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Private Maritime Security Companies v. Pirates: The Battle of Legality

VANESSA ZEHNDER[†]

I. INTRODUCTION

Under the blue skies, and amid the calm waters of the Indian Ocean, a small boat that appears as a mere dot on the horizon approaches a massive cargo ship.¹ The serenity of the ocean is quickly shattered when a voice calls for warning shots through a radio.² Immediately following this order is the sound of rapid gun fire at the hands of a private security team.³ While the radio transmission only called for warning shots, there is no pause between the initial shots and the countless additional shots that follow.⁴ The gunfire continues for over one minute and causes the targeted skiff to lose control and collide with the cargo ship prior to drifting off into the horizon.⁵ Before the initial skiff is out of sight, another pirate skiff approaches the cargo ship and is met with similar gunfire.⁶ The situation depicted above illustrates the problem of allowing private maritime security companies (“PMSCs”) to “self-regulate”⁷ in the fight against piracy,

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1. J W, *Pirates Dead Bodies Floats as Pirates Fails and Shredded to Pieces. Pirates Tries to Hijack the Wrong Vessel*, YOUTUBE (July 14, 2017), https://www.youtube.com/watch?v=h5_oeFLpRvc.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. David Isenberg, *The Rise of Private Maritime Security Companies*, HUFFINGTON

which must be solved by implementing regulations for PMSCs to follow to protect both American ships, as well as international ships.⁸

Piracy is known as the “original universal jurisdiction crime.”⁹ Universal jurisdiction enables states to pursue pirates regardless of their nationality.¹⁰ The region in which piracy is most prevalent, and earned the name “Pirate Alley”, is the horn of Africa, which creates momentous difficulties because the Gulf of Aden is a heavily traveled commercial shipping route.¹¹ While the function of protecting ships against piracy is generally performed by the states, in recent times there has been a shift towards utilizing PMSCs for such protection.¹² Currently, “quick fix” solutions include using PMSCs as state employed anti-piracy task forces and as private security for merchant vessels traversing high-risk piracy regions.¹³ In some cases this has led to a presumption of guilt by the PMSC prior to proving guilt, and sometimes even a death sentence before proving guilt or providing any legal process.¹⁴ While it is legal for a state to pursue and seize pirates with its military, questions remain in regards to the largely unregulated grey area of using PMSCs to protect against piracy.¹⁵

This article will examine piracy as defined by the United Nations Convention on the Law of the Sea (“UNCLOS”) and other international statutory laws, as well as the history of piracy and the lack of regulation for PMSC.¹⁶ This article will then argue that PMSCs should have the legal ability to protect vessels and their cargo against pirates, a function generally performed by states, when performed in a regulated manner, by utilizing a mechanism such as letters of marque.¹⁷ Lastly, this article will analyze potential solutions for when PMSCs and pirates come into contact without regulation.¹⁸

POST (May 29, 2012, 1:50 PM), https://www.huffingtonpost.com/david-isenberg/private-military-contractors_b_1548523.html.

8. *Infra* Part III(C).

9. Tara Helfman, *Marauders in the Courts: Why the Federal Courts Have Got the Problem of Maritime Piracy (Partly) Wrong*, 62 SYRACUSE L. REV. 53, 55 (2012).

10. *Id.*

11. Sean Patrick Mahard, *Blackwater's New Battlefield: Toward a Regulatory Regime in the United States for Privately Armed Contractors Operating at Sea*, 47 VAND. J. TRANSNAT'L L. 331 (2014).

12. *Id.*

13. *Id.*

14. *See* J W, *supra* note 1.

15. Helfman, *supra* note 9, at 56.

16. *Infra* Part II.

17. *Infra* Part III.

18. *Infra* Part III(C).

II. BACKGROUND

A. Defining and Tracing the History of Piracy

Those who commit piracy have been labeled “*communis hostis omnium*,” which translates to the “common enemy of all.”¹⁹ Piracy is internationally defined by UNCLOS as:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State.²⁰

Additionally, Article 105 of UNCLOS supports universal jurisdiction to enforce against piracy, by providing that “every State may seize a pirate ship or aircraft.”²¹ The United Nations Security Council passed Resolution 2316, in addition to a variety of other resolutions,²² in an effort to provide authorization for nations to pursue pirates and to patrol the waters in high risk piracy areas, regardless of whether the area is within the high seas or territorial Somali waters.²³ In terms of international law, territorial sea means “the sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea.”²⁴ High seas refer to “the open ocean, not part of the exclusive economic zone, territorial sea or internal waters of any

19. Jonathan Bellish, *The Economic Cost of Somali Piracy 2012*, (Oceans Beyond Piracy, Working Paper, 2012).

20. United Nations Convention on the Law of the Sea, Dec. 10 1982, 1833 U.N.T.S. 101 [Hereinafter “UNCLOS”]. (The United States has signed, but the Senate has not ratified.)

21. *Id.* at 105.

22. See generally S.C. Res. 1676 (May 10, 2006); S.C. Res. 1838 (Oct. 7, 2008); S.C. Res. 1846 (Dec. 2, 2008); S.C. Res. 1851 (Dec. 16, 2008); S.C. Res. 1897 (Nov. 30, 2009); S.C. Res. 1918 (Apr. 27, 2010); S.C. Res. 1950 (Nov. 23, 2010); S.C. Res. 1976 (Apr. 11, 2011); S.C. Res. 2015 (Oct. 24, 2011); S.C. Res. 2020 (Nov. 22, 2011); S.C. Res. 2077 (Nov. 21, 2012); S.C. Res. 2383 (Nov. 7, 2017).

