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Pirates Versus Mercenaries:

Purely Private Transnational Violence at the Margins of International Law

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Over the last decade, as American and international forces confronted a panoply of asymmetric threats from terrorist and insurgent groups, a consensus solidified around the idea that states could legitimately use force against certain kinds of violent non-state actors. This paper explores the related but quite different question of the legality and legitimacy of non-state actors using force against other non-state actors, using as examples the relatively recent increases in maritime piracy on the one hand, and in the use of private military companies (PMCs) on the other.

Of course, neither pirates nor mercenaries are new phenomena. In fact, both of these kinds of violent non-state actors appear regularly throughout both ancient and modern world history. Much as today's pirates threaten global shipping routes, the Roman Republic—then the Western world's superpower—faced pirates who threatened its food supply. Ultimately, the Republic sent its great general Pompey to put an end to the threat.¹ Similarly, mercenaries fought for the Egyptian Pharaoh in the thirteenth century B.C.E., Greek city-states, the Roman Republic, and the empires of both Rome and Byzantium, as well as for the British in the American Revolution. The feudal system, which obliged subjects of the sovereign to engage in

¹ A.T. Whatley, *Historical Sketch of the Law of Piracy*, 3 LAW MAG. & REV. 536, 538 (1874); Plutarch, *Pompey*, in 5 PLUTARCH'S LIVES 117, 173–85 (Bernadotte Perrin trans., G.P. Putnam's Sons 1917).

military service, reduced the use of mercenaries somewhat during the Middle Ages.² The Hanseatic League, an quasi-public alliance of Northern-European merchants, formed in part to protect maritime trade from Baltic pirates. Some of the League's earliest legislation set up incentives for private attacks on pirates.³ Both piracy and the use of mercenaries decreased dramatically during much the 20th century, but surged with the decline of superpower patronage after the end of the Cold War.

This paper posits the questions of how international law would, and should, react to purely private transnational violence. It uses a hypothetical offensive by a private military company against Somali pirates to both illustrate the relevance of these questions and to help flesh out their particulars.

I. Factual Background on Piracy off the Coast of Somalia

Somalia has been without a capable government for 19 years, since the collapse of the Siad Barre regime in 1991.⁴ The United Nations-backed Transitional Federal Government ("TFG"), although officially recognized by many states, is largely impotent beyond those portions of the capital city over which it manages to maintain control. The semi-autonomous regional quasi-states of Somaliland and Puntland also exist, print their own currency, and maintain their own foreign relations apart from the TFG.⁵ Although the data are poor, there is little doubt that Somalia's economy is extremely weak, primarily due to the terrible security situation.

² P.W. SINGER, *CORPORATE WARRIORS*, 20–21 (Cornell U. Press 2003).

³ Whatley, *supra* note 1, at 541; Ernst Daenell, *The Policy of the German Hanseatic League Respecting the Mercantile Marine*, 15 AM. HIST. REV. 47 (Oct. 1909), available at <http://www.jstor.org/stable/1835424>.

⁴ *Somalia*, CIA WORLD FACTBOOK, Introduction, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last visited March 3, 2010).

⁵ *Somalia Country Report*, ECONOMIST INTELLIGENCE UNIT, February 2010, at 5, 8–9.

One need not go far to find headlines about hijackings off the coast of Somalia. Stories in the press give a lurid picture of a new scourge upon the sea. However, it is important to understand the scale of piracy compared to the total volume of shipping in the area. Of 21,000 ships transiting the Gulf of Aden, 0.6% were attacked, and just 0.2% were boarded by pirates.⁶ Somali piracy is no doubt a serious problem, but international commerce is at no risk of grinding to a halt.

A. The Human Cost of Somali Piracy

Data from the International Maritime Organization (IMO), although incomplete because submissions are voluntary, gives a partial picture of Somali piracy's human impact. In 134 reported attacks in waters off East Africa in 2008, 44 ships were hijacked, one crew member was killed, two were wounded, 8 crew members were missing, and 703 crew members were taken hostage.⁷ Although the figure of 700 hostages is stunning, the low number of injuries and deaths takes away much of the force of popular reporting on the scale of the threat.

The human cost of contemporary Somali piracy is also slight in comparative and historical terms. Just after its founding, the United States faced a far more serious and sadistic threat from the Barbary Corsairs, who frequently tortured, enslaved, or killed captured sailors.⁸ Contemporary piracy in the South China Sea is far more violent than that off the coast of Somalia: in 2008, 4 crew were killed, 10 were wounded, and 30 went missing in the South China

⁶ Raymond Gilpin, *Counting the Costs of Somali Piracy* 12 (U.S. Inst. Peace, Working Paper, 2009), available at <http://www.usip.org/resources/counting-the-costs-somali-piracy>.

⁷ 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*]

⁸ Brief of Lawrence M. Friedman, et al., as Amici Curiae in Support of Petitioner at 9, *Hamdan v. Rumsfeld*, 2006 WL 53971 (U.S. Jan. 6, 2006) (No. 05-184) [hereinafter *Hamdan Amicus Brief*].

Sea as a result of 62 reported incidents; of 84 reported incidents in East Africa and the Indian Ocean, however, one crewmember was killed, 2 were wounded, and 8 went missing.⁹

B. The Economic Costs of Somali Piracy

Despite its relatively small human impact, piracy exacts a significant economic toll. The economic cost of piracy can be divided into the following categories: ransom payments, increased insurance premiums, indirect economic costs, the cost of deploying naval forces to the area, and, in a more recent trend, the cost of providing armed security teams aboard ships.

i. Ransoms

Because insurers and shippers typically do not disclose the amounts of ransom payments, or even the fact of their payment, it is only possible to give rough estimates. The most widely-cited estimates of aggregate ransom payments to Somali pirates are \$60–80 million in 2008 and \$150 million in 2009.¹⁰ The available evidence tends to indicate a trend toward more sophisticated operations resulting in seizures of larger, more valuable ships, with larger ransom demands and payments per ship.

ii. Avoidance

Most of the ships attacked by Somali pirates are commercial shipping vessels sailing between continents. The only way to assure avoiding piracy in the Gulf of Aden and Indian Ocean is to avoid those areas entirely—usually by re-routing ships around the Cape of Good Hope instead of through the Suez Canal. The U.S. Department of Transportation’s Maritime Administration estimates that diverting one tanker’s normal route between Saudi Arabia and the

⁹ *IMO 2008 Annual Report*, *supra* note 7, at 15.

¹⁰ *Donors pledge over \$250 million for Somalia*, USA TODAY, Apr. 23, 2009, http://www.usatoday.com/news/washington/2009-04-23-somalia-donors_N.htm; *Q&A: Somali piracy*, BBC NEWS, Nov. 2, 2009, <http://news.bbc.co.uk/2/hi/africa/7734985.stm>.

United States around the Cape of Good Hope would add \$3.5 million per year in additional fuel costs while cutting its delivery capacity by 26%.¹¹

iii. Insurance

In 2008 alone, the cost of additional war-risk insurance for a ship's passage through the Gulf of Aden rose from \$500 to \$20,000 per trip. Applied to the 21,000 ships transiting the Gulf annually, the total annual cost to insure these ships could be as high as \$400 million.¹² To the extent this represents a new revenue source for insurers and is greater than their overall payouts, insurers may prefer the status quo to stronger anti-piracy measures. One would therefore expect demands for stronger protection to come from the shippers themselves, as has mostly been the case.

iv. Indirect Economic Costs

Piracy imposes other indirect economic costs. For example, whenever a ship avoids the Gulf of Aden by re-routing around the Cape of Good Hope, Egypt loses out on revenue from the Suez Canal, the second-most central port in the global shipping network.¹³

v. Unarmed Defensive Measures

In 2009, the IMO promulgated a set of "best management practices" for avoiding and repelling pirate attacks.¹⁴ The recommendations include coordinating transits with military vessels in the area, pressurizing fire hoses with which to hit attacking pirates, and posting more

¹¹ Maritime Administration, *Economic Impact of Piracy in the Gulf of Aden on Global Trade*.

¹² *Id.*

¹³ Pablo Kaluza et al., *The complex network of global cargo ship movements*, J. ROYAL SOC. INTERFACE (Jan. 19, 2010) (analysis of 2007 global shipping traffic); Gilpin, *supra* note 6, at 11, *citing* Louis Wasser, *Somalia Piracy Costs Suez Canal Business*, S.F. CHRON., 29 Apr. 2009 (projecting \$1.5 billion decrease in Suez Canal revenue over two years). Because Suez is primarily a transit point, not a primary shipping destination itself, canal revenue is entirely lost rather than redistributed to other ports if ships route around it on their way to their destinations.

