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Use of force by private contractors against Somali pirates

Effy Folberg

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PEACE NEGOTIATIONS
POST-CONFLICT CONSTITUTIONS
WAR CRIMES PROSECUTION

USE OF FORCE BY PRIVATE CONTRACTORS AGAINST SOMALI PIRATES

Legal Memorandum

**Prepared by Effy Folberg
J.D. Candidate, 2013**

Public International Law & Policy Group

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Confidential

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I. EXECUTIVE SUMMARY

This memo addresses the extent to which private actors can seize and attack pirate ships operating off the coast of Somalia as well as the liabilities for third parties that support such private actors using force on the high seas. In order to determine the scope of the rules of engagement private actors can use against Somali pirates, this memo first analyzes whether Somali pirate attacks amount to an armed conflict. The memo concludes that an armed conflict does not exist because there is insufficient evidence that Somali pirates are organized enough to plan attacks, and the attacks are too sporadic to amount to an armed conflict. Consequently, international human rights law governs the use of force that can be used against Somali pirates.

Because international human rights law governs the dispute with Somali pirates, international treaties governing the use of force on the high seas, such as the Paris Declaration on Maritime Law, the Geneva Convention on the High Seas, and the United Nations Convention on the Law of the Sea, must be followed. As applied to private actors, these treaties generally forbid states from contracting out (by issuing letters of marque) or authorizing private actors to use force against or seize pirate ships unless that vessel is acting in self-defense of the vessel. Consequently, states that contract out their anti-piracy operations to the private could be subject to civil actions in courts for damages.

Finally, the memo analyzes the permissible uses of force a merchant ship can use in self-defense of the vessel. This memo concludes that because self-defense under international law has been underappreciated, private actors have little guidance on what constitutes proportionate force against a pirate attack. Consequently, private actors acting in self-defense face a substantial risk of being second-guessed by courts evaluating a private actor's self-defense claim.

II. INTRODUCTION

a. Scope^{*}

This memo addresses the use of force by armed private security guards against pirates, specifically those operating off the coast Somalia. This memo will address three major areas of law that determine the proper use of force by private security guards on the ship and patrolling around ships. Because the existence of an armed conflict is highly probative in determining the legal framework for acceptable uses of force,¹ the memo will first address whether the recent piracy activities off the coast of Somalia amount to armed conflict.

Second, due to the recent advocacy of scholars² and a current U.S. Presidential candidate,³ this paper will address the legality of States issuing letters of marque and reprisal (“letters of marque”) to combat piracy. Because this memo has been instructed to address the potential impact of liabilities on third parties, this memo will address the possible liabilities of States issuing letters of marque. Although the analysis of this section is primarily limited to liabilities the United States would face, the analysis should apply to any State that might decide to issue letters of marque.

Third, this memo will address the use of force ships and private contractors may exercise in self-defense of their crewmembers, their vessels and the vessels of others. Because private

* The following is a verbatim copy of the issues this memo was assigned to address: Analyze legal issues relating to

¹ See *infra* Part IV(a) (discussing the importance of the existence of an armed conflict to determining whether international humanitarian law or international human rights law governs the conflict).

² See *infra* Part IV(c) (discussing the proposals for the United States to start issues letters of marque and reprisal).

³ Elizabeth Dickinson, *Ron Paul's Piracy Plan: Free for All*, FOREIGN POLICY (Apr. 15, 2009 3:35 PM) http://blog.foreignpolicy.com/posts/2009/04/15/ron_pauls_piracy_plan_to_hunt_pirates_free_for_all [Electronic copy provided in accompanying USB flash drive at Source 3].

self-defense⁴ requires a response to be necessary and proportionate, the memo will also address various passive self-defense measures to determine the legality of armed security guards.⁵ Finally, this section will address the scope of a private actor's right to seize and apprehend pirates.

b. Summary of Conclusions

1. Currently, the piracy attacks originating from the coast of Somalia do not amount to an armed conflict.

The piracy and armed robbery originating off the coast of Somalia do not meet the requirements of an armed conflict. Under international law, an armed conflict is defined as protracted hostilities with sufficient gravity between at least two organized groups.⁶ Currently, the available facts on the level of violence, the organization of the Somali pirates, multilateral naval forces and merchant vessels, and United Nations Security Council Resolutions indicate that an armed conflict does not exist on Somalia's territorial seas or the high seas of Somalia.

Although some Somali Pirate organizations probably have a sufficient a command structure to qualify an organized group, not all Somali pirate organizations possess this level of organization. Moreover because current statistics do not differentiate which pirate organizations are responsible for each pirate incident or hijacking, it is impossible to determine the amount of

⁴ The term private self-defense refers to self-defense exercised by individuals as opposed to states. This term has been chose to help differentiate between the individual and collective self-defense exercised by states.

⁵ Passive self-defense measures are measures that are primarily used to prevent a pirate from boarding a ship. See *infra* Part IV(d) for examples and explanations of the success of passive self-defense measures. They are distinct from active self-defense measures, which usually refer to the use of (primarily lethal) force.

⁶ See Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter "GC III"] (describing general framework for the existence of an armed conflict.) [Electronic copy provided in accompanying USB flash drive at Source 35]. See also Rome Statute of the International Criminal Court art. 8(2)(f), July 17 1998, UN Doc. A/CONF.183/9, 2187 U.N.T.S. 9 [hereinafter "Rome Statute"] (defining armed conflict as "protracted armed conflict between governmental authorities and organized armed groups or between such groups" and distinguishing this definition from "internal disturbances") [Electronic copy provided in accompanying USB flash drive at Source 51]; Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) [Electronic copy provided in accompanying USB flash drive at Source 50].

pirate attacks that are attributable any “organized group.” Consequently, it is very dubious whether the amount of attacks committed by organized groups is sufficient to be an armed conflict. Finally, even if the Somali pirates were an organized group, the merchant vessels being attacked do not qualify as an organized group. Therefore there are not protracted hostilities between two organized groups.

Even if the requirement for two organized groups were met, the level of hostilities is not of a sufficient gravity to rise to the level of an armed conflict. Although the press often focuses on the increased piracy incidents off the coast of Somalia, a “piracy incident” includes failed piracy attempts, which happen to comprise the overwhelming majority of piracy “incidents.” Because the amount of deaths due to Somali piracy is minimal, the violence is of insufficient gravity to qualify as an armed conflict. Moreover, the United Nations Security Council resolutions authorizing the use of force in Somalia support a finding that there is not an armed conflict.⁷ As a result, international human rights law⁸ and the treaties governing the high sea⁹ dictate the use of force available to private actors can use in response to piracy.

⁷ See *infra* Part IV(b)(2) (discussing the intensity requirement for an armed conflict).

⁸ See Margaret L. Satterthwaite, *The Legal Regime Governing the Transfer of Persons in the Fight Against Terrorism*” UNIV. PUB. L. & LEGAL THEORY WORKING PAPERS 1, 11 available at http://lsr.nellco.org/nyu_plltwp/192 (claiming human rights law applies in all situations and is only superseded by international humanitarian law in an armed conflict) [Electronic copy provided in accompanying USB flash drive at Source 22].

⁹ *E.g.*, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, S. Treaty Doc. No. 101-1 (1989), 1678 U.N.T.S. 222 [Electronic copy provided in accompanying USB flash drive at Source 31]; United Nations Convention on the Law of the Sea *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 [d]; Geneva Convention on the High Seas, *opened for signature* Apr. 29, 1958, 450 U.N.T.S. 11 [hereinafter “GCHS”] [Electronic copy provided in accompanying USB flash drive at Source 34].

2. Issuing letters of marque is likely a violation of international law. Consequently, private actors acting upon such authorization are likely culpable of piracy and States issuing letters of marque are liable for any damages these private actors cause.

If the United States¹⁰ or other States elected to issue letters of marque and reprisal to combat Somali piracy, this would likely violate international law. First, as evidence by state practice, and by the United Nations Security Council, pirates are no longer *hostis humani generis* for the purposes of use of force against pirates. Consequently, contemporary international humanitarian law and international human rights law govern the use of force against pirates. Second, because piracy and armed robbery originating from Somalia neither amount to nor are connected with an armed conflict,¹¹ letters of marque would amount to an illegal use of force because letters of marque could only be lawful in an armed conflict—assuming issuing a letter of marque is legal at all. Third, although not a signatory to the 1856 Paris Declaration, the United States has developed a State practice and expressed an *opinio juris* that privateering is against customary international law. Moreover, even if the United States has not considered itself bound to the Paris Declaration, the United States' failure to persistently insist on its right to utilize privateers in armed conflict, and the lack of general state practice in issuing letters of marque indicate the practice is no longer accepted under international law. Accordingly, any State that issues letters of marque and reprisal will be liable for all damages caused by privateers. Moreover, specifics of how the private contractors are funded may affect whether they may be committing an act of piracy.

¹⁰ Although theoretically any nation could issue letters of marque and reprisal (assuming they are not a party to the 1856 Paris Declaration), the predominate focus of the literature has focused on the United States government issuing letters of marque and reprisal because the United States did not ratify the Paris Declaration and the Constitutional authority for Congress to issue letters of marque.

¹¹ See *supra* Conclusion 1 and *infra* Part IV(b).

3. Under international law, the right of self-defense at sea is limited to the proportionate and necessary use of force in a response against imminent threat to oneself or others on the same ship.

Currently under international law, the right of private self-defense at sea is poorly defined. Under customary international law, an individual can exercise self-defense if it is a necessary and proportionate response to protect oneself or others.¹² However, it is unclear whether definition of self-defense on the high seas differs from the definition of self-defense as found in the Rome Statute and the International Criminal Tribunal for the Former Yugoslavia. More problematic, the Geneva Convention of the High Seas, the United Nations Convention on the Law of the Sea and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA Convention”) do not provide for an explicit right of self-defense. A plain meaning interpretation of the right of visit and the right of seizure strongly suggest the right to use force to protect other ships is much more limited on the high seas than the typical means for self-defense. On the high seas, an individual can only use self-defense to repel a pirate attack against one’s own vessel while a lawful seizure of a pirate vessel can only occur in the process of protecting one’s vessel from a pirate attack.

¹² As elaborated on in Part III(d), there is a split in opinion over whether the defense of property can be included in self-defense when there isn’t a war crime. *Compare* Rome Statute *supra* note 6, art. 31(c) (“The person acts reasonably to defend himself or herself or another person or, in the *case of war crimes*, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission...”) (emphasis added) [Electronic copy provided in accompanying USB flash drive at Source 51] *with* Prosecutor v. Kordic & Cerkez, IT-9514/2-T, Judgment, ¶ (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) (“The notion of ‘self-defence’ may be broadly defined as providing a defence to a person who acts to defend or protect himself *or his property* (or another person or person’s property) against attack.”) (emphasis added) [Electronic copy provided in accompanying USB flash drive at Source 49].

III. FACTUAL BACKGROUND

Although the recent surge of Somali piracy is relatively new, modern Somali piracy traces its roots back to 1991 after the fall of Siad Barre.¹³ Since then, Somalia has effectively had no governing system to maintain an economy for Somali citizens. Although the Transitional Federal Government, the officially recognized government of Somalia, was created in 2004, this government has only possessed effective control over its capital Mogadishu since August of 2011.¹⁴ The 2010 Human Development Index—an rough estimation on the quality of life in a country—illustrates the dire situation through its absence any data for Somalia.¹⁵

As a result of the weak government infrastructure in Somalia, piracy has flourished off Somalia's coasts. Over the past few years, hundreds of piracy incidents have plagued commercial shippers.¹⁶ When pirates are successful in hijacking a commercial shipping vessel, they are often capable of negotiating ransom amounts in the millions. The average ransom paid out today is around 5.4 Million USD¹⁷ with the largest ransom currently recorded being 11 million USD.¹⁸

¹³ *Somalia*, CIA WORLD FACTBOOK, Introduction, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last visited Oct. 29, 2011) [Electronic copy provided in accompanying USB flash drive at Source 98].

¹⁴ *Al-Shebaab Rebels Withdraw From Somali Capital*, AL-JAZEERA (Aug. 6, 2011) <http://english.aljazeera.net/video/africa/2011/08/20118655455968226.html> [Electronic copy provided in accompanying USB flash drive at Source 1].

¹⁵ UNITED NATIONS DEVELOPMENT PROGRAM, HUMAN DEVELOPMENT REPORT 2010 146 (2010) [Electronic copy provided in accompanying USB flash drive at Source 99]

¹⁶ *See, e.g.*, Int'l Maritime Bureau, *Piracy News & Figures*, (Oct. 21, 2011) <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> (last visited Nov. 7, 2011) (noting that over 400 piracy attacks have occurred off the coast of Somalia in 2011) [Electronic copy provided in accompanying USB flash drive at Source 9].

¹⁷ Viola Gienger, *Piracy Syndicates Feed off Ransom Payments, U.S. Navy Chief*, BUSINESS WEEK (Apr. 22, 2011) <http://www.businessweek.com/news/2011-04-22/piracy-syndicates-feed-off-ransom-payments-u-s-navy-chief-says.html> [Electronic copy provided in accompanying USB flash drive at Source 13].

