

UPPING THE STAKES TO WIN THE WAR AGAINST
SOMALI PIRACY: JUSTIFICATIONS FOR A NEW
STRATEGY BASED ON INTERNATIONAL
HUMANITARIAN LAW

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INTRODUCTION

On December 3, 1816, President James Madison stood before the American people and delivered his eighth and final annual message.¹ 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.² However, a triumph over a European power did not serve as the sole inspiration for this praise.³ 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.⁴

During that time, the Barbary pirates captured an estimated thirty-five American vessels and seven hundred sailors,⁵ with some sailors languishing in captivity for several years.⁶ Freedom for these Americans came at the cost of two wars,⁷ during which the United States Navy deployed its largest squadron to date⁸ and Marines flew the American flag over an occupied

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¹ President James Madison, Eighth Annual Message (Dec. 3, 1816) (transcript available at <http://millercenter.org/president/madison/speeches/speech-3629>).

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).

⁴ FRANK LAMBERT, *THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC WORLD* 7 (2005).

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.⁹ 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.’”¹⁰

The United States suppressed the Barbary pirates with its military forces through direct sea and land combat.¹¹ Congress authorized offensive action to protect “commerce and seaman . . . on the Atlantic ocean, the Mediterranean and adjoining seas.”¹² 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.¹³ As a rationale for the conflict, Congress and the president cited the freedom of the seas and its importance to American independence.¹⁴

In recent years, piracy has reemerged as a serious threat to the safety of all those who peaceably navigate the oceans.¹⁵ This has occurred most visibly in the Horn of Africa,¹⁶ where the political instability following the collapse of the Somali government in 1991 created fertile ground for piracy.¹⁷ The risk zone for pirate attacks covers an area the size of continental Europe, as it extends from East Africa to India.¹⁸ Somali pirates’ broad operational capability stems from their well-financed and sophisticated on-land infrastructure,¹⁹ 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.

¹⁵ Dominique Gaurier, *The Enemy of All Mankind*, in *PIRACY IN COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW* 25, 25 (Charles H. Norchi & Gwenaële Proutière-Maulon eds., 2012).

¹⁶ AM. INST. OF MARINE UNDERWRITERS, ISSUES BOOK 2014 at 3-4 (2014), available at <http://www.aimu.org/images/issuesbook.pdf>.

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.

¹⁹ *Assuring the Freedom of Americans on the High Seas: The United States Response to Piracy: Hearing Before the Subcomm. on the Coast Guard & Mar. Transp. of the H. Comm. on Trans. & Infrastructure*, 112th Cong. xii (2011) [hereinafter *Hearing I*]; Carol Matlack, *Inside Somali Piracy Inc.*, BLOOMBERG BUSINESSWEEK (Nov. 6, 2013), <http://www.businessweek.com/articles/2013-11-06/inside-somali-piracy-inc> (explaining that many piracy financiers are Somali warlords).

heavy weaponry, global positioning systems (“GPS”),²⁰ and refined tactics.²¹ Since 2008, pirates have captured over 130 ships²² at an average ransom of \$5 million per ship in 2011.²³ States and private shippers have responded by increasing naval patrols, employing private security contractors, and altering shipping practices.²⁴ During 2013, Somali pirates seized four vessels and attacked twenty-three vessels, and 145 vessels reported suspicious approaches.²⁵ Between direct losses and deterrence and avoidance efforts, the World Bank recently reported that Somali piracy costs the global economy \$18 billion annually.²⁶

Some commentators argue the law of war has no relevance for curbing piracy because pirates are not combatants, but ordinary criminals.²⁷ 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.²⁸ 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.²⁹

Two paradigms of modern international law—international humanitarian law (“IHL”) and international human rights law (“IHRL”)—govern the

²⁰ James Ewinger, *Case Western Reserve University Symposium Takes Judicious Aim at Piracy*, PLAIN DEALER (Sept. 7, 2013), <http://www.cleveland.com/metro/index.ssf/2013/09/piracy.html>.

²¹ Tulloch, *supra* note 18, at 45.

²² *Key Facts and Figures*, EU NAVAL FORCE SOMALIA (Oct. 23, 2014), <http://eunavfor.eu/key-facts-and-figures>.

²³ Anna Bowden & Shikha Basnet, *The Economic Cost of Somali Piracy, 2011* at 2 (One Earth Future Found., Working Paper, 2012), available at http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011.pdf.

²⁴ *Id.*

²⁵ Jens Vestergaard Madsen et al., *The State of Maritime Piracy, 2013* at 2-4 (One Earth Future Found., Working Paper, 2014), available at http://oceansbeyondpiracy.org/sites/default/files/attachments/SoP2013-Digital_0.pdf.

²⁶ Teo Kermeliotis, *Somali Pirates Cost Global Economy “\$18 Billion a Year,”* CNN (Apr. 12, 2013), <http://edition.cnn.com/2013/04/12/business/piracy-economy-world-bank/index.html>.

²⁷ See, e.g., Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?*, 11 MELB. J. INT’L L. 141, 152-53 (2010).

²⁸ Amitai Etzioni, *Somali Pirates: An Expansive Interpretation of Human Rights*, 15 TEX. REV. L. & POL. 39, 47 (2010).

²⁹ Michael Bahar, *Power Through Clarity: How Clarifying the Old State-Based Laws Can Reveal the Strategic Power of Law*, 30 U. PA. J. INT’L L. 1295, 1317-18 (2009) (asserting that since the international community should not be resigned to suffer attacks emanating from criminally lawless areas, militaries can engage pirates who commit violent acts on the high seas or in failed states and ungoverned territories).

use of force by states against nonstate actors.³⁰ The United States' killing of Osama Bin Laden provides a good illustration of the distinction.³¹ 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.³² 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.³³ Bin Laden, rather than the Navy Seals, had the burden to clearly indicate he intended to surrender to avoid being shot.³⁴ Alternatively, if IHRL governed the raid, the American forces would have acted like law enforcement officials.³⁵ On a mission to capture Bin Laden, deadly force could only be used in self-defense to an imminent threat.³⁶ 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.³⁷ 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.³⁸ 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.³⁹ Piracy represents a critical disruption to the order that states seek to maintain, both in Madison's time and now.⁴⁰ Accordingly, freedom of the seas presents the same justification for attacking today's Somali pirates as their Barbary brethren.⁴¹

³⁰ INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW: SIMILARITIES AND DIFFERENCES 1 (2003), available at http://www.ehli.icrc.org/images/resources/pdf/ihl_and_ihrl.pdf.

³¹ Charles Garraway, *War and Peace: Where Is the Divide?*, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 93, 108 (Kenneth Watkin & Andrew J. Norris eds., 2012) (Vol. 88, U.S. Naval War College International Law Studies).

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.⁴² 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 civilian criminals, 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.⁴³ Over time, an actor's lack of state sanction has distinguished piracy from other acts of violence on the high seas.⁴⁴ Somali pirates also act without state sanction,⁴⁵ placing them within the traditional parameters of

⁴² In addition to using oar-powered boats, rather than motorized dinghies, the Barbary pirates carried out their seize-and-ransoms business model in the Mediterranean with support from their local rulers. Jeffrey Gettleman, *Lessons from the Barbary Pirate Wars*, N.Y. TIMES (Apr. 11, 2009), http://www.nytimes.com/2009/04/12/weekinreview/12gettleman.html?ref=weekinreview&_r=0.

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.⁴⁶

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.⁴⁷ Even in the earliest days, society placed limits on what type of seaborne activity was acceptable.⁴⁸ Later, the attitude toward piracy developed more fully, and a recognized treatment of pirates gained acceptance.⁴⁹ 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.⁵⁰

1. Piracy from Antiquity to Blackstone

Laws on piracy date back to ancient Athens, making it one of the world’s oldest crimes.⁵¹ Gauged by the writings of Thucydides, Aegean peoples had a distinct definition of the conduct that rendered someone a pirate.⁵² 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.⁵³ 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.⁵⁴

The word “pirate” initially referred to sea raiders who literally warred with all their neighbors and possessed a substantial degree of political or-

⁴⁶ Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J. 183, 234-35 (2004).

⁴⁷ DAVID ABULAFIA, *THE GREAT SEA: A HUMAN HISTORY OF THE MEDITERRANEAN* 41, 52 (2011).

⁴⁸ Gaurier, *supra* note 15, at 26.

⁴⁹ *Id.* at 29.

⁵⁰ *See, e.g.*, Gaurier, *supra* note 15, at 31-35; ALFRED P. RUBIN, *THE LAW OF PIRACY* 201-02, 206, 210-11 (1988) (explaining that scholars have widely accepted nineteenth-century British views on piracy as highly persuasive evidence of the international law in that period and noting that Britain’s extensive naval action against “piracy” shows Britain assumed it was at war with these actors who threatened Britain’s hegemony on the high seas, reminiscent of Rome’s conception of permanent war with “*pirata*” in the Eastern Mediterranean). Some current scholars dismiss the hostile phrases directed toward pirates as mere rhetoric. *See, e.g.*, Guilfoyle, *supra* note 27, at 152-53.

