range.\textsuperscript{406} Further, pirates’ training allows them to complete an attack in under twenty minutes\textsuperscript{407} through the coordinated efforts of up to seven skiffs simultaneously attacking from a single mother ship.\textsuperscript{408}

Somali pirates’ operational organization continues once the pirates seize a vessel. The pirates bring the captured ship back to the Somali coast and anchor it nearby their onshore base to await ransom.\textsuperscript{409} Throughout the ransom negotiations, boats sail out to the anchored vessel from the pirate village to bring supplies and relieve the guards.\textsuperscript{410}

Like other armed groups, pirates control territory. Satellite evidence suggests that pirates visibly control the ports where they operate.\textsuperscript{411} Although pirates once intermingled with the local population, they have become increasingly distinguishable from local civilians.\textsuperscript{412} In fact, residents of the key Puntland port of Eyl\textsuperscript{413} recently expelled the pirates, demonstrating their distinctness from local populations.\textsuperscript{414} Given the pirates’ demonstrated operational capabilities and their recognized structures, pirate groups qualify as organized armed groups.

C. “Armed Conflict” Exists

As an “armed organized group,” Somali pirates are engaged in an NIAC against merchant vessels and counterpiracy patrols. Independent of piracy, Somalia has faced a prolonged NIAC\textsuperscript{415} with Islamist insurgent group al-Shabaab currently at the conflict’s center.\textsuperscript{416} Some scholars have questioned whether the land-based instability fueled by nonpirate insurgent

\textsuperscript{406} Id. (“[M]other ships allow the pirates to operate larger weapons, remain at sea during rough weather, and extend their reach a thousand miles or more into the Indian Ocean.”); \textit{Hearing II}, supra note 326, at xii-xiii.

\textsuperscript{407} \textit{Hearing II}, supra note 326, at xii.

\textsuperscript{408} \textit{Hearing I}, supra note 19, at xii.

\textsuperscript{409} Tulloch, supra note 18, at 46.


\textsuperscript{411} HAYWOOD & SPIVAK, supra note 75, at 73 (“[F]inding a military target is not difficult. Satellite imagery clearly shows pirate ports and even individual boats being fitted out for a pirate missions [sic].”); \textit{EU Naval Force Airstrike on Somali Pirates Destroys Equipment}, INDEPENDENT (May 15, 2012), http://www.independent.co.uk/news/world/politics/eu-naval-force-airstrike-on-somali-pirates-destroys-equipment-7753289.html (identifying the pirate village attacked by EU forces as eleven miles outside the known pirate town of Haradheere).

\textsuperscript{412} Mohamud, supra note 222, at 14.


\textsuperscript{414} Mohamud, supra note 222, at 14.

\textsuperscript{415} Guilfoyle, supra note 27, at 146.

groups justifies applying IHL to Somali pirates.\footnote{417} This Comment argues that no such conceptual leap is necessary. Although Somalia’s internal instability facilitates pirate safe havens\footnote{418} and some evidence suggests a connection between pirate groups and al-Shabaab,\footnote{419} the Somali pirates’ actions against shippers alone suffice for a NIAC.

Scholars who assert that Somali pirates are not part of an armed conflict impose rigidity on NIAC that does not exist in reality.\footnote{420} International law recognizes NIAC as the most confusing genre of conflict.\footnote{421} Common Articles Two and Three of the Geneva Conventions and AP II do not define “armed conflict,” and there is no agreed test to assess which actions amount to “armed conflict.”\footnote{422} Facing this uncertainty, courts and tribunals have defined “armed conflict” broadly. For example, the International Criminal Tribunal for the Former Yugoslavia defined armed conflict as “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”\footnote{423}

This Section provides three examples of how states and international organizations recognize NIACs and apply IHL. First, the United States recognizes an armed conflict when, as with terrorism post-9/11, it determines that a threat rises to the level of a military objective. Second, Colombia follows similar practices in applying IHL to narcotics trafficking organizations. Third, through a series of resolutions, the UN has laid the framework for applying IHL to the recognized NIAC created by Somali piracy.