23. See S.C. Res. 2316 (Nov. 9, 2016) (Unanimously adopted to renew previous resolutions in regards to the fight against piracy and calls on both the Somali authorities and the states to do what they can to fight piracy).

24. UNCLOS, *supra* note 20 at Part II.

state.”²⁵

We often think of piracy as loosely organized and generally committed by poor individuals, that is no longer the reality of the situation.²⁶ In Somalia, piracy has become a very lucrative, socially acceptable profession and has created a new group of elites who own large homes, new cars, and vacation internationally.²⁷ Piracy has developed extensively to the point where the tables have turned to the rumored point of international businessmen asking pirates for loans.²⁸

While piracy has preyed on innocent ships for hundreds of years, it has made its appearance on the big screen in many recent works.²⁹ The most well-known and realistic depiction being the 2013 film, *Captain Phillips*.³⁰ The film’s director, Paul Greengrass, referred to the situation portrayed in the film as “a complex portrait of the myriad effects of globalization.”³¹ This film portrays the events of April 8, 2009, when Somali Pirates targeted the Maersk Alabama, which was en route to East Africa to deliver food aid.³² The situation, which occurred 145 miles off the Somali coast, progressed into a hostage situation and U.S. military forces ultimately killed the pirates.³³ While this particular story was turned into a blockbuster hit, it shares many similarities with the other 217 pirate attacks in 2009.³⁴

1. United States

In addition to its presence in international law, piracy also has roots within the legal system of the United States of America.³⁵ The

25. *High Seas*, Duhaime’s Law Dictionary (online ed.).

26. Robyn Hunter, *Somali Pirates Living the High Life*, BBC NEWS (Oct. 28, 2008, 9:16 AM), <http://news.bbc.co.uk/2/hi/africa/7650415.stm>.

27. *Id.*

28. *Id.*

29. CAPTAIN PHILLIPS (Sony Pictures 2013).

30. *Id.*

31. *Captain Phillips*, IMDB, <http://www.imdb.com/title/tt1535109/> (last visited Apr. 15, 2018).

32. Jennifer S. Martin, *Fighting Piracy with Private Security Measures: When Contract Law Should Tell Parties to Walk the Plank*, 59 AM. U. L. REV. 1363, 1364 (2010).

33. *Id.*

34. Jonathan Saul & Royce Cheah, *Piracy Attacks at Six-Year High in 2009: Watchdog*, REUTERS (Jan. 14, 2010, 8:19 AM), <https://af.reuters.com/article/topNews/idAFJJOE60D0DA20100114>; CAPTAIN PHILLIPS, *supra* note 29.

35. Piracy Under Law of Nations 18 U.S.C. § 1651 (1948) (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”). U.S. CONST. art. I, § 8 (“To define and punish piracies and felonies committed on the high seas, and offenses against the law of

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United States piracy statute automatically calls for a life sentence.³⁶ While the definition of piracy seems relatively straightforward, multiple legal cases disagree on what exactly is necessary to constitute the crime of piracy.³⁷ In the United States courts, the main point of contention is whether an actual taking is necessary to constitute piracy in the situation of an attempted attack that did not reach the point of a successful taking.³⁸ An actual taking is defined as: “a physical appropriation of an owner’s property by an entity clothed with eminent-domain authority.”³⁹ In the 2010 case, *United States v. Hasan*, the defendants thought they were attacking a merchant vessel, but actually attacked a United States Navy vessel.⁴⁰ The district court held that an actual taking is not required to qualify as piracy, and the statute can be fulfilled by an “act of violence” committed “on the high seas” for “private ends.”⁴¹ Similarly, two years later in *United States v. Dire*, the Fourth Circuit found that Congress’ proscription of piracy under 18 U.S.C. § 1651 “necessarily incorporated modern developments in international law” and that UNCLOS article 101 defines general piracy⁴² under modern customary international law.⁴³ Thus, the fourth circuit upheld jury instructions which do not require a taking to fulfill the crime of piracy.⁴⁴

Piracy does not solely target large commercial vessels.⁴⁵ Pirates kidnapped Rachel and Paul Chandlers, an older British couple, from their small yacht and held them hostage for thirteen months until their family paid the ransom.⁴⁶ Stemming from another incident, *United States v. Shibin* dealt with Mohammed Saaili Shibin who served as a translator on behalf of the pirates that were holding the twenty-two person crew of the M/V Marida Marguerite hostage, after they seized

nations”).

36. U.S.C. § 1651.

37. William Crum McKinney, *United States v. Said & United States v. Hasan*, 62 S.C.L. REV. 577 (2011). See *United States v. Said*, 680 F.3d 374 (4th Cir. 2012); see also *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010).

38. *Said*, 680 F.3d; *Hasan*, 747 F. Supp. 2d.

39. *Taking*, BLACK’S LAW DICTIONARY (10th ed. 2014).

40. *Hasan*, 747 F. Supp. 2d.

41. *Id.*

42. See UNCOLS, *supra* note 20.

43. *United States v. Abdi Wali Dire*, 680 F.3d 446 (4th Cir. 2012).

44. *Id.*

45. Decca Aitkenhead, *Paul and Rachel Chandler: How We Survived Being Kidnapped by Somali Pirates*, THE GUARDIAN (Oct. 30, 2011), <https://www.theguardian.com/uk/2011/oct/30/paul-rachel-chandler-kidnap-somali-pirates>.