⁵¹ Michael Davey, Note, *A Pirate Looks at the Twenty-First Century: The Legal Status of Somali Pirates in an Age of Sovereign Seas and Human Rights*, 85 NOTRE DAME L. REV. 1197, 1200 (2010).

⁵² Gaurier, *supra* note 15, at 26.

⁵³ *Id.*

⁵⁴ ABULAFIA, *supra* note 47, at 194.

ganization.⁵⁵ Later, “pirate” took on a broader definition and applied to ordinary robbers who operated at sea.⁵⁶ Bold pirates seized a young Julius Caesar and held him for ransom.⁵⁷ Although they treated Caesar well in captivity, upon his release, Caesar returned with a flotilla and crucified the pirates.⁵⁸ 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.⁵⁹ Pompey received great praise for his actions.⁶⁰

It was within this context that Cicero unequivocally condemned pirates as *hostis humani generis*.⁶¹ 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.⁶² *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.⁶³ This phrase also possessed a duality: pirates were both “enemies of all mankind” in the military sense and offenders of international criminal law.⁶⁴ This gave pirates a status like unlawful combatants⁶⁵ who could be treated militarily or criminally at the enforcing state’s convenience.⁶⁶

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.⁶⁷ The Swiss philosopher Emer de Vattel relied on the status of pirates to argue that other criminals ought to be treated identically.⁶⁸ In *The Law of Nations*, Vattel reasoned,

[A]lthough 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.*

⁵⁹ Gaurier, *supra* note 15, at 29; Robert Harris, *Pirates of the Mediterranean*, N.Y. TIMES (Sept. 30, 2006), http://www.nytimes.com/2006/09/30/opinion/30harris.html?pagewanted=1&_r=0&ei=5087&en=7b5321a993a151e4&ex=1159848000.

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.*

⁶⁴ Eugene Kontorovich, “*A Guantánamo on the Sea*”: *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243, 257 (2010).

⁶⁵ *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (distinguishing between lawful and unlawful combatants).

⁶⁶ Kontorovich, *supra* note 64, at 257.

⁶⁷ Gaurier, *supra* note 15, at 31.

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.

⁷³ Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy Within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT'L L. 197, 201-02 (2010).

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).

[T]he 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.⁷⁶

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.'" ⁷⁷

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."⁷⁸ 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.⁷⁹ States relied upon pirates' status as military enemies subject to universal jurisdiction to suppress piracy through a legal framework based on swift justice.⁸⁰ This model differed sharply from that reserved for civilians.⁸¹

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.⁸² Parliament designed the process to speed up pirate prosecutions,⁸³ which operated

⁷⁶ Gaurier, *supra* note 15, at 31-32 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES, *5, *71) (internal quotation marks omitted).

⁷⁷ 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).

⁷⁸ Guilfoyle, *supra* note 27, at 152-53.

⁷⁹ 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); Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT'L & COMP. L. REV. 293, 310-13 (2006) (summarizing English piracy law and its effects during the eighteenth and nineteenth centuries).

⁸⁰ See *Texas v. Johnson*, 491 U.S. 397, 422 (1989) (Rehnquist, C.J., dissenting).

⁸¹ Quoting John C. Yoo, former Deputy Assistant Attorney General, the article read,

Why is it so hard for people to understand that there is a category of behavior not covered by the legal system? . . . What were pirates? They weren't fighting on behalf of any nation.

What were slave traders? Historically, there were people so bad that they were not given protection of the laws. There were no specific provisions for their trial, or imprisonment. If you were an illegal combatant, you didn't deserve the protection of the laws of war.

Jane Mayer, *Outsourcing Torture*, NEW YORKER, Feb. 14, 2005, at 106.

⁸² Max Boot, *Pirates, Then and Now: How Piracy Was Defeated in the Past and Can Be Again*, 88 FOREIGN AFF. 94, 99 (2009).

⁸³ *Id.*

through Vice-Admiralty courts around the British Empire.⁸⁴ Seven “commissioners” drawn from the ranks of naval officers and colonial officials—not ordinary judges or jurors—presided over these courts.⁸⁵

The case of Captain William Kidd illustrates how the scales were stacked against pirates, imposing a virtually nonexistent due process standard.⁸⁶ At his trial, Kidd faced charges of murder and piracy.⁸⁷ When he initially refused to enter a plea, the court stated it would find him guilty by default.⁸⁸ He then asked for a delay and moved for dismissal, which were both denied, along with his request for counsel.⁸⁹ During the two-day trial, before a separate jury for each charge,⁹⁰ Kidd had to conduct his own cross-examinations of hostile witnesses and present his own defense.⁹¹ Unsurprisingly, Kidd was convicted and executed.⁹²

The United States also took a serious stance against piracy after the Revolution.⁹³ In addition to its conflict with the Barbary pirates in the Mediterranean, the United States combated piracy around its shores.⁹⁴ 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.⁹⁵ 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 truck, 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.*

⁸⁵ Boot, *supra* note 82, at 99.

⁸⁶ Kidd sailed from London in 1696 with an antipiracy commission from the King of England. Once at sea, the crew pressured him to engage in piracy. During the dispute, he killed one of his sailors and succumbed to their pressure. Kidd subsequently landed at Boston, where he was apprehended and charged with piracy. He was then taken to London for trial commencing in May 1701. Evan J. Wallach, *Partisans, Pirates, and Pancho Villa: How International and National Law Handled Non-State Fighters in the “Good Old Days” Before 1949 and That Approach’s Applicability to the “War on Terror,”* 24 EMORY INT’L L. REV. 549, 558-59 & n.38 (2010) (citing DOUGLAS BOTTING, *THE SEAFARERS: THE PIRATES* 105-06, 114-15, 121-22, 124 (1978)).

⁸⁷ *Id.* at 558-59.

⁸⁸ *Id.* at 559 n.41.

⁸⁹ *Id.* at 559.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Wallach, *supra* note 86, at 559.

⁹³ Gerard W. Gawalt, *America and the Barbary Pirates: An International Battle Against an Unconventional Foe*, LIBRARY CONG., http://memory.loc.gov/ammem/collections/jefferson_papers/mtjprece.html (last visited Dec. 17, 2013) (summarizing America’s interaction with the Barbary pirates after the American Revolution).

⁹⁴ See generally JAMES A. WOMBWELL, *THE LONG WAR AGAINST PIRACY: HISTORICAL TRENDS* 36-49 (2010), available at http://usacac.army.mil/cac2/cgsc/carl/download/csipubs/OP32_Piracy.pdf (recounting the U.S. Navy’s sea and land engagements against pirates based in Florida, New Orleans, Puerto Rico, and Cuba, including missions onto Cuban and Puerto Rican soil after their governors denied the United States permission to go ashore).

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 *Commentaries*¹⁰⁶ 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.*

⁹⁷ Boot, *supra* note 82, at 101; *History*, COMMANDER, NAVY INSTALLATIONS COMMAND, NAVAL AIR STATION KEY WEST, https://www.cnic.navy.mil/regions/cnrse/installations/nas_key_west/about/history.html (last visited Oct. 29, 2014).

⁹⁸ Boot, *supra* note 82, at 101.

⁹⁹ *Cf.* Craig Evan Klafter, *The Americanization of Blackstone’s Commentaries*, in *ESSAYS ON ENGLISH LAW AND THE AMERICAN EXPERIENCE* 42, 42 (Elisabeth A. Cawthon & David E. Narrett eds., 1994).

¹⁰⁰ U.S. CONST. art. I, § 8, cl. 10; Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV. 447, 475 (2000).

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.

¹⁰⁵ Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1061 (2011).

¹⁰⁶ *Id.* at 1066.

¹⁰⁷ *Id.* at 1065-66, 1068.

the United States' ability to punish piracy.¹⁰⁸ Chief Justice John Marshall insisted the United States' piracy statute could not reach a foreign seaman on a foreign ship.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.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.¹¹¹ Prior to the Civil War, the United States' actions demonstrated pirates' inferior status under the then-uncodified law of war.¹¹² In 1863, Professor Francis Lieber drafted a code of conduct for soldiers, which the Lincoln administration promulgated as General Orders 100, *Instructions for the Government of the Armies of the United States in the Field* ("Lieber Code").¹¹³ The Lieber Code was recognized as the first codification of regulations for the conduct of war by land.¹¹⁴ Even today, it forms the basis for most American and international regulations for the law of war.¹¹⁵ In this seminal work, Lieber explicitly identified pirates as an example of combatants who deserved no protections.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.¹¹⁷

¹⁰⁸ *Id.* at 1061-75 (discussing the Supreme Court's decisions and the resulting dialogue with Congress).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 1071, 1074.

¹¹¹ RUBIN, *supra* note 50, at 293-94 (stating that "unprivileged belligerents" were analogized to pirates); Bahar, *supra* note 29, at 1319-20 (calling pirates and nonstate combatants close cousins who are both targeted by military assets).

¹¹² See sources and accompanying text *supra* notes 93-99.