¹⁴ IMO, *Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia developed by the industry*, Maritime Safety Committee Circular MSC.1/Circ.1335 (Sep. 29, 2009) [hereinafter *Best Practices*].

lookouts.¹⁵ Other defensive measures include “greasing or electrifying of hand rails and the installation of barbed wire in vulnerable parts of ships.”¹⁶ More sophisticated equipment has also been employed with mixed success. One non-lethal device, the long-range acoustical device (“LRAD”)—which sells for over \$20,000—emits directionally-focused and painfully-loud sound as one way to deter approach by potential attackers.¹⁷ However, after a few initial successes against pirates, the LRAD has since proven ineffective.¹⁸ After using an LRAD to no effect, one British security guard said, “We thought it would make the pirates back off, but they just laughed. It was a total waste of time.”¹⁹ Another as-yet unproven non-lethal measure on the market is a set of polypropylene rope nets called Propeller Arresters, which are even more expensive than the LRAD. The company marketing the system claims that a set of Propeller Arrestors, laid out around a ship’s perimeter, will tangle the propellers of approaching boats to stop and deter pirate attacks.²⁰ In sum, although there are several documented instances of non-lethal defenses stopping pirate attacks, Somali pirates have proven to be determined adversaries capable of overcoming any such defenses employed thus far.

¹⁵ *Id.* at 6–10.

¹⁶ Carolin Liss, *Privatising Anti-Piracy Services in Strategically Important Waterways: Risks, Challenges and Benefits*, 6, (University of Tokyo, GraSPP Discussion Paper E-09-003, Oct. 2009).

¹⁷ LRAD Corporation, *Maritime Applications*, <http://www.lradx.com/site/content/view/287/110> (last visited May 25, 2010). Tracy V. Wilson, *How LRAD Works*, HOWSTUFFWORKS.COM, <http://science.howstuffworks.com/lrad2.htm> (last visited May 25, 2010).

¹⁸ Sam Gustin, *High-tech letdown: Somali pirates repelled by bullets, not soundwaves*, DAILY FINANCE, Nov. 18, 2009, <http://www.dailyfinance.com/story/company-news/high-tech-letdown-somali-pirates-repelled-by-bullets-not-sound/19245428/>; James Kraska and Brian Wilson, *Piracy Repression, Partnering and the Law*, 40 J. MAR. L. COM. 43 (2009), fn. 12, *citing* Rod Nordland, NEWSWEEK, Dec. 2008 (quoting pirate as saying “For those with the sonic guns, we hijacked some of them even after they fired the sonic guns.”).

¹⁹ Susie Boniface, *Heroic Brit trio take on Somali pirates before escaping into sea*, THE DAILY MIRROR, Jul. 12, 2008, <http://www.mirror.co.uk/news/top-stories/2008/12/07/heroic-brit-trio-take-on-somali-pirates-before-escaping-into-sea-115875-20951441/>.

²⁰ Merchant Maritime Warfare Centre, *Propeller Arresters*, http://www.mmwc.org/propeller_arresters.php (last visited May 25, 2010).

vi. Armed Security

Recently, shippers have begun to place armed guards aboard vessels transiting the Gulf of Aden and western Indian Ocean. In some instances, shipping companies contract with private security companies to provide such guards. Some states have also provided military personnel to protect ships sailing under their flags. For example, France—which has taken an aggressive stance against piracy generally—has provided teams of marines to French fishing vessels.²¹ Hiring private armed guards costs approximately \$40,000–\$60,000 per voyage.²² The cost of providing armed security is substantial, and, when combined with the simultaneous increase in insurance premiums, imposes a substantial burden on ship owners.

vii. Military Response

The European Union’s high-profile combined naval operation, EU NAVFOR (also called Atalanta), had a budget of €8.3 million for 2009, its first year.²³ However, this figure does not include any of the costs of the military personnel and equipment used, which are borne individually by the contributing states. Taking those costs into account, one analyst estimates the total cost of the European operation at upwards of \$300 million for one year.²⁴

Although difficult to quantify accurately, the aggregate economic costs of Somali piracy likely run into the billions of dollars,²⁵ with some estimates as high as \$16 billion per year.²⁶ In historical context, however, this cost is slight. At the beginning of the 19th century, the United

²¹ *French marines repel new pirate attack on trawlers*, AFP, Oct. 13, 2009.

²² Peter T. Leeson, *Piracy, Economics, and the Law*, 8 CIP REPORT 7, 2009.

²³ Mission, EU NAVFOR Somalia, <http://www.eunavfor.eu/about-us/mission/> (last visited May 25, 2010)

²⁴ J. Peter Pham, *Countering Somali Piracy by Involving the Private Sector*, WORLD DEF. REV., Apr. 30, 2009 (estimating one-year total cost of EU operation at “over \$300 million”).

²⁵ Gilpin, *supra* note 6, at 12.

²⁶ Jeni Bone, *Piracy costs maritime industry \$16bn+*, Maritime Business News, Aug. 23, 2008, <http://www.marinebusiness-world.com/index.cfm?nid=48105>.

States paid out a substantial portion of its treasury in tribute to the Barbary powers.²⁷ As a very rough point of comparison, the EU NAVFOR operation consumes merely 0.002% of the EU's budget, or 0.00002% of the EU's combined \$14.5 trillion gross product.²⁸

II. Deterring Piracy: Risk and Reward

The scale and sophistication of Somali pirate operations—often involving extended voyages, multiple fast boats deployed from larger “motherships,” and an organized investment market²⁹—show that today's pirates are sophisticated and rational economic actors. They are not, as some press reports portray them, merely khat-chewing petty criminals acting on impulse.³⁰ As with any other economic activity, these business associations have emerged because the participants perceive piracy's rewards to outweigh its risks.

At a higher level of abstraction, maritime piracy, like any other criminal activity, can be reduced by either diversion, deterrence, or incapacitation. These options themselves depend on changing potential pirates' perceptions of risks, rewards, and opportunities. Diversion operates by providing alternative opportunities with acceptable rewards and less risk than the offense. Deterrence increases the perceived risk of the offense. Incapacitation removes the opportunity

²⁷ U.S. Census Bureau, HISTORICAL STATISTICS OF THE UNITED STATES, 1789–1945, available at http://www.census.gov/compendia/statab/past_years.html.

²⁸ *European Union*, CIA WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html> (last visited Apr. 14, 2010); European Union, Budget, http://europa.eu/pol/financ/index_en.htm (last visited Apr. 14, 2010).

²⁹ Mohamed Ahmed, *Somali sea gangs lure investors at pirate lair*, REUTERS, Dec. 1, 2009, <http://www.reuters.com/article/idUSTRE5B01Z920091201?sp=true> (describing “stock exchange” for investing in piracy in Haradheere, Somalia); Gilpin, *supra* note 6, at 8–9 (describing mode of operation based on multiple skiffs and larger motherships)

³⁰ Robyn Hunter, *Somali pirates living the high life*, BBC NEWS, Oct. 28, 2008, <http://news.bbc.co.uk/2/hi/7650415.stm>.

entirely by restricting the actor's ability to commit the offense by, for example, putting him in jail.³¹

A. Diversion

Somalia's ruined economy presents few compelling alternatives to piracy. Most of the country's economy is based on agriculture and remittances from abroad, and its per-capita GDP is estimated at \$600—the fifth-lowest in the world.³² In contrast, one conservative analysis estimates an average individual pirate could expect to earn \$15,000 for a year's work.³³ Lucky participants in a multi-million dollar ransom stand to earn far more.

One justification pirates often claim for their actions is to expel foreign fishing vessels operating illegally in Somali waters. At one point, such poaching was a serious problem, and overfishing by foreign vessels led to a significant depletion of certain fish stocks. Today, although piracy has largely driven foreign fishing vessels away from Somalia and deep into the Indian Ocean, pirates have continued to ply their new trade instead of returning to fishing—presumably because it is far more lucrative.³⁴

Some authors advocate co-opting pirates into a legitimate coast guard under TFG auspices. However, given the TFG pays its nascent coast guard recruits under \$750 per year, few pirates are likely to opt for a government job when they stand to earn twenty times that salary as pirates.³⁵ “High profits with low costs and little risk of consequences in a failed and starving

³¹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 15 (LexisNexis 2006) (discussing “general deterrence,” and incapacitation as a species of “specific deterrence”).

³² *Somalia*, CIA WORLD FACTBOOK, *supra* note 4.

³³ Gilpin, *supra* note 6, at 9–11.

³⁴ *Somalia Country Report*, *supra* note 5, at 8.

³⁵ Will Ross, *Somali navy chief: World's worst job?*, BBC NEWS, Jun. 16, 2009, <http://news.bbc.co.uk/2/hi/africa/8096137.stm>.