¹⁸ MARK KIRK, KIRK REPORT: ENDING SOMALI PIRACY AGAINST AMERICAN AND ALLIED SHIPPING 1 (2011) [hereinafter "Kirk Report"] [Electronic copy provided in accompanying USB flash drive at Source 95].

In response to the growing threat of piracy off the coast of Somalia, various governments have devoted naval resources in order to combat Somali piracy.¹⁹ However, the effectiveness of the government efforts has been minimal. With the use of piracy motherships to increase the range of Somali pirates, the Gulf of Aden and the Indian Ocean have become impossible to patrol.²⁰ Moreover, due to many Somali fisherman fishing with small arms in their boats, it is almost impossible to distinguish a Somali fishing vessel from a pirate vessel until the pirate vessel starts on its attack.²¹ Because of these difficulties ship owners have openly started calling for more expansive rights to use force on their own.²²

IV. LEGAL ANALYSIS

a. *Whether an armed conflict exists determines the what force can be used against pirates.*

1. A Legal History of the Use of Force at Sea

Although pirates have been condemned as *hostis humani generis*²³ (meaning “enemy of humanity”) since the 1600s, the evolution of the use of force that can be used to counteract

¹⁹ See generally ROBIN GEIB & ANN PETRIG, *PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN* 17-29 (2011) (summarizing current government responses to piracy [Electronic copy provided in accompanying USB flash drive at Source 64].

²⁰ See Statement of Terrence McKnight, Retired Rear Admiral of the United States Navy, C-SPAN, *International Piracy Threats and Tactics* (Mar. 11, 2011) <http://www.c-spanvideo.org/program/298371-1> (noting the 1.1 million miles of ocean in the Gulf of Aden and recent piracy attacks in the Indian Ocean hinder states abilities to combat piracy). [No Electronic Source: Video Available on Internet].

²¹ Statement of Dominick Donald, Chief analyst & Vice President of Aegis Defense Services, C-SPAN, *Piracy and Maritime Security* (Nov. 24, 2008) <http://www.c-spanvideo.org/program/282555-1> [No Electronic Source: Video Available on Internet].

²² Phillip J. Shapiro, CEO of Liberty Maritime Co., Statement Before the Surface Transportation and Merchant Marine Infrastructure, Safety and security Subcommittee 5-10 (May 5, 2009) available at <http://www.marad.dot.gov/documents/ShapiroTestimonyPiracy.pdf> [Electronic copy provided in accompanying USB flash drive at Source 97].

²³ See Douglas R. Burgess Jr., *Hostis Humani Generi: Piracy Terrorism and a New International Law*, 13 U. MIAMI INT’L & COMP. L. REV. 293, 299-300 (2006) (noting piracy was the first international crime to be universally condemned by all nations) [Electronic copy provided in accompanying USB flash drive at Source 17].

piracy has been severely tamed from its Grotian roots. Often seen as the influential figure on piracy, Hugo Grotius advocated an expansive use force to expunge pirates. Grotius maintained that one did not need to declare a state of war in order to attack pirates because it was not customary to declare war against those who do not form part of a State.²⁴ In particular, Grotius maintained that pirates, as enemies of the state, even justified attacks by unlicensed privateers²⁵—essentially private actors unaffiliated with a government—due to the international community’s interest in preserving the freedom of the seas.²⁶

Grotius’ claim that private actors could use force without the authorization of States would eventually break down. Although the use of force by merchant vessels was generally accepted in the Middle Ages due to weak central governments’ inability to protect their citizens, states eventually began to curtail the individual use of force on the high seas because these ships often were the cause of wars between states.²⁷ States restricted the permissible use of private force on the high seas by requiring a private actor to possess a letter of marque and reprisal to use force against other vessels.²⁸ The historical practice of states also confirms that private

²⁴ James Thuo Gathii, *The Use of Force, Freedom of Commerce, and Double Standards in Prosecuting Pirates in Kenya*, 59 AM U. L. REV. 1321, 1328 (2010) [Electronic copy provided in accompanying USB flash drive at Source 20].

²⁵ See WEBSTER’S DICTIONARY (1828) (defining “privateer” as “A ship or vessel of war owned and equipped by a private man or by individuals, at their own expense, to seize or plunder the ships of an enemy in war. Such a ship must be licensed or commissioned by government, *or it is a pirate.*” (emphasis added) available at <http://machaut.uchicago.edu/?action=search&word=privateer&resource=Webster%27s&quicksearch=on> [Electronic copy provided in accompanying USB flash drive at Source 101].

²⁶ See Gathii, *supra* note 24 (noting Grotius’ defense of private Dutch vessel’s seizure of a Portuguese vessel due to the Netherland’s interests in maintaining its trade and commerce) [Electronic copy provided in accompanying USB flash drive at Source 20].

²⁷ See Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1041-42 (1986) (recalling an incident with an English sailor’s fight with a Norman ship eventually escalated to a massacre of 15,000 men) [Electronic copy provided in accompanying USB flash drive at Source 21].

²⁸ See Todd Emerson Hutchins, *Structuring a Sustainable Letters of Marque Regime: How Commissioning Privateers can Defeat the Somali Pirates*, 99 CAL. L. REV. 819, (2011) (claiming that “[S]tates[,] [as] the primary actors [in international law,] were responsible for seeking international redress for their subjects... [Consequently]

vessels were required to obtain a letter of marque and reprisal in order to attack pirates on the high seas. For instance, in the 18th century, the British Parliament specifically licensed private ships to attack pirate vessels in order to protect the British commerce while South Carolina, then a colony of Britain, issued letters of marque to disable pirates in the Americas.²⁹ Thus, in contrast to Grotius' claim that private actors could attack pirates without government sanction, states (or at least the United States and Britain) required a private ship to obtain a letter of marque before engaging on anti-piracy operations.³⁰ Although the history on letters of marque issued to capture pirates is sparse, the last known letter of marque issued to a privateer to capture a pirate was issued in the early 1700s.³¹

Moreover, Grotius' claim that using force against pirates did not require a declaration of or amount to war would change with respect to private actors. Although states sometimes issued letters of marque for hunting pirates, letters of marque were predominately issued to authorize private ships to attack enemy ships, primarily merchant vessels, during a declared war.³² For instance, during 1770s-1820s, the United States due to its weaker naval power compared to

letters of marque came to be used primarily as a means of conducting public warfare with private actors.”). [Electronic copy provided in accompanying USB flash drive at Source 27]. *See also* WEBSTER, *supra* note 25 [Electronic copy provided in accompanying USB flash drive at Source 101].

²⁹ Theodore T. Richard, *Reconsidering The Letter of Marque: Utilizing Private Security Providers Against Piracy*, 39 PUB. CONT. L.J. 411, 434-36 (2010) [Electronic copy provided in accompanying USB flash drive at Source 26].

³⁰ *See* Alexandra Schwartz, Note, *Corsairs in the Crosshairs: A Strategic Plan to Eliminate Modern Day Piracy* 5 N.Y.U. J.L. & LIBERTY 500, 511 (2010) (“By 1704 an Englishman needed a commission...in order to “hunt” pirates) [Electronic copy provided in accompanying USB flash drive at Source 14].

³¹ *See* Richard, *supra* note 29 (noting that South Carolina issued a letter of marque for a pirate in 1718) [Electronic copy provided in accompanying USB flash drive at Source 26]. *See also* Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century* 19 YALE J.L. & HUMAN. 1, n.231 (2009) (noting that the British had issued letters of marque to hunt pirates in 1715). [Electronic copy provided in accompanying USB flash drive at Source 24].

³² *See* Richard *supra* note 29, at 422-23 (“The most well-known purpose of letters of marque was to create wartime privateers. The letters...grant[ed]...the owner of a private vessel to capture enemy vessels and goods on the high seas.”) [Electronic copy provided in accompanying USB flash drive at Source 26].

Britain, heavily utilized privateers to attack British commercial vessels.³³ Although the United States Supreme Court declared in *The Marianna Flora* that pirates could be “lawfully captured by the public or private ships of any nation, in peace or in war; for they are *hostes [sic] humani generis[.]*”³⁴ and war could exist against pirates,³⁵ the Court also limited this war power by noting that piracy did not justify attacking another state, which could not be connected to the piracy operation.³⁶

The ability for private actors to participate in war would become further limited in 1856. In order to reign in privateering’s abuses,³⁷ several States ratified the Paris Declaration Respecting Maritime Law (“Paris Declaration”) that, among other things, declared “[p]rivateering is and remains abolished.”³⁸ The United States objection and refusal to sign the Paris Declaration has caused a significant debate whether the Paris Declaration’s ban on privateering is binding upon the United States or is a source of customary international law.³⁹

³³ Parrillo, *supra* note 31 at 8 (2007) (noting that weaker nation states tended to rely upon privateering) [Electronic copy provided in accompanying USB flash drive at Source 24]. *See also* EDGAR STANTON MACLAY, *Preface to A HISTORY OF AMERICAN PRIVATEERS* viii (D. Appleton & co. 1899) (recalling the Americans had significantly more privateers compared to their public navy) [Electronic copy provided in accompanying USB flash drive at Source 60].

³⁴ *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 2, 41 (1825) [Electronic copy provided in accompanying USB flash drive at Source 77].

³⁵ *See id.* at 26 (“War against pirates existed...”).

³⁶ *See id.* at 30 (“[Pirates] are, indeed, public offenders, like the highway robber, but they are not public enemies so as to give those who cruise [sic] against them any of the rights of war in respect to the subjects of friendly states who are not involved in their guilt.”).

³⁷ *See* Parrillo, *supra* note 31 at 9 (arguing incentives such as rank and promotion deterred public vessels from committing the crimes privateers committed during war) [Electronic copy provided in accompanying USB flash drive at Source 24].

³⁸ Paris Declaration Respecting Maritime Law, art 1., Apr. 16, 1856 *available at* <http://www.icrc.org/ihl.nsf/INTRO/105?OpenDocument> [hereinafter “Paris Declaration”] [Electronic copy provided in accompanying USB flash drive at Source 42].

³⁹ *See infra* Part IV(c)(2) for analysis of the Paris Declaration as a source of customary international law and how the Paris Declaration applies to the United States.

Despite the debate over the status of the Paris Declaration as a source of customary international law, since 1856 no State has issued letters of marque for a private vessel to attack an enemy ship. Even though the Confederate Army in the American Civil War issued letters of marque against the Union and Congress authorized President Lincoln to issue letters of marque,⁴⁰ Lincoln declined to issue letters of marque against the Confederates.⁴¹

However, banning privateering only shifted States practice towards temporarily incorporating private actors into states' naval forces. In 1870 Prussia, a signatory to the Paris Declaration, attempted to work around the Paris Declaration by utilizing a "volunteer navy" comprised of commercial vessels to attack France, also a party to the Paris Declaration, and her vessels.⁴² When France claimed Prussia was violating the terms of the Paris Declaration, the British Law Office determined that Prussia's volunteer navy was different because they were "for all intent [*sic*] and purposes in the service of the Prussian Government, and the crews would be under the same discipline as the crews on board vessels belonging permanently to the Federal Navy."⁴³ According to historian Francis Stark, the Prussian vessels were regarded as different from the privateering prohibited in the Paris Declaration in four respects: (1) the Prussian vessels were supplied arms and paid by the Prussian government (2) the vessels were incorporated into the Prussian navy as "public servants," and were subject to the same discipline and orders as an enlisted man, (3) they were designed for the work of the navy and were prohibited to attack or

⁴⁰ William Young, Note, *A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal* 66 WASH. & LEE L. REV. 895, 927 (2009) ("[t]he U.S. government has not issued letters of marque and reprisal for nearly two hundred years.) Young notes that the American Civil War and those issued by Texas (not a part of the United States at the time) in 1834-1835 as exceptions to this claim. *Id.* at n.190. [Electronic copy provided in accompanying USB flash drive at Source 28].

⁴¹ *See id.*

⁴² Richard *supra* note 29 at 430. [Electronic copy provided in accompanying USB flash drive at Source 26].

⁴³ *Id.*

seize private property.⁴⁴ Thus, the Paris Declaration effectively banned governments from authorizing private actors to use force on the high seas unless they were incorporated into and under the effective control of a state's naval forces.

Some commentators have claimed these volunteer navies or auxiliary forces were inconsistent with the Paris Declaration.⁴⁵ However most scholars conclude that the Paris Declaration was intended to apply only to private actors in order for stronger naval powers to secure a military advantage over weaker naval states.⁴⁶ Moreover, since the Paris Declaration states have also expressly maintained that private merchant vessels operating under a state's auxiliary forces were equivalent to public warships.⁴⁷

2. The Contemporary Use of Force Paradigm on the High Seas

By the 20th century private use of force at sea had become nonexistent⁴⁸ and states focused on regulating their own use of force against one another in all forms of war. Upon the conclusion of World War II, states forbade one another to use or threaten to use force against another state without the authorization of the United Nations Security Council unless the state

⁴⁴ Francis R. Stark, *The Abolition of Privateering and the Declaration of Paris*, in *STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW* 231, 379 (Faculty of Pol. Sci. Columbia Univ. eds. Columbia Univ. 1897) [Electronic copy provided in accompanying USB flash drive at Source 61].