¹¹³ Michael Howard, *Constraints on Warfare*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD, *supra* note 37, at 6; Paul Finkelman, *Francis Lieber and the Law of War*, N.Y. TIMES OPINIONATOR BLOG (Mar. 2, 2013, 12:00 PM), http://opinionator.blogs.nytimes.com/2013/03/02/francis-lieber-and-the-law-of-war/?_r=0.

¹¹⁴ Howard, *supra* note 113, at 6; RUBIN, *supra* note 50, at 292.

¹¹⁵ Howard, *supra* note 113, at 6; Finkelman, *supra* note 113.

¹¹⁶ Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 17 (2008).

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.¹¹⁸ Further, the Lieber Code specifically assigned pirates this status because, as nonstate actors, they operated impermissibly outside the accepted state framework.¹¹⁹ 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.¹²⁰

Throughout history, piracy has been recognized as a unique crime deserving harsh treatment. Although permissible in limited circumstances against foreigners in ancient times,¹²¹ the definition of piracy soon expanded to include all acts of robbery at sea by nonstate actors,¹²² who were condemned as *hostis humani generis*.¹²³ From this point, pirates were situated within the laws of war and could be dealt with through military force.¹²⁴ If captured and placed on trial, pirates received truncated due process rights compared to civilian criminals.¹²⁵ Therefore, *hostis humani generis* amounted to more than mere rhetoric; it represented a uniquely harsh standard of treatment for pirates.¹²⁶

B. *The Pirate vs. Privateer Distinction*

Despite this firm stance against piracy, a fine line distinguished acceptable conduct from forbidden attacks against merchant shipping.¹²⁷ States simultaneously licensed private individuals to attack the merchant

¹¹⁸ Passman, *supra* note 116, at 17.

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 Kritsiotis, *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).

¹²⁰ James Kraska, *Comparative Counter-Piracy Strategy: European, American, African, and Asian Perspectives*, in PIRACY IN COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW, *supra* note 15, at 201, 202.

¹²¹ Gaurier, *supra* note 15, at 26.

¹²² Kontorovich, *supra* note 46, at 234-35.

¹²³ HAYWOOD & SPIVAK, *supra* note 75, at 32-33; Bradford, *supra* note 75, at 868-69 & n.691.

¹²⁴ Kontorovich, *supra* note 64, at 257.

¹²⁵ See Boot, *supra* note 82, at 99.

¹²⁶ See Passman, *supra* note 116, at 16-17.

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.¹²⁸ Although this increased risk to merchants,¹²⁹ having state sanction turned an otherwise unlawful act of piracy into a lawful one of privateering.¹³⁰

Privateering, commissioning private vessels with letters of marque to attack enemy merchant ships during war, was a widespread state practice for centuries.¹³¹ 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.¹³² Privateers were incentivized by the opportunity for adventure and fortune.¹³³ 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.¹³⁴

Although the United States and European nations issued letters of marque authorizing privateering,¹³⁵ this practice in no way diminished the effect of *hostis humani generis*.¹³⁶ State sanction of the activity was pivotal.¹³⁷ By virtue of occurring at sea, privateers had almost no direct supervision of their activities,¹³⁸ 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.¹³⁹

These checks existed as a well-understood and limited form of regulation,¹⁴⁰ and possessing a valid commission did not excuse attacks on mer-

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.

¹³⁵ See U.S. CONST., art. I, § 8, cls. 1, 11 (“Congress shall have Power . . . To declare war, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . .”); James Anderson, *A Sea of Change Reforming the International Regime to Prevent, Suppress and Prosecute Sea Piracy*, 44 J. MAR. L. & COM. 47, 49-50 (2013).

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.

¹⁴⁰ DONALD A. PETRIE, *THE PRIZE GAME: LAWFUL LOOTING ON THE HIGH SEAS IN THE DAYS OF FIGHTING SAIL 2* (1999) (stating that Americans knew prize law as well as Americans know baseball’s rules today).

chant vessels that were outside the commission's scope.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.¹⁴² At his trial, Kidd attempted to show that he only captured vessels he reasonably believed were French.¹⁴³ The court rejected this defense and did not show Kidd any leniency.¹⁴⁴

This outcome demonstrates that failing to stay on the proper side of the piracy-privateering distinction brought harsh punishment.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*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.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.¹⁴⁸ Without a lawful commission that would have made the defendant a state actor, the Court upheld the piracy conviction.¹⁴⁹

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

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))).

¹⁴² Wallach, *supra* note 86, at 558-59 n.38.

¹⁴³ *Id.* at 559 & nn.41 & 46.

¹⁴⁴ *Id.*

¹⁴⁵ Kontorovich, *supra* note 46, at 217.

¹⁴⁶ 18 U.S. (5 Wheat.) 144 (1820).

¹⁴⁷ *Id.* at 149-50, 153.

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.

¹⁴⁹ See Ramsey, *supra* note 127, at 1615-16.

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).

¹⁵¹ Kontorovich, *supra* note 46, at 214.

demonstrated by the treatment of Captain Kidd and the defendant in *Klintock*, action under color of commission did not trigger leniency.¹⁵²

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

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.

¹⁵⁸ Angelo Guisado, *Searching for Answers: Reprisals, Reckoning, and Recourse for Maritime Pirates*, 25 U.S.F. MAR. L.J. 121, 124 (2013).

¹⁵⁹ SEAN D. MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 383-84 (2d ed. 2012).

¹⁶⁰ Eugene Kontorovich, *International Legal Responses to Piracy Off the Coast of Somalia*, AM. SOC'Y INT'L LAW 13 (Feb. 6, 2009), <http://www.asil.org/insights/volume/13/issue/2/international-legal-responses-piracy-coast-somalia>.

¹⁶¹ VIRGINIA W. BREWER, CONG. RESEARCH SERV., *PIRACY IN TWENTIETH CENTURY INTERNATIONAL LAW* 2-3, 5 (1969).

¹⁶² See Rabkin & Rabkin, *supra* note 129, at 211 & nn.52-53.

¹⁶³ Guilfoyle, *supra* note 27, at 152-53.

A. *The Declaration of Paris*

In 1856, the major European powers gathered to negotiate peace terms after the Crimean War.¹⁶⁴ Among other things, the peace conference issued the Declaration of Paris, which proclaimed that privateering should now be considered unlawful.¹⁶⁵ This declaration eliminated the legal line between government-sponsored private seizures and the unsponsored seizures that rendered perpetrators “enemies of mankind,”¹⁶⁶ but the declaration occurred within the context of broader changes.¹⁶⁷ The ban on privateering did not condemn all state-sanctioned seizures.¹⁶⁸ It still allowed naval seizures of contraband goods, even if the goods were carried to the enemy nation on a neutral ship.¹⁶⁹ Therefore, this declaration restricted the use of force at sea to a state’s official naval forces¹⁷⁰ and continued the condemnation of private acts of violence.¹⁷¹

B. *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.¹⁷² The Harvard Draft Convention (“Harvard Draft”) suggested more stringent standards for nations to obey when capturing pirates.¹⁷³ 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.”¹⁷⁴ 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.¹⁷⁵

¹⁶⁴ Hattendorf, *supra* note 37, at 108-09.

¹⁶⁵ Guisado, *supra* note 158, at 124.

¹⁶⁶ *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.

¹⁶⁷ See Hattendorf, *supra* note 37, at 109.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See Declaration of Paris, Apr. 16, 1856, available at http://avalon.law.yale.edu/19th_century/decparis.asp (“Privateering is and remains abolished . . .”).

¹⁷¹ Burgess, *supra* note 79, at 294, 314-15.

¹⁷² 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).

¹⁷³ Kontorovich, *supra* note 64, at 253.

¹⁷⁴ *Id.* at 257; see also Saoirse de Bont, *Murky Waters: Prosecuting Pirates and Upholding Human Rights Law*, 7 J. INT’L L. & INT’L REL. 104, 115 (2011).

¹⁷⁵ 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.¹⁷⁶ After peaking in the seventeenth and eighteenth centuries, piracy seemed to disappear in the nineteenth and twentieth centuries.¹⁷⁷ 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.¹⁷⁸ The authors attributed this difficulty to the reality that "large-scale piracy disappeared long ago."¹⁷⁹ As a result, the authors announced draft articles covering "the *moot* area of piracy," anticipating that the articles would be updated as necessary.¹⁸⁰

C. *The 1958 Geneva Convention on the High Seas and the United Nations Convention on the Law of the Sea*

The Harvard Draft Convention heavily influenced the 1958 Geneva Convention on the High Seas.¹⁸¹ The drafting states embraced the general antipiracy regime embodied in the Harvard Draft as customary international law, and they codified its provisions in the 1958 Geneva Convention on the High Seas.¹⁸² Many states later adopted the United Nations Convention on the Law of the Sea ("UNCLOS").¹⁸³ This convention relied heavily on the Harvard Draft¹⁸⁴ and incorporated the 1958 Geneva Convention's definition of piracy.¹⁸⁵

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).

¹⁸⁰ BARRY HART DUBNER, *THE LAW OF INTERNATIONAL SEA PIRACY* 46-47 (1980).