46. *Id.*

the ship on the high seas.⁴⁷ Further, the pirates that hijacked the yacht “Quest”, identified Shibin as the person responsible for negotiating with authorities days before the pirates shot and killed all four United States citizen hostages.⁴⁸ While Shibin did not board the M/V Marguerite until the pirates brought it into Somali waters and the S/V Quest never made it back to Somalia for him to board, the court held he could still be found guilty of aiding and abetting piracy.⁴⁹ The court ultimately found Shibin guilty on all counts with a sentence in excess of twelve life terms.⁵⁰

2. Somalia

Both interesting and troubling is that to this day Somalia has not successfully passed anti-piracy legislation.⁵¹ In 2012, Somali piracy cost the international economy a total of USD 5.7-6.1 billion.⁵² This amount comes from a variety of expenses including ransoms, recovery, and insurance.⁵³ Things such as security equipment and guards, rerouting to avoid high-piracy areas, increased speeds to evade pirates leading to higher fuel costs for ships, military operations, and counter-piracy organizations also add to the high cost.⁵⁴ Expenses do not stop after the pirate attacks occur due to costs of labor, prosecutions, and imprisonment of pirates.⁵⁵ Somalia was not a signatory to the first and second UNCLOS negotiations because it had not yet gained its independence.⁵⁶ In order for a state to be a signatory, the state “signs a document, personally or through an agent, and thereby becomes a party to an agreement.”⁵⁷

47. United States v. Shibin, No. 2:11CR33, 2012 WL 8231152, at *1 (E.D. Va. Apr. 16, 2012).

48. *Id.* (During the course of his negotiations, Shibin utilized tactics such as psychological and physical torture of the crew of the M/V Marida Marguerite. For a period of time while holding the crew hostage, Shibin was in the role of a regular pirate and carried an AK-47 and guarded the hostages); Eliza Griswold, *How the Somali Pirate Victims Became Martyrs*, THE DAILY BEAST (Feb. 23, 2011), <https://www.thedailybeast.com/how-the-somali-pirate-victims-became-martyrs> (Scott and Jean Adam were missionaries that were on their way to deliver Bibles to underserved nations).

49. United States v. Shibin, 722 F.3d 233, 239 (4th Cir. 2013).

50. *Id.*

51. Afyare Elmi & Ladan Affi, *Barriers to Developing Anti-Piracy Law in Somalia*, ALJAZEERA CENTRE FOR STUDIES (Nov. 20, 2014), <http://studies.aljazeera.net/en/reports/2014/11/2014112010310522448.html>.

52. Bellish, *supra* note 19.

53. *Id.*

54. *Id.*

55. *Id.*

56. Elmi & Affi, *supra* note 51.

57. *Signatory*, BLACK’S LAW DICTIONARY (10th ed. 2014).

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However, Somalia did adopt the 1959 Marine Code, which was prepared during the United Nations trusteeship era, and gave Somalia six nautical miles of territorial sea.⁵⁸ The Marine Code covers piracy, and defines it as a crime that is committed by individuals on board a ship, punishable by imprisonment for ten to twenty years, regardless of whether it occurs in the high seas or territorial waters.⁵⁹ A 1966 amendment to the Marine Code of 1959 increased Somalia's territorial sea from six nautical miles to twelve nautical miles.⁶⁰ In 1972, Somalia passed Law 37 in response to the trend of claiming large amounts of territorial sea as the negotiation preparations for UNCLOS III began, which expanded Somalia's territorial sea from twelve nautical miles to 200 nautical miles.⁶¹ Interestingly, Law 37 did not mention piracy and stated that Somali Penal Law would govern any offenses occurring within the territorial sea.⁶² On January 26, 1989, in order to be in line with UNCLOS, Somalia's National Assembly approved the Somali Law of the Sea, Law No. 5, which brought Somalia's territorial sea back down to twelve miles.⁶³ By passing Law No. 5, Somalia once again passed a law regarding the sea that made no mention of piracy.⁶⁴ Somalia began working on its ratification of UNCLOS III in early 1989 and repealed Law 37, which led to Somalia becoming the fortieth state to ratify the Convention on July 24, 1989.⁶⁵ The widely held public opinion in Somalia, that Kenya is trying to steal its territories and resources, has added to the difficulty of passing any laws related to the sea and anti-piracy.⁶⁶

3. International Approach

Not all governments utilize the same approach to piracy. In addition to the counter-piracy operations of individual states, there are multiple international organizations that are active in the fight against piracy.⁶⁷ These include the European Union's Naval Force Operation

58. **MARITIME CODE**, Preliminary Provision, art. 1: Territorial Sea. (Som.), <https://somaliswiss.files.wordpress.com/2011/10/somali-maritime-code-21-03-19591.pdf>; Elmi & Affi, *supra* note 51.

59. *Id.*

60. *Id.*

61. Law on the Somali Territorial Sea and Ports, Law No. 37 (Sept. 10, 1972) (Som.), http://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/SOM_1972_Law.pdf.

