

Pirates vs. Private Security: Commercial Shipping, the Montreux Document, and the Battle for the Gulf of Aden

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The scourge of Somali piracy has imperiled the free movement of commercial shipping vessels in the Gulf of Aden, a major conduit of global commerce. A “grand armada” of international naval forces sent to safeguard commercial vessels near Somalia has been unable to stem the growth of Somali pirate syndicates capable of brazen attacks and bolstered by the promise of multimillion dollar ransoms. This Comment explores the commercial shipping industry’s increasing reliance on private military and security companies (PMSCs) to secure their vessels, cargo, and crews from pirate attacks. The International Maritime Organization and other groups have vehemently opposed PMSC employment aboard commercial vessels, citing the inevitable escalation of violence and excessive use of force that are part of the PMSC modus operandi. This Comment highlights the factual underpinnings that animate these concerns and suggests that the PMSC misconduct in the conflicts in Iraq and Afghanistan provide instructive, indeed critical, lessons regarding the responsible employment of PMSC forces to combat piracy.

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Against this backdrop, this Comment introduces the Montreux Document, an internationally developed code of conduct for PMSCs participating in armed conflict that recalls and affirms the international humanitarian law (IHL) obligations of these armed contractors and their employers. The Montreux Document, which can be readily integrated into PMSC operations through contractual machinery, is the foundational tool by which these private security providers can establish themselves as professional entities accountable to the rule of law. The Comment further analyzes whether the Montreux Document, though clearly relevant to armed conflict on land, is rendered inapposite in the context of counterpiracy operations. In so doing, this Comment examines the current majority position that Somali piracy is not “armed conflict” under international law, and thus not subject to the IHL obligations the Montreux Document seeks to affirm. Furthermore, the unprecedented expansion of piracy since 2008, combined with the explicit invocation of IHL by Security Council Resolution 1851, suggest that piracy may increasingly be viewed as “armed conflict” in the future. Finally, this Comment argues that even if IHL is not presently applicable to counterpiracy operations as “armed conflict,” contract law provides a method of incorporating IHL, by way of the Montreux Document, into PMSC counterpiracy operations. Will the commercial shipping industry heed this call and demand that their PMSC forces operate in accordance with the Montreux Document? In order to effectively manage the conduct of the PMSCs protecting its assets and crewmembers, honor its international legal obligations, and responsibly pursue the most viable solution to the piracy epidemic in the Gulf of Aden, this Comment concludes that it must.

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INTRODUCTION

In the early morning hours of March 23, 2010, 2866 dead-weight tons of steel and bulk cargo sliced through one of the world's most dangerous shipping lanes. The Panamanian-flagged Motor Vessel *Almezaan*, armed with a private security team, was headed for the Somali capital of Mogadishu. Above the faint din of the *Almezaan*'s main engines, the wail of outboard motors shattered the sunrise calm in the Gulf of Aden. Pirates at the helm of maneuverable skiffs, directed from afar by a mother ship, worked in tandem to overcome the *Almezaan* with AK-47s, hoping to secure a multimillion dollar ransom for the release of its cargo and crew. Private military and security company operators repelled the attack. Undeterred, the pirate skiffs attempted another approach on the *Almezaan*. In a burst of muzzle flashes, shots rang out from the skiffs, and were returned in kind. After the second failed attempt, the would-be captors fled, only to be intercepted by a European Union helicopter deployed from a patrolling frigate. Six of the seven pirates that attempted to take the *Almezaan* were detained—the seventh lay dead, mortally wounded by private security gunfire.¹

The first recorded death of a pirate at the hands of private military and security company (PMSC)² employees in the Gulf of Aden sparked mixed reactions. While some commercial shippers³ and the U.S. military⁴ claimed that private armed security has become an operational necessity for a shipping industry plagued by Somali piracy, others argued the employment of PMSC