¹⁸¹ Poomintr Sooksripaisarnkit, *The Global Insurance Industry*, in *PIRACY IN COMPARATIVE PERSPECTIVE, PROBLEMS, STRATEGIES, LAW*, *supra* note 15, at 275, 279.

¹⁸² Anderson, *supra* note 135, at 60-61.

¹⁸³ U.N. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]. The United States has not ratified UNCLOS, but it is bound by the 1958 Geneva Convention on the High Seas. Guisado, *supra* note 158, at 131.

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 purposes¹⁸⁶ and restricts the instances where warships may interfere with merchant vessels.¹⁸⁷ UNCLOS gives piracy greater attention and allows states broader authority to combat piracy than other types of disturbances.¹⁸⁸ 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.¹⁸⁹ 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.¹⁹⁰

Several other articles elaborate on a warship's rights and responsibilities when dealing with pirate ships.¹⁹¹ 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.¹⁹² Once pirates and vessels are seized, states may only handle piracy through the criminal justice system,¹⁹³ unless pirates are killed in self-defense.¹⁹⁴

-
- (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

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 topic²⁰⁵ 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].

²⁰⁰ Yvonne M. Dutton, *Maritime Piracy and the Impunity Gap: Insufficient National Law or a Lack of Political Will?* 86 TUL. L. REV. 1111, 1126 (2012).

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 practice²⁰⁶ to support its novel requirement of full trials for captured pirates.²⁰⁷ 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.²⁰⁸ Piracy retains a special status within these treaties, showing that pirates should not necessarily be treated the same as other criminal threats.²⁰⁹

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.²¹⁰ 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.²¹¹

Modern piracy exemplifies this concern. Today's nations operate within conventions that were adopted when large-scale piracy appeared to be a relic.²¹² These conventions have proven wholly inadequate to handle the scale and type of piracy that has emerged off the coast of Somalia.²¹³

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 2012,²¹⁴ states have limited themselves to acting on the sea in immediate self-defense or to protect third parties.²¹⁵ 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 Özçayir, *supra* note 177, at 267-68.

²⁰⁹ See Rabkin & Rabkin *supra* note 129, at 211 & nn.52-53.

²¹⁰ Adam Roberts, *Land Warfare: From Hague to Nuremberg*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD, *supra* note 37, at 116, 137.

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).

²¹³ Anderson, *supra* note 135, at 60-61. See, e.g., Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 AM. U. L. REV. 1267, 1289-91 (2010) (explaining the UNCLOS framework's restraints).

²¹⁴ Selina MacLaren, Comment, *Entrepreneurship, Hardship, and Gamesmanship: Modern Piracy as a Dry Endeavor*, 14 CHI. J. INT'L L. 347, 354 (2013).

²¹⁵ Ruth Wedgwood, *What Do You Do with a Captured Pirate?*, HOOVER INST. (Mar. 1, 2009), <http://www.hoover.org/research/what-do-you-do-captured-pirate>.

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 semiautonomous 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

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 *Puntland Profile*, BBC NEWS (Jan. 8, 2014), <http://www.bbc.co.uk/news/world-africa-14114727>.

²²⁰ Tulloch, *supra* note 18, at 42.

²²¹ 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.

²²³ Malkhadir Muhumed, *Bitter Splits Ahead of Puntland Election*, AL JAZEERA (Dec. 19, 2013), <http://www.aljazeera.com/indepth/features/2013/12/bitter-splits-ahead-puntland-election-2013125102019761739.html>; *Puntland Profile*, *supra* note 219.

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.²²⁵ 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.²²⁶

Generally, pirates attack a vessel with a crew of five to nine men in a small, high-speed boat.²²⁷ Pirates board as quickly as possible and use assault rifles and rocket-propelled grenades to subdue the crew.²²⁸ Then, pirates anchor the captured ship off the Somali coast and begin ransom negotiations to release the ship and its crew.²²⁹ Successful ransoms, totaling approximately \$213 million since 2011,²³⁰ have allowed pirates to upgrade their technology.²³¹ In addition to heavier weaponry, the pirates use GPS, satellite phones, and open source intelligence such as shipping industry blogs to locate ships.²³² For example, technologically savvy pirates may hack the shipping industry's Automatic Identification System to identify and track potential targets.²³³ The pirates have also seized merchant or fishing vessels to use as mother ships.²³⁴ This strategy allows pirates to remain at sea for longer periods and carry out operations farther from the Somali coast.²³⁵

The extent of Somali pirates' operations is even more surprising given the typical pirate's characteristics.²³⁶ Most pirates come from the inland hill regions of Somalia.²³⁷ They have never been to sea and most cannot

²²⁵ Tulloch, *supra* note 18, at 45.

²²⁶ *Id.*

²²⁷ *Id.* at 44.

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Madsen et al., *supra* note 25, at 10.

²³¹ Tulloch, *supra* note 18, at 41 (noting that pirates have gained hundreds of millions of dollars since 2004); *Somali Pirates and 21st Century Technology*, U.S. NAVAL INST. (July 2011), <http://blog.usni.org/2011/07/02/somali-pirates-and-21st-century-technology>.

²³² James Ewinger, *Case Western Reserve University Symposium Takes Judicious Aim at Piracy*, PLAIN DEALER (Sept. 7, 2013), <http://www.cleveland.com/metro/index.ssf/2013/09/piracy.html>; *Somali Pirates and 21st Century Technology*, *supra* note 231.

²³³ Dave Lee, *Ship Trackers "Vulnerable to Hacking," Experts Warn*, BBC News (Oct. 31, 2013), <http://www.bbc.co.uk/news/technology-24586394>.

²³⁴ Hannah McNeish, *Madagascar Captures Somali Pirate "Mother Ship." Now What?*, CHRISTIAN SCI. MONITOR (Mar. 1, 2011), <http://www.csmonitor.com/World/Africa/2011/0301/Madagascar-captures-Somali-pirate-mother-ship.-Now-what>.

²³⁵ *Id.*

²³⁶ MCKNIGHT & HIRSH, *supra* note 216, at xiii; Indep. EVALUATION UNIT, U.N. OFFICE ON DRUGS & CRIME, IN-DEPTH EVALUATION OF THE COUNTER PIRACY PROGRAMME: COMBATING MARITIME PIRACY IN THE HORN OF AFRICA AND THE INDIAN OCEAN INCREASING REGIONAL CAPACITIES TO DETER, DETAIN, AND PROSECUTE PIRATES, at 5 (2013) [hereinafter UN REPORT].

²³⁷ MCKNIGHT & HIRSH, *supra* note 216, at xiii; UN REPORT, *supra* note 236, at 5 ("Despite high levels of risk piracy attracts a stable supply of recruits. Recruitment is often from mainland regions and clans with no historic involvement in fishing. The most successful piracy groups recruit for skills across clan lines.").

swim.²³⁸ More than anything, Somali pirates are opportunists who exploit Somalia's weak government for financial gain.²³⁹ The pirates either impose themselves on coastal communities²⁴⁰ or live in hideouts within valleys, mountains, or along the vast, poorly monitored coastline.²⁴¹ Even though these pirates may not be seasoned sailors, evidence suggests they receive training from the Islamist insurgent group al-Shabaab.²⁴² 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.²⁴³ 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.²⁴⁴

Profit motive drives Somali pirates who hope to escape Somalia's extreme poverty.²⁴⁵ These conditions provide a vast supply of men with a level of risk aversion that is substantially lower than Western conceptions of risk.²⁴⁶ This situation parallels the business model of the Barbary pirates of the late eighteenth and early nineteenth centuries. Both groups captured merchant vessels, held crews for ransom,²⁴⁷ and came from states that held a marginalized status in the international community.²⁴⁸

Convincing Somalis that piracy does not offer a tenable career is not an impossible task.²⁴⁹ Pirates believe "They will not shoot at me. I will get their money. And no one will arrest me. It's a good job."²⁵⁰ Due to the inad-

²³⁸ MCKNIGHT & HIRSH, *supra* note 216, at xiii.

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.

²⁴² Kraska, *supra* note 120, at 201, 219 (citing Bernard Sanga, *Kenya's Somali Incursion Cuts Piracy Costs in Indian Ocean*, BUS. DAILY (Nov. 9, 2011), <http://www.businessdailyafrica.com/Corporate-News/Kenya-Somali-incursion-cuts-piracy-costs-in-Indian-Ocean/-/539550/1269660/-/be236tz/-/index.html>); MCKNIGHT & HIRSH, *supra* note 216, at 46.

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).

²⁴⁹ See John R. Bolton, Editorial, *Bolton: Treat Somali Pirates Like Terrorists: Viewing Sea Raids as Law Enforcement Issue Hasn't Worked*, WASH. TIMES (Oct. 14, 2011), <http://www.washingtontimes.com/news/2011/oct/14/treat-somali-pirates-like-terrorists/> (stating that pirates will have a clearer idea of the costs of piracy if their land bases are destroyed).