⁴⁵ See SERVERO GOMEZ NUNEZ, *SPANISH-AMERICAN WAR: BLOCKADES AND COAST DEFENSE* 20 (1899) (claiming the United States use of "auxiliary forces" in the Spanish-American War were a covert means of privateering) [Electronic copy provided in accompanying USB flash drive at Source 65].

⁴⁶ See, e.g., Parrillo, *supra* note 31 at 59 (arguing that a US ratification to the Paris Declaration's Ban on would force the United States to give up its primary tool of naval war and develop a large public navy) [Electronic copy provided in accompanying USB flash drive at Source 24].

⁴⁷ See *supra* note 40 and accompanying text; *Nicolas Eustanthiou & Co. v. United States* 154 F. Supp. 515, 523 (E.D. Va. 1957) (noting that a Greek statute treated auxiliary vessels as equal to military warship) [Electronic copy provided in accompanying USB flash drive at Source 75].

⁴⁸ See *United States v. Davis*, No. 2:09-cr-00078-JCM-RJJ, 2010 WL 4386962 (Sept. 20, 2010) ("The power to grant letters of marque has not been used for more than a century.") [Electronic copy provided in accompanying USB flash drive at Source 80].

was defending itself against an armed attack.⁴⁹ Shortly thereafter, States further limited their powers by ratifying the 1949 Geneva Conventions. These treaties form the foundation of contemporary use of force by states. Under contemporary customary international law, international human rights law (IHRL) governs the use of force unless an armed conflict exists.⁵⁰ Should an armed conflict exist, international humanitarian law (IHL) governs the conduct of states when IHL conflicts with IHRL.⁵¹

Almost a decade after the 1949 Geneva Conventions, states met again in Geneva to, among other things, establish the 1958 Geneva Convention on the High Sea (High Seas Convention), which among other things regulated use force allowed on the high seas and territorial waters.⁵² First, the convention established a definition of piracy that criminalized an individual knowingly committing acts of violence, detention, or depredation for private ends by one ship on the high seas against another ship.⁵³ Additionally, only a state's warships⁵⁴ are

⁴⁹ Charter of the United Nations, June 26, 1945, arts. 2(4), 51, 59 Stat. 1031, 1213, T.S.No.993 (effective Oct. 24, 1945) [Electronic copy provided in accompanying USB flash drive at Source 30].

⁵⁰ Heike Krieger, *A conflict of Norms: The relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study*, 11 J. CONFLICT & SEC. L. 265, 266 (2006). [Electronic copy provided in accompanying USB flash drive at Source 19].

⁵¹ *Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts* (Taormina Declaration), Apr. 7, 1990 available at <http://www1.umn.edu/humanrts/instree/1990a.htm> [Electronic copy provided in accompanying USB flash drive at Source 32].

⁵² GCHS, *supra* note 9 arts. 13-25 [Electronic copy provided in accompanying USB flash drive at Source 34]. A state's territorial waters encompass twelve nautical miles from its shore; everything else is the high seas. UNCLOS *supra* note 9 art. 32 [Electronic copy provided in accompanying USB flash drive at Source 57].

⁵³ GCHS, *supra* note 9 art. 15 [Electronic copy provided in accompanying USB flash drive at Source 34].

⁵⁴ UNCLOS, *supra* note 9 art. 29 defines a warship as:

[A] ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate services list or its equivalent and manned by a crew which is under regular armed forces discipline. [Electronic copy provided in accompanying USB flash drive at Source 57].

allowed to board a vessel if they suspect that a vessel is engaging in piracy.⁵⁵ Even when a state's warships suspects a vessel is engaging in piracy, the rules of engagement on the high seas dictate that the warship must first send a boat to verify the suspicious vessel's papers. Military personnel are only allowed to board the vessel after a good faith inspection of the papers fails to remove the suspicion of piracy.⁵⁶ Finally, the drafters of the High Seas Convention expressly rejected an "imminent danger" exception to the rules of engagement for boarding a ship.⁵⁷ Consequently, states cannot attempt to use the epidemic of piracy off the coast of Somalia as a justification for derogating from the rules of engagement for seizing a pirate vessel. Because the restrictions on a state's use force against pirates are more tailored like police operations⁵⁸ rather than military operations current international human rights law, as supplement by international treaties on the high seas, governs the use of force against pirates—a dramatic shift from the 1600-1800s.⁵⁹

Therefore, when analyzing the acceptable uses of force against pirates, one must first determine whether there is an armed conflict to determine whether the laws of armed conflict (international humanitarian law) or international human rights law, supplemented by the relevant

⁵⁵ GCHS *supra* note 9, art. 21 [Electronic copy provided in accompanying USB flash drive at Source 34].

⁵⁶ *Id.* art. 22.

⁵⁷ Articles Concerning the Law of the Sea with Commentaries, *reprinted in* 2 Y.B. INT'L L. COMM. 265, 284 (1956) (noting the Commission considered and ultimately rejected an imminent danger exception to the right to board a ship due to the potential for states to abuse the exception.) [Electronic copy provided in accompanying USB flash drive at Source 29].

⁵⁸ Compare U.S. CONST. amend IV ("The right of the people to be secure...from unreasonable searches and seizures) [Electronic copy provided in accompanying USB flash drive at Source 83] with GCHS, *supra* note 9, notes 46-48 and accompanying text [Electronic copy provided in accompanying USB flash drive at Source 34]. Moreover current trials for Somali piracy are happening in states civilian criminal courts unlike Al-Qaeda suspects who are mainly being tried in military commissions. *E.g.* United States v. Salad 779 F. Supp. 2d 509 (E.D. Va. 2011) [Electronic copy provided in accompanying USB flash drive at Source 82].

⁵⁹ See *supra* Part IV(a)(1) (explaining the history of the use against pirates).

treaties governing the use of force on the high seas, governs the use of force against the Somali pirates.

b. The Recent Somali Piracy Epidemic Is Not an Armed Conflict

International criminal tribunals have defined an armed conflict as protracted hostilities with a sufficient gravity between two organized groups.⁶⁰ If these conditions are met, then international humanitarian law governs the use of force states can utilize in combat.⁶¹ If these conditions are not met, then as a matter of international law, the violence will be treated as “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”⁶² and thus will be governed by international human rights law.⁶³ Accordingly, this memo will analyze the three elements of an armed conflict (organized groups, protracted hostilities, and sufficient gravity) to determine what law governs the use of force against Somali pirates.

1. Organized Groups

Some Somali pirate organizations may be organized to qualify as an organized group; however, there is insufficient evidence to link these pirate attacks to specific organizations. In order to determine what qualifies as an organized group for the purposes of an armed conflict the International Criminal Tribunal for the former Yugoslavia in *Prosecutor v. Limaj*⁶⁴ refrained

⁶⁰ See *supra* note 6 and accompanying text.

⁶¹ See *supra* note 50 and accompanying text.

⁶² Rome Statute, *supra* note 6 [Electronic copy provided in accompanying USB flash drive at Source 51]. See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (APII) (Geneva, June 8, 1977), 1125 U.N.T.S. 609 (No. 17513), 1442, *open for signature* July 12, 1978 [Electronic copy provided in accompanying USB flash drive at Source 43].

⁶³ See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), 2004 I.C.J. 136, ¶¶95,105 (July 9) [hereinafter “The Wall Case”] (claiming international humanitarian law applies only in armed conflict. [Electronic copy provided in accompanying USB flash drive at Source 38].

⁶⁴ *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005)

from formulating a test, emphasizing that the finding of an armed conflict was “context specific.”⁶⁵ However, the Court in *Limaj* looked to six factors to determine whether the Kosovo Liberation Army (“KLA”) was sufficiently organized, and thus *Limaj* can serve as a framework for evaluating whether Somali pirates qualify as an organized group. Factors that help an entity qualify as an “organized group” include: (1) a headquarters for operations,⁶⁶ (2) an identifiable area of operation,⁶⁷ (3) an ability to acquire and distribute arms⁶⁸ (4) a demonstrable hierarchy with a capacity to coordinate its actions⁶⁹ (5) the ability to make political statements,⁷⁰ and (6) engage in negotiations.⁷¹ The memo analyzes address each factor in turn. Unfortunately, because little is known about the organization and degree of cooperation among Somali pirate organizations, a holistic analysis of the factors will assume the available facts generally represent all Somali pirate organizations unless otherwise noted.

Headquarters

When evaluating the headquarters of the KLA, the trial chamber noted that the KLA headquarters frequently moved around; however they possessed several headquarters throughout municipalities in Kosovo.⁷² Although it is difficult to know exactly where the headquarters are

[Electronic copy provided in accompanying USB flash drive at Source 48].

⁶⁵*Id.* at ¶90.

⁶⁶ *Id.* at ¶104.

⁶⁷ *Limaj*, IT-03-66-T at ¶95 [Electronic copy provided in accompanying USB flash drive at Source 48].

⁶⁸ *Id.*

⁶⁹ *Id.* at ¶108, 110.

⁷⁰ *Id.* at ¶95.

⁷¹ *Id.* at ¶125.

⁷² *Id.* at ¶104.

for various piracy organizations, the United Nations Monitoring Group has identified Puntland and “the Xaradheere and Hobyo districts of the southern Mudug region” as being the locations where pirates conduct their operations.⁷³ Consequently, this factor weighs in favor of finding that the Somali pirates qualify as an organized group.

Zones of Operation

When evaluating whether a group possesses a zone of operation, *Limaj* indicates that several zones can exist with a variety of organization and structure in each zone of operation; however in *Limaj* each zone had a commander that oversaw the KLA’s operation.⁷⁴ In the case of Somali piracy, a zone of operation exists for the piracy attacks as they are mainly organized in various Puntland provinces and ports⁷⁵ and attacks take place in the Gulf of Aden and the surrounding parts of the Indian Ocean.⁷⁶ Thus, this factor weighs in favor of finding a sufficiently organized group.

Arms Acquisition and Distribution

In *Limaj* the court noted the KLA leadership actively support the creation of supply lines for their military operations⁷⁷ and that the KLA possessed several light weapons such as AK-47s

⁷³ Monitoring Group on Somalia, Rep., transmitted by letter dated July. 18, 2011 from the members of the Monitoring Group on Somalia to the Chairman of the Security Council Comm. Established pursuant to resolution 751 (1992) ¶107, U.N. Doc. S/2011/433 (July 18, 2011) [hereinafter “2011 Monitoring Group Report”] [Electronic copy provided in accompanying USB flash drive at Source 39].

⁷⁴ *Limaj*, IT-03-66-T at ¶95 [Electronic copy provided in accompanying USB flash drive at Source 48].

⁷⁵ See KIRK REPORT, *supra* note 18 for locations of various identified ports. As of 2011 the following ports were identified as possessing either ships or hostages: Huridyo, Camp July, Garacad, El Danaan, Canuu, Haradheere. [Electronic copy provided in accompanying USB flash drive at Source 95].

⁷⁶ See INTERNATIONAL MARITIME BUREAU, *Live Piracy Map*, <http://www.icc-ccs.org/piracy-reporting-centre/imb-live-piracy-map> (last visited Nov. 13, 2011) [Electronic copy provided in accompanying USB flash drive at Source 90].

⁷⁷ *Limaj*, IT-03-66-T, at ¶100 [Electronic copy provided in accompanying USB flash drive at Source 48].

and grenades.⁷⁸ In the case of Somali pirates, it is currently unknown the exact ways they acquire their weapons; the acquisition of these arms likely violate the arms embargo currently enforced on Somalia.⁷⁹ Additionally, the types of weapons seized from Somali pirates range consist of AK-47s, RPGs and various other assault rifles.⁸⁰ This suggests the types of arms possessed by Somali pirates are comparable to the types of arms the KLA possessed. Accordingly, this factor weighs in favor of finding Somali pirates as an organized group even though it is unknown how these pirate organizations obtain their weapons.

Demonstrated Hierarchy with Coordinated Actions

In evaluating the level of organizational capacity needed to possess a sufficient hierarchy with coordinated actions, the Trial Chamber in *Limaj* emphasized the ability of the KLA to reinforce of its armed forces against Serb forces.⁸¹ The court also looked to the presence of a high command structure with the ability to promote individuals to higher ranks within the KLA,⁸² a requirement of subordinates to report to higher ranking officials about their activities⁸³ and obey orders,⁸⁴ and a code of conduct for all members to follow.⁸⁵

⁷⁸ *Id.* at ¶121.

⁷⁹ 2011 Monitoring Group Report, *supra* note 73 at ¶101-105 [Electronic copy provided in accompanying USB flash drive at Source 39].