\footnote{417} Guilfoyle, supra note 27, at 146 ("[I]f it remains worth asking whether the fact that a non-international armed conflict in Somalia has directly or indirectly fuelled the rise of piracy changes this conclusion [that piracy is not armed conflict]."); Kontorovich, supra note 64, at 261 ("Even if an armed conflict exists in Somalia, it is not clear that it extends outside of Somali waters and into the high seas."); Coito, supra note 61, at 214-15 ("[The] increase in pirate attacks off the Horn of Africa is directly linked to continuing insecurity and the absence of the rule of law in war-torn Somalia." (quoting PLOCH ET AL., supra note 257, at Summary) (internal quotation marks omitted)).

\footnote{418} HAYWOOD & SPIVAK, supra note 75, at 83.

\footnote{419} Wiesenbach, supra note 361, at 101. “An UN [sic] report suggests that pirates and al-Shabaab have colluded on ad hoc agreements and that pirates share some 30% of their ransoms to trade tranquility [sic] for ransom money with al-Shabaab, which al-Shabaab potentially uses to purchase arms and to sustain armed conflict against the TFG.” Id. (footnote omitted). See also PLOCH ET AL., supra note 257, at 16-17 (summarizing various sources discussing the linkage between al-Shabaab and pirate groups).

\footnote{420} See, e.g., Guilfoyle, supra note 27, at 143-46.

\footnote{421} Schmitt, supra note 390, at 121.

\footnote{422} David E. Graham, Defining Non-International Armed Conflict: A Historically Difficult Task, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY, supra note 31, at 43, 45 ("[I]t has never been clear what level of violence must be reached—and how protracted the actions in issue must be—in order for such hostilities to be deemed a non-international armed conflict.").

\footnote{423} Id. at 48 (quoting Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995)) (internal quotation marks omitted). Under this definition, hostilities do not need to be continuous; some scholars do not give weight to this definition. Id.
1. U.S. Recognition of Terrorism NIACs

No American state practice exists for determining when a NIAC exists.\textsuperscript{424} Instead, an armed conflict exists whenever the United States authorizes its military to use deadly force as a measure of first resort against a threat, and thereafter the law of war applies.\textsuperscript{425} Therefore, whenever the United States deems a threat sufficiently serious to become a military objective, that target may be lawfully attacked under IHL.\textsuperscript{426} Somali pirates meet this threshold because these nonstate actors attack vessels of different nationalities with foreign navies occasionally intervening.\textsuperscript{427} Naval forces have exchanged gunfire with pirates,\textsuperscript{428} and the placement of armed guards on merchant vessels has increased the amount of armed conflict with pirates.\textsuperscript{429} Accordingly, declaring pirates as a military target in an armed conflict is well within the United States’ historical practice.

The United States’ stance toward terrorism reflects this malleable definition of “armed conflict,” and nothing prohibits the United States from applying the same approach to Somali piracy.\textsuperscript{430} For example, prior to September 11, 2001, the United States viewed terrorism as a criminal act best addressed by increasing law enforcement capabilities and promoting democracy and human rights.\textsuperscript{431} The United States swiftly altered its position after 9/11 and applied an IHL paradigm.\textsuperscript{432} It would be strange if pirates,

\textsuperscript{424} Id. at 52-53 (citing DEP’T OF DEF., DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM ¶ 4.1 (2006), available at http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf) (explaining the United States does not make an official classification when presented with a potential NIAC and always adheres to the law of war as a baseline).
\textsuperscript{425} Corn, supra note 382, at 78 (providing the example of Mexican drug cartels crossing into the United States and causing violence, and concluding that even if this situation would typically be handled by law enforcement officials, the president could use the military against the cartels according to IHL if he deemed it necessary for national security). See also The Prize Cases, 67 U.S. 635, 670 (1862) (holding that the existence of a state of war is a political question and the president’s decisions in response to the threat provide conclusive evidence of whether a state of war exists); Graham, supra note 422, at 53 (citing DEP’T OF DEF., supra note 424).
\textsuperscript{426} Corn, supra note 382, at 78.
\textsuperscript{427} Guilfoyle, supra note 27, at 144.
\textsuperscript{428} Id.
\textsuperscript{429} Isenberg, supra note 330 (noting that the number of merchant vessels has increased sharply in recent years and providing a link to a video showing armed guards engaging pirates at sea).
\textsuperscript{430} Corn, supra note 382, at 74-75 (advocating the possibility of an IHL approach for terrorism and piracy because both are transnational nonstate threats that (1) challenge multiple States’ national security; (2) emanate from entities that rarely have a traditional military character; and (3) may require the military to respond taking into account the state’s analysis of the threat’s nature, the requisite response, and the consequences of applying a law enforcement or armed conflict legal framework).
\textsuperscript{431} Garraway, supra note 31, at 101.
\textsuperscript{432} Id.
who are referred to as “terrorists of the sea,”433 could not be treated the same as terrorists, especially since scholars use the treatment of pirates as hostis humani generis to justify applying IHL to terrorists.434