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.²⁵¹ When nations finally recognized the need for concerted action against Somali pirates, the pirate organizations were acting as increasingly sophisticated private armies.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.²⁵³ Shipping companies also have implemented preventive measures, including hiring armed guards onboard their vessels.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.²⁵⁵ The EU launched its first naval operation, Naval Force (“NAVFOR”) Somalia—Operation Atalanta, in December 2008.²⁵⁶ Its mission includes protecting the World Food Program’s aid shipment to Somalia²⁵⁷ 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.”²⁵⁸ The EU has authorized this operation until December 2016.²⁵⁹

²⁵¹ Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*, 29 BERKELEY J. INT’L L. 399, 400, 448-49 (2011); Isanga, *supra* note 213, at 1297, 1299.

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.

²⁵³ Jonathan Bellish, *The Economic Cost of Somali Piracy, 2012* at 1-4 (One Earth Future Found., Working Paper, 2013).

²⁵⁴ *Id.*

²⁵⁵ de Bont, *supra* note 174, at 126.

²⁵⁶ *About Us*, EU NAVFOR SOMALIA, <http://eunavfor.eu/home/about-us/> (last visited Dec. 27, 2013).

²⁵⁷ LAUREN PLOCH ET AL., CONG. RESEARCH SERV., R40528, PIRACY OFF THE HORN OF AFRICA 27 (2011).

²⁵⁸ *Id.* (quoting another source) (internal quotation marks omitted).

In addition, the U.S. Navy established Combined Task Force 151 (“CTF-151”) in January 2009.²⁶⁰ CTF-151’s sole mission is to conduct anti-piracy operations in the Gulf of Aden and Indian Ocean.²⁶¹ The number of states participating in CTF-151 fluctuates, but in total, it places about twenty-four ships in the region.²⁶²

NATO instituted Operation Ocean Shield in August 2009.²⁶³ This mission contributes to counterpiracy and regional capacity-building efforts.²⁶⁴ On June 3, 2014, NATO extended Operation Ocean Shield until the end of 2016.²⁶⁵

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.²⁶⁶ 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.²⁶⁷ Fuel and other daily operational costs for surface vessels and reconnaissance aircraft account for nearly all of these costs.²⁶⁸ Due to these high costs, some experts have questioned states’ willingness to continue naval counterpiracy operations.²⁶⁹

²⁵⁹ Press Release, European Union Naval Force Somalia, EU Counter-Piracy Operation Atalanta Extended to End of 2016 (Nov. 21, 2014), <http://eunavfor.eu/eu-counter-piracy-operation-atalanta-extended-to-end-of-2016/>.

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.*

²⁶⁵ *Operation Ocean Shield: Marcom Factsheet*, NATO, <http://www.mc.nato.int/about/Pages/Operation%20Ocean%20Shield.aspx> (last visited Nov. 11, 2014).

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.”).

²⁶⁹ Jon Huggins, *The Cost of Piracy: Moving from Mitigation to Investment*, OCEANS BEYOND PIRACY 2-3 (Sept. 10, 2013), <http://oceansbeyondpiracy.org/sites/default/files/attachments/Huggins%20Jon%20Sec2Ch1%20-%20Final%20Briefing%20Paper-En-Website%20%281%29.pdf>.

Naval deployments only have a limited effect on deterring Somali pirates.²⁷⁰ Due to the sheer size of the area where pirates operate,²⁷¹ the number of naval vessels deployed is woefully inadequate.²⁷² No more than thirty warships have been deployed at any one time to patrol an area the size of continental Europe.²⁷³ Experts suggest a minimum of fifty warships are needed to effectively patrol the Gulf of Aden alone.²⁷⁴ 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.²⁷⁵ African military leaders also complain that multilateral naval missions merely “swat[] the bee” of Somali piracy.²⁷⁶

The U.S. Department of State has acknowledged that maintaining a constant presence in the region is essential to decrease successful Somali pirate attacks.²⁷⁷ This is because the combination of lucrative payoffs and limited alternative job prospects creates an economic incentive that mere arrest will not disrupt.²⁷⁸ 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.²⁷⁹ The United Nations (“UN”) has already called for

²⁷⁰ SARAH PERCY & ANJA SHORTLAND, *THE BUSINESS OF PIRACY IN SOMALIA* 12 (2011), available at http://www.diw.de/documents/publikationen/73/diw_01.c.358500.de/dp1033.pdf.

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.”).

²⁷⁵ Bowden & Basnet, *supra* note 23, at 2 (estimating that military operations cost \$1.27 billion in 2011; “war risk” and “kidnap and ransom” insurance cost \$635 million); Neil Roberts, *Hull War, Piracy, Terrorism and Related Perils Listed Areas*, JOINT WAR COMM. OF LLOYD’S MKT. ASSOC. & INT’L. UNDERWRITERS ASSOC. OF LONDON 2-3 (June 12, 2013), http://www.lmalloyds.com/Web/Market_Places/marine/JWC/JW_Bulletins/JWLA021.aspx.

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).

²⁷⁷ Thomas Kelly, Principal Deputy Assistant Sec’y, Bureau of Political-Military Affairs, Remarks at Combating Piracy Week, London, U.K.: The U.S. Government’s Approach to Countering Somali Piracy (Oct. 25, 2012), available at <http://www.state.gov/t/pm/rls/rm/199929.htm> (“[S]hould governments and navies turn their attention and resources elsewhere, pirates are certain to get back in their skiffs.”).

²⁷⁸ *Id.*

²⁷⁹ Kaija Hurlburt & D. Conor Seyle, *The Human Cost of Maritime Piracy*, 2012, at 12, (One Earth Future Found., Working Paper, 2013), available at <http://oceansbeyondpiracy.org/sites/default/files/attachments/View%20Full%20Report.pdf> (identifying that in 2012, more pirate attacks occurred in the Gulf of Guinea than the Gulf of Aden and Western Indian Ocean).

joint counterpiracy patrols in West Africa and begun working on a military framework.²⁸⁰

Insufficiently robust rules of engagement further diminish the effectiveness of these antipiracy patrols.²⁸¹ Naval vessels may only target pirates when acting in immediate self-defense.²⁸² Further, even if a naval vessel comes across a hijacked ship with hostages aboard, it can only take limited action.²⁸³ The USS *Carter Hall* incident in June 2007 illustrates this phenomenon.²⁸⁴ 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.²⁸⁵ Consequently, the *Carter Hall* could only fire warning shots and watch the pirates pilot the *Danica White* into Somali waters.²⁸⁶ 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.²⁸⁷ Recognizing this handicap, the UN Security Council passed a resolution in June 2008 that removed this obstacle as applied to Somalia.²⁸⁸

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.²⁸⁹ Despite their unquestioned authority to arrest individuals engaged in piracy activities, capture and prosecution have not occurred with regularity.²⁹⁰ Instead, navies follow a program referred to as

²⁸⁰ Press Release, United Nations Security Council, Gulf of Guinea Piracy “Clear Threat” to Security, Economic Development of Region; Countries Need United Front in Response, Top UN Official Tells Security Council, U.N. Press Release SC/10558 (Feb. 27, 2012), <https://www.un.org/News/Press/docs/2012/sc10558.doc.htm>.

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).

²⁸⁸ S.C. Res. 1816, ¶ 7, U.N. Doc. S/RES/1816 (June 2, 2008).

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 Shnyder, *Universal Jurisdiction Over*

“catch and release.”²⁹¹ Under this policy, naval forces board suspected pirate vessels, throw weapons and boarding equipment overboard, and gather the suspects’ biometric data.²⁹² As the title suggests, navies then either leave the suspected pirates with enough food and fuel to return to shore,²⁹³ or even give them a ride back to the Somali coast.²⁹⁴

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,²⁹⁵ stems from a variety of factors.²⁹⁶ Some European governments have instructed navies not to make arrests out of fear that pirates will make asylum claims when brought to stand trial.²⁹⁷ Pragmatically, ships also have limited space to detain suspected pirates,²⁹⁸ and taking a pirate to port or transferring him to the seizing state could divert already-limited resources from patrols.²⁹⁹ Also, there are few convenient forums for a piracy trial; the capturing nation’s courts are likely located far from where the offense occurred.³⁰⁰ The global nature of ocean transit, in which perpetrators, victims, and witnesses have many nationalities, further complicates the logistics of piracy trial.³⁰¹ Although these complications do not completely bar pirate prosecutions within the EU and the United States, these states often reserve

“*Operation of a Pirate Ship*”: *The Legality of the Evolving Piracy Definition in Regional Prosecutions*, 38 N.C.J. INT’L L. & COM. REG. 473, 557 (2013) (“This practice [of catch-and-release] may be evidence of a custom of non-prosecution where pirates are apprehended simply due to operating a ship and planning for piracy.”).

²⁹¹ See, e.g., Todd Emerson Hutchins, Comment, *Structuring a Sustainable Letters of Marque Regime: How Commissioning Privateers Can Defeat the Somali Pirates*, 99 CAL. L. REV. 819, 828 (2011).

²⁹² Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, 59 INT’L & COMP. L.Q. 141, 141 (2010).

²⁹³ *Id.*

²⁹⁴ Anderson, *supra* note 135, at 62.

²⁹⁵ MCKNIGHT & HIRSH, *supra* note 216, at 24-28.