⁸⁰ *Id.*

⁸¹ *Limaj*, IT-03-66-T at ¶108 [Electronic copy provided in accompanying USB flash drive at Source 48].

⁸² *Id.* at ¶96.

⁸³ *Id.* at ¶97 (“[E]very leader of an operational unit had an obligation to inform the General Staff about all developments in their respective areas of responsibility.”).

⁸⁴ *Id.* at ¶116.

⁸⁵ *Id.* at ¶98.

In the case of Somali pirates, there is sufficient evidence to indicate that some pirate organizations possess a demonstrated hierarchy sufficient to for these organizations to qualify as an organized group. Currently, it is known that there are certain pirate “kingpins” such as Asad “Boyah” Abdulahi,⁸⁶ Mohammed “Garaad” Abdi,⁸⁷ and Mohamed “Afweyene” Hassan Abdi.⁸⁸ These kingpins are in-turn funded and supported by various sponsors,⁸⁹ who are believed to be located in London⁹⁰ and Dubai.⁹¹ However the organization of various pirate organizations varies considerably. “Afweyene” is the leader of a pirate syndicate known as the Somali Marines and possess a standard military hierarchy with individuals assigned as various level of admirals.⁹²

However, the Marka Group lead by Sheikh Yusuf Mohamed Siad has been described as disorganized,⁹³ and not much more is known about them.⁹⁴ Garaad’s syndicate, known as the National Volunteer Coast Guard, appears to specialize in targeting small boats.⁹⁵ Garaad claims

⁸⁶ Interview by Xan Rice and Abdiqani Hassan with Asad “Booyah” Abdulahi, a pirate kingpin, GUARDIAN (Nov. 21, 2008) *available at* <http://www.guardian.co.uk/world/2008/nov/22/piracy-somalia> [Electronic copy provided in accompanying USB flash drive at Source 8].

⁸⁷ KIRK REPORT, *supra* note 18 at 7-8 [Electronic copy provided in accompanying USB flash drive at Source 95].

⁸⁸ *Id.*

⁸⁹ GEOPOLICITY, THE ECONOMICS OF PIRACY: PIRATE RANSOMS OFF THE COAST OF SOMALIA 8 (2011) [Electronic copy provided in accompanying USB flash drive at Source 88].

⁹⁰ Hutchins, *supra* note 28 [Electronic copy provided in accompanying USB flash drive at Source 27].

⁹¹ Robyn Hunter, *Somali Pirates Living the High-Life*, BBC NEWS (Oct. 28, 2008) *available at* <http://news.bbc.co.uk/2/hi/africa/7650415.stm> [Electronic copy provided in accompanying USB flash drive at Source 12].

⁹² GLOBAL SECURITY, *Pirates* (July 7, 2011) (last visited Oct. 22, 2011) *available at* <http://www.globalsecurity.org/military/world/para/pirates.htm> [Electronic copy provided in accompanying USB flash drive at Source 7].

⁹³ *Id.*

⁹⁴ Part of the problem itself may be identifying various pirate groups. *Compare id.* (identifying four pirate groups); *with* KIRK REPORT, *supra* note 18 (identifying three pirate groups) [Electronic copy provided in accompanying USB flash drive at Source 95].

⁹⁵ GLOBAL SECURITY, *supra* note 92 [Electronic copy provided in accompanying USB flash drive at Source 7].

he has control over hundreds of hijackers and has a “sub-lieutenant” report to him, but these claims cannot be verified and are believed to be an exaggeration.⁹⁶ In fact Jay Bahadur, a journalist who went to Somalia to interview pirates, claims that “[p]irates operate in relatively small, decentralized groups of twenty to fifty...[and] disperse once the task is complete and the ransom has been divided up. The loyalty is to the money, not the Don.”⁹⁷

Speaking about Somali pirates generally, there doesn’t appear to be active cooperation between the crime syndicates.⁹⁸ However, within each syndicate, several commentators have noted that Somali pirate syndicates utilized advanced GPS technology, have started to deploy “motherships” to further the range and precision of these attacks,⁹⁹ and possess a code of conduct for pirates to follow on their missions.¹⁰⁰ However, Bahadur downplays the novelty of these technological advances claims it is too difficult for pirates to target a specific ship; rather, pirates, according to Bahadur, simply look to where the shipping lanes and hope to find a ship.¹⁰¹ Dominick Donald, the Chief Analyst and Vice President of a UK private security firm, agrees with Bahadur and believes Somali pirate attacks are more opportunistic than planned.¹⁰²

⁹⁶ JAY BAHADUR, *THE PIRATES OF SOMALIA: INSIDE THEIR HIDDEN WORLD*, 81-82 (2011) [Electronic copy provided in accompanying USB flash drive at Source 63].

⁹⁷ *Id.* at 52.

⁹⁸ *Id.* at 84 (noting Garaad’s mocking Boyah, another pirate warlord’s alleged ceasefire on piracy).

⁹⁹ Statement of Dominick Donald, Chief analyst & Vice President of Aegis Defense Services C-SPAN, *Piracy and Maritime Security* (Nov. 24, 2008) <http://www.c-spanvideo.org/program/282555-1> [No Electronic Source: Video Available on Internet].

¹⁰⁰ Frank Langfitt, *Inside the Pirate Business: From Bounty to Bonuses*, NATIONAL PUBLIC RADIO (Apr. 15, 2011) <http://www.npr.org/2011/04/15/135408659/inside-the-pirate-business-from-booty-to-bonuses> [Electronic copy provided in accompanying USB flash drive at Source 5].

¹⁰¹ BAHADUR *supra* note 96 at 53-54 [Electronic copy provided in accompanying USB flash drive at Source 63].

¹⁰² Statement of Dominick Donald, Chief analyst & Vice President of Aegis Defense Services, C-SPAN, *Piracy and Maritime Security* (Nov. 24, 2008) <http://www.c-spanvideo.org/program/282555-1> [No Electronic Source: Video Available on Internet].

Accordingly, this factor likely weighs in finding the group is not sufficiently organized to be an organized group for the purposes of an armed conflict. Although some Somali pirate organizations appear to have the necessary command structure to be deemed sufficiently organized, several organizations contract out their pirate operations on a temporary basis. Moreover, even though many of these organizations may be sufficiently organized, the opportunistic nature of Somali pirate attacks makes Somali pirate attacks more similar “acts of banditry”¹⁰³ rather than the highly coordinated actions of the KLA in the Balkans.

Ability to Make Political Statements

In *Limaj*, the Court noted the KLA issued political statements of their goal to liberate and unify the “occupied territories of Albania,” condemned violations of international humanitarian law, and possessed a spokesperson to speak with the media.¹⁰⁴ In regards to this factor, some Somali pirate organizations have given two statements explaining the rationale for their pirate attacks: money¹⁰⁵ and retaliation for illegal fishing off the coast of Somalia.¹⁰⁶ Neither of these statements likely constitutes a “political statement” for the purposes of an armed conflict. Currently, only 6.5 percent of Somali pirate attacks are aimed against commercial fishing vessels,¹⁰⁷ and several of these vessels likely possess permits to fish in Somalia.¹⁰⁸ Consequently,

¹⁰³ Rome Statute, *supra* note 6 [Electronic copy provided in accompanying USB flash drive at Source 51].

¹⁰⁴ Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶101-103 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) [Electronic copy provided in accompanying USB flash drive at Source 48].

¹⁰⁵ Jeffrey Gettleman, *Somali Pirates Tell Their Side: They Only Want Money*, N.Y. TIMES (Sept. 30, 2008) available at <http://www.nytimes.com/2008/10/01/world/africa/01pirates.html> [Electronic copy provided in accompanying USB flash drive at Source 10].

¹⁰⁶ JAY BAHADUR, *supra* note 86 at 238 (quoting a pirate named Gaban as saying “Illegal fishing [is] the only reason we’re doing this.”) [Electronic copy provided in accompanying USB flash drive at Source 63].

¹⁰⁷ Monitoring Group on Somalia, Rep., transmitted by letter dated Feb. 26, 2010 from the members of the Monitoring Group on Somalia to the Chairman of the Security Council Comm. Established pursuant to resolution 751 (1992) ¶127, U.N. Doc. S/2010/91 (Mar. 10, 2010) [Electronic copy provided in accompanying USB flash drive at Source 40].

individuals making these claims likely are not speaking on behalf of an organization, but rather small pirate organization retaliating against vessels unassociated with commercial fishing for what these pirates perceive as illegal fishing.

In regard to the desire to acquire money, this private goal is distinguishable from the KLA's goals of freeing Kosovo. Although no court has expressly made a public/private distinction as it relates to motivations, a private desire to gain money is closer to banditry than the political change the KLA sought. Consequently, the ability to make political statements weighs against finding Somali pirate syndicates as organized group(s) for the purposes of an armed conflict.

Engage in Negotiations

In *Limaj*, the court noted that the KLA was actively involved in negotiations with the European Union over how to solve the problem in Kosovo.¹⁰⁹ Additionally, one diplomat recognized the involvement of the KLA as crucial to solving the problems in Kosovo.¹¹⁰ In this instance, Somali pirates do engage in negotiations for ransom payments for the ships they hijack and the persons they take hostage. On the one hand this does show an ability to engage in negotiations similar to the KLA.

However, the Trial Chamber's focus on the external recognition of the KLA as a necessary party to negotiations suggest that the ability to engage in negotiations must amount to more than demands made to a party. Rather, external recognition as an entity that must be negotiated with in order to end hostilities or solve the underlying problem of the dispute.

¹⁰⁸ *Id.*

¹⁰⁹ Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶125, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) [Electronic copy provided in accompanying USB flash drive at Source 48].

¹¹⁰ *Id.*

Because businesses and the international community have only talked to pirates through have not recognized negotiating that negotiating with Somali pirates is necessary to solve the Somali pirates' dispute (i.e. illegal fishing or their monetary desires), these hostage negotiations are unlikely to qualify as “engaging in negotiations” for the purposes of the organized group analysis. This conclusion is bolstered by the recognition that solving is building up Somalia criminal justice infrastructure.¹¹¹ If building up the infrastructure is critical to solving the root cause of Somali piracy and the hostage negotiations with pirates do not further the efforts to rebuild Somalia's infrastructure, this suggests these pirates are not capable of engaging in the negotiations in the same sense as the court in *Limaj*.

Conclusion on Organization Group Analysis

As stated earlier, a major hindrance to determining whether a particular Somali pirate organization possesses all of the required characteristics is the lack of evidence linking certain political statements or attacks to each organization. Although there is some information available on pirate syndicate responsibility for certain piracy attacks,¹¹² this is the exception and not the norm. Regardless of this discrepancy, the current facts suggest that many Somali pirate organizations do not possess enough characteristics to be considered an organized group.

Even though Somali pirate syndicates possess the necessary command structures (for high-level individuals), zone of operations, and arms to qualify as an group, these factors alone tend to suggest that Somali pirates are a highly organized criminal network. There are significant

¹¹¹ Statement of Judge Rosemelle Mutoka, Chief Magistrate Judge for the Law Courts in Mombasa, Kenya, FREDERICK K. COX CENTER INTERNATIONAL LAW CENTER, “*International Law in Crisis*”—*Piracy: New Threats, New Responses*, YOUTUBE (Sept. 9, 2011), <http://www.youtube.com/watch?v=EBsn-E0dAkc> [**Source is a Video Online: Not Included on Flash Drive**].

¹¹² See, e.g., *French Warship Detains Pirates*, AGENCE FRANCE-PRESSE Apr. 15, 2009 (quoting pirating warlord Garaad as claiming the attack on the *Liberty Sun* was in retaliation for killing his men on the *Maersk Alabama*) available at <http://www.google.com/hostednews/afp/article/ALeqM5icD48ecBA5bC2fJoLnNJfg4a9FIA> [Electronic copy provided in accompanying USB flash drive at Source 6].

questions over how consistent Somali pirate personnel are from mission to mission, whether these attacks are planned or are merely opportunistic attacks on ships, and the ability for these groups to “engage in negotiations”¹¹³ with states. Because Somali pirate syndicates do not maintain a consistent group of subordinates and cannot plan operations, this suggests that Somali pirate syndicates lack an organizational cohesiveness and operational capacity to distinguish them from a criminal gang.

Although there is no legal authority indicating that criminal gangs cannot be an organized group, the external recognition of the KLA as a negotiating partner to end the violence in Kosovo implies that the KLA that such a requirement exists. Because most states do not negotiate with criminal gangs, the fact that states would negotiate with the KLA indicated that the KLA had become a challenger to the rule of law that had to be accommodated rather than a mere violator of the rule of law who had to be punished.