62. *Id.*

63. Elmi & Affi, *supra* note 51.

64. *Id.*

65. *Id.*

66. *Id.*

67. *See generally* Press Release, Security Council, Unanimously Adopting Resolution

ATALANTA, the North Atlantic Treaty Organization's Operation Ocean Shield, the Combined Maritime Forces' Combined Task Force 151, the African Union, and the Southern Africa Development Community.⁶⁸ Under European Union Council Joint Action 851, the European Union Naval Force ATALANTA provides protection for vessels including those of the World Food Programme, African Union Mission in Somalia, and at risk shipping vessels.⁶⁹ Additionally, the European Union Naval Force ATALANTA works to "deter, prevent and repress acts of piracy and armed robbery off the Somali Coast."⁷⁰ Ukrainian M/V Juliet was able to thwart off attackers because of the protection she received from the force.⁷¹ In 2009, the Internationally Recognized Transit Corridor was established through the Gulf of Aden by the International Maritime Organization.⁷² Within this corridor, coalition naval forces would escort merchant vessels.⁷³ The establishment of this guarded corridor led to pirates expanding further into the north-west Indian Ocean.⁷⁴ In October 2017, the European Union committed 37.5 million euros towards counter piracy operations and other maritime security.⁷⁵

While it is typically the United States' approach to never negotiate with the "bad guys," rumors suggest that the Spanish government paid a ransom in excess of 3.5 million dollars for the

2383 (2017), Security Council Renews Authorization for International Naval Forces to Fight Piracy off Coast of Somalia, U.N. Press Release SC/13058 (Nov. 7, 2017).

68. *Id.*

69. EU NAVFOR Somalia: Mission, EUROPEAN UNION EXTERNAL ACTION, <http://eunavfor.eu/mission/> (last visited Apr. 15, 2018); The Council of the European Union, *Acts Adopted Under Title V of the EU Treaty Council Joint Action 2008/851/CFSP*, 301 OFFICIAL J. OF THE EUR. UNION 33, 33 (Nov. 10, 2008).

70. The Council of the European Union, *supra* note 69.

71. Martin, *supra* note 32, at 1365.

72. *The Evolution of the Security Association for the Maritime Industry (SAMI) and Piracy in the Indian Ocean*, LESSONS FROM PIRACY, <http://www.lessonsfrompiracy.net/files/2014/06/DRAFT-The-Evolution-of-the-Security-Association-for-the-Maritime-Industry-8-May-14.pdf>; *Piracy and Armed Robbery Against Ships in Waters of Somalia, Ref. T2-OSS/2.7.1*, INTERNATIONAL MARITIME ORGANIZATION (Aug. 3, 2009), <http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Guidance/Documents/SN.1-Circ.281.pdf>; *Introduction to IMO*, INTERNATIONAL MARITIME ORGANIZATION, <http://www.imo.org/en/About/Pages/Default.aspx> (The International Maritime Organization is a United Nations agency responsible for regulating international shipping).

73. *The Evolution of the Security Association for the Maritime Industry (SAMI) and Piracy in the Indian Ocean*, *supra* note 72.

74. *Id.*

75. Aiswarya Lakshmi, *EU Leads the Way with Ambitious Action for Cleaner and Safer Seas*, MARINE LINK (Oct. 6, 2017), <https://www.marinelink.com/news/ambitious-cleaner-action430100>.

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release of the Spanish fishing ship, *Alakrana*, and its thirty-six person crew.⁷⁶ The Spanish Prime Minister stated that the “government did what it had to do.”⁷⁷ The United Arab Emirates is currently seeking a seat in the decision making body of the International Maritime Organisation on the basis of creating increased security.⁷⁸ Due to concerns about the impact of piracy on commercial shipping lanes in the region, the United Arab Emirates has taken measures to fight piracy both publically and by secretly funding anti-piracy operations.⁷⁹

Dating back to the United Nations’ first Resolution regarding piracy off the Somali coast in 2006, the United Nations condemned acts of piracy.⁸⁰ In a 2008 Resolution, the United Nations escalated to calling for “nations with military capacity in the area to actively fight piracy.”⁸¹ At a 2017 meeting of the United Nations Security Council, the Council again gave primary responsibility in the fight against piracy to the Somali authorities, while also recognizing the need for international assistance by asking states that have the available resources to help.⁸² In November 2017, the United Nations Security Council unanimously renewed their “Authorization for International Naval Forces to Fight Piracy off the Coast of Somalia.”⁸³ This need for international assistance stems from the fact that piracy occurs in an area greater than one million square miles of the ocean.⁸⁴

Illustrating how parts of the international community work around the Somali authorities is that some Western navies will bring alleged pirates to states with anti-piracy laws like Kenya, Seychelles, and Mauritius to be prosecuted.⁸⁵ Upon conviction, the United Nations

76. *Somali Pirates Free Spanish Boat*, BBC NEWS (Nov. 17, 2009, 4:31 PM), <http://news.bbc.co.uk/2/hi/8364530.stm>.

77. *Id.*

78. Ramola Talwar Badam, *Updated: UAE’s bid for International Maritime Organisation council seat would ‘boost security’*, THE NAT’L (Oct. 2, 2017, 6:58 PM), <https://www.thenational.ae/uae/updated-uae-s-bid-for-international-maritime-organisation-council-seat-would-boost-security-1.663402>.

79. Mark Mazzetti & Eric Schmitt, *Private Army Formed to Fight Somali Pirates Leaves Troubled Legacy*, N.Y. TIMES (Oct. 4, 2012), <http://www.nytimes.com/2012/10/05/world/africa/private-army-leaves-troubled-legacy-in-somalia.html>.

80. S.C. Res. 1676 (May 10, 2006).

81. S.C. Res. 1838 (Oct. 7, 2008).

82. Press Release, Security Council, Security Council Unanimously Adopts Resolution 2316 (2016), Renewing Authorization for International Naval Forces to Combat Piracy off Somali Coast, U.N. Press Release SC/12582 (Nov. 9, 2016).