²⁹⁶ *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).

²⁹⁷ 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).

²⁹⁸ MCKNIGHT & HIRSH, *supra* note 216, at 24-28.

²⁹⁹ Guilfoyle, *supra* note 292, at 141.

³⁰⁰ Dutton, *supra* note 73, at 225.

³⁰¹ 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/-/fmwxb8z/-/> (“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.³⁰²

As a consequence, piracy prosecutions occur relatively infrequently.³⁰³ Of the 770 pirates detained by EU NAVFOR between December 2008 and 2011, only ninety-three have been sent to court.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.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.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.³⁰⁷ Regional prosecution and imprisonment entails significant burdens on both the capturing nation and the detaining nation.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.³⁰⁹ In particular, Kenya's prison system suffers from extreme overcrowding and allegations of torture.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.³¹¹ Puntland's justice system has different problems. Experts note convicted pirates often

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

³⁰³ Ian Drury, *Failure to Prosecute Pirates Beggars Belief, Say MPs as It's Revealed 90% of All Suspects Are Freed Without Trial*, 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 . . .").

³⁰⁴ Katherine Houreld, *Pirates Jailed in 17 Nations As Prosecutions Rise*, ASSOCIATED PRESS, Mar. 15, 2011, available at http://www.washingtonpost.com/wp-dyn/content/article/2011/03/15/AR2011031502847_pf.html.

³⁰⁵ UN REPORT, *supra* note 236, at 6.

³⁰⁶ *Id.*

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, *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.

³⁰⁸ de Bont, *supra* note 174, at 141.

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

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

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.

³¹⁸ See Simon Barker, *Solution to Piracy Is Born on the Land, Not the Sea*, CAN. B. ASSOC. (Nov. 2012), http://www.cba.org/CBA/sections_maritime/newsletters2012/piracy.aspx (stating that multinational forces are engaged in counterpiracy operations in the waters off East Africa); Bellish, *supra* note 253, at 14-15.

³¹⁹ Julian Hale, *EU May Help Somalia Establish Coast Guard to Combat Piracy*, DEFENSE NEWS (Oct. 8, 2013), <http://www.defensenews.com/article/20131008/DEFREG04/310080028/>.

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

³²² See James W. Harlow, *Soldiers at Sea: The Legal and Policy Implications of Using Military Security Teams to Combat Piracy*, 21 S. CAL. INTERDISC. L.J. 561, 585 (2012); Harrelson, *supra* note 185, at 296-97.

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).

³³⁰ Sanjay Jha & Tucker Reals, *India Arrests 35 from U.S. Security Firm AdvanFort’s Well-Armed Anti-Piracy “Mother Ship”*, CBS NEWS (Oct. 18, 2013, 7:30 AM), http://www.cbsnews.com/8301-202_162-57608126/india-arrests-35-from-u.s-security-firm-advanforts-well-armed-anti-piracy-mother-ship/; see also David Isenberg, *The Rise of Private Maritime Security Companies*, SECURITY ASS’N FOR

Washington D.C.-based security contractor that provides counterpiracy protection, and carried licensed weapons aboard a vessel owned by AdvanFort.³³¹ According to AdvanFort, these arrests occurred when the vessel sought refuge in an Indian port from a typhoon.³³²

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.³³³ 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.³³⁴ Subsequently, the tanker docked in an Indian port for several days, and Indian authorities detained the marines and charged them with murder.³³⁵ This occurred even though India supports antipiracy efforts, and its navy helps patrol the Indian Ocean region.³³⁶ Incidents like these cause some critics to argue the "armed guards cure" worsens the piracy problem by creating new complications for ship owners.³³⁷ Even the United States recognizes that armed guards have drawbacks, and the State Department accepts that "[i]f a vessel with an armed team embarked intends to enter a port, the port State may exercise authority for regulating the personnel or their arms."³³⁸

3. Combating Somali Piracy Ashore

Collectively, naval patrols, prosecutions, and armed guards advance the fight against piracy, but the threat persists.³³⁹ As recently as November

MAR. INDUS. (July 12, 2012), <http://www.seasecurity.org/mediacentre/the-rise-of-private-maritime-security-companies/> ("Maritime security providers have been arrested and jailed in Somalia, Egypt and Kenya.").

³³¹ Jha & Reals, *supra* note 330.

³³² *Id.*

³³³ Annie Banerji & D. Jose, *Murder Trial of Italian Marines in India Navigates Murky Waters*, REUTERS (June 10, 2013), <http://in.reuters.com/article/2013/06/10/india-italy-marines-idIND EE95900B20130610>.

³³⁴ *Id.*

³³⁵ *Id.*

³³⁶ *Hearing II*, *supra* note 326, at 8 (statement of Rear Admiral Ted Branch, United States Navy, Director of Information, Plans, and Security, Office of the Chief of Naval Operations); *MV Seaman Guard Ohio: India Police Arrest Crew of US Ship*, BBC NEWS (Oct. 18, 2013), <http://www.bbc.co.uk/news/world-asia-india-24577190>.

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.

³³⁹ *EU Naval Force Confirms Super Tanker Safe After Attack by Suspect Pirates off Somali Coast*, EU NAVFOR (Oct. 11, 2013, 2:40 PM), <http://eunavfor.eu/eu-naval-force-confirms-super-tanker-safe-after-attack-by-suspect-pirates-off-somali-coast/>; *EU Naval Force: Piracy Continues—EU Warship Prevents Suspect Pirates Going to Sea and a Merchant Ship Is Attacked by Pirates in the Indian Ocean*,

12, 2014, Somali pirates have attacked merchant vessels off the Somali coast.³⁴⁰ Also, even if deterrence measures limit attacks against bigger vessels that can afford armed guards, pirates merely direct their attention to smaller vessels.³⁴¹ Attacks against smaller ships often get excluded from piracy statistics³⁴² and do not appear in a nation's news cycle, unless its nationals are involved.³⁴³

Due to Western nations' failure to end piracy, "the effect on East Africa has been devastating—tantamount to a blockade."³⁴⁴ Within Somalia, honest Somalis have difficulty exporting their livestock, one of Somalia's chief exports.³⁴⁵ These negative effects even extend to landlocked nations such as Uganda, where piracy has led to a shortage of consumer goods and rapid inflation.³⁴⁶

Somali pirates operate through a sophisticated land infrastructure that some believe outclasses regional state powers.³⁴⁷ Scholars estimate Somali pirates' revenues in 2009 at \$82 million, which dwarfs the \$16 million annual revenues for the Puntland government.³⁴⁸ Pirate networks include organized kingpins, who reside in Puntland or Kenya and receive proceeds from ransom payments,³⁴⁹ as well as large groups like the Somali Marines, whose criminal enterprise resembles a military structure.³⁵⁰ When not on the

EU NAVFOR (Nov. 7, 2013, 2:06 PM), <http://eunavfor.eu/eu-naval-force-piracy-continues-eu-warship-prevents-suspect-pirates-going-to-sea-and-a-merchant-ship-is-attacked-by-pirates-in-the-indian-ocean/>.

³⁴⁰ Cynthia Blank, *Pirates Attempt to Hijack Israeli Cargo Ship at Sea*, ARUTZ SHEVA (Nov. 13, 2014), <http://www.israelnationalnews.com/News/News.aspx/187406#.VGFMo-c14sw>.

³⁴¹ 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).

³⁴² Hurlburt & Seyle, *supra* note 279, at 4.

³⁴³ See, e.g., *4 Americans Seized by Pirates Found Dead on Yacht*, NPR (Feb. 22, 2011, 12:52 PM), <http://www.npr.org/2011/02/22/133961448/4-americans-seized-by-pirates-found-dead-on-yacht>.

³⁴⁴ Kraska, *supra* note 120, at 216.

³⁴⁵ Hurlburt & Seyle, *supra* note 279, at 10.

³⁴⁶ 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/2013/04/11/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.").

³⁴⁷ See Norchi, *supra* note 77, at 426-27.

³⁴⁸ Dutton, *supra* note 200, at 1130.

³⁴⁹ Dutton, *supra* note 73, at 212 n.79 (citing James Kraska, *Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea*, 28 COMP. STRATEGY 197, 199 (2009)); Carol Matlack, *Inside Somali Piracy Inc.*, BLOOMBERG BUSINESSWEEK (Nov. 6, 2013), <http://www.businessweek.com/articles/2013-11-06/inside-somali-piracy-inc> (explaining that many piracy financiers are Somali warlords).

³⁵⁰ 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.³⁵¹ However, navies can use aerial reconnaissance, such as drones, to closely monitor pirates' inland activities.³⁵²

The Somali pirates' persistence signals that although piracy can be managed at sea, the problem is best solved on land.³⁵³ Recognizing that current offshore polices to deter piracy are ineffective or unsustainable,³⁵⁴ military leaders abroad have argued that attacking pirates on land would be humane, efficient, and prudent.³⁵⁵ 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.³⁵⁶ 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."³⁵⁷ Although CTF-151 never followed through, Rear Admiral Terry McKnight acknowledged that the U.S. military has seriously contemplated this approach.³⁵⁸

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 2012.³⁵⁹ This strike only involved a single attack helicopter,³⁶⁰ which destroyed "known pirate supplies."³⁶¹ After receiving the Somali government's approval, the EU forces carried out the attack to disrupt and prevent pirates from getting out to sea.³⁶² EU NAVFOR identified these

³⁵¹ See MCKNIGHT & HIRSH, *supra* note 216, at 4.