Some may argue that placing this much emphasis on the external recognition to negotiate is placing too much weight on what is ultimately a political decision of states. Of course, the lack of external recognition to negotiate is not dispositive of the organized group analysis because the armed conflict analysis is based on a totality circumstances.¹¹⁴ But the lack of external recognition combined with an inability to plan operations or maintain a consistent staff, suggests that States are not negotiating with Somali pirates because these syndicates lack the organizational capacity to conduct piracy operations. Accordingly, these objective factors (i.e. factors not subject the political decisions of a state) support the proposition that Somali pirate syndicates are insufficiently organized to qualify as an organized group.

¹¹³ See *supra* notes 109-111 and accompanying text.

¹¹⁴ See *supra* note 65 and accompanying text.

2. Intensity

Regardless of whether the organized group requirement is met, the intensity of the piracy attacks is not of sufficient gravity to rise to the level of an armed conflict. In order to determine whether there is sufficient gravity for an armed conflict to exist, international criminal tribunals have focused on a plethora of factors to determine whether the intensity threshold is satisfied.¹¹⁵ For example, in *Limaj*, the court found that the intensity of the conflict in Kosovo possessed a sufficient intensity to qualify as an armed conflict because thousands of civilians were displaced by the conflict,¹¹⁶ armed clashes took place at least three days a week for several months,¹¹⁷ the combatants were heavily armed,¹¹⁸ there was an increased presence of government force in the area,¹¹⁹ and there were significant civilian casualties.¹²⁰ In *Prosecutor v. Delalic* the Trial Chamber also looked to how the United Nations Security Council reacted to the situation¹²¹ when determining whether the intensity threshold was met. Finally, some trial chambers claimed

¹¹⁵ This memo lists only the factors that are most applicable to the situation on the high seas near Somalia. For a comprehensive list of factors utilized by international criminal courts see *Prosecutor v. Boskoski & Tarculovski*, Case No. IT-04-82-T Judgment, ¶177-78 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008) [Electronic copy provided in accompanying USB flash drive at Source 46].

¹¹⁶ *Limaj*, IT-03-66-T at ¶167 [Electronic copy provided in accompanying USB flash drive at Source 48].

¹¹⁷ *Id.* at ¶169.

¹¹⁸ *See, e.g., Id.* at ¶ 163 (“In the battle at Llapushnik/Lapusnik, on 25 and 26 July 1998, the Serbian forces used heavy military weaponry such as tanks, 220 mm cannons, and “Katyusha” rockets.”).

¹¹⁹ *Id.* at ¶142, 150.

¹²⁰ *See, e.g., Id.* at ¶143 (The most significant of [act of violence] was the attack at the end of February 1998 and in early March 1998 on the villages Qirez/Cirez, Likoshan/Likosane, and Prekazi-i-Poshtem/Donjie Prekaze located in the Drenica area, in the course of which 83 Kosovo Albanians were killed.”)

¹²¹ *Prosecutor v. Delalic (Celebici)*, IT-96-21-T, Judgment, ¶190 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) [Electronic copy provided in accompanying USB flash drive at Source 47].

a government's decision to comply with international human rights or international humanitarian law also indicates whether the intensity threshold has been satisfied.¹²²

In the case of Somali piracy, these various factors overwhelmingly favor a finding that the intensity threshold is not met. First, the seriousness of the pirate attacks on ships is not equivalent to the clashes in the former Yugoslavia or Rwanda. Whereas those incidents featured deadly fighting on both sides,¹²³ a piracy incident is not equivalent to this form of fighting because piracy incidents often include unsuccessful attempts to pirate and mere approaches of a merchant vessel.¹²⁴ Because simply approaching a ship, even with a hostile intention, is not the same as live fire being exchanged several days a week, this factor favors a finding against meeting the intensity threshold. Moreover, if the intensity threshold is evaluated just by hijackings, the statistics are still less favorable from a severity standpoint. During 2007, 2008, 2009, 2010, and 2011, there have been only 13,¹²⁵ 44,¹²⁶ 52,¹²⁷ 44,¹²⁸ and 26¹²⁹ hijackings

¹²² Prosecutor v. Boskoski and Tarculovski, Case No. IT-04-82-T, Judgment, ¶¶177-78 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008). [Electronic copy provided in accompanying USB flash drive at Source 46].

¹²³ See e.g. *Limaj*, IT-03-66-T, *supra* note 99 [Electronic copy provided in accompanying USB flash drive at Source 48].

¹²⁴ See, e.g., Int'l Maritime Bureau [IMB], *Live Piracy Report: Attack No. 376-11*, (Oct. 16, 2011, 3:00 PM), <http://www.icc-ccs.org/piracy-reporting-centre/live-piracy-report/details/59/390> ("Armed pirates in two skiffs chased a general cargo ship underway. Master raised alarm, contacted warships for assistance, took evasive manoeuvres and all crewmembers mustered at a safe room except the bridge crew. After 30 minutes of chasing the pirates aborted the attempted attack and moved away.") [Electronic copy provided in accompanying USB flash drive at Source 91].

¹²⁵ IMB, PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT 2007, tbl. 1, (Jan. 2008) *available at* <http://www.southchinasea.org/docs/ICC-IMB-PRC-2007.pdf> [Electronic copy provided in accompanying USB flash drive at Source 92]. Please note the author has added the total for the Gulf of Aden and Eritrea to this Somalia total due to its proximity to the region.

¹²⁶ Int'l Maritime Org. [IMO], *Reports on Acts of Piracy and Armed Robbery Against Ships, Annual Report, 2008*, Annex 2, MSC.4/Circ.133 (Mar. 19, 2009) *available at* http://www.imo.org/includes/blastData.asp/doc_id=11376/133.pdf [hereinafter IMO 2008 Annual Report] [Electronic copy provided in accompanying USB flash drive at Source 93].

¹²⁷ ANNA BOWDEN ET. AL., THE ECONOMIC COST OF PIRACY tbl. 2 (2010) [Electronic copy provided in accompanying USB flash drive at Source 84].

respectively. That averages out to 1.1, 3.7, 4.3, 3.7 and 2 respective hijackings per month. Moreover, because the monsoon season makes it harder to conduct piracy operations, the levels of piracy taper off during some parts of the year.¹³⁰ Thus, it is difficult to find a sustained period of hostile actions (e.g. hijacking and kidnapping) that threaten lives in the same manner as previously analyzed armed conflicts.

Additionally, the seriousness of Somali piracy has actually decreased in recent years. Although the “incidents” of Somali piracy have increased, the success of hijackings has significantly decreased throughout recent years. Moreover, the chances of a ship being hijacked or attacked have always been minimal. Currently estimates of the total number of ships that pass through the Gulf of Aden range from 24,000¹³¹ to 30,000¹³² ships per year. Thus, the chances of encountering a piracy incident are quite low. For the years of 2007, 2008, 2009, 2010, and 2011, the chances of a ship being burdened by a hijacked were between .04-.05 percent, .14-.18 percent, .17-.21 percent, .14-.18 percent, .08-.10 percent respectively. In other words, over 99% of ships travelling through the Gulf of Aden do not get hijacked. Moreover, the probability of not even encountering a piracy incident is also over 99%.¹³³ Even if many piracy incidents or

¹²⁸ *Id.*

¹²⁹ Int'l Maritime Bureau, *Piracy News & Figures*, (Oct. 21, 2011) <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> (last visited Nov. 7, 2011) [Electronic copy provided in accompanying USB flash drive at Source 91].

¹³⁰ See, e.g., Jonathan Saul, *Somali Piracy Set to Surge as Monsoon Ends: EU Navy*, REUTERS (Sept. 14, 2011, 3:24 PM) <http://af.reuters.com/article/topNews/idAFJOE78D0K720110914> [Electronic copy provided in accompanying USB flash drive at Source 11].

¹³¹ BAHADUR, *supra* note 96 at 46 [Electronic copy provided in accompanying USB flash drive at Source 63].

¹³² *Factbox: The Dangerous Gulf of Aden*, REUTERS (Jan. 27, 2011) <http://af.reuters.com/article/kenyaNews/idAFLDE70Q19S20110127> [Electronic copy provided in accompanying USB flash drive at Source 4].

¹³³ See IMB, *supra* note 129 (noting that 400 Somali piracy incidents have taken place so far) [Electronic copy provided in accompanying USB flash drive at Source 91].

hijackings go unreported, the overwhelming majority of ships would still travel safely through the Gulf of Aden without any incident. Unlike in *Limaj* and *Boskoski* where attacks and the seriousness increased over time,¹³⁴ the number of hijackings has significantly varied over time. Finally, unlike *Limaj* where civilians fled the area, the majority of merchant vessels are still traveling through the geographic area where Somali piracy is taking place, likely because the risk of a hijacking is so low.

Some may argue that because Somali piracy is a form of terrorism, it should meet the intensity threshold. Several scholars have argued that the tactics used by the Somali pirates are similar to the Al-Qaeda and therefore an armed conflict may exist between the Somali pirates and various states.¹³⁵ Moreover, the Somali pirates' hostage taking is in violation of the Convention For the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation¹³⁶ ("SUA Convention" or "SUA") that was designed to prevent maritime terrorism on the high seas.¹³⁷ Finally, some court decision, and UN organs have indicated that terrorist acts are likely to viewed as meeting the intensity threshold for an armed conflict. For example in *Boskoski* the ICTY Trial Chamber noted that "acts of terrorism" can satisfy the intensity

¹³⁴ See generally Prosecutor v. Boskoski and Tarculovski, Case No. IT-04-82-T, Judgment, ¶¶208-249 (Int'l Crim. Trib. for Former Yugoslavia July 10, 2008). [Electronic copy provided in accompanying USB flash drive at Source 46]; Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶¶135-170, (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) [Electronic copy provided in accompanying USB flash drive at Source 48].

¹³⁵ See generally Eugene Kontorovich "A Guantánamo on the Sea": *The Difficulties of Prosecuting Pirates and Terrorists* 98 CAL. L. REV. 243, 259-262 (2010) (arguing that Somali pirates could qualify as combatants by comparing the pirates to Al-Qaeda) [Electronic copy provided in accompanying USB flash drive at Source 18]; Milena Sterio, *Fighting Piracy in Somalia (And Elsewhere): Why More is Needed*, 33 FORDHAM INT'L L.J. 372, 400-405 (2010) (comparing Somali pirates to al-Qaeda) [Electronic copy provided in accompanying USB flash drive at Source 23].

¹³⁶ See SUA, *supra* note 9 at arts.3(1)-(2) ("Any person [that] unlawfully and intentionally: (1) seizes or exercises control over a ship by force or threat thereof or...intimidation; or (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.") [Electronic copy provided in accompanying USB flash drive at Source 31].

¹³⁷ See Sterio, *supra* note 135 at 405 (noting the purpose of SUA) [Electronic copy provided in accompanying USB flash drive at Source 23].

threshold assuming they hostilities are “protracted” rather than “isolated or sporadic acts of violence.”¹³⁸ Other national courts have agreed with this proposition as well. The United States Supreme Court has concluded the United States is in an armed conflict with Al-Qaeda after the September 11 terrorist attacks on the World Trade Center.¹³⁹ Additionally, the Israeli Supreme Court has determined Israel has been in an armed conflict with various Palestinian terrorist organizations since the first intifada.¹⁴⁰ Finally, the United Nations Commission of the Inquiry on Lebanon determined that an international armed conflict existed between Hezbollah and Israel even though Israel recognized Hezbollah as a terrorist organization.¹⁴¹

However, these situations of terrorism are different from the current situation in Somalia because of the amount of civilian casualties, the intent to inflict civilian casualties, and the international response to Somali piracy. First, Somali piracy is distinguishable from the Sept. 11 terrorist attacks due to the disparity in deaths. While the Sept. 11 attacks are estimated to have caused 2,981 deaths,¹⁴² the total amount of deaths caused by Somali piracy range about 10-30 civilians.¹⁴³

¹³⁸ Prosecutor v. Boskoski and Tarculovski, Case No. IT-04-82-T, Judgment, ¶¶186-87 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008) [Electronic copy provided in accompanying USB flash drive at Source 46].

¹³⁹ Hamdan v. Rumsfeld 548 U.S. 557 (2006) [Electronic copy provided in accompanying USB flash drive at Source 72].

¹⁴⁰ HCJ 769/02 The Public Committee Against Torture in Israel v. The Government of Israel, ¶16, (2006) (unpublished); online English at: <http://elyon1.court.gov.il/files.eng/02/690/007/a34/02007690.a34.pdf> [Electronic copy provided in accompanying USB flash drive at Source 1].

¹⁴¹ Human Rights Comm, *Report of the Comm’n of Inquiry on Lebanon, Pursuant to Human Rights Council Resolution S-2/1*, ¶¶8,9,57, U.N. Doc. A/HRC/3/2 (Nov. 23, 2006). [Electronic copy provided in accompanying USB flash drive at Source 89].

¹⁴² NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE SEPTEMBER 11 COMMISSION REPORT: EXECUTIVE SUMMARY 1-2 (2004) *available at* http://www.9-11commission.gov/report/911Report_Exec.pdf [Electronic copy provided in accompanying USB flash drive at Source 96].