83. *Id.*

84. Martin, *supra* note 32, at 1366.

85. Elmi & Affi, *supra* note 51.

Office on Drugs and Crime (“UNODC”) relocates some of the inmates to facilities in Somaliland and Puntland to serve their sentences.⁸⁶ Somaliland “engages in diplomatic operations with the United Nations, the Arab League, the European Union and nations” but is not a recognized state by the United Nations.⁸⁷ The decision by the UNODC to send a number of pirates to non-Somali partners for their incarceration “perpetuates the status quo.”⁸⁸

B. The Grey Area: Legality of Private Security

While the ability of merchant vessels to protect themselves against piracy appears within United States law, the law references only “the commander and crew of any merchant vessel” and makes no mention of additional contractors, such as private security personnel.⁸⁹ To date, no legally binding regulations exist governing PMSCs.⁹⁰ While PMSCs are required to follow the laws of the ship’s flagged nation, most nations have minimal regulations for them.⁹¹ All merchant ships are required to be registered to a state; the ship is, however, allowed to select the state to which it registers.⁹² A lot of ships fly a “flag of convenience,” which is “one that flies the flag of a country other than the country of ownership.”⁹³ Ship owners utilize so-called flags of convenience because they provide a way around the more strict regulations of other countries in respect to the aspects of wages, ship conditions, and working conditions.⁹⁴ Further complicating this general lack of regulation is the unsettling idea that some PMSCs will function under ships flagged to countries that do not have any

86. *Id.*

87. T.G., *Why Somaliland is Not a Recognised State*, THE ECONOMIST (Nov. 1, 2015), <https://www.economist.com/blogs/economist-explains/2015/11/economist-explains>.

88. Elmi & Affi, *supra* note 51.

89. 33 U.S.C. § 383 (2012) (Authorizes merchant vessels to defend against piratical attacks on the high seas; “[t]he commander and crew of any merchant vessel . . . may oppose and defend against any aggression” by a nonpublic armed vessel).

90. *Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, §1.1, INT’L MARITIME ORGANIZATION (May 25, 2012), <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Guidance/Documents/MSC.1-Circ.1443.pdf>.

91. Mahard, *supra* note 11, at 335.

92. Sharda, *What are Flag States in the Shipping Industry?*, MARINE INSIGHT (July 23, 2016), <https://www.marineinsight.com/maritime-law/what-are-flag-states-in-the-shipping-industry-2/>.

93. *Flags of Convenience*, INT’L TRANSPORT WORKERS’ FED’N, <http://www.itfglobal.org/en/transport-sectors/seafarers/in-focus/flags-of-convenience-campaign/>.

94. *Id.*

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regulations to avoid dealing with any such restraints.⁹⁵ This troubling concept should be solved through the implementation of regulation, which can be accomplished by utilizing the letters of marque.⁹⁶ The letters of marque would go beyond the issue of flags and allow the PMSC to act on behalf of the state and the state would be able to directly exercise control over the PMSC.⁹⁷

This issue gained international attention on March 25, 2011, when a private security commander aboard a merchant vessel in the Indian Ocean ordered his men to fire at an approaching skiff that had not yet fired any shots at the vessel.⁹⁸ As described in the Introduction, the privately contracted security personnel did not pause after firing the ordered warning shots and continued to fire until the skiff was out of sight.⁹⁹ Trident Group, the United States employer of the guards aboard the merchant vessel, later acknowledged that some of the pirates were likely killed.¹⁰⁰ In summary, employees of a company based in the United States, a country where due process is an inherent element of criminal justice, allowed its guards to fire in a fashion that any reasonable person could expect to kill those on board the skiff, even though only warning shots were called for.¹⁰¹

Additionally, another attempt to attack the aforementioned merchant vessel, the Maersk Alabama, was made in November 2009, but was unsuccessful because the vessel had contracted with armed security personnel.¹⁰² This second attempt to attack the Maersk Alabama led to a statement from Vice Admiral Bill Gortney, Commander of the Central Command, which identified onboard security teams as one of the “maritime industry’s best practices” and “a great example of how merchant mariners can take pro-active action to prevent being attacked.”¹⁰³ The story of the MV Biscaglia, where the security team was unarmed and failed to thwart off a pirate hijacking, illustrates the need for security personnel to be armed.¹⁰⁴

95. *Id.*

96. *See infra* Part III(C).

97. *See Letters of Marque*, BLACK’S LAW DICTIONARY (10th ed. 2014) [Hereinafter Definition of Letters of Marque].

98. *See J W*, *supra* note 1.

99. *Id.*

100. Mahard, *supra* note 11, at 334.

101. *See J W*, *supra* note 1.

102. Martin, *supra* note 32, at 1365.

103. Alan Cowell, *Pirates Attack Maersk Alabama Again*, N.Y. TIMES (Nov. 18, 2009), <http://www.nytimes.com/2009/11/19/world/africa/19pirates.html>.