Although there are exceptions, pirates and terrorists both operate as organized armed groups.435 The Obama administration has stated that the U.S. military has authority to use military force against al Qaeda outside of Afghanistan’s “hot” battlefields without doing a separate self-defense analysis for each operation.436 The United States uses this approach even though terrorist attacks, like pirate attacks, are mainly directed at civilians.437

Some may seek to distinguish pirates’ attacks against civilians by claiming that pirates act for purely private ends, while terrorists act based upon ideological motivations. However, this approach ignores the key similarity that both pirates and terrorists act without state sanction.438 In fact, based on Guilfoyle’s reasoning, any nonpublic (i.e., nonstate) action is for private ends.439 This means that pirates and terrorists both act for private ends, even if motivated by profit or ideology, respectively.440


434 Burgess, supra note 79, at 294, 315-17; see also Frank A. Biggio, Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism, 34 CASE W. RES. J. INT’L L. 1, 8-9 (2002) (noting the magnitude of the threat and the universal condemnation of the acts); Bolton, supra note 249 (“It is nonsensical to engage in legal contortions, cramming piracy or terrorism into inappropriate criminal-justice models suitable within civil societies but not the state of nature prevailing in Somalia.”).

435 See Schmitt, supra note 390, at 130-31 (stating that individuals operating autonomously would not be part of an organized armed group based solely upon a shared, but unconnected purpose).


438 David Glazier, Playing by the Rules: Combating Al Qaeda Within the Law of War, 51 WM. & MARY L. REV. 957, 972 (2009) ("Pirates, like al Qaeda, are fundamentally nonstate actors involved in criminal conduct, but are too powerful and geographically remote to be countered by traditional law enforcement.").

439 Guilfoyle, supra note 27, at 144-45, 149 ("[A]ll violence lacking state sanction (public violence) is violence for private ends. The ‘private ends’ requirement only emphasises [sic] the point that states cannot commit piracy.").

440 Id.
2. Colombia’s NIAC Against Narcotics Traffickers

Colombia’s application of IHL against narcotics trafficking groups reinforces that the existence of an armed conflict largely rests with the perception of the state countering the threat.\(^\text{441}\) Colombia views well-organized, well-equipped narcotics trafficking groups in Colombia as “organized armed groups” that may be combated according to IHL within a NIAC.\(^\text{442}\) A NIAC exists even though these narcotics trafficking groups, like pirates, use violence for purely economic motives.\(^\text{443}\) Highlighting the flexibility of state approaches to armed conflict, Colombia does not solely rest upon IHL.\(^\text{444}\) The military uses IHRL and IHL simultaneously, varying which paradigm controls based on the proportionality analysis in a given situation.\(^\text{445}\) The fluctuation rests largely upon the mission area’s proximity to population centers.\(^\text{446}\)

3. UN Security Council Resolutions and Somali Piracy

Adherence to IHL is consistent with multiple UN Security Council resolutions regarding Somali piracy. Collectively, these resolutions establish that Somali piracy is an armed conflict and foreign nations may attack Somali pirates ashore. Beginning with Resolution 1816 in 2008, the Security Council determined that Somali piracy is a serious crime that exacerbates the threat to international peace and security posed by the internal insecurity in Somalia.\(^\text{447}\) To combat this threat, the Security Council authorized states to enter Somali territorial waters and use “all necessary means” to repress piracy as if the states were acting on the high seas according to “rel-

\(^{441}\) Juan Carlos Gomez, Twenty-First Century Challenges: The Use of Military Forces to Combat Criminal Threats, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY, supra note 31, at 279, 281.