State ensure that Somali pirate groups have almost unlimited human resources and do not lack for recruits and support.”³⁶

Development of the Somali economy is the international community’s best hope for diverting pirates away from crime. This is, however, a long term goal with little prospect of near-term realization.³⁷

B. Deterrence

International military efforts off the coast of Somalia focus on deterring piracy through a strong military presence protecting designated shipping lanes.³⁸ Despite the impressive array of international cooperation and naval firepower, pirate attacks in the region have simply shifted outward into the Indian Ocean and beyond the easy reach of international patrols. Deterrence is further hampered by the frequent failure to prosecute those pirates who are captured by naval forces—a policy derided as “catch and release.”³⁹ States have advanced several justifications for their refusals to prosecute suspected pirates, including cost and fears that pirates will claim

³⁶ NATIONAL SECURITY COUNCIL, COUNTERING PIRACY OFF THE HORN OF AFRICA: PARTNERSHIP & ACTION PLAN (Dec. 2008), http://www.marad.dot.gov/documents/Countering_Piracy_Off_The_Horn_of_Africa_-_Partnership_Action_Plan.pdf.

³⁷ *But see* Peter T. Leeson, *Better Off Stateless: Somalia Before and After Government Collapse*, 35 J. COMP. ECON. 689 (2007) (noting improvements to indicia of economic and human development after collapse of central government).

³⁸ EU NAVFOR Somalia, Mission, *supra* note 23 (describing the mission of the European Union’s joint naval operation as “to help deter, prevent and repress acts of piracy and armed robbery off the coast of Somalia”); New Counter-Piracy Task Force Established, US NAVY, January 8, 2009, http://www.navy.mil/Search/display.asp?story_id=41687 (quoting US commander of international naval task force, describing its mission as “deterring, disrupting and eventually bringing to justice the maritime criminals involved in piracy events”).

³⁹ *See, e.g.*, *EU force frees Somali “pirates”*, BBC NEWS, Mar. 25, 2010, <http://news.bbc.co.uk/2/hi/africa/8586729.stm> (six pirates released by EU NAVFOR one day after their capture); S.C. Res. 1918, 2, U.N. Doc. S/RES/1918 (Apr. 27, 2010) (noting “cases when persons suspected of piracy are released without facing justice”).

asylum once released.⁴⁰ Most of the pirates now facing prosecution were turned over to Kenyan authorities, who have since refused to take any more cases.⁴¹ Piracy has not subsided since the multinational armada arrived on the scene, and insignificantly few pirates have been brought to justice. Despite the hundreds of millions of dollars the international community has spent to fight them, pirates still have little to fear. The international community's current approach has failed to create sufficient risk to deter pirates.

C. Incapacitation

As discussed above, the pattern of "catch-and-release" seriously impairs naval forces' ability to incapacitate pirates by putting them on trial and into prison. The less savory alternative, of course, is to kill them instead. Before the birth of modern human-rights law, this had been the standard way of dealing with pirates in much of the world, and many now advocate its return.⁴²

Because of Somalia's poor long-term economic and social prospects, any incapacitation through violence would be only temporary, as new recruits with little to lose and everything to gain would be attracted to piracy for the same basic economic reasons as current pirates. However, because Somalia's most active pirates operate in identified clan-based organizations, a concerted effort to incapacitate all the major pirate gangs simultaneously could likely set back piracy in the region substantially, because reconstituting the experience and operational capacity of the organizations would take some time. A concerted violent effort at incapacitation is likely to be only temporary; however, absent an enduring solution to Somalia's political problems, it

⁴⁰ Bruno Waterfield, *Somali pirates embrace capture as route to Europe*, TELEGRAPH.CO.UK, May 19, 2009, <http://www.telegraph.co.uk/news/worldnews/piracy/5350183/Somali-pirates-embrace-capture-as-route-to-Europe.html>.

⁴¹ *Kenya ends trials of Somali pirates in its courts*, BBC NEWS, Apr. 1, 2010, <http://news.bbc.co.uk/2/hi/africa/8599347.stm>.

⁴² Sandeep Gopalan, *Put Pirates to the Sword*, WALL ST. J., Jan. 18, 2010.

could well be more effective, and cheaper, than the current approach, which is almost entirely defensive and reactive.

D. Incentives Toward Offense

Fundamentally, deterring maritime piracy boils down to altering pirates' risk-reward assessments. Unfortunately, pirates' hostages serve dual purposes: they are both bargaining chips for ransom negotiations and human shields used to dissuade attempts to recover ships by force. The presence of innocent hostages makes retaking a hijacked vessel by force infeasible in most circumstances, although it has been done successfully in a small number of instances. French forces, for example, have staged at least three rescues; one resulted in the death of a hostage.⁴³ Hostages are indeed pirates' most powerful bargaining chips, which allow them to negotiate and obtain large ransom payments with little threat of reprisal.⁴⁴ Therefore, reducing the expected reward for hijacking a ship is essentially impossible. Because of this threat to innocent human life, counter-piracy strategy should focus on increasing the risk to pirates *outside* the context of

⁴³ *French commandos storm yacht held by pirates, one hostage killed*, TELEGRAPH.CO.UK, Apr. 10, 2009, <http://www.telegraph.co.uk/news/worldnews/piracy/5137861/French-commandos-storm-yacht-held-by-pirates-one-hostage-killed.html>. One maritime security recommendation, creating hardened "safe rooms" for crew to retreat to during a pirate attack, best preserves the military option, as demonstrated by the Russian recapture of a pirated ship whose crew avoided being taken hostage by using such a room. Tony Halpin, *Russian special forces storm oil tanker, arrest Somali pirates*, THE TIMES ONLINE, May 7, 2010, <http://www.timesonline.co.uk/tol/news/world/africa/article7117736.ece>. Ironically, Russia released the pirates the next day, citing a lack of a legal framework for their prosecution. *Freed Somali pirates "probably died" – Russian source*, BBC NEWS, May 11, 2010, <http://news.bbc.co.uk/2/hi/africa/8675978.stm>.

⁴⁴ If merchant ships were unmanned, for example, military responses would be far more palatable and likely. In comparison, the U.S. military leads a trend of replacing manned aircraft with unmanned aircraft which can be used without fear of killing any crew. For example, the U.S. now operates the nearly fully autonomous Global Hawk aircraft, which will eventually replace the manned U-2 made famous for being shot down over the Soviet Union during the Cold War. P.W. SINGER, *WIRED FOR WAR* 36 (Penguin Books 2009).

any ongoing hijacking or ransom negotiation: any effective action against pirates must be proactive, not reactive.

Initially, the shipping industry responded to Somali piracy by promulgating best practices such as avoiding areas of known recent pirate activity, sailing at greater speed through high-risk areas, coordinating transits with military commanders, using specially designated routes with warship escorts, and improving reporting of attacks,⁴⁵ which remains poor.⁴⁶

More recently, shippers have begun placing armed guards on vessels, some of whom have fired on pirates. Although it is too early to say to what extent arming the vessels will deter pirate attacks, it seems reasonable to expect some reaction from the pirates—perhaps simply by increasing their ransom demands to internalize their increased risk.

Although the shipping industry has public and private mechanisms for reporting pirate attacks, even this most basic tool is greatly underutilized because of perceived fear of insurers raising their premiums, pirates retaliating, and other reasons. Perhaps less surprisingly, the insurance industry turned the surge in piracy into a profit center by selling new forms of “kidnap and ransom” insurance.⁴⁷

Even insurers, however, appear to be reaching the conclusion that the status quo cannot last forever. One major maritime shipping insurer with historical ties to the Opium Wars⁴⁸ has

⁴⁵ *Best Practices*, *supra* note 14; About the Maritime Security Centre-Horn of Africa, <http://www.mschoa.org/About.aspx> (last visited Apr. 15, 2010).

⁴⁶ Elizabeth Andersen, et al., *Suppressing Maritime Piracy: Exploring the Options in International Law* (Am. Soc. Int’l L. Workshop Report, 2010) (“It is widely believed that as many as 50 percent of pirate attacks are not reported, due to shipowners’ fears that doing so will increase insurance premiums and result in costly post-incident investigations.”).

⁴⁷ Myles Neligan and Lorraine Turner, *Piracy premiums take a breather but menace remains*, REUTERS, Apr. 1, 2010, <http://uk.reuters.com/article/idUKLNE63001I20100401?sp=true>.

⁴⁸ William Kay, *China House rides the economic dragon*, THE INDEPENDENT, Jun. 20, 2001, <http://www.independent.co.uk/news/business/news/china-house-rides-the-economic-dragon-674714.html>.

proposed funding a private navy to patrol the Somali coast, signaling its belief that both the international naval efforts, as well as efforts to build up the TFG's capacity, are insufficient to protect its interests.⁴⁹

An offensive campaign against Somali pirates—who lack sophisticated weapons systems and military-style command and control—might be relatively inexpensive. With good targeting information, a small force could strike the main Somali pirate havens, kill key figures in the major pirate networks, and then leave the country quickly. Although the operation might only incapacitate organized piracy for a short time, it would create a much stronger deterrent effect than either the multinational naval effort or piecemeal prosecutions have achieved.

A direct attack against pirates on land would, of course, be wildly unpopular within Somalia. One analyst warns that an attack on land “would lead to ‘the dangerous politicization (and radicalization) of what has hitherto remained a purely economic phenomenon.’”⁵⁰ This might explain why states have been reluctant to take this path, even though the UN Security Council has authorized them to do so.⁵¹ Land attacks by foreigners which could jeopardize Somalia's precarious political situation are, therefore, likely off the table for states. Private actors, however, have few such concerns: the political cost is an externality about which a hull insurer tired of paying ransoms is unlikely to care.