104. *The Evolution of the Security Association for the Maritime Industry (SAMI) and*

Officials in the maritime industry agree that there is a “glaring absence of regulation” for PMSCs.¹⁰⁵ Maritime Officials also claim that the number of ships reporting use of a PMSC is approximately half as many as actually use a PMSC.¹⁰⁶ The United Nations acknowledged this lack of oversight in a 2008 statement, saying that with the structure of an employee only being held accountable to their employers, which is what occurs when there are no additional regulations from states, “immunity can soon turn into impunity.”¹⁰⁷ This lack of regulation coupled with concern over the growing number of PMSCs operating without prior maritime security experience led maritime security firms to the decision of creating a “code of conduct and ethics” and the International Association of Maritime Security Professionals (“IAMSP”).¹⁰⁸ The IAMSP, a voluntary group that self-regulates, has around 400 members, who accounted for “half of the reputable industry.”¹⁰⁹ A large concern is that hundreds of ‘expatriates’ from Iraq and Afghanistan are moving into the maritime security sector without the specific necessary knowledge to perform the work of private maritime security.¹¹⁰ One of the founders of the IAMSP stated: “We have fears that a glut of inexperienced and unqualified so-called maritime security operators are bringing the legit guys into disrepute.”¹¹¹ The concern does not end there; a member of the seafarer’s union, Nautilus International, stated that: “Private security in the marine sector is currently not regulated in the way that it is on land . . . [t]here is a big worry this could be opening the doors to a lot of cowboys.”¹¹²

III. ANALYSIS

In 2012, the increase of private security was attributed as one of three main factors related to the decrease in pirate attacks that year.¹¹³

Piracy in the Indian Ocean, *supra* note 72.

105. Mahard, *supra* note 11, at 336.

106. *Id.*

107. *Private Security Companies Lack Oversight and Regulation – UN Working Group*, U.N. NEWS CTR. (Mar. 10, 2008), <http://www.un.org/apps/news/story.asp?NewsID=25924>.

108. See *Code of Practice*, INT’L ASS’N OF MAR. SECURITY PROF., <http://iamsponline.org/membership/code-of-practice/>; Jonathan Saul, *Facing Piracy, Ship Security Firms Set Ethics Code*, REUTERS (May 9, 2011, 8:28 AM), <https://www.reuters.com/article/uk-shipping-security-piracy/facing-piracy-ship-security-firms-set-ethics-code-idUSLNE74804X20110509>.

109. Saul, *supra* note 108.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Somalia: Piracy Incidences Dip Amid Reports of Corruption*, ALL AFRICA (July 24,

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While such force is at times utilized by law enforcement officers and armed services members, regulations exist for those state actors, and authority is given based on such regulations. In the context of maritime security, the possibility of killing potentially innocent parties increases, while the ability to collect evidence and adjudicate decreases.¹¹⁴ Even in authorized capacities, use of force and force escalation are hot-button issues in today's society, which makes the issue all the more important.

Piracy spans an area of approximately one million square miles of the ocean, thus regulating individuals of many different nationalities who fight against piracy is a very complex task.¹¹⁵ The United States Navy "encourages" ship owners to hire armed security, but some maritime organizations remain concerned that "armed guards may increase the danger to ships' crews or that overzealous contractors might accidentally fire on fishermen."¹¹⁶ Prior incidents involving United States private security companies have shown a presumption of guilt prior to being proven guilty course of action without any form of legal process, which goes against the very foundation of the United States' criminal justice system.¹¹⁷ Even when most nations, organizations, and experts agree that such regulation is necessary, there is no clear-cut route to creating and implementing such standards.¹¹⁸ Finding a "one size fits all" solution is complicated by the involvement of individuals of various nationalities, the sheer size of the affected ocean, crossing into territorial waters of other states, and the high-risk interactions of security forces and pirates.

A. Previous Attempts at Finding a Solution

An early attempt at a solution was the development of the Puntland Maritime Police Force.¹¹⁹ Puntland is a self-declared autonomous state located in the north-east region of Somalia.¹²⁰ Founded by the former head of Blackwater Worldwide, Erik Prince,

2012, 6:01 AM), <http://allafrica.com/stories/201207231573.html>.

114. Isenberg, *supra* note 7.

115. Martin, *supra* note 32, at 1366.

116. *Private Security Firms Join Battle Against Somali Pirates*, FOX NEWS (Oct. 26, 2008), <http://www.foxnews.com/story/2008/10/26/private-security-firms-join-battle-against-somali-pirates.html>.

117. See ABC News, *Hidden War Between American Mercenaries, Somali Sailors*, YOUTUBE (Oct. 11, 2013), <https://www.youtube.com/watch?v=qJcG0cPtJO8>.

118. Mahard, *supra* note 11.

119. Mazzetti & Schmitt, *supra* note 79.

120. *Puntland Profile*, BBC NEWS (Feb. 4, 2016), <http://www.bbc.com/news/world-africa-14114727>.

the creation of this Force did not occur without its share of controversy.¹²¹ From countless mercenaries to millions of dollars in secret payments from the United Arab Emirates, to a trainee being beaten to death at a force training camp, the development of a sophisticated anti-piracy fighting force was not what many had hoped for.¹²² While the Force did have successes, its unsavory incidents did not go without notice by the United Nations, which called the creation of the group a “‘brazen, large-scale and protracted violation’ of the arms embargo in place in Somalia.”¹²³ This alone illustrates the dangers and complexity of the largely outsourced fight against piracy in the Somalia region. In light of the troubled path of this so called “private army,” the United States, through its officials, stated that it did not endorse the creation of such a private army.¹²⁴ Somewhat contrary to the statements of the United States officials is that the Puntland Maritime Police Force shared some buildings with the Puntland Intelligence Service, which received training from the United States’ Central Intelligence Agency.¹²⁵ Further, Blackwater was placed under investigation for the 2007 killing of seventeen Iraqi civilians.¹²⁶ While this incident occurred on land, the involvement of Blackwater and other similar PMSCs in the fight against piracy highlights the dire need for the self-regulation of this industry to come to an end to prevent other such incidents from occurring.¹²⁷

B. Complications

A large complication in the search for a suitable solution is the weakness of the Somalian legal system. As previously mentioned, Somalia has still not managed to successfully implement anti-piracy legislation.¹²⁸ Transparency International ranked the country of Somalia as “the most corrupt on earth.”¹²⁹ In the rare instances of prosecutions occurring in Somalia, the sentences have been largely inconsistent.¹³⁰ Abshir Boyah, a high-level pirate leader, received a

121. Mazzetti & Schmitt, *supra* note 79.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Private Security Firms Join Battle Against Somali Pirates*, *supra* note 116.