\(^{442}\) Id.; see also Craig A. Bloom, Square Pegs and Round Holes: Mexico, Drugs, and International Law, 34 HOUS. J. INT’L L. 345, 348 (2012) (arguing that violence between the Mexican government and drug cartels rises to the level of a non-international armed conflict).

\(^{443}\) Gomez, supra note 441, at 281.

\(^{444}\) Id. at 285-86 (“[Rules for the use of force are] dependent on the mission assigned to the forces. In Colombia, two differently colored cards are used. A blue card is used when the military unit is engaged in a law enforcement mission. The rules on the blue card are based on [IHRL]. They provide for the use of force only when no other option is available to accomplish the mission and in self-defense of the person and others. The red card is used in operations against military objectives. These cards are based on IHL and permit the offensive use of force, including lethal force if demanded by military necessity.”).

\(^{445}\) Id. at 284-86.

\(^{446}\) Id. at 285.

\(^{447}\) S.C. Res. 1816, supra note 288, Preamble; Isanga, supra note 213, 1315-16 (stating that terrorism was designated a threat to international peace and security).
relevant international law.”

With Resolution 1851, the Security Council then unequivocally departed from the recent practices and authorized states and regional organizations to undertake “all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy . . . consistent with applicable international humanitarian and human rights law.”

This explicitly authorizes land- and sea-based operations pursuant to both IHL and IHRL.

Resolution 1851, which has been renewed annually and remains in effect until November 12, 2015, incorporates language that traditionally authorizes the use of force and recognizes the existence of armed conflict.

Further, Resolution 1851’s reference to the “applicable” IHL indicates that it refers to a principle already in existence. This reflects the idea that states may apply IHL, as they have historically to deal with piracy, if they deem the action warranted based on their perception of the threat.

The United States’ treatment of terrorists and Colombia’s treatment of narcotics traffickers follow the same principle.

Some scholars argue that states currently do not view Somali pirates as a threat deserving of IHL, but these statements were made before the EU’s airstrike against pirate supplies suggested otherwise. Nothing in Resolution 1851 suggests IHRL is the only permissible method to deal with Somali pirates. Although Resolution 1851 calls upon Member States to apply IHRL when prosecuting captured pirates, this does not indicate a trial is necessary when a pirate was attacked on land rather than detained at sea.

Subsequent Security Council resolutions affirm that UNCLOS remains the legal framework applicable to countering piracy at sea and that the Somali resolutions do not establish customary international law. However, UNCLOS does not control when it is silent on an issue. In particular,

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450 S.C. Res. 2184, ¶ 13, U.N. Doc. S/RES/2184 (Nov. 12, 2014) (renewing both UNSCR 1846 and 1851, and noting that these resolutions were previously renewed through resolutions: 1897 (2009), 1950 (2010), 2020 (2011), and 2077 (2012), and 2125 (2013)).
451 Lieblich, supra note 365, at 128 (noting that previous and subsequent resolutions using the same language have applied to clear situations of armed conflict); Tullio Treves, Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia, 20 EUR. J. INT’L L. 399, 412 (2009) (accepting that “all necessary means” permits the use of force, but rejecting that an armed conflict exists).
453 See supra Part I.
454 See supra Part IV.C.1-2.
455 See Treves, supra note 451, at 412-13; Guilfoyle, supra note 27, at 147.
457 S.C. Res. 2184, supra note 450, Preamble, ¶ 14.
UNCLOS does not address what rule controls counterpiracy on land when a host state has ceased to function for decades. Because most Somali pirates continue to operate out of regions without effective state control, international law should revert to the customary rule that exists outside of UNCLOS. This traditional rule, reflected in the UN Resolutions and shown through centuries of American and international practice, would treat pirates as engaging in armed conflict and allow application of IHL if a state deems it necessary.

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Thus, under both the UN Resolutions and an independent IHL analysis, the United States can lawfully attack pirate villages with the intent to kill pirates and destroy their equipment. Although no agreed international standard armed conflict exists, Somali pirate organizations qualify as organized armed groups because they have defined structures that allow each group to carry out concerted activities, including attacks using heavy weapons. Furthermore, treatment of Somali pirates as military enemies is consistent with United States and international practice, as demonstrated through IHL operations against terrorists and drug traffickers and the authorization of IHL against pirates in the UN Resolutions. The following section describes a legal framework for combating piracy according to principles of IHL.