In short, all these factors point to the likelihood that private, non-state actors could soon take the Somali piracy problem into their own hands by hiring private military companies to

⁴⁹ Neligan, *supra* note 47.

⁵⁰ Christopher Helman, *The Profits Of Piracy*, FORBES.COM, Apr. 15, 2010, <http://www.forbes.com/2010/04/15/pirates-somalia-shipping-insurance-business-logistics-piracy.html>.

⁵¹ S.C. Res. 1846, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

conduct offensive attacks against known pirate networks. This remainder of this paper addresses the question of what the law would and should do with such a situation.

III. The Return of Private Military Force

Several conflicts in the last two decades demonstrate that offensive operations by private military companies can be surprisingly effective and inexpensive compared to other approaches.

For example, in 1993, the government of Angola signed a \$40 million contract with Executive Outcomes.⁵² In one year, the firm reconstituted and trained a 5,000-strong Angolan army brigade, brought in former Soviet aircrews to maintain and fly aircraft the country lacked the expertise to operate itself, and fielded its own special-operations forces.⁵³ The firm then commanded these joint public-private forces in an offensive that quickly brought the UNITA rebels, which the Angolan government had been fighting for two decades, to the negotiating table.⁵⁴

In early 1997, the government of Papua New Guinea (PNG) signed a contract with another private military company, Sandline, for a military campaign to destroy the rebel Bougainville Revolutionary Army (BRA).⁵⁵ The contract contemplated a 16-man command, and 54 additional soldiers, 4 ex-Soviet attack helicopters, electronic warfare equipment, 150 firearms and other weapons, and hundreds of thousands of rounds of ammunition.⁵⁶ The principal objectives of the contract were to destroy the BRA's military capability and to retake a strategic mine. Sandline was to train PNG soldiers, and to engage directly in combat with the BRA, including commanding PNG forces and operating aircraft. Sandline's employees would be

⁵² Singer, *supra* note 2, at 107–10.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 245–54.

⁵⁶ *Id.* at 246–48, 253–54.

enrolled as “Special Constables” in the PNG military—a convenient means around classification as “mercenaries” under the Geneva Protocol I definition, which excepts members of a state’s military.⁵⁷

Singer’s three-tiered typology for characterizing firms in the private military industry is used widely in the literature. The first category, military provider firms, engage in direct command or combat. Executive Outcomes and Sandline are leading examples.⁵⁸ The second category, military consultant firms, are far more common today. These firms offer training to host state militaries, but do not themselves engage in combat. MPRI, now a subsidiary of publicly-held L-3 Communications, is a typical military consultant firm.⁵⁹ The third category, military support firms, provide logistical support to militaries, but do not train them or engage in combat.⁶⁰ This paper is concerned primarily with military provider firms.

IV. Law and Private Transnational Violence

Both domestic and international law may apply to incidents of transnational violence between non-state actors.⁶¹ As will be demonstrated, public international law, which has focused primarily on states, is not well-equipped to deal with this form of violence, which does not fit the

⁵⁷ See Part IV.C, *infra*, and *id.* at 249; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 47(2)(e), Jun. 8, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 [hereinafter Protocol I]. Note, however, that by explicitly integrating PMC fighters into a state’s military, the state will likely responsibility for those fighters’ actions. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (finding U.S. responsible for rebels’ actions against Nicaraguan government). See also David Turns, *Implementation and compliance*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 364–65 (Elizabeth Wilmshurst and Susan Breau eds., Cambridge U. Press 2007).

⁵⁸ Singer, *supra* note 2, at 92–95.

⁵⁹ *Id.* at 95–97.

⁶⁰ *Id.* at 97–100.

⁶¹ Contrast, for example, the “war on terror,” in which both states, such as the U.S., and non-state actors, such as Al Qaeda, are in conflict.

existing legal frameworks for armed conflict. The following sections evaluate specific instruments and bodies of law that may apply to private transnational violence.

A. UN Charter

The United Nations Charter, like most multilateral treaties, binds only signatory states;⁶² it has no direct application to private actors. Therefore, Article 2(4)'s prohibition on the use of force applies only to states.⁶³

However, the Charter does contemplate a broad role for the UN and its member states in establishing and keeping peace. The Charter does not bar the UN or its member states from acting against non-state actors if they threaten international peace and security. For example, Chapter VII, which empowers the Security Council to authorize force, does not specify whether the targets of its action must be states. The Security Council has in several instances authorized force against non-state actors under Chapter VII, most notably against Al Qaeda after 9/11,⁶⁴ and more recently against Somali pirates.⁶⁵ Where Al Qaeda's threat to international peace and security is apparent, this is less clear for piracy. Although the Security Council has not stated explicitly whether piracy itself is sufficient to act under Chapter VII, in its more limited action to encourage criminal prosecution of pirates, the Council did not cite Chapter VII.⁶⁶

⁶² "Accordingly, our respective Governments...have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations." U.N. Charter, preamble.

⁶³ "The [U.N.] and its Members...shall act in accordance with the following Principles..." *Id.* art. 2. "Members" are defined as states. *Id.* arts. 3, 110.

⁶⁴ S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (reacting to 9/11 attacks under Chapter VII to suppress terrorism by non-state actors).

⁶⁵ S.C. Res. 1846, *supra* note 51 (allowing warships entry into Somali territorial waters for anti-piracy operations); S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (endorsing cooperation between states); S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009) (extending mandate for naval operations). Each resolution notes that piracy is one aspect of Somalia's security problems.

⁶⁶ S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010).

Article 2(7) provides further support for UN action against private actors. Article 2(7) generally exempts domestic matters from UN intervention. However, it expressly allows “enforcement measures under Chapter VII” in the context of domestic conflict.⁶⁷ Presumably, transnational violence by non-state actors would fall within this exception. In fact, the Security Council’s authority under Chapter VII extends to purely domestic violence between non-state actors if it constitutes a “threat to the peace.”⁶⁸

In sum, although the UN Charter does not directly prohibit private transnational violence in the same explicit terms in which it prohibits violence between states, it does provide a means for states to act against it.

B. Law of the Sea

The law of the sea provides clearer results for private violence than does general international law. Two principal treaties define piracy and related offenses: the United Nations Convention on the Law of the Sea⁶⁹ (“UNCLOS”) and the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation⁷⁰ (“SUA Convention”). Applying these treaties, the sea component of any attack against pirates by other private actors would likely constitute piracy or a related SUA offense.

⁶⁷ “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.” U.N. Charter art. 2(7).

⁶⁸ Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 30, (Oct. 2, 1995) (noting “settled practice” of the Security Council and “common understanding” that “internal armed conflicts” are actionable under Chapter VII if they constitute a “threat to the peace”).

⁶⁹ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261 [hereinafter UNCLOS].

⁷⁰ Convention and Protocol from the International Conference on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 27 I.L.M. 668 [hereinafter SUA Convention].

Article 101 of UNCLOS defines piracy as “any illegal acts of violence...committed for private ends...on the high seas...[or] outside the jurisdiction of any State,” or any voluntary participation in such violence. Under the scenario presented, offensive attacks against pirates would clearly be “acts of violence...committed for private ends.”

Article 107 provides further guidance by giving the right to interdict pirate ships exclusively to military vessels “or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”⁷¹ Therefore, any attack by private forces on the high seas—even an attack against pirates—is piracy under UNCLOS unless a state has explicitly and visibly authorized the attacking ship.

Similarly, the SUA Convention creates a criminal offense for anyone who “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,” but also exempts state forces from liability.⁷² As with UNCLOS, any attack other than in self-defense within the SUA Convention’s jurisdiction is a crime, even if committed against pirates.

Matters are further complicated by states’ adoption of these treaties. UNCLOS has been adopted by 160 states,⁷³ and SUA by 156.⁷⁴ The U.S. has adopted SUA, but not UNCLOS—although it has adopted the earlier Convention on the High Seas, which is substantially similar, especially in its piracy provisions.⁷⁵ Under the Siad Barre regime, Somalia adopted UNCLOS,

⁷¹ UNCLOS, *supra* note 69, art. 107.

⁷² SUA Convention, *supra* note 70, art. 3(1)(b).

⁷³ U.N. Treaty Collection, United Nations Convention on the Law of the Sea, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en (last visited May 26, 2010)

⁷⁴ IMO, Status of Conventions, http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (last visited May 26, 2010).