³⁵² *Id.*; Jeffrey Gettleman, *Toughening Its Stand, European Union Sends Forces to Strike Somali Pirate Base*, N.Y. TIMES (May 15, 2012), http://www.nytimes.com/2012/05/16/world/africa/european-forces-strike-pirate-base-in-somalia.html?_r=0 (describing that EU forces conducted aerial reconnaissance before attacking pirate supplies in May 2012).

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 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.

³⁶¹ Press Release, European Union Naval Force Somalia, EU Naval Force Delivers Blow Against Somali Pirates on Shoreline (May 15, 2012), http://eeas.europa.eu/delegations/somalia/documents/press_corner/20120515.pdf; see also Frederic Wiesenbach, *Uncertainty on Somalia's Beaches—The Legal Regime of Onshore Anti-Piracy Operations*, 19 J. CONFLICT & SECURITY L. 85, 97 (2014) (listing the pirate supplies "destroyed [as] five small boats, drums of diesel, and a weapons store with mounted machine guns").

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.”³⁶³ Although it recognized the pirates’ right to life, the EU forces conceded the pirates’ status as *hostis humani generis* complicates that right.³⁶⁴

Despite significant expense, counterpiracy patrols off the Somali coast and self-help measures do little to remove pirates’ impunity³⁶⁵ and piracy’s economic impact.³⁶⁶ Reliance upon a law enforcement framework³⁶⁷ has fostered “catch and release” practices,³⁶⁸ which produce questionable results.³⁶⁹ 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.³⁷⁰

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.³⁷¹

Some scholars questioned the legality of the EU’s airstrike against Somali equipment.³⁷² For IHL to apply, an armed conflict must exist.³⁷³ Un-

antipiracy force. “What we want to do is make life more difficult for these guys.”); Press Release, European Union Naval Force Somalia, *supra* note 361.

³⁶³ Press Release, European Union Naval Force Somalia, *supra* note 361; *see also* Eliav Lieblich, *Quasi-Hostile Acts: The Limits on Forcible Disruption Operations Under International Law*, 32 B.U. INT’L L.J. 355, 359-50 (2014) (“Preventing piracy by acting forcibly against pirates on land—where they are presumably concentrated—considerably levels the playing field, while keeping the risk to operating forces at minimum.”).

³⁶⁴ Leboeuf, *supra* note 43, at 246.

³⁶⁵ PERCY & SHORTLAND, *supra* note 270, at 12.

³⁶⁶ Press Release, World Bank, *supra* note 346; Bellish *supra* note 253, at 15, 17; Huggins, *supra* note 269, at 3; Kelly, *supra* note 277.

³⁶⁷ *See* Garraway, *supra* note 31, at 108.

³⁶⁸ Drury, *supra* note 303.

³⁶⁹ *See* Pflanz, *supra* note 309.

³⁷⁰ *See* Barker, *supra* note 318.

³⁷¹ DEP’T OF THE NAVY & DEP’T OF HOMELAND SEC., THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶¶ 8.1, 8.2.1, 8.2.3 (2007), *available at* <http://www.usnwc.edu/getattachment/a9b8e92d-2c8d-4779-9925-0defea93325c/> [hereinafter HANDBOOK].

³⁷² Lieblich, *supra* note 363, at 358-59 (questioning whether EU NAVFOR operated under IHRL or IHL).

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.³⁷⁴ This is because the required “minimum level of intensity” and the groups having a “minimum amount of organization” are hard to gauge.³⁷⁵

Regardless, Somali pirates and their supplies are legitimate military objectives according to IHL.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.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-

³⁷³ INT’L COMM. OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? 1 (2004), available at http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

³⁷⁴ See Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 21 (2003).

³⁷⁵ INT’L COMM. OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 5 (2008), available at <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

³⁷⁶ *Contra* Guilfoyle, *supra* note 27, at 142-43 (stating that the fight against piracy is a law enforcement operation against criminals, not combatants under the laws of armed conflict).

³⁷⁷ WILLIAM H. BOOTHBY, THE LAW OF TARGETING 434 (2012) (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).

cation.³⁷⁸ 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").³⁷⁹ 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*.³⁸⁰ According to *Hamdan v. Rumsfeld*,³⁸¹ 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.³⁸² 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,³⁸³ NIACs have minimal rules governing military conduct.³⁸⁴ 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.³⁸⁵ Although Common Article Three provides these minimal protections, it does not offer any protection to civilian property.³⁸⁶ 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.

³⁷⁸ INT'L COMM. OF THE RED CROSS, *supra* note 375, at 1, 5.

³⁷⁹ ANICÉE VAN ENGELAND, CIVILIAN OR COMBATANTS?: A CHALLENGE FOR THE 21ST CENTURY 29, 66 (2011).

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").

³⁸¹ 548 U.S. 557 (2006).

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.").

³⁸³ Common Article 2 states that the Geneva Conventions' numerous protections apply to international armed conflicts. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; see also INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 17 n.2 (Jean S. Pictet ed., 1958), available at http://www.loc.gov/frd/Military_Law/pdf/GC_1949-IV.pdf.

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)

³⁸⁶ Geneva Convention IV, *supra* note 383, 6 U.S.T. at 3518, 3520, 75 U.N.T.S. at 288, 290.

AP II “supplements and develops . . . Article 3 without changing the conditions of its application,” but AP II includes “still rather modest rules.”³⁸⁷ 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.³⁸⁸ As a result, militaries operating in NIACs have fewer restrictions and details to guide them.³⁸⁹ 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.³⁹⁰ 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.³⁹¹ 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).³⁹² 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.³⁹³

The definition of an organized armed group requires two elements. “Armed” merely means having the capacity to carry out attacks.³⁹⁴ To be “organized,” the armed group must have a degree of structure that allows

³⁸⁷ Sylvie-Stoyanka Junod, *General Introduction to the Commentary on Protocol II*, in INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1319, 1319, 1324 (Yves Sandoz et al. eds., 1987).

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.*

³⁸⁹ Annyssa Bellal et al., *International Law and Armed Non-State Actors in Afghanistan*, 93 INT’L REV. RED CROSS 47, 59 & n.63 (2011).

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).

³⁹¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), arts. 1, 4, 13, June 8, 1977, 1125 U.N.T.S. 611.

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,³⁹⁵ but this structure need not be hierarchical or implemented formalistically.³⁹⁶ Further, for IHL to apply, organized armed groups must operate in a NIAC.³⁹⁷ 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 actors³⁹⁸ who attack vessels within Somalia's territorial waters and on the high seas.³⁹⁹ Pirates use heavy weapons, such as rocket-propelled grenades, antitank rocket launchers, and automatic rifles.⁴⁰⁰ 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.⁴⁰¹ 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.⁴⁰² Some of these groups, such as the Somali Marines, have a hierarchical military structure.⁴⁰³ Other pirate groups are established businesses that allow investors to purchase stock in the enterprise.⁴⁰⁴

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.⁴⁰⁵ 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 COMM. 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.⁴⁰⁶ Further, pirates' training allows them to complete an attack in under twenty minutes⁴⁰⁷ through the coordinated efforts of up to seven skiffs simultaneously attacking from a single mother ship.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.⁴⁰⁹ Throughout the ransom negotiations, boats sail out to the anchored vessel from the pirate village to bring supplies and relieve the guards.⁴¹⁰

Like other armed groups, pirates control territory. Satellite evidence suggests that pirates visibly control the ports where they operate.⁴¹¹ Although pirates once intermingled with the local population, they have become increasingly distinguishable from local civilians.⁴¹² In fact, residents of the key Puntland port of Eyl⁴¹³ recently expelled the pirates, demonstrating their distinctness from local populations.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 NIAC⁴¹⁵ with Islamist insurgent group al-Shabaab currently at the conflict's center.⁴¹⁶ Some scholars have questioned whether the land-based instability fueled by nonpirate insurgent

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."); *Hearing II, supra* note 326, at xii-xiii.

⁴⁰⁷ *Hearing II, supra* note 326, at xii.

⁴⁰⁸ *Hearing I, supra* note 19, at xii.

⁴⁰⁹ Tulloch, *supra* note 18, at 46.

⁴¹⁰ MCKNIGHT & HIRSH, *supra* note 216, at 16; Simon Delfau, *Shipowners: The Piracy Challenge*, in *PIRACY IN COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW, supra* note 15, at 107, 111.

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]."); *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).

⁴¹² Mohamud, *supra* note 222, at 14.

⁴¹³ Edward Lucas, *Pirates and Insurgency: Reframing the Somali Piracy Problem*, PIRACY STUDIES (Feb. 24, 2012), <http://piracy-studies.org/2012/pirates-and-insurgency/>.