D. Legal Framework for Attacking Somali Pirates on Land

If the United States decides to conduct airstrikes against pirates’ onshore bases, it must follow an established legal framework. The Com-
mander’s Handbook on the Law of Naval Operations ("Handbook") instructs U.S. commanders on the legal rules governing naval operations during armed conflict. The Handbook’s rules incorporate international law and apply generically across all armed conflicts. Therefore, these rules would apply to an armed conflict involving Somali pirates, regardless of the label given to such a conflict.

Somali pirates’ status as organized armed groups operating within an armed conflict renders pirates and their equipment legitimate military objectives. As with all legitimate military targets, the Handbook instructs that attacks must be necessary and any civilian suffering must be proportional. Attacks against pirates on land and at sea will typically meet both criteria.

1. Military Necessity

The United States has a military need to attack pirate villages because Somali piracy will persist as long as pirates can freely operate ashore. The Somali government has recognized its inability to control the pirates who reside within its territory, exhibited most notably by Somalia granting the EU approval to carry out the 2012 airstrike against pirate equipment. Indeed, some have argued that the Somali government’s overall weakness has long been established in international practice that there might well be a war between a state and a non-state enemy . . . .

464 HANDBOOK, supra note 371, at 3.
465 Id. ¶¶ 5.1.2.2, 5.1.2.3, 5.2. The Handbook creates an additional category of armed conflict, labeled "International Armed Conflict Between Nation States and Non-State Actors." Id. ¶ 5.1.2.3. Although the Handbook includes “The Global War on Terror” in this category and notes the law applicable in this type of conflict is still unsettled, this Comment has relied upon the Supreme Court’s decision in Hamdan and categorized “The Global War on Terror” as an NIAC under the Geneva Conventions Common Article Three. Id.; see supra notes 371-376 and accompanying text.
466 HANDBOOK, supra note 371, ¶ 8.1, 8.2, 8.2.5.
468 Targeting analysis must also conform with the principles of distinction and unnecessary suffering. HANDBOOK, supra note 371, ¶ 5.3. This Comment assumes distinction would be met given the discussion of necessity and proportionality. Id. ¶ 5.3.2. Further, it would be too speculative for this Comment to suggest the types of weapons the U.S. military should use to ensure the combatants do not endure unnecessary suffering. Id. ¶ 5.3.4.
469 WOMBWELL, supra note 94, at 170 (“Ultimately, piracy is a land-based problem. . . . If you eliminate the shore havens . . . that make piracy possible, then piracy will die out. If those pillars remain in tact [sic], then no amount of naval patrols are going to fully suppress piracy.”); see supra Part III.A.3.
470 MacLaren, supra note 214, at 354.
should allow other nations to pursue pirates into Somali territory as a means of upholding Somalia’s international responsibility to suppress piracy.471 Historically, the United States has recognized the military necessity of attacking pirates by bombarding coastal cities that harbored pirates,472 as well as by invading Spanish Florida in 1817 when Spain could not suppress pirates operating in that territory.473 Overall, military attacks will “eliminate the shore havens . . . [and] piracy will die out,” as the objective would be to “teach the Somalis that piracy is too dangerous to continue.”474 The likely effectiveness of attacking pirates on land reinforces the necessity of military action. Even limited, but properly timed, airstrikes against pirate villages and equipment might effectively disrupt piracy. Pirate activity corresponds closely with the monsoon season, as the rough seas dissuade pirates from venturing out in the Indian Ocean.475 Successful airstrikes near the switch in the monsoon season would require pirates to obtain new fuel, boats, and motors.476 As a result, pirates might miss the window for attacking merchant ships, which could even allow nations to deploy fewer counterpiracy vessels to the region.477

2. Proportionality

Somali pirates’ status as combatants within an armed conflict means that pirates are not civilians.478 As combatants, the U.S. military may lawfully target pirates without prohibitions, including proportionality.479 Although militaries cannot directly target civilians, the principle of proportionality recognizes that attacking military objectives may cause incidental