⁷⁵ Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82.

but neither the old regime nor the TFG has adopted SUA.⁷⁶ The UN Security Council has attempted to smooth over some of these difficulties by promoting the use of SUA and UNCLOS, and encouraging more states to adopt SUA and the Transnational Organized Crime convention (discussed below). Further, piracy is among the few specific crimes prohibited by the law of nations, and for which universal jurisdiction is generally recognized.⁷⁷ Given the universally criminal nature of piracy, Somalia's failed-state status, and UN Security Council resolutions authorizing states to intrude into its territorial waters (albeit with the TFG's express consent), then, for practical purposes, whether an attack occurs within or without Somalia's territorial waters has little relevance. The principal question, then, is whether these private acts of violence are "illegal."

C. International Law's Weak Prohibition of Mercenarism

A report to the U.K. House of Commons (the Green Paper) explains why "mercenary" is such a loaded term: "In modern times mercenaries have a bad reputation, so much so that the word has become almost a form of abuse. This is based partly on the experience of the 60s and 70s when, starting with the Congo, mercenaries were associated with instability and secessionist movements. They were also involved both in a number of attempted coups and in human rights abuses."⁷⁸

The international community reacted to what it perceived as a trend in illegitimate private violence, and advanced several treaties purporting to prohibit mercenary activity. However, their

⁷⁶ IMO, Status of Conventions by Country, http://www.imo.org/Conventions/mainframe.asp?topic_id=248 (last visited May 26, 2010).

⁷⁷ Eugene Kantorovich, "A *Guantanamo on the Sea*": *The Difficulties of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243, 251, n.61 (2010).

⁷⁸ FOREIGN AND COMMONWEALTH OFFICE, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION, 2001-02, H.C. 577, 14 at ¶ 32 (footnote omitted) [hereinafter Green Paper].

shortcomings are many and well documented.⁷⁹ The common key flaw of these instruments is that they focus too narrowly on specific instances of abuse, and fail to take a broader historical view of private military activity.

As discussed below,⁸⁰ most of the protections of the Geneva Conventions, including Protocol I, extend only to international armed conflict, i.e., war between states.⁸¹ Because mercenaries are so often employed in internal armed conflict, this has the effect of gutting the Protocol's prohibition on mercenarism of a great deal of its potential effect. Further, a study by the British House of Commons notes the ease of evading the Protocol I definition by skillful contracting. For example, Sandline's 1997 contract with Papua New Guinea specified that its employees would be enrolled in the PNG military, thus easily satisfying Geneva Protocol I's exception for "member[s] of the armed forces of a Party to the conflict."⁸²

The UN's International Convention against the Recruitment, Use, Financing and Training of Mercenaries ("Mercenary Convention") is similarly narrowly tailored to the unique events in Africa in the mid-20th century. It is entirely useless in the context of purely private international violence because it prohibits only the use of mercenaries by or against states in armed conflict.⁸³ The Mercenary Convention is also largely hamstrung by its lack of meaningful adoption—only

⁷⁹ *Id.* at 9, ¶ 16 (concluding that "The internationally agreed definitions have been shaped to suit the agendas of those drafting them and are not necessarily very useful").

⁸⁰ *See infra* Part IV.G.

⁸¹ Protocol I, *supra* note 57, art. 1(3), *citing* Common Article 2 of the original Geneva Conventions (defining scope of Conventions to be "all cases of declared war or any other armed conflict which may arise between two or more [states]"), *see infra* note 112.

⁸² Protocol I, *supra* note 57, art. 47(2)(e). Note, however, that Protocol I would not have applied to the PNG conflict because it was not international in nature.

⁸³ International Convention Against the Recruitment, Use, Financing and Training of Mercenaries art. 1, G.A. Res. 44/34, U.N. Doc. A/44/34 (Dec. 4, 1989) [hereinafter "Mercenary Convention"].

32 states have joined the treaty, and none of the major sources of private military talent are parties.⁸⁴

The Green Paper notes similar problems with the OAU's Convention for the Elimination of Mercenarism in Africa. The OAU's definition is drawn narrowly to target only mercenaries working against an OAU member state or OAU-recognized national liberation movement.⁸⁵ Therefore, it would have allowed both of the controversial PMC deployments by Executive Outcomes in Sierra Leone and Angola merely because they were sponsored by an OAU member state.⁸⁶ Because PMC attacks on pirates target neither states nor revolutionary movements, they too would fall outside both the OAU and Mercenary Convention definitions.

Percy, however, finds another explanation for the weakness of international law's prohibition against mercenaries. She argues that "weak law can be the result of strong norms,"⁸⁷ and, in the case of the Article 47 and the Mercenary Convention, that states created weak law because "[s]tates were so committed to the anti-mercenary norm that they refused to dilute it or adjust it in any way during the lawmaking process, resulting in law that precisely reflects the norm but is legally flawed."⁸⁸ According to Percy, mercenaries are objectionable for two main reasons: (1) because they "lie outside state control and so pose both a practical threat to states and a threat to the normative idea that states ought to have a monopoly on the use of force", and (2) because their motive to fight—financial gain—is illegitimate as compared to others, who

⁸⁴ ICRC, International Humanitarian Law – UN Convention on Mercenaries 1989, <http://www.icrc.org/ihl.nsf/INTRO/530?OpenDocument> (last visited June 10, 2010).

⁸⁵ OAU Convention for the Elimination of Mercenarism in Africa, Jul. 3, 1977, OAU Doc. CM/817 (XXIX), Annex II Rev.3 [hereinafter OAU Convention].

⁸⁶ Green Paper, *supra* note 78, at ¶¶ 7–8; OAU Convention, *supra* note 85.

⁸⁷ Sarah V. Percy, *Mercenaries: Strong Norm, Weak Law*, 61 INT'L ORG. 367, 369 (2007).

⁸⁸ *Id.* at 368.

fight for the acceptable motivations of “patriotism or ideology.”⁸⁹ Percy also notes that mercenaries’ financial motive is more important to their repugnance than is their foreignness, noting that various foreign volunteer fighters are seldom considered mercenaries.⁹⁰ Percy traces the norm against mercenaries back to the late-19th century, the point at which modern states ceased employing mercenaries in favor of domestic professionalized forces, drawing on evidence from state practice in the 1960s that shows states treated that decade’s mercenary activities in Africa as an illegitimate breach of such a norm—clearly predating both Article 47 and the Mercenary Convention, of 1979 and 1989, respectively.⁹¹

Percy’s articulation of a strong norm against using mercenaries supports the view that using private force against pirates is objectionable, even if that norm is reflected poorly in the official instruments of international law.

D. Somali Law

One principal reason for the growth of Somali piracy is, of course, the lack significant law-enforcement capacity since the central government’s collapse in 1991.⁹² Both of Somalia’s main pirate havens, Eyl and Harardhere, are clearly outside the reach of the TFG. Eyl is situated in Somalia’s northeastern semi-autonomous Puntland region, and Harardhere is along the central coast. These towns would be the likely focus on land of an offensive against organized pirate gangs. Although the popular media frequently portrays Somalia as completely lawless, Puntland and Somaliland are comparatively stable, with functioning judicial systems,⁹³ and Xeer, a

⁸⁹ *Id.* at 371.

⁹⁰ *Id.* at 372.

⁹¹ *Id.* at 372–74.

⁹² *Somalia*, CIA WORLD FACTBOOK, *supra* note 4, Introduction.

⁹³ See Mohamed Olad Hassan, *7 Somali pirates sentenced to life in jail*, FOX NEWS, Apr. 28, 2008 (Puntland court sentences pirates after capture by regional militia); but see *Gunmen kill*

customary law system, is in widespread use throughout the country.⁹⁴ However, as a community-based system, dealing with foreign mercenary soldiers from the other side of the world is far outside Xeer's scope. Further, even if Puntland and Somaliland were to receive foreign assistance to build their judicial and law-enforcement capacity, as they have requested,⁹⁵ the overall situation in Somalia suggests that pirates would merely relocate elsewhere.

E. International Human Rights Law

Because no other rights are possible without it, the most important human right of all is the right to life, which is recognized by the key instruments of human rights protection. It is the first right guaranteed by the Universal Declaration of Human Rights, which declares, "Everyone has the right to life, liberty and security of person."⁹⁶ Similarly, the International Covenant on Civil and Political Rights (ICCPR) states that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."⁹⁷ The American Convention on Human Rights states, "Every person has the right to have his life respected. This right shall be protected by law...No one shall be arbitrarily deprived of his life."⁹⁸

Although the right to life's widespread formal recognition is relevant in the sense that it may be considered part of customary international law, recognition alone is not sufficient to guarantee that the right is enforceable against non-state actors. These treaties operate directly

Somalia pirate judge, BBC NEWS, Nov. 12, 2009 (Puntland judge from previous story murdered). *Somaliland court jails 14 for piracy*, AFP, May 10, 2009.

⁹⁴ Leeson, *Better Off Stateless*, *supra* note 37, at 25–26.

⁹⁵ Peter Greste, *Puntland turns against Somali pirates*, BBC NEWS, Jun. 1, 2009.

⁹⁶ Universal Declaration of Human Rights art. 3, Dec. 10, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 [hereinafter UDHR].