¹⁴³ *See* IMB, *supra* note 129 (noting only 15 people have been killed as a result of Somali piracy in 2011) [Electronic copy provided in accompanying USB flash drive at Source 91]. *See also* Ansel Halliburton, *Pirates Versus Mercenaries: Purely Private Transnational Violence at the Margins of International Law* 3 (“[T]he low

Even though these low civilian death tolls are numerically similar to the Israeli death tolls for Palestinian terrorist attacks,¹⁴⁴ Somali piracy is distinguishable from these attacks because the primary motivation of Somali piracy is to exchange individuals and their ships in exchange for money¹⁴⁵—not to kill individuals on the ships. Although the distinction may be slight, the intention changes the nature of the acts. While Palestinian terrorist organizations are intentionally targeting civilian populated areas,¹⁴⁶ Somali pirates generally appear to kill individuals as only “collateral damage” to their ransom operations. In fact, there has only been one documented incident of a Somali pirate attack where the sole objective was kill individuals.¹⁴⁷ Because Somali pirates are more interested in capturing individuals and their possessions than killing these individuals, Somali pirates are distinguishable from terrorist acts that have satisfied the armed conflict analysis.

Instead Somali pirate syndicates are more analogous to transnational crimes, such as human trafficking, and thus fail to meet the intensity threshold. For example, the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children (“Human Trafficking Convention”) defines human trafficking as:

number of injuries and deaths takes away much of the force of popular reporting on the scale of the [Somali piracy] threat.”) *available at* <http://ssrn.com/abstract=1755214> [Electronic copy provided in accompanying USB flash drive at Source 15].

¹⁴⁴ B’TSELEM, INVESTIGATION INTO THE FATALITIES OF OPERATION CAST LEAD 2 (Sept. 9, 2009) *available at* http://www.btselem.org/download/20090909_cast_lead_fatalities_eng.pdf [Electronic copy provided in accompanying USB flash drive at Source 85].

¹⁴⁵ *See supra* notes 104-107 and accompanying text.

¹⁴⁶ ISRAELI MINISTRY OF FOREIGN AFFAIRS, *The Hamas War on Terror Against Israel*, (March, 2011) <http://www.mfa.gov.il/MFA/Terrorism--Obstacle+to+Peace/Hamas+war+against+Israel/Missile+fire+from+Gaza+on+Israeli+civilian+targets+Aug+2007.htm> (last visited Oct. 23, 2011) (noting the intentional targeting of Israeli cities) [Electronic copy provided in accompanying USB flash drive at Source 94].

¹⁴⁷ *See French Warship Detains Pirates, supra* note 112 [Electronic copy provided in accompanying USB flash drive at Source 6].

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁴⁸

When compared to this definition, Somali pirate operations appear very similar because these operations involve the use of force to capture individuals and extortion of these kidnapped individuals' families or employers. However, these pirate operations are distinguishable because of the lack of "exploitation" in Somali piracy. Because individuals being held hostage are not transferred to individuals where they will be forced into performing sexual services or other forms of labor, Somali pirates could not be guilty of human trafficking under this definition. But this lack of "exploitation" goes to the *mens rea* of the human trafficker and does not affect the *actus reus* of the seizure of a victim.¹⁴⁹ Given that Somali piracy is only distinguishable from human trafficking through the *mens rea* of human trafficking, this suggests that the *actus reus* of a criminal organization taking several individuals is of insufficient gravity to be considered an armed conflict. So far no State has treated a human trafficking problem as if it were an armed conflict and therefore Somali piracy should be treated similarly. Consequently, even if Somali piracy qualifies as terrorism, this form of terrorism is distinguishable from terrorism that has been found to meet the intensity threshold for an armed conflict.

¹⁴⁸ See Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25 Annex II, U.N. GAOR, 55th Sess., Supp. No. 49, at Art. 3 (2001) [Electronic copy provided in accompanying USB flash drive at Source 44].

¹⁴⁹ See *id.* "[F]or the purposes of exploitation" clearly establishes human trafficking as a specific-intent crime. As such, a failure to meet this *mens rea* but satisfy all other elements suggests that a "lesser" offense has been committed.

Finally, the United Nations Security Council has consistently treated the situation in Somalia as if international human rights law applied. Every Security Council resolution authorizing the use of force has required States to comply with the UNCLOS use of force legal regime¹⁵⁰ when combating terrorism.¹⁵¹ Although Security Council Resolution 1851 authorized the use of force “in Somalia” that was consistent with “international humanitarian law,” the phrase in Somalia refers to the Somali mainland and not its territorial waters or the high seas.¹⁵² Because the UNCLOS legal regime is a part of international human rights law, this factor should weigh in favor of finding the intensity threshold has not been met.

3. Protracted Hostilities

The length of protracted hostilities is long enough to qualify as an armed conflict. Although there is no predetermined length that hostilities must last for in order to be an armed conflict, Somali piracy unquestionably meets this standard. For instance, International Criminal Tribunal for Rwanda found that armed conflict existed during the 1994 genocide in Rwanda,¹⁵³

¹⁵⁰ See *infra* Part IV(c)-(d) for explanation of UNCLOS legal regime.

¹⁵¹ S.C. Res. 1976, U.N. Doc., S/RES/1976 (April 11, 2011) (“Reaffirming that international law, as reflected in the United Nations Convention on the Law of the Sea...sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities.”) [Electronic copy provided in accompanying USB flash drive at Source 52]; S.C. Res. 1950, U.N. Doc., S/RES/1950 (Nov. 23, 2010) (“Renews its call upon States...to take part in the fight against piracy...off the coast of Somalia...consistent with...international law, by deploying naval vessels, [to prevent] the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use”) [Electronic copy provided in accompanying USB flash drive at Source 53]; S.C. Res. 1897, U.N. Doc., S/RES/1897 (Nov. 30, 2009) (affirming that UNCLOS provides the relevant legal framework for combatting piracy) [Electronic copy provided in accompanying USB flash drive at Source 54]; S.C. Res. 1846, ¶9, U.N. Doc. S/RES/1846 (Dec. 2, 2008) [Electronic copy provided in accompanying USB flash drive at Source 55].

¹⁵² GEIB & PETRIG, *supra* note 19 at 86 (“[O]perative paragraph 6, [the paragraph authorizing the use of all necessary measures consistent with international humanitarian law,] of Security Council Resolution 1851 only applies on the Somali mainland...”). [Electronic copy provided in accompanying USB flash drive at Source 64].

¹⁵³ Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶604 (Sep. 2 1998) [Electronic copy provided in accompanying USB flash drive at Source 45].

even though the Tribunal only had temporal jurisdiction over the 1994.¹⁵⁴ Given that the modern era of piracy started in 2007,¹⁵⁵ a four-year time period is likely long enough for an armed conflict to form assuming the other two requirements are met during this time period.

4. Conclusion of Armed Conflict Analysis

There is not an armed conflict on the high seas due to Somali piracy because there are not sufficiently organized groups to rise above the level of mere criminal gangs. Even if some Somali pirate syndicates may qualify as organized groups, there is not an identifiable organized group against who these pirate syndicates are fighting. Additionally, even if all of the successfully pirate attacks, hostage-takings, and killings are attributable to “organized groups,” these actions are of insufficient gravity to rise to the level of an armed conflict.

c. Ships Acting Upon and States Issuing Letters of Marque would be Liable for Piracy

Several scholars have proposed that states, specifically the United States, should issue letters of marque and reprisal¹⁵⁶ in order to combat piracy.¹⁵⁷ According to these scholars, authorizing private individuals to engage in self-help measures against piracy will better protect

¹⁵⁴ Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) [Electronic copy provided in accompanying USB flash drive at Source 56].

¹⁵⁵ GEOPOLICITY, *supra* note at 89, annex. 1) [Electronic copy provided in accompanying USB flash drive at Source 88].

¹⁵⁶ Generally speaking, a letter of marque is “a license authorizing a private citizen to engage in reprisals against citizens or vessels of another nation.” BLACK’S LAW DICTIONARY (9th ed. 2009) [Electronic copy provided in accompanying USB flash drive at Source 86].

¹⁵⁷ *See, e.g.*, Todd Emerson Hutchins, *Structuring a Sustainable Letters of Marque Regime: How Commissioning Privateers can Defeat the Somali Pirates*, 99 CAL. L. REV. 819 (2011) [Electronic copy provided in accompanying USB flash drive at Source 27]; Theodore T. Richard, *Reconsidering The Letter of Marque: Utilizing Private Security Providers Against Piracy*, 39 PUB. CONT. L.J. 411 (2010) [Electronic copy provided in accompanying USB flash drive at Source 26]; D. Joshua Straub, *Letters of Marque: A Short-Term Solution to an Age-Old Problem*, 40 J. MAR. L. & COM. 261 (2009) [Electronic copy provided in accompanying USB flash drive at Source 16].

private vessels from piracy attacks and further current efforts to apprehend pirates.¹⁵⁸ Although closely related to privateering mentioned above,¹⁵⁹ this section will specifically analyze the relationship between the United States' letter of marque power and international law. This section will first explain the history of the United States letter of marque power and will then analyze whether the Paris Declaration on Respecting Maritime Law bound the United States to stop issuing letters of marque.

1. The Constitution Only Authorizes Letters of Marque Where There Is an Armed Conflict

The United States has possessed the power to issue letters of marque and reprisal since the Articles of Confederation. Under the Articles of Confederation, the United States Congress could issue letters of marque during peacetime¹⁶⁰ with the consent of at least nine states.¹⁶¹ States could issue letters of marque only if the United States Congress had made a declaration, and these letters of marque could be issued only against nation-states that the United States had entered or was about.¹⁶² Given the United States could issue letters of marque in time of peace, one might conclude that the framers of the Articles were attempting to create an ability to hunt pirates during times of undeclared war.

However it is more likely the framers of the Articles were more concerned about individual states issuing letters of marque and dragging the United States into a war with another

¹⁵⁸ Richard, *supra* note 157 at 416 (“This article advocates a revival of the letter of marque to empower the private sector to assist governments in dealing with modern piracy.”) [Electronic copy provided in accompanying USB flash drive at Source 26]

¹⁵⁹ *See supra* Part IV(a).

¹⁶⁰ ARTICLES OF CONFEDERATION of 1781 art. IX, para. 1. [Electronic copy provided in accompanying USB flash drive at Source 69].

¹⁶¹ *Id.* at para. 6

¹⁶² *Id.* at art. VI, para. 5.

state. By the 16th and 17th century, letters of marque and reprisal were seen as having the effect of war even though war had not been declared.¹⁶³ James Madison, in Federalist Paper No. 44 confirms that under the Articles of Confederation, the letter of marque power was tied directly to war with nation-states.¹⁶⁴ He claims:

The prohibition of letters of marque is another part of the old system, but is somewhat extended in the new. According to the former, letters of marque could be granted by the States after a declaration of war; according to the latter, these licenses must be obtained, as well during war as previous to its declaration, from the government of the United States. This alteration is fully justified by the advantage of uniformity in all points[,] which relate to foreign powers; and of immediate responsibility to the nation in all those for whose conduct the nation itself is to be responsible.¹⁶⁵

Madison's assertion demonstrates that at the time of the drafting the Constitution, the letter of marque power was seen as something that could be issued against a nation-state prior to a declaration of war. Thus the framers' decision to give Congress the exclusive power to declare war and grant letters of marque and reprisal¹⁶⁶ should be understood as matter of consolidating the war power in the federal government. Moreover, during the Constitutional Convention there is no record of piracy being mentioned during the discussions over the letter of marque clause.¹⁶⁷ Because Congress's ability to punish piracies on the high seas is immediately before Congress's

¹⁶³ Lobel, *supra* note 27 at 1044 [Electronic copy provided in accompanying USB flash drive at Source 21].

¹⁶⁴ THE FEDERALIST NO. 44, 199-200 (James Madison) (Penn State Univ. ed., 2001) [Electronic copy provided in accompanying USB flash drive at Source 71].

¹⁶⁵ *Id.*

¹⁶⁶ U.S. CONST. art 1. §8 cl. 10 (granting Congress the power to issue letters of marque and reprisal); *Id.* at §10 cl. 1 (excluding the states from issuing letters of marque and reprisal) [Electronic copy provided in accompanying USB flash drive at Source 83].

¹⁶⁷ ALFRED P. RUBIN, THE LAW OF PIRACY 125 (1988) ("There was no reference to piracy in the discussion of that provision as recorded by Madison.") [Electronic copy provided in accompanying USB flash drive at Source 59].

letter of marque power in the Constitution,¹⁶⁸ one would think piracy would have been mentioned at the Convention. In all probability, the framers weren't thinking of piracy when drafting the letter of marque clause as a letter of marque had not been issued by a colony in over 60 years.¹⁶⁹

Moreover, the subsequent practice of the United States suggests after ratifying the Constitution, no one thought the letter of marque authorized the use of force against pirates that were not a part of an armed conflict. Although many commentators claim that Congress can issue letters of marque to hunt pirates, no commentator can point to an instance where the United States has issued a letter of marque outside of an armed conflict.¹⁷⁰ In fact, the historical record indicates that letters of marque were only issued were during the Revolutionary War,¹⁷¹ the United States “Quasi War” with France (1798-1800),¹⁷² and the War of 1812¹⁷³—all of which were armed conflicts between states. Finally, several United States court decisions also claim

¹⁶⁸ U.S. CONST. art 1. §8 cl. 9-10 [Electronic copy provided in accompanying USB flash drive at Source 83].