473 Batterson, supra note 460, at 1-2; see also HAYWOOD & SPIvak, supra note 75, at 37 (explaining that historically the coastal state has been the first line of defense against piracy, but when the coastal state fails, nations whose ships are getting attacked provide the second line of defense).
474 WOMBWELL, supra note 94, at 170 (“[T]he Somalis will have to be taught that piracy is too dangerous to continue.”); Bolton, supra note 249 (“Destroying pirate bases, repeatedly if necessary, may not end piracy, but the lessons and the costs for the pirates will be far higher and clearer than at present.”).
475 Delfau, supra note 410, at 108. Specifically, monsoon season creates rough seas from January to March and June to mid-September, while calmer waters prevail from April to May and mid-September to December, which allows pirates to venture far into the Indian Ocean. Id.
476 Murphy, supra note 17, at 90. This could take substantial time since pirates import most of their supplies from Yemen and the Gulf States. Id.
477 MCKNIGHT & HIRSH, supra note 216, at 5, 190.
478 See supra Part III.B.1-2.
479 BOOTHBY, supra note 377, at 433; Schmitt, supra note 390, at 121.
damage to civilians and/or their property.\textsuperscript{480} Proportionality merely requires the decision maker to conclude that the anticipated damage to civilians does not exceed the expected military advantage achieved by carrying out the attack.\textsuperscript{481}

The location of pirate hideouts in sparsely populated valleys, mountains, or along the vast, poorly monitored Somali coastline\textsuperscript{482} makes the proportionality analysis relatively straightforward. Some civilians may live within pirate villages as well, but the pirates would be required to remove the civilians from the area.\textsuperscript{483} Regardless, civilians could be deliberately attacked if they aid the pirates.\textsuperscript{484} Proportionality may play a role in targeting decisions when pirates live in more populated areas, but even then, the United States could follow the EU’s example and only attack pirates and their supplies as they outfit their skiffs.\textsuperscript{485}

CONCLUSION

Throughout history, states have consistently used their military forces to attack pirates as military targets and \textit{hostis humani generis}. In the twenty-first century, instability in Somalia has fostered a new generation of pirates, who use heavy weapons and complex organization to seize merchant vessels and ransom their crews. Like other pirates throughout history, Somali pirates threaten freedom of the seas by disrupting world trade. Recent private and state measures to combat piracy have delivered few improvements at great expense. In part, the law enforcement paradigm from which antipiracy efforts proceed has allowed Somali piracy to persist.

Although states mainly rely upon a law enforcement framework to combat Somali pirates, scholars erroneously argue that states are restricted to this approach. This false assumption dates to a relatively short period of time when piracy had disappeared as an international threat, and it is no longer appropriate to today’s changed circumstances. According to historical practice and contemporary international law, states may target Somali pirate groups with deadly force as a measure of first resort. Attacks are justified, including on land, because these pirates are organized armed groups in an NIAC and therefore legitimate targets under IHL. Furthermore, such attacks would almost certainly be proportional given the distinction be-

\textsuperscript{480} \textsc{Handbook}, supra note 371, ¶ 8.3, 8.3.1.
\textsuperscript{481} \textit{Id.} at ¶ 8.3.1; \textit{see also} \textsc{Boothby}, supra note 377, at 442; \textsc{Corn}, supra note 382, at 70.
\textsuperscript{482} \emph{Hearing I}, supra note 19, at xii (“Somali pirates typically operate from well-equipped and well-armed bases ashore.”); \textsc{Mohamud}, supra note 222, at 15.
\textsuperscript{483} \textsc{Handbook}, supra note 371, ¶ 8.3.2.
\textsuperscript{484} \textit{Id.} ¶ 8.3.
\textsuperscript{485} \textsc{Press Release, European Union Naval Force Somalia}, supra note 361.
tween pirates and civilians, as well as necessary to eliminate the pirate threat that continues to plague the high seas.

In many ways, piracy is, and always has been, symptomatic of a less ordered world. As the Somali pirates demonstrate, failed or weak states’ shortcomings potentially reverberate through the world’s economy, and more capable nations such as the United States can and should apply IHL to restore global order when necessary.