⁹⁷ International Covenant on Civil and Political Rights, art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

⁹⁸ American Convention on Human Rights, art. 4(1), Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

only on states which have agreed to them. The UDHR is, on its face, a non-binding declaration of a “common standard of achievement,” albeit one meant for “all peoples and all nations.”⁹⁹ Although the ICCPR and ACHR oblige signatory states to protect those rights they specify, this does not make either treaty itself binding on non-state actors, and leaves rights enforcement up to states, whose motivation and capacity to prosecute violations vary widely.¹⁰⁰

F. Domestic Law: The Alien Tort Statute

The Alien Tort Statute (ATS) provides U.S. federal-court jurisdiction over tort claims by aliens for torts “committed in violation of the law of nations or a treaty of the United States.”¹⁰¹

Recent ATS decisions have arisen primarily in the human-rights context, and have required that the defendant have been a “state actor” at the time of the tort. For example, in *Filartiga v. Pena-Irala*, the Second Circuit held that the ATS provided jurisdiction for a victim’s family’s tort case against a policeman (now living in the U.S.) who had tortured the victim abroad.¹⁰² For two reasons, the decision turned on the fact that the defendant was a state actor at the time of the offense. First, acting under color of law was an element of the particular offense involved (official torture under customary international law).¹⁰³ Second, the Court construed human rights as protecting individuals against *governments*, as opposed to other individuals.¹⁰⁴

Although finding an ATS defendant to be a state actor is necessary for many types of claims, it is not required for all. This is because the ATS provides jurisdiction for any “tort...committed in violation of the law of nations.” State action is merely an element of the

⁹⁹ UDHR, *supra* note 96, at pmb1.

¹⁰⁰ ICCPR, *supra* note 97, art. 2; ACHR, *supra* note 97, art. 1.

¹⁰¹ 28 U.S.C. § 1350 [hereinafter ATS].

¹⁰² *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹⁰³ *Id.* at 882–84 (“...we conclude that official torture is now prohibited by the law of nations”).

¹⁰⁴ *Id.* at 885 (“...international law confers fundamental rights upon all people vis-à-vis their own governments”).

underlying tort—not an element of the ATS itself. In *Sosa v. Alvarez-Machain*, the Supreme Court narrowed the ATS’ application to a “handful of international law *cum* common law claims understood in 1789,”¹⁰⁵ including “piracy, crimes against peace, war crimes, and crimes against humanity.”¹⁰⁶ The inclusion of piracy in this list is key. Because piracy is a universally-recognized crime under customary international law¹⁰⁷ (entirely distinct from human-rights issues)—and is not perpetrated by states, requiring state action for piracy claims makes no sense. Therefore, a piracy victim may sue his attackers in tort in U.S. federal court under the ATS.

As discussed above, a PMC attack against pirates, if not expressly authorized by a state, would itself constitute piracy under UNCLOS,¹⁰⁸ and would therefore satisfy the “in violation of the law of nations or a treaty of the United States” prong of the ATS.¹⁰⁹ *See supra* Part IV.B. If a state authorized the PMC attack, then the victim could use that authorization to prove the state-action element of a human-rights tort. If there was no authorization, the victim could allege piracy itself as a tort, bypassing the state-action requirement. Either way, then, the ATS would provide jurisdiction in a Somali pirate’s case against his PMC attackers.

Where international law provides a broader right created after 1789, one must look beyond the Alien Tort Statute for jurisdiction. For example, the U.S. implementation of the

¹⁰⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

¹⁰⁶ Jessica Priselac, Comment, *The Requirement of State Action in Alien Tort Statute Claims: Does Sosa Matter?*, 21 EMORY INT’L L. REV. 789, 792 (2007).

¹⁰⁷ *Id.*

¹⁰⁸ UNCLOS, *supra* note 69, arts. 101, 107.

¹⁰⁹ Although the U.S. is not a party to UNCLOS, “it appears to be satisfied with all aspects of the Convention except for the deep seabed portion of the text.” Jonathan I. Charney, *The United States and the Law of the Sea after UNCLOS III: The Impact of General International Law*, 46 LAW & CONTEMP. PROBS. 37 (1983). There is no reason to believe the United States’ practice in piracy would deviate from the UNCLOS rules it has impliedly endorsed with its votes on the Security Council, and which rules are in any event functionally identical to those in the older Convention on the High Seas to which it is a party. *See supra* note 75, arts. 15, 21.

Hostages Convention does not limit the offense to state actors.¹¹⁰ However, it only creates a criminal offense, rather than a private right of action. If the government declines to prosecute, the victim has no private right of action under the Convention or the Supreme Court's construction of the Alien Tort Statute.

G. International Humanitarian Law

International humanitarian law (“IHL”), or the law of armed conflict (“LOAC”), is a rich body of law best known for the Geneva Conventions, but which traces its roots to the Lieber Code developed during the U.S. Civil War.¹¹¹ Before exploring it, however, a threshold question must be answered: does international humanitarian law apply at all to transnational violence without any state combatants?

IHL distinguishes between two forms of armed conflict: *international* armed conflict and *non-international* armed conflict (or “armed conflict not of an international character,” as the Geneva Conventions describe it). Purely private transnational violence fits neither category neatly, however. Such conflict crosses international borders, a characteristic of international armed conflict, but involves no states as combatants; international armed conflict is typically between states. Non-international armed conflict essentially means civil war, or a conflict between state and non-state combatants. Although neither category fits perfectly, transnational non-state violence is more like non-international armed conflict because of the major role of at least one non-state actor.¹¹²

¹¹⁰ 18 U.S.C. § 1203.

¹¹¹ General Orders No. 100, in RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* (Precedent 1983), available at The Avalon Project, Yale Law School, http://avalon.law.yale.edu/19th_century/lieber.asp (last visited Jun. 10, 2010) [hereinafter Lieber Code].

¹¹² Some authors have characterized aspects of the United States' efforts against terrorist non-state actors as international armed conflict. See, e.g., John Cerone, *Status of Detainees in*

In substance, the law of non-international armed conflict is a very small subset of IHL. Only Common Article 3 and Protocol II (if ratified by the state combatant) apply to non-international armed conflict.¹¹³ POW rules do not apply, and combatants may be prosecuted as criminals instead of enjoying combatant immunity. Additionally, because there is no state party in purely private transnational violence, not even Additional Protocol II would apply—leaving only Common Article 3 to protect combatants.

Common Article 3, which purports to be non-derogable, protects “[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause” from inhumane treatment. Article 3(1) absolutely prohibits four specific categories of conduct:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;

International Armed Conflict, and their Protection in the Course of Criminal Proceedings, ASIL INSIGHT, n.1 (Jan. 2002), <http://www.asil.org/insigh81.cfm>. Although its reasoning is not entirely clear, the Supreme Court appeared to reject this view as to alleged Al Qaeda members captured in Afghanistan, holding instead that Common Article 3 protected them. *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006).

¹¹³ Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Common Article 3]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, Jun. 8, 1977, 1125 U.N.T.S. 609, 26 I.L.M. 568 [hereinafter Protocol II].

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.¹¹⁴

PMC attacks on pirates would constitute murder under Article 3(1)(a). Because piracy is a crime under the law of nations, and because some states impose the death penalty for piracy, such attacks, if construed as punishment for the crime of piracy, could also constitute extrajudicial executions under Article 3(1)(d).

The remaining question, then, is whether pirates qualify as “[p]ersons taking no active part in the hostilities” at all. There are two parts to this question: first, whether there are “hostilities”; and second, whether the pirates are “taking no active part” in them. “Hostilities” and “armed conflict,” although terms of art in IHL, lack universally accepted definitions.¹¹⁵ Determining whether any incident of armed violence rises to the level of “armed conflict” is both fact intensive and often subjective, especially for determinations of non-international armed conflict.¹¹⁶

The hypothetical scenario presented in this paper, a PMC attacking Somali pirates, is most likely not an “armed conflict” because (1) both sides’ goals are primarily economic, not political; (2) although the PMC has military objectives against pirates, the same is not true of the pirates; and (3) there is no overall umbrella group or political movement behind the pirates; and (4) piracy is defined clearly by international law as a crime, not as an act of war. These factors were quite different in the U.S.’ early conflict with the Barbary pirates, in which piracy was used as an instrument of state by three Barbary powers, Tripoli, Algiers and Tunis, which, “although

¹¹⁴ Common Article 3, *supra* note 113.

¹¹⁵ Jelena Pejić, *Status of armed conflicts*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 57, at 79.

¹¹⁶ *Id.*

nominally satraps of the Ottoman Empire, acted autonomously.”¹¹⁷ The Barbary pirates’ dual goals were to gain from taking ships, and to coerce states into paying tribute to the Barbary powers.¹¹⁸ Because of these differences, the Barbary conflict would qualify as armed conflict, but violence between a PMC and modern Somali pirates would not.

Even if there were “hostilities,” one would be hard pressed to find pirate victims of a PMC attack to be “taking no active part” in them. It seems, then, that international humanitarian law would not apply to purely private transnational violence, at least in the form presented by a PMC attack on individual pirates.