¹⁶⁹ *See supra* notes 30-33 and accompanying text .

¹⁷⁰ *See* Richard *supra* note 157 at 437 (noting that individuals wanted letters of marque to be blockade runners and for self-defense) [Electronic copy provided in accompanying USB flash drive at Source 26]. *But see* Rome Statute, *supra* note 6 at art. 31(c) (noting the distinction between individual self-defense and a defensive military operation) [Electronic copy provided in accompanying USB flash drive at Source 51]

¹⁷¹ *See generally* MACLAY, *supra* note 33 at x-xx [Electronic copy provided in accompanying USB flash drive at Source 60].

¹⁷² *Id.*

¹⁷³ *Id.*

issuing a letter of marque would be the equivalent of declaration of war,¹⁷⁴ and that the power to issue letters of marque was exclusively to be used in an international armed conflict.¹⁷⁵

Although it isn't clear why the United States would adopt such a restrictive view of the letter of marque power, one possible explanation is that at the time of ratifying the Constitution the United States believed that private actors could freely capture pirates on the high seas without a commission as a matter of international law. Alfred P. Rubin¹⁷⁶ has noted that in the late 1700s there were no statutes requiring pirate hunters to obtain a letter of marque from the government to hunt pirates, although it is clear private individuals could hunt pirates.¹⁷⁷ Moreover, the United States Supreme Court declared in the early 1800s that private or public ships could both attack pirate ships.¹⁷⁸

The Court's position regarding international law on private actors being able to hunt pirates without a license is no longer customary international law and (likely was contrary to international opinion at the time¹⁷⁹). Article 107 of the United Nations Convention on the Law of the Sea and article 21 of the Geneva Convention on the High Seas both state that all seizures on the high seas may be carried out only by warships or military aircraft, or other ships or aircraft

¹⁷⁴ *Barron v. Baltimore* 32 U.S. (7 Pet.) 243, 249 (1833) (To grant letters of marque and reprisal, would lead directly to war; the power of declaring which is expressly given to [C]ongress.) [Electronic copy provided in accompanying USB flash drive at Source 70].

¹⁷⁵ *Norris v. Doniphan* 4 Met. 385, 386 (Ky. Ct. App. 1863) (claiming the *Prizes Case* held That clause of the constitution which authorizes Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water"...relates only to wars with foreign nations.") [Electronic copy provided in accompanying USB flash drive at Source 76].

¹⁷⁶ Alfred P. Rubin is the Distinguished Professor Emeritus of International Law of the Fletcher School at Tufts University.

¹⁷⁷ RUBIN, *supra* note 167 at 128 [Electronic copy provided in accompanying USB flash drive at Source 59].

¹⁷⁸ *The Marianna Flora*, *supra* note 34 [Electronic copy provided in accompanying USB flash drive at Source 77].

¹⁷⁹ *See e.g.*, Schwartz, *supra* note 30 ("BY 1704 an Englishman needed a commission...in order to "hunt" pirates) [Electronic copy provided in accompanying USB flash drive at Source 14]. *See also* WEBSTER, *supra* note 25 [Electronic copy provided in accompanying USB flash drive at Source 101].

on government service authorized to that effect.¹⁸⁰ Consequently, the framers' understanding of the letter of marque power as limited to armed conflict between States could make it unconstitutional for Congress to issue letters of marque against pirates who are not parties to an armed conflict.

If Congress issued letters of marque against pirates, and these letter of marque were to be found unconstitutional, then private contractors who used force against pirates on the high seas under the authority of these letters of marque and would be liable for damages under the Alien Tort Statute (ATS). The ATS provides that “the district courts [of the United States] shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁸¹ In order for a suit to fall inside of the Alien Tort Statute the plaintiff must (1) be an alien¹⁸² and (2) allege tortious conduct that violates a customary international legal norm with a specificity comparable to the 18th century paradigms the Court has recognized being customary international law for the purposes of the Alien Tort Statute.¹⁸³ Although many suits under the ATS are unable to show they possess the requisite “specificity” under international law,¹⁸⁴ piracy is one of the crimes the Supreme Court has expressly held to meet this specificity threshold.¹⁸⁵

¹⁸⁰ UNCLOS *supra* note 9 at art. 107 [Electronic copy provided in accompanying USB flash drive at Source 57]; GCHS, *supra* note 9 at art. 24 [Electronic copy provided in accompanying USB flash drive at Source 34]; See *infra* Part IV(d) for further analysis of this article.

¹⁸¹ 28 U.S.C. §1350 (2006) [Electronic copy provided in accompanying USB flash drive at Source 68].

¹⁸² *Id.*

¹⁸³ *Sosa v. Alveraz-Machain*, 542 U.S. 692, 724 (2004) [Electronic copy provided in accompanying USB flash drive at Source 78].

¹⁸⁴ See, e.g., *Kiobel v. Royal Dutch Petroleum* 621 F.3d 111 (2nd Cir. 2010) *cert. granted*, No. 10-1491 (Oct. 17, 2011) (holding that corporations cannot violate customary international human rights law) [Electronic copy provided in accompanying USB flash drive at Source 73] See also *Sosa*, 542 U.S. 692 (holding kidnapping did not possess the specificity required to be consideration a violation of the law of nations for the purposes of the Alien Tort Statute) [Electronic copy provided in accompanying USB flash drive at Source 78].

Under UNCLOS, piracy is defined as: “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” against another private ship or persons aboard that private ship on the high seas.¹⁸⁶ Under this definition, armed security guards on board a ship could not commit piracy because the UNCLOS definition requires two ships. However, private security forces on a patrol boat that attack a pirate vessel or a ship under attack would satisfy the two-ship requirement.

Assuming the two-ship requirement is met, the next question is whether the belief that one possessed a lawful or constitutional license to attack prevents one from possessing a “private purpose” under the UNCLOS definition of piracy. The commentaries on UNCLOS suggest that the primary objective of the “private purpose” prong to piracy was to exclude acts of violence that were committed for “political motives.”¹⁸⁷ Given that private security contractors work for monetary gain, it is difficult to see how this could qualify as a political motive.

Additionally, historical practice supports the proposition that a mistake about the legality of the commission is not a defense to piracy. For instance, during the Civil War, President Lincoln declared that the Confederacy’s letters of marque would not be recognized and any Confederate privateer would be tried for piracy.¹⁸⁸ Moreover, during the war, Confederate

¹⁸⁵ *Sosa*, 542 U.S. at 724 [Electronic copy provided in accompanying USB flash drive at Source 78].

¹⁸⁶ UNCLOS, *supra* note 9 at art. 101 [Electronic copy provided in accompanying USB flash drive at Source 57].

¹⁸⁷ 3 CENTER FOR OCEANS LAW AND POLICY, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 200 (Myron H. Nordquist, et. al., eds. 1995) [hereinafter “UNCLOS Commentary”] [Electronic copy provided in accompanying USB flash drive at Source 58].

¹⁸⁸ 12 Stat. at Large at 1259 (1863) (“I [President Lincoln] hereby proclaim and declare that if any person under the pretended authority of the [Confederate] States...such a person will be held amenable to the law of the United States for the prevention and the punishment of piracy.”) available at <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=012/llsl012.db&recNum=1312> [Electronic copy provided in accompanying USB flash drive at Source 66].

privateers were brought up on charges for piracy,¹⁸⁹ and the district court held that Confederate privateers could be charged with piracy because the United States did not recognize the Confederacy as a lawful government or a belligerent at the time.¹⁹⁰ Moreover, the United States frequently punished foreign privateers on valid commissions, under an issuing states' domestic law, piracy if such privateers happened to violate a United States treaty.¹⁹¹ Consequently, a mistake as to the legality of one's commission would not be a defense to the charge of piracy. Therefore, individuals sailing on letters of marque from the United States could (if the letter of marque power cannot be exercised against non-state actors unassociated with an armed conflict) potentially face civil actions under the Alien Tort Statute and possibly other criminal charges from other States.

Alternatively, U.S. courts may deem the question of whether a letter of marque can be issued against non-state actors unaffiliated with an armed conflict a "political question" and therefore not rule on the issue. Should United States courts refuse to rule on the legality of the letter of marque, the liability for damages would shift to the United States. Under the *Draft Articles of State Responsibility*¹⁹² ("Draft Articles") a state can be held responsible for breaching

¹⁸⁹ See *United States v. Baker* 24 F. Cas. 962, 963 (C.C.S.D.N.Y 1861) (No. 14,501) (indicting Confederate privateers for, among other things, "[p]iracy according to the law of nations....") [Electronic copy provided in accompanying USB flash drive at Source 80].

¹⁹⁰ *Id.* at 966

¹⁹¹ See RUBIN, *supra* note 167 at 155-56 (noting that Americans who sailed under foreign letters of marque against the United States or an ally to the United States could be prosecuted as pirates) [Electronic copy provided in accompanying USB flash drive at Source 59].

¹⁹² Int'l L. Comm'n, *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, Y.B.INT'L L.COMM'N, (2001) [hereinafter "Draft Articles"], *adopted through* Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002) [Electronic copy provided in accompanying USB flash drive at Source 37]. See also *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), 1997 I.C.J. 7, ¶¶47-49 (Sept. 25) (determining the Draft Articles are a source of customary international law) Electronic copy provided in accompanying USB flash drive at Source 33].

an international obligation that is attributable to that State.¹⁹³ Under Article 8 of the Draft Articles, conduct that is attributable to a State “if [a] person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”¹⁹⁴ Comment 2 specifically states private actors actions can be attributed to a state as long as the state had authorized the action.¹⁹⁵ Finally, even if a private contractor were to exceed the authority of his letter of marque, this would not exculpate the United States because article 7 forbids a defense that an individual acted outside the scope of authority.¹⁹⁶ Therefore, the conduct of private contractors acting upon letters of marque would be attributable to the United States. Consequently, the only remaining issue is to determine whether the United States would have committed an international wrongdoing.

2. Issuing Letters of Marque is Contrary to the 1856 Paris Declaration, the Law of the Seas Convention

The Paris Declaration, the Law of the Sea Convention, binds the United States and because the United States indicated through its words and actions that private contractors must be incorporated in a State before these actors can use force on the high seas. Under international law, a customary international legal norm exists when longstanding and widespread practice among states is undertaken because of a sense of legal obligation to perform or refrain from performing an act.¹⁹⁷ The International Court of Justice has emphasized that *opinio juris*—a

¹⁹³ Draft Articles, at arts. 1-2 [Electronic copy provided in accompanying USB flash drive at Source 37].

¹⁹⁴ *Id.* at art. 8.

¹⁹⁵ *Id.* at cmt. 2.

¹⁹⁶ *Id.* at art. 7 (“The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions.”).

¹⁹⁷ North Sea Continental Shelf (F.R.G. v. Den.), 1969 I.C.J. 3, ¶41-44 (Feb. 20) [Electronic copy provided in accompanying USB flash drive at Source 41].

State's belief as to its legal obligations—must be carefully distinguished from political statements or conduct that is performed out of political convenience.¹⁹⁸ In the case of privateering, the United States created its *opinio juris* to ban privateering during the Paris Declaration and the United States, along with the vast majority of other states, has consistently abstained from privateering since the Declaration. Thus, if the United States were to issue letters of marque to private contractors, the United States would be in violation of an international legal obligation. As a result, the United States would be liable for any damages resulting from a private contractor acting upon a letter of marque.

The 1856 Paris Declaration on Respecting Maritime Law declared that “privateering is and remains abolished.”¹⁹⁹ The impetus behind the Paris Declaration was to increase the rights of neutral States, whose ships would often be raided during war, while protecting the major naval powers’ (Britain, France and Russia) military advantage at sea.²⁰⁰ Because the major naval powers had the ability to blockade ports, major naval powers did not need to rely upon privateering’s commerce raiding to disrupt an enemy’s commerce.²⁰¹ On the other hand, the United States, due to its relatively weaker naval power compared to Britain, strenuously objected to the Paris Declaration, because privateering was critical to the United States naval military strategy.²⁰²

¹⁹⁸ *Id.* at 44.

¹⁹⁹ Paris Declaration, *supra* note 38 [Electronic copy provided in accompanying USB flash drive at Source 42].

²⁰⁰ See Parrillo *supra* note 31 at 58 (noting privateers could never be an advantage to Britain because of its large navy) [Electronic copy provided in accompanying USB flash drive at Source 24].

²⁰¹ *Id.*

²⁰² *Id.* at 58-59.