127. *Id.*

128. Elmi & Affi, *supra* note 51.

129. Jeffery Gettleman, *Fueled by Bribes, Somalia’s Election Seen as Milestone of Corruption*, N.Y. TIMES (Feb. 7, 2017), <https://www.nytimes.com/2017/02/07/world/africa/somalia-election-corruption.html> (Transparency International is a global anticorruption organization).

130. *Somalia*, *supra* note 113.

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mere five-year sentence, while some low-level pirates have received twenty-year sentences.¹³¹ This discrepancy was viewed as corruption between high-level “pirate kingpins” and government officials.¹³² Further, Somalian President Sheik Sheriff Sheik Ahmed issued a diplomatic passport to a pirate leader, Mohamed Abdi Hassan ‘Afweyne’, which only further fueled speculation of corruption between the Somali government and high-level “pirate kingpins.”¹³³

C. Solutions

A strong potential solution is to bring back letters of marque. In the simplest terms, at its core, the purpose of the letter of marque is to right a private wrong.¹³⁴ Letters of marque are defined as “a license authorizing a private citizen to engage in reprisals against citizens or vessels of another country.”¹³⁵ Letters of marque serve as “permits for private individuals to use force against enemies of the state on its behalf.”¹³⁶ This old-fashioned document could be modernized and used to provide regulation in the world of piracy and private security. After the early 18th century, the purpose of the letter of marque shifted to be used as a State instrument to provide permission for national navies to “capture and plunder enemy ships.”¹³⁷

Although the United States has not recently utilized letters of marque, the United States Constitution provides for letters of marque in Article I section 8.¹³⁸ The particular circumstances at hand in this situation, from the international occurrence to the use of private actors, make it the perfect situation to utilize the letters of marque.¹³⁹ Using letters of marque as a solution would provide a permit for a PMSC to utilize force against pirates, which are enemies of the state, on behalf of the state.

While the 1856 Paris Declaration “banned” letters of marque, this is irrelevant because although the United States has respected the

131. *Id.*

132. *Id.*

133. *Id.*

134. *Letters of Marque*, CONSTITUTION SOCIETY (Nov. 2, 2017), http://www.constitution.org/mil/lmr/marque_it.htm.

135. Definition of Letters of Marque, *supra* note 97.

136. Georgi Boorman, *Is it Time to Bring Back Letters of Marque?*, FEDERALIST (Mar. 25, 2015), <http://thefederalist.com/2015/03/25/is-it-time-to-bring-back-letters-of-marque/>.

137. *Letters of Marque*, *supra* note 134; Boorman, *supra* note 136.

138. U.S. CONST. art. I, § 8. (“The Congress shall have the power . . . to declare War, grant Letters of Marque and Reprisal.”).

139. Definition of Letters of Marque, *supra* note 97.

Declaration during military conflicts, the United States never formally accepted the Declaration.¹⁴⁰ In respect to utilizing letters of marque as an international solution, it could either be added to UNCLOS or a new treaty could be created. While the United States would have no issues with using letters of marque as is, if a new treaty was to be formed or added to UNCLOS for international use, letters of marque could be slightly altered so that other states who formally assented to the 1856 Paris Declaration can also utilize this solution without violating the Declaration.¹⁴¹ Further, there are many differences between the threat faced today and the threat faced in 1856, in addition to many differences between the privateers of concern in 1856 and today's PMSCs. Due to substantial developments in technology since 1856, the ability of pirates to attack large merchant vessels has increased.¹⁴² The ability of pirates to reach a much larger area of the ocean to commit such attacks has also increased.¹⁴³ Taking these factors into consideration in addition to global developments in prosecution, investigation, and oversight since 1856, letters of marque, or a slightly varied instrument, could be utilized internationally while still respecting the concerns held by a select few countries regarding letters of marque in 1856.¹⁴⁴

This solution would serve to close the gap that is the lack of regulation of PMSCs because the security personnel would be authorized by their state and could act in the same capacity as state actors.¹⁴⁵ Further, this solution would provide room for some government control.¹⁴⁶ Providing such permits does open the door for potential abuses of power. However, the government would be able to hold individuals who abuse such power accountable through prosecution because they would be acting as state actors and subject to prosecution as such. UNCLOS Article 107 limits "a seizure on account of piracy" to only "warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect."¹⁴⁷ Utilizing letters of marque as a solution would not conflict with UNCLOS Article 107 because the

140. *Id.*

141. *Declaration Respecting Maritime Law. Paris, 16 April 1856*, INT'L COMM. OF THE RED CROSS (Apr. 16, 1856), <https://ihl-databases.icrc.org/ihl/INTRO/105?OpenDocument> (Hereinafter "ICRC").