V. Accountability for Private Military Force

Dickinson addresses concerns about accountability for private military forces,¹¹⁹ which are illustrated in the anti-piracy context by a late-March 2010 pirate attack on the MV *Almezaan*. Armed private security guards aboard the *Almezaan* returned fire, killing one pirate—the first known killing by private security forces of a pirate.¹²⁰ The six surviving pirates were released the next day “because the captain of the ship they were accused of attacking declined to identify them for the purposes of legal action.”¹²¹

Although the *Almezaan*’s captain may have had legitimate reasons not to cooperate, the incident raises the specter of a code of silence. Although courts would likely void contract terms requiring sailors to not cooperate with investigations into killings by private security teams as

¹¹⁷ *Hamdan* Amicus Brief, *supra* note 8, at 4.

¹¹⁸ *Id.* at 4 and n. 7.

¹¹⁹ Laura Dickinson, *Filartiga’s Legacy in an Era of Military Privatization*, 37 RUTGERS L. J. 703 (2006) (arguing that human-rights tort claims have a better chance of holding government contractors accountable than do legal actions against government employees).

¹²⁰ Alan Cowell, *In First, Private Guards Kill Somali Pirate*, N.Y. TIMES, Mar. 24, 2010.

¹²¹ Alan Cowell, *Pirate Suspects Are Released by Naval Force*, N.Y. TIMES, Mar. 25, 2010.

contrary to public policy,¹²² the parties have strong incentives toward silence regardless of the formal terms of their contract. Individual sailors have little incentive to cooperate with an investigation that might result in murder prosecutions against security guards who saved them from being taken hostage (or worse) by pirates. Refusing to cooperate deprives a prosecution of either the security guards or the pirates of key witnesses, with the end result—as in the Almezaan attack—of impunity for both the security guards and the surviving pirates. Shipping companies have a similarly strong incentive to not cooperate with investigating authorities: security contractors might refuse to work for shippers who violate the code of silence, or charge them more.

A code of silence could also shield serious human rights violations. Although most vessels report an attack immediately, a captain might opt not to report if he believed his private security team could easily overpower the attackers. This decision might be based on subjective malice and intent to kill pirates; but it might also be a purely rational economic decision. If the attack can be suppressed quickly, a captain opting not to report the attack could continue and arrive in port on time. If, on the other hand, he reported the attack, then international naval forces would respond and investigate, a process that would eat into the ship's schedule. If the captain does not take into account the value of pirates' lives, his most rational decision might be to kill them, keep quiet, and keep moving.

VI. The Normative Question: *Should Private Industry Be Allowed to Kill Pirates?*

Somali piracy presents a unique nexus of problems: actors based in a failed state, attacks in international waters beyond states' territorial jurisdictions, lack of leverage in ransom negotiations, and very high costs for apprehending pirates at sea and prosecuting them. Although

¹²² See Restatement (Second) of Contracts § 178 (1981).

largely undertaken for economic reasons, and with very low actual losses of life, some crew members do die every year, and the potential for escalation and greater casualties remains. Because the international community's legal and military responses to date have had such a minor impact, and because the full range of legally possible alternatives offers little hope of greater success, actors in the maritime shipping and insurance industries will be increasingly attracted to illegal measures. As discussed above, the legal risks presented today by the offensive option are high enough to deter it. But *should* this be the case? Under these circumstances, *should* national and international law allow private actors to wield violence against pirates? This section addresses that normative question.

A. Should There Be a Piracy Exception to the Fundamental Right to Life?

Gopalan notes that international law's failure to stop Somali piracy "has created a perverse incentive to kill rather than prosecute," and argues that a program of targeted killing of pirates is justified.¹²³ Gopalan quotes UN Security Council Resolution 1851, which authorizes the use of force against pirates under Chapter VII of the UN Charter. This support is misplaced, however, because Gopalan ignores the proviso that "any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law."¹²⁴ As discussed above, the fundamental human right to life allows few exceptions, and preemptive self-defense or defense of property—no matter how valuable—are not among them.

Despite the flaws in their legal reasoning, arguments such as Gopalan's have innate appeal and resonate with the public. Comments to piracy news stories frequently decry the inefficacy of current approaches and call for killing pirates with no legal process at all. After the

¹²³ Gopalan, *supra* note 42.

¹²⁴ S.C. Res. 1851, *supra* note 65.

recent killing of a pirate by private security contractors, one blog covering the private military industry began its coverage thus: “Excellent. This is yet again the kind of stuff that will give today’s pirates a pause [sic] next time they want to attack a boat.”¹²⁵

In years past, many offenses were punishable by death, including piracy. Congress adopted the death penalty for piracy as early as 1819.¹²⁶ Justice Story explored the history of the international law of piracy, quoting one Italian jurist who wrote, “every nation has a right to pursue, and exterminate [pirates], without any declaration of war.”¹²⁷ At that time, the United States’ early experience with the Barbary Corsairs would have been fresh in the Court’s experience, and the majority had little trouble upholding a death sentence. Lord Coke wrote, “with professed pirates there is no state of peace, they are the enemies of every country, and at all times, and therefore are universally subject to the extreme rights of war”—in other words, summary execution of pirates was the norm.¹²⁸

But *should* there be a piracy exception to the strong rules and norm against extrajudicial killing? Given the strength and clarity of the prohibition against extrajudicial killing—which is unequivocally non-derogable for anything beyond self-defense—the obvious answer is no.

On the other hand, many facts underlying piracy work against this absolute position. Because they sail from predictable locations with unusual equipment (e.g., weapons and ship-boarding gear such as ladders), with reasonable efforts, pirates could be identified with precision while they are at sea even before they engage in acts of piracy. Given the absence of innocent civilians or property at sea, collateral damage there is especially unlikely, assuming the attacks

¹²⁵ *Maritime Security: Private Security Repels An Assault, One Pirate Killed*, Feral Jundi, Mar. 25, 2010, <http://feraljundi.com/2010/03/25/maritime-security-private-security-repels-an-assault-one-pirate-killed/>.

¹²⁶ *United States v. Smith*, 18 U.S. 153, 154 (1820).

¹²⁷ *Id.* at 163 (quoting Azuni).

¹²⁸ Whatley, *supra* note 1, at 549 (citations omitted).

occur before the pirates take hostages.¹²⁹ Further, pirates themselves routinely violate the human rights of their hostages, notably the right to be free from arbitrary detention and the right to life.¹³⁰ In fact, the very act of hostage-taking is a denial of the hostage's right to life. Unlike state combatants, or even many non-state combatants, pirates fail to give reciprocal recognition to the human and humanitarian rights of their hostages. Historically, pirates were regarded as "enem[ies] of the human race"¹³¹—a categorization akin to a perpetrator of modern crimes against humanity. Finally, the culpability of men in a swarm of fast boats approaching merchant vessels with assault rifles, rocket-propelled grenades, and ladders is not seriously in question. Absent evidentiary problems, it is difficult to foresee a scenario under which fair judicial proceedings would result in a not-guilty verdict for someone aboard such a boat.¹³²

When so many of the circumstances militating for full human-rights enforcement are lacking, the arguments for full enforcement of suspected pirates' human rights lose much of their force. However, given the extraordinarily strong language setting out the fundamental human right to life in the UDHR, ICCPR, and other legal instruments, a return to summary execution of pirates at sea seems out of the question.

B. How Much Process are Pirates Due?

One principal objection to extrajudicial killings is that they constitute a deprivation of life and liberty without sufficient process. But how much process is sufficient, and do pirates require

¹²⁹ However, pirates might react to targeted killings by embarking already-held hostages as human shields on *all* their ships.

¹³⁰ See UDHR, *supra* note 96, at art. 9; ICCPR, *supra* note 97, arts. 9(1) (right to be free from arbitrary detention) and 6(1) (right to life). Hostage-taking is also an offense under the International Convention Against the Taking of Hostages, Dec. 17, 1979, G.A. Res. 34/146, U.N. Doc. A/34/46, T.I.A.S. No. 11081, 1316 U.N.T.S. 205 [hereinafter "Hostages Convention"].

¹³¹ *Smith*, 18 U.S. at 161.

¹³² This also assumes the participants are adults. Suspected pirates might raise defenses that they are minors. See, e.g., *Accused Somali pirate to be tried as adult*, MSNBC, Apr. 21, 2009, <http://www.msnbc.msn.com/id/30313755>.

or deserve as much process as others? Common Article 3 provides some guidance, requiring that states “afford[] all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹³³

However, knowing exactly which “judicial guarantees” are “recognized as indispensable by civilized peoples” is far from simple. The Supreme Court addressed this issue in *Hamdan v. Rumsfeld*.¹³⁴ Justice Stevens looked to customary international law to establish a floor for due process to be afforded to prisoners of war, namely that the accused be present when any evidence is given against him.¹³⁵ However, because Justice Kennedy declined to reach the merits of whether the military commission at issue satisfied Common Article 3,¹³⁶ the Court did not reach a majority opinion on that question. In dissent, Justice Thomas rejected Justice Stevens’ position on Common Article 3, arguing that the commission need not function like a court-martial, a premise on which the majority proceeded, and that Common Article 3’s “nebulous standards” were “easily” satisfied.¹³⁷

C. The Law of Armed Conflict’s Prohibition on Targeted Killings

The prohibition on targeted killings in the law of armed conflict is generally credited to Francis Lieber and the Code he developed for the Union Army at Lincoln’s request during the U.S. Civil War.¹³⁸ Article 148 of the Lieber Code, which prohibits assassination, reads:

¹³³ Common Article 3, *supra* note 113.