However, the United States objected to the Paris Declaration because the Declaration did not go far enough by banning public naval ships from engaging in commerce raiding. At the conference in Paris, Secretary of State William Marcy argued that the privateering clause augmented to include a “the private property of the subjects or citizens of a belligerent on the high seas shall be exempted from seizure by public armed vessels of the other vessels....”²⁰³ Thus, the United States *opinio juris* was actually more expansive than the Declaration of Paris. Although some scholars have questioned whether Marcy genuinely proposed the amendment,²⁰⁴ Marcy’s personal letters actually indicate he actively courted weaker naval states and believed the amendment would succeed if he could overcome Britain’s objections to it.²⁰⁵

Moreover, after the Paris Declaration, the United States, as well as several other states refrained from practicing privateering. An essential feature of a privateer, and consequently of issuing a letter of marque, is that the United States would not pay or supply arms for a privateer to conduct its operations.²⁰⁶ In this respect, privateers differed from the later used “auxiliaries,”²⁰⁷ because a letter of marque authorized a private individual to engage in self-help measures, whereas an auxiliary became a part of the government. Therefore an auxiliary’s

²⁰³ STARK, *supra* note 44 at 367-68 [Electronic copy provided in accompanying USB flash drive at Source 61].

²⁰⁴ See Parrillo, *supra* note 31 at 60-62 (arguing Marcy’s amendment was a mere rhetorical dodge to avoid the regulation problems of privateers). [Electronic copy provided in accompanying USB flash drive at Source 24].

²⁰⁵ See STARK *supra* note 33 at 371 (quoting Marcy as claiming “Russia has already [accepted the amendment]—and several other powers have received it with favor. If there is sturdy resistance in any quarter it will come from England.”) [Electronic copy provided in accompanying USB flash drive at Source 61].

²⁰⁶ MACLAY, *supra* note 33 at 7 (“The privateer... was a ship armed and fitted out at private expense for the purpose of preying on the enemy’s commerce to the profit of her owners, and bearing a commission or a letter of marque, authorizing her to do so, from the [g]overnment.”) [Electronic copy provided in accompanying USB flash drive at Source 60]. Although the origins of this policy are not clear, the United States likely wanted to avoid possessing a large navy, due to fear of a large federal government. See Parrillo *supra* note 31 at 58 [Electronic copy provided in accompanying USB flash drive at Source 24].

²⁰⁷ See *supra* Part IV(a) for discussion of auxiliaries.

conduct would not be government sanctioned private self-help, but rather it would be an incorporation or “nationalization” of a private entity.

As previously mentioned,²⁰⁸ States resorted to auxiliaries likely out of sense of legal obligation. By 1909, all of the Latin American and European nations had become parties to the Paris Declaration. As for the United States, one would think that the United States would have issued letters of marque during its Civil War, the Spanish-American War, WWI or WWII if it thought it still had the international legal freedom to do so. Instead, the United States proceeded, just as Prussia had in the 1870s,²⁰⁹ by incorporating private ships as auxiliaries to fight wars.²¹⁰

Even if there were insufficient state practice to declare a customary norm or United States’ *opinio juris* had not been crystalized by WWII, both prongs needed to form a customary international norm binding upon the United States were satisfied when the United States ratified the Geneva Convention on the High Seas²¹¹ and declared the United Nations Convention on the Law of the Sea to be customary international law.²¹² Article 107 of UNCLOS and the High Seas Convention both stipulate a “seizure on account of piracy may be carried out only by warships or

²⁰⁸ *Id.*

²⁰⁹ *See supra* note 42 and accompanying text.

²¹⁰ *See e.g.*, NUNEZ, *supra* note 45 [Electronic copy provided in accompanying USB flash drive at Source 65].

²¹¹ Geneva Convention on the High Seas, *opened for signature* April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200 (entered into force Sept. 30, 1962) [Electronic copy provided in accompanying USB flash drive at Source 34].

²¹² *United States v. Alaska* 503 U.S. 569, 588 n.10 (1992) (noting the United States brief claimed “[t]he United States has not ratified [the United Nations Convention on the Law of the Sea], but has recognized that its baseline provisions reflect customary international law.”) (alterations in the original) [Electronic copy provided in accompanying USB flash drive at Source]. *See also* 18 U.S.C. §1651 (2006) (defining the punishment for piracy on the high seas “as defined by the law of nations) [Electronic copy provided in accompanying USB flash drive at Source 67].

military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”²¹³

One could possibly argue that a letter of marque makes a private ship as being “on government service and authorized to that effect.” However, the better interpretation is that UNCLOS only allows states to use auxiliaries or public ships that are outside the armed forces discipline of a state. First, letters of marque only authorize a private ship to attack others, but do not incorporate those ships into the State.²¹⁴ Therefore interpreting a privateer to fall within those guidelines would make “on government service” repetitive with “authorized to that affect.” Consequently, this interpretation should be rejected because it renders “on government service” without meaning.

Additionally, interpreting “on government service and authorized to that affect” as authorizing auxiliaries is consistent with the context and the drafting history of the Law of the Sea treaty. Although the International Law Commission had originally proposed that the right to seize ships on account of piracy be restricted to warships, Panama objected this interpretation as too restrictive. Specifically, Panama was concerned that some states would lack funds to produce or lack the political will to deploy warships.²¹⁵ As a solution, Panama suggested that “any vessel on state service...[should be able to] make seizures on account of piracy.”²¹⁶ Panama’s position cannot be understated given the definition of a warship. Under Article 29 of UNCLOS and article 8 of the High Seas Convention, a warship must be a ship that (1) belongs to the armed

²¹³ UNCLOS, *supra* note 9 [Electronic copy provided in accompanying USB flash drive at Source 57]

²¹⁴ *See supra* note 217 and accompanying text noting that privateers were outfitted at their private expense and were not paid by the government.

²¹⁵ United Nations Convention on the Law of the Sea I, IV Off. Rec. 117, 30, A/CONF.13/40 (1958) [Electronic copy provided in accompanying USB flash drive at Source 100].

²¹⁶ *Id.*

forces of a State; (2) bears the external marks distinguishing that state from other ships of its nationality; (3) under the command of a duly commissioned officer; (4) whose name appears on an official service list; and (5) is manned by a crew that is under the discipline of the armed forces.²¹⁷ Given that any ship that lacks any of these criteria is not a warship, Panama likely wanted to allow law pirate seizures to extend to government ships that are not manned by someone under the armed forces, or in the case of auxiliaries, ships that are not owned by the armed forces but still incorporated into the state as a volunteer force.

The consequence of article 29 of UNCLOS and article 8 of the High Seas Convention is to prevent States from issuing letters of marque to private citizens. Consequently, there is an international legal obligation to refrain from issuing letters of marque to private individuals; any state that does do so shall be liable for those ships conduct.

d. Current Rules of Engagement for Private Actors are Limited To Self-Defense Against One's Vessel.

Under customary international law, self-defense is defined as “when a person acts reasonably to defend himself, herself, or another person...to protect against and immanent or unlawful use of force in a manner proportionate to the degree of danger to the [oneself] or other person being protected.”²¹⁸ Although there is some debate over whether self-defense includes the defense of property,²¹⁹ the UNCLOS commentaries suggest that the defense of the vessel on the

²¹⁷ UNCLOS, *supra* note 9 at art. 29 [Electronic copy provided in accompanying USB flash drive at Source 57].; GCHS, *supra* note 9 at art. 8 [Electronic copy provided in accompanying USB flash drive at Source 34].

²¹⁸ Rome Statute, *supra* note 6 at art. 31(c) [Electronic copy provided in accompanying USB flash drive at Source 51].

²¹⁹ *Compare Id.* (stating self-defense to be exercised in defense of property in the case of a war crime) *with* Prosecutor v. Kordic & Cerkez, IT-9514/2-T, Judgment, ¶ (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001) (“The notion of ‘self-defence’ may be broadly defined as providing a defence to a person who acts to defend or protect himself *or his property* (or another person or person’s property) against attack.”) (emphasis added) [Electronic copy provided in accompanying USB flash drive at Source 49].

high seas is a form of self-defense. During the drafting of UNCLOS, several states wanted to clarify that a victim vessel of piracy could board that pirating vessel in self-defense without breaching the prohibition of private actor seizures of pirate ships.²²⁰ However, this definition of self-defense is limited in scope because it does not allow a private third-party (such as a patrol boat) to attack a pirate ship that is attacking a merchant. Thus, the definition of self-defense on the high seas does allow for the protection of personal property (i.e. the vessel) but does so at the expense of allowing private third parties to help protect

There is currently no international consensus on whether the “reasonableness” of force being should be evaluated by a objective test or whether the “reasonableness” should be evaluated through the vantage point of and/or the personal history of the defending party.²²¹ However, for the purposes of self-defense of a vessel on the crew or a high seas, an objective reasonable standard should and will likely be supplied. Because both the International Maritime Bureau and the International Maritime Organization issue guidelines on how to defend a ship against a pirate attack, the crew of any ship can be expected to read it and prepare accordingly. Because of the available industry standards on using force on the high seas, there is little policy to take into account of someone’s personal past and history given the available resources on the suggested rules of engagement for merchant vessels. Consequently, on the high seas, a strictly objective reasonableness test should be utilized.

A more controversial question is whether the use of armed security guards can use deadly force in response to a piracy attack. Although states have started to allow armed security guards

²²⁰ UNCLOS Commentary, *supra* note 187 at 223 (noting that a ship that seizes an attacking pirate vessel does not violate the prohibition that only warships can seize pirate vessels). [Electronic copy provided in accompanying USB flash drive at Source 58].

²²¹ GEER-JAN ALEXANDER KNOOPS, DEFENSE IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 66-69 (2nd ed. 2008) [Electronic copy provided in accompanying USB flash drive at Source 62].

to be present on ships travelling through the Gulf of Aden,²²² only the United States has given guidelines on what constitutes proportionate and reasonable force.²²³ Although some jurisdictions in the United States allow for the use of deadly force against kidnapping,²²⁴ the current United States Coast Guard Port Security Advisory only allows for lethal force to be used in self-defense if it is meant to prevent death or great bodily harm.²²⁵ Great bodily is specifically defined as “an injury to the body that results in unconsciousness, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”²²⁶ Because kidnapping or hijacking, particularly if there is no violent resistance when the pirates board the ship, does not cause those sorts of physical injury, the use of force to prevent piracy may be limited to nonlethal force. Consequently, some of the more passive defense measures, such as evasive maneuvering, posting fake body guards, or using barbed wire to deter boarding may be the only exercises of lawful self-defense that will not seriously be questioned by a court.

Although the civil legal systems do not differentiate between lethal or nonlethal forces, these legal systems still require a defendant to act reasonably under the circumstances. However, because the rules of engagement for self-defense are not properly defined, ship owners have little guidance on how to determine what is or is not proportionate in certain circumstances

²²² *Britain to Allow Armed Guards at Sea*, ASSOCIATED PRESS (Oct. 31, 2011) http://m.apnews.mobi/ap/db_6720/contentdetail.htm?contentguid=R9SnmqWJ [Electronic copy provided in accompanying USB flash drive at Source 2]

²²³ See Dep’t of Homeland Security, Port Security Advisory 3-09 76 Fed. Reg. 39 (2011) [hereinafter “PSA 3-09”] [Electronic copy provided in accompanying USB flash drive at Source 87].

²²⁴ MODEL PENAL CODE § 3.04[B] [Electronic copy provided in accompanying USB flash drive at Source 74].

²²⁵ PSA 3-09 at 413 [Electronic copy provided in accompanying USB flash drive at Source 87].

²²⁶ *Id.*

Finally, even if it become predictable on how courts will rule on the use of lethal force in self-defense, several states ban the possession of firearms in their ports.²²⁷ As a result, several private security guards will likely not possess firearms because they cannot possess those firearms at the ports where they may dock. Consequently, the ability for private security guards to protect against a pirate attack is, as a practical matter, severely limited to more passive defense techniques.

V. CONCLUSION

Under current international law, the ability for private actors to use force against pirates—whether it to defend against the attack of, or to seize a pirate vessel, is severely limited. Because the history of the use of force on the high seas has progressively limited the rights private actors,²²⁸ private actors cannot use force on the high seas unless it is to protect their own vessel or members on those vessels. Moreover, the ability to use lethal force could be quite limited as private actors' actions may be second-guessed by foreign courts or the private actors may be effectively prevented to carry arms because a vessel's port state bans firearms. Should states elect to authorize private actors to seize pirates, these states and private security companies face a substantial risk of their actions being held to be illegitimate by courts and may subsequently be forced to pay damages for their seizure.

²²⁷ See Robert S. Jeffrey, *An Efficient Solution in a Time of Economic Hardship: The Right to Keep and Bear Arms in Self-Defense Against Pirates*, 41 J. MAR. L & COMM. 507, 527 (2010) (noting many port states have laws that prevent firearms at their ports) [Electronic copy provided in accompanying USB flash drive at Source 25].

²²⁸ See *supra* Part IV(a) describing the history the private use of force on the high seas.