⁴¹⁴ Mohamud, *supra* note 222, at 14.

⁴¹⁵ Guilfoyle, *supra* note 27, at 146.

⁴¹⁶ *Somalia Profile*, BBC NEWS (Sept. 24, 2013), <http://www.bbc.co.uk/news/world-africa-14094632> (providing a timeline of events in Somalia).

groups justifies applying IHL to Somali pirates.⁴¹⁷ This Comment argues that no such conceptual leap is necessary. Although Somalia's internal instability facilitates pirate safe havens⁴¹⁸ and some evidence suggests a connection between pirate groups and al-Shabaab,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.⁴²⁰ International law recognizes NIAC as the most confusing genre of conflict.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."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."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.

⁴¹⁷ Guilfoyle, *supra* note 27, at 146 ("[I]t 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)).

⁴¹⁸ HAYWOOD & SPIVAK, *supra* note 75, at 83.

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).

⁴²⁰ *See, e.g.*, Guilfoyle, *supra* note 27, at 143-46.

⁴²¹ Schmitt, *supra* note 390, at 121.

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.")

⁴²³ *Id.* at 48 (quoting Prosecutor v. Tadić, Case No. IT-94-I-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.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.⁴²⁵ Therefore, whenever the United States deems a threat sufficiently serious to become a military objective, that target may be lawfully attacked under IHL.⁴²⁶ Somali pirates meet this threshold because these nonstate actors attack vessels of different nationalities with foreign navies occasionally intervening.⁴²⁷ Naval forces have exchanged gunfire with pirates,⁴²⁸ and the placement of armed guards on merchant vessels has increased the amount of armed conflict with pirates.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.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.⁴³¹ The United States swiftly altered its position after 9/11 and applied an IHL paradigm.⁴³² It would be strange if pirates,

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).

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).

⁴²⁶ Corn, *supra* note 382, at 78.

⁴²⁷ Guilfoyle, *supra* note 27, at 144.

⁴²⁸ *Id.*

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).

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).

⁴³¹ Garraway, *supra* note 31, at 101.

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

⁴³³ Amitai Etzioni, *Pirates: Terrorists of the Seas*, NAT’L INT. (Oct. 20, 2011), <http://nationalinterest.org/commentary/pirates-terrorists-the-seas-6041>.

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).

⁴³⁶ Corn, *supra* note 382, at 75-76 (quoting John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at the Program on Law and Security, Harvard Law School: Strengthening Our Security by Adhering to Our Values and Law (Sept. 16, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>).

⁴³⁷ *See* Quintan Wiktorowicz & John Kaltner, *Killing in the Name of Islam: Al-Qaeda’s Justification for September 11*, 10 MIDDLE E. POL’Y 76, 77 (2003); Vitaliy O. Pradun, *Targeting Civilians: Strategy or Revenge?*, CHI. PROJECT ON SECURITY & TERRORISM (Mar. 25, 2011), <http://cpost.uchicago.edu/blog/2011/03/25/targeting-civilians-strategy-or-revenge/> (“Suicide terrorists usually target civilians specifically.”).

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.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.⁴⁴² A NIAC exists even though these narcotics trafficking groups, like pirates, use violence for purely economic motives.⁴⁴³ Highlighting the flexibility of state approaches to armed conflict, Colombia does not solely rest upon IHL.⁴⁴⁴ The military uses IHRL and IHL simultaneously, varying which paradigm controls based on the proportionality analysis in a given situation.⁴⁴⁵ The fluctuation rests largely upon the mission area's proximity to population centers.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.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).

evant international law.⁴⁴⁸ 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.”⁴⁴⁹ 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, 2015,⁴⁵⁰ incorporates language that traditionally authorizes the use of force and recognizes the existence of armed conflict.⁴⁵¹ Further, Resolution 1851’s reference to the “applicable” IHL indicates that it refers to a principle already in existence.⁴⁵² 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.⁴⁵³ The United States’ treatment of terrorists and Colombia’s treatment of narcotics traffickers follow the same principle.⁴⁵⁴

Some scholars argue that states currently do not view Somali pirates as a threat deserving of IHL,⁴⁵⁵ 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.⁴⁵⁶

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.⁴⁵⁷ However, UNCLOS does not control when it is silent on an issue. In particular,

⁴⁴⁸ S.C. Res. 1816, *supra* note 288, ¶ 7. The UNSC renewed this authorization using identical language in Resolution 1846. S.C. Res. 1846, *supra* note 399, ¶ 10.

⁴⁴⁹ S.C. Res. 1851, ¶ 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (emphasis added).

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).

⁴⁵² Cf. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, ¶¶ 143, 161 (Feb. 26) (Judgment) (holding that treaty language stating “[t]he Contracting Parties confirm that genocide . . . is a crime under international law” affirmed the status genocide already possessed under customary international law).

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.

⁴⁵⁶ See S.C. Res. 1851, *supra* note 449, ¶ 7.

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,⁴⁵⁸ international law should revert to the customary rule that exists outside of UNCLOS.⁴⁵⁹ This traditional rule, reflected in the UN Resolutions and shown through centuries of American and international practice,⁴⁶⁰ would treat pirates as engaging in armed conflict and allow application of IHL if a state deems it necessary.

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,⁴⁶¹ 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.⁴⁶² 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' on-shore bases, it must follow an established legal framework.⁴⁶³ The Com-

⁴⁵⁸ *Somalia's Puntland Breaks Off Relations with Central Government*, REUTERS (Aug. 5, 2013), <http://www.reuters.com/article/2013/08/05/us-somalia-politics-puntland-idUSBRE9740UZ20130805>.

⁴⁵⁹ Cf. Lieblich, *supra* note 365, at 35.

⁴⁶⁰ Historical practice can be seen through Congress's authorization of the use of military force against pirates who operated in the Caribbean's uncontrolled territory or were harbored in North Africa. Michael J. Stepek, *Challenges of Jurisdiction and Prosecution*, in *PIRACY IN COMPARATIVE PERSPECTIVE: PROBLEMS, STRATEGIES, LAW*, *supra* note 15, at 331, 335 (identifying that the customary international law of piracy developed prior to the twentieth century when the world was less complex and states protected their own interests); ELSEA & WEED, *supra* note 12, at 6-7; Sarah Batterson, *A Horde of Foreign Freebooters: The U.S. and the Suppression of the Slave Trade*, *DIACRONIE STUDI DI STORIA CONTEMPORANEA*, 1-2 (2013).

⁴⁶¹ Graham, *supra* note 422, at 44-45.

⁴⁶² See *supra* Part III.B.2.

⁴⁶³ Bahar, *supra* note 29, at 1297 ("[W]hile we cannot wage war against non-state actors, the U.S. Constitution and international law . . . vigorously support forcefully engaging non-state actors . . ."); Ingrid Detter, *The Law of War and Illegal Combatants*, 75 *GEO. WASH. L. REV.* 1049, 1099 (2007) ("It

mander's Handbook on the Law of Naval Operations ("Handbook") instructs U.S. commanders on the legal rules governing naval operations during armed conflict.⁴⁶⁴ The Handbook's rules incorporate international law and apply generically across all armed conflicts.⁴⁶⁵ 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.⁴⁶⁶ As with all legitimate military targets, the Handbook instructs that attacks must be necessary and any civilian suffering must be proportional.⁴⁶⁷ Attacks against pirates on land and at sea will typically meet both criteria.⁴⁶⁸

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.⁴⁶⁹ 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.⁴⁷⁰ 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.

⁴⁶⁷ GEOFFREY S. CORN ET AL., *THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH* 164, 187 (2012); Sandeep Gopalan, Editorial, *Put Pirates to the Sword: Targeted Killings Are a Necessary, Justified and Legal Response to High-Seas Piracy*, WALL ST. J. (Jan. 18, 2010), <http://online.wsj.com/news/articles/SB10001424052748703652104574651962659622546>.

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

⁴⁷¹ Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. INT'L & COMP. L. 43, 53-54 (2009); see also Bahar, *supra* note 29, at 1317-18.

⁴⁷² CHRISTOPHER MCKEE & EDWARD PREBLE: A NAVAL BIOGRAPHY 1761-1807 256 (1996) (recounting a U.S. naval bombardment of Tripoli during the Barbary wars).

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.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.⁴⁸¹

The location of pirate hideouts in sparsely populated valleys, mountains, or along the vast, poorly monitored Somali coastline⁴⁸² 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.⁴⁸³ Regardless, civilians could be deliberately attacked if they aid the pirates.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.⁴⁸⁵

CONCLUSION

Throughout history, states have consistently used their military forces to attack pirates as military targets and *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-

⁴⁸⁰ HANDBOOK, *supra* note 371, ¶¶ 8.3, 8.3.1.

⁴⁸¹ *Id.* at ¶ 8.3.1; *see also* BOOTHBY, *supra* note 377, at 442; Corn, *supra* note 382, at 70.

⁴⁸² *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.

⁴⁸³ HANDBOOK, *supra* note 371, ¶ 8.3.2.

⁴⁸⁴ *Id.* ¶ 8.3.

⁴⁸⁵ 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.