¹³⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

¹³⁵ *Id.* at 633–35 (Stevens, J., plurality opinion) (finding Guantánamo military commissions violated Common Article 3 for failing to provide adequate “judicial guarantees” of due process under customary international law).

¹³⁶ *Id.* at 643–46, 653–54 (Kennedy, J., concurring) (agreeing that court-martial is baseline for due process from which deviation must be justified, but not reaching construction of Common Article 3).

¹³⁷ *Id.* at 719–24 (Thomas, J., dissenting).

¹³⁸ MICHAEL GROSS, *MORAL DILEMMAS OF MODERN WAR* 100 (Cambridge U. Press 2010).

The law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such intentional outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers of rewards for the assassination of enemies as relapses into barbarism.¹³⁹

Underlying Lieber's prohibition on assassination (or targeted killings in contemporary parlance) is the proposition that combatants in armed conflict, unless guilty of atrocities, should not be treated as criminals either during or after hostilities. Instead, they should be treated with a "presumption of innocence," meaning that "no soldier faces arrest, trial, and punishment for killing enemy soldiers." This proposition, like the Geneva Conventions' prohibition against giving no quarter, is premised on a desire to avoid a cycle of escalating atrocities.¹⁴⁰

Although pirates are unlikely to agree to a reciprocal formal code of conduct, neither Lieber nor Lincoln expected the Confederacy to adopt the Lieber Code. Still, the Code had an important signaling function analogous to modern human-rights and humanitarian law norms. One reason that pirate attacks and hostage-holding are so infrequently lethal is the pirates' strong incentive to remain within the bounds of these norms so as to avoid being put outside those

¹³⁹ Lieber Code, *supra* note 111, art. 148.

¹⁴⁰ GROSS, *supra* note 138, at 102. *See also* Anthony Rogers, *Combatant status*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 57, at 304 (noting recognition of the "non-penal character of [POW] internment" throughout the development of the customary laws of armed conflict).

norms themselves. In other words, pirates understand that any escalation of violence cuts both ways, and they are enormously outmatched in firepower. A program of targeted killings of pirates would undermine this equilibrium and likely lead to more lethal pirate attacks and more dead hostages.

Piracy differs significantly from the situations envisaged by Lieber or the drafters of the Geneva Conventions in that it does not rise to the level of armed conflict. Somali pirates are civilian criminals, not combatants. Under the laws of war, civilians may not be targeted unless they participate directly in hostilities in an armed conflict—and therefore, where, as in the piracy context, there is no armed conflict, civilians may not be targeted for killing.¹⁴¹

D. Discretionary Prosecution of Maritime Mercenaries

Because they take hostages, Somali pirates would be subject to the Hostages Convention. Article 8 of that treaty states that whenever any offender is “found” in a state, that state is “obliged” to prosecute him regardless of where the offense took place.¹⁴² A state’s duty under UNCLOS is far less clear because it specifies only that “[a]ll States shall cooperate to the fullest possible extent in the *repression* of piracy...”¹⁴³ At first glance, the SUA Convention appears to impose a duty to prosecute suspected offenders. However, a closer reading discloses a serious loophole allowing states essentially unfettered discretion. Article 7(1) states that, “*Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the offender...is present shall...take him into custody...for such time as is necessary to enable any criminal or extradition proceeding to be instituted.*”¹⁴⁴ How to determine which “circumstances”

¹⁴¹ Michael N. Schmitt, *The law of targeting*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, *supra* note 57, at 141–42.

¹⁴² Hostages Convention, *supra* note 130, art. 8.

¹⁴³ UNCLOS, *supra* note 69, art. 100 (emphasis added)

¹⁴⁴ SUA Convention, *supra* note 70, art. 7(1).

would “warrant” prosecution is not specified, and the text implies that a state’s satisfaction to that end may be entirely subjective. Although the track record for prosecution of Somali pirates is far from stellar,¹⁴⁵ in the case of a PMC attack itself constituting piracy or a SUA offense, such a subjective standard could even more easily result in impunity.

The UN Convention Against Transnational Organized Crime¹⁴⁶ (hereinafter “TOC Convention”) creates powerful tools for prosecuting transnational crime. Substantively, instead of enumerating specific offenses, the TOC Convention operates on any crime with a domestic sentence of four years or more, creates conspiracy offenses, and outlaws participation in organized-crime groups.¹⁴⁷ Procedurally, the TOC Convention facilitates cooperation between authorities of different states, including extradition.¹⁴⁸

For example, because piracy is recognized as one of the core international crimes and carries heavy punishment worldwide, Somali pirates would clearly qualify as “organized criminal groups” committing “serious crime,” and therefore would be subject to the TOC Convention.¹⁴⁹ Perhaps less intuitively, however, a PMC chartered to fight piracy could just as easily find itself ensnared by the TOC Convention. So long as it intended to kill, any modern firm would satisfy the TOC Convention’s definition of an “organized criminal group.”¹⁵⁰ If the PMC is hired to kill pirates, its employees could be charged with murder—which, in all likelihood, carries a maximum sentence greater than four years in every state party to the TOC Convention. Thus, the many complexities of humanitarian law, human rights, and mercenaries

¹⁴⁵ See *supra* Part II.B.

¹⁴⁶ United Nations Convention Against Transnational Organized Crime Nov. 15, 2000, U.N. Doc. A/55/383, T.I.A.S. 13127 [hereinafter “TOC Convention”].

¹⁴⁷ *Id.* arts. 2(b), 3, 5.

¹⁴⁸ *Id.* arts. 16, 18–27.

¹⁴⁹ *Id.* arts. 2, 3.

¹⁵⁰ *Id.*

are potentially moot; a domestic prosecutor in any involved state could invoke the TOC Convention's procedural advantages and proceed along the familiar lines of a murder case.

Conclusions

The world is afflicted with many grave threats and problems, but today, maritime piracy is not among them. Over the last several years, the international community has spent hundreds of millions of dollars waging a losing battle against small bands of Somali pirates who have inflicted substantial economic damage but actually killed only a handful of sailors. Because they do not work, states should abandon their current counter-piracy policies and instead direct their attention and resources to areas with better prospects for lasting impact—economic and political development on land in Somalia, for example.

Clearly, however, something must be done about the explosion of Somali piracy. Because modern piracy is largely an economic crime, and because states have proven ill-suited to stop it with any of the political, legal, or military tools thus far deployed, economic actors (i.e., the shipping companies) should be given greater leeway to respond effectively. In the Somali piracy context, this means using force—at the very least to defend against attacks in progress

However, because pirates are unlikely to respond to anything short of major violence, the next choice is stark: either stop at defensive force—which has so far provided little deterrence—or grant PMCs authority to strike pirate enterprises preemptively. This boils down to an easily stated, but troubling question: should the international community accept to the economic cost of piracy (which continues to rise), or should it accept the humanitarian costs of authorizing private military force against it? If states choose the latter option, they would be essentially reverting to the maritime law of centuries past. To do so today, however, they must create an explicit exemption to the substantial body of human-rights and humanitarian law that has developed

since the world last grappled with large-scale maritime piracy. Although these bodies of law do not provide clear or complete coverage of private transnational violence, the trend toward greater coverage is unmistakable, and the human right to life is one of international law's strongest positive rights. Without a clear exemption, any authority conferred on PMCs to fight piracy would be largely rhetorical because PMCs would rightly fear prosecution under these legal regimes, especially given the strong norm against mercenarism.¹⁵¹ Whether to grant a piracy exemption to the right to life depends on whether one views piracy as qualitatively different from other crimes. Historically, piracy has been treated differently from other crimes,¹⁵² but whether that remains true today is less clear. That the Security Council has acted repeatedly under Chapter VII, and authorized states to go on the offensive,¹⁵³ suggests that it may.

¹⁵¹ See *supra* Part IV.C.

¹⁵² See *Smith*, 18 U.S. at 161 (characterizing pirates as “enem[ies] of the human race,”); *The Marianna Flora*, 24 U.S. 1, 40 (1825) (“Pirates may, without doubt, be lawfully captured on the ocean by the public or private ships of every nation; for they are, in truth, the common enemies of all mankind, and, as such, are liable to the extreme rights of war.”).

¹⁵³ S.C. Res. 1846, *supra* note 51.