142. Cowell, *supra* note 103.

143. *Id.*

144. ICRC, *supra* note 141.

145. *Letters of Marque*, *supra* note 134; *see also* Boorman, *supra* note 136.

146. *Letters of Marque*, *supra* note 134; *see also* Boorman, *supra* note 136.

147. UNCOLS, *supra* note 20 at 107.

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PMSC would be authorized as a state actor.¹⁴⁸

Another potential, yet complicated, solution is the use of contract doctrine to provide regulation for PMSCs. However, the complexity and high-risk nature of providing a contract for PMSCs who are expected to risk their lives to protect a ship and sometimes kill pirates prior to the pirates ever receiving a trial or any form of legal process, likely goes beyond the control of standard contract doctrine.¹⁴⁹ In the incident discussed previously, the PMSCs were under employment contracts and the contracts did not prevent such an incident, which led to the deaths of one or more alleged pirates that did not yet attack the ship being protected by the PMSC, without any form of due process.¹⁵⁰ Additionally, PMSCs have been known to work around their contracts and any current regulations by way of things such as dropping their weapons into the ocean prior to entering weapons-restrictive ports and other “creative workarounds to avoid the stiff fines and penalties levied by developing and often rightfully paranoid nations in Africa and the Middle East.”¹⁵¹

Further complicating matters is that a contract would possibly be breached if security personnel decided to not put their lives in danger and to not protect the ship, which is what they were hired to do. If the ship’s owner brought a claim of breach, the PMSC would probably then defend against a potential claim of breach using the common law doctrine of impracticability or another similar defense.¹⁵² The common law doctrine of impracticability provides a defense when “the duty to be performed becomes unfeasibly difficult or expensive for a party who was to perform.”¹⁵³ Utilizing contract doctrine under these circumstances is more likely to end in years of circular arguments and expensive litigation, than in an actual workable solution for regulation of PMSC.

However, the Montreux Document could potentially be integrated by utilizing contractual tools. This Document covers “pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict.”¹⁵⁴ The Montreux Document serves as a reminder of

148. *Id.*

149. *See generally* ABC News, *supra* note 117.

150. *Id.*

151. Isenberg, *supra* note 7.

152. *Impracticability Law and Legal Definition*, US LEGAL, <https://definitions.uslegal.com/i/impracticability/> (lasted visited April 3, 2018).

153. *Id.*

154. *The Montreux Document*, ICRC, 1 (Aug. 2009),

international humanitarian law obligations of PMSCs and their armed contractor employees.¹⁵⁵ The Document has been predominantly applied to armed conflicts that occur on land.¹⁵⁶ In order to apply this document to piracy off the coast of Somalia, the presumption that such piracy is not “armed conflict” under international law would need to be overcome.¹⁵⁷ The Document defines the covered group, “private military and security companies,” as “private business entities that provide military and/or security services” including “armed guarding and protections of persons and objects, such as convoys, buildings and other places”¹⁵⁸ The Montreux Document suggests that private military and security companies be subject “to prosecution if they commit conduct recognized as crimes under applicable national or international law.”¹⁵⁹ PMSCs working to protect against piracy fulfill the definition of a PMSC given in the Montreux Document.¹⁶⁰ To utilize the Montreux Document in the current scenario using contract doctrine, states would hire a PMSC through a contract which includes provisions of the Montreux Document.¹⁶¹ The Montreux Document provides states with criteria for the selection of a PMSC and terms of use in the contracting process.¹⁶²

The conflict between PMSCs and pirates is certainly an “armed conflict” in the sense of both sides being armed. However, it is questionable whether this conflict will meet the level of “armed conflict” discussed in the Montreux Document because the armed factor of this conflict is not as large as with armed conflicts on land where there are thousands of casualties. As made apparent in the November 2017 meeting of the United Nations Security Council, the United Nations is in need of further international support in the counter-piracy fight because what has been done thus far has not been enough, which potentially leaves room for a different approach.¹⁶³

https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

155. Joel Christopher Coito, *Pirates vs. Private Security: Commercial Shipping, the Montreux Document, and the Battle for the Gulf of Aden*, 101 CAL. L. REV. 173, 174 (2013).

156. *Id.*

157. *Id.*

158. *The Montreux Document*, *supra* note 154, at 9.

159. *Id.* at 15.

160. *Id.* at 9.

161. *Id.* at 10.

162. *Id.* at 17–18.

163. Press Release, *supra* note 82.

IV. CONCLUSION

The unregulated, violent interactions¹⁶⁴ between pirates and PMSCs and the lack of state interference, are indicative of a need for regulation. While the situation is extremely intricate due to the lack of proper enforcement by the Somali government and the use of non-state security forces, potential solutions do exist.¹⁶⁵ Utilization of PMSCs has been shown, in conjunction with other efforts, to decrease the amount of pirate attacks. However, in some cases the cost of prevention has led to killings at the hands of PMSCs without any specific regulation.¹⁶⁶ While utilizing and reforming traditional contract doctrine in conjunction with the Montreux Document could be useful, letters of marque appear to be the most promising solution. This is due to the fact that letters of marque would provide authorization for private individuals to act on behalf of the government and thus allow governmental control and avoid violating UNCLOS Article 107. Particularly, this solution puts an end to PMSCs, especially those that have no formal training in maritime security, exercising force at their own discretion. As seen on video,¹⁶⁷ such regulation is desperately needed to avoid continuing on a track of executions without any form of legal process.

164. ABC News, *supra* note 117.

165. *Supra* Part III(C).

166. *See* ABC News, *supra* note 117.

167. *Id.*