1. These events are recounted in *Shooting of Pirate by Security Guards Is Raising Concerns*, ASSOCIATED PRESS STARS & STRIPES (Mar. 25, 2010), <http://www.stripes.com/news/shooting-of-pirate-by-security-guards-is-raising-concerns-1.100284>; *Pirate Shot Dead by Armed Guard*, TURKISHMARITIME.COM (last visited Nov. 4, 2012), http://www.turkishmaritime.com.tr/news_print.php?id=5507; *Commercial Ship Strikes Back in Deadly Shootout with Somali Pirates*, CHRISTIAN SCI. MONITOR (Mar. 24, 2010), <http://www.csmmonitor.com/World/Africa/2010/0324/Commercial-ship-strikes-back-in-deadly-shootout-with-Somali-pirates>.

2. Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations and Private Military and Security Companies During Armed Conflict [hereinafter Montreux Document], Annex to the letter dated October 2, 2008 from the Permanent Rep. of Switzerland to the United Nations addressed to the Secretary General, ¶ 9, U.N. Doc A/63/467 (Sept. 17, 2008) (“PMSCs are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.”).

3. See Kathryn Westcott, *‘Pirate’ Death Puts Spotlight on ‘Guns for Hire,’* BBC NEWS (Mar. 24, 2010, 7:14 PM), <http://news.bbc.co.uk/2/hi/africa/8585967.stm> (“[N]o ship with an armed guard has been hijacked, so there are those—particularly those who have had hijacked ships—who think they are necessary.”).

4. See *id.*; see also Kevin Jon Heller, *Blackwater to Protect Somali Shipping Lanes*, OPINIO JURIS BLOG (Oct. 27, 2008), <http://opiniojuris.org/2008/10/27/blackwater-to-protect-somali-shipping-lanes/> (Lieutenant Nate Christensen, U.S. Navy 5th Fleet Spokesman, referred to the increased use of PMSC forces aboard commercial vessels as a “great trend” and indicated that “[w]e would encourage shipping companies to take proactive measures to help ensure their own safety.”).

personnel aboard commercial vessels would inevitably push the maritime shipping industry into increasingly violent confrontations with pirates.⁵ In light of lucrative piracy practices and the inability of coalition naval forces⁶ to stem the expansion of pirate operations, the commercial shipping industry has increasingly turned to PMSC employment to protect its vessels transiting the Gulf of Aden.⁷ This move, however, has raised serious concerns⁸ over “frequent reports of security contractors’ impunity for . . . human rights abuses, criminal misconduct, or aggressive behavior.”⁹

This Comment posits that the Montreux Document, a comprehensive text “containing rules and good practices relating to [PMSCs] operating in armed conflict,”¹⁰ is the cornerstone upon which private security providers can establish themselves as legitimate, professional entities in counterpiracy operations. Further, the best way to implement the Montreux Document is for shipping companies to incorporate its provisions into their contracts with PMSCs, and for shipping clients to insist on these standards.

Part I of this Comment examines the Gulf of Aden’s pivotal role in the global economy, and documents how increasingly pervasive Somali piracy threatens this vital shipping lane. Furthermore, it demonstrates the inability of a robust international naval presence to stem the expansion of piracy in the Gulf of Aden. Part II chronicles the history of PMSC misconduct in Iraq and the ongoing conflict in Afghanistan that animates international concerns regarding private security contractors’ criminal conduct and apparent impunity.¹¹ Similar challenges now face PMSC operators in the Gulf of Aden, and the lessons of these land-based conflicts apply in the counterpiracy context. Specifically, Part II analyzes the employment of PMSCs in Iraq and Afghanistan in regard to four

5. See Katharine Houreld, *AP IMPACT: Security Firms Join Somali Piracy Fight*, USA TODAY (Oct. 26, 2008, 8:10 PM), http://www.usatoday.com/news/world/2008-10-26-2583935117_x.htm. (“[A]rmed guards onboard ships may encourage pirates to use their weapons or spark an arms race between predators and prey.”).

6. See Eugene Kontorovich, *A Guantanamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists*, 98 CALIF. L. REV. 243, 249 (2010). (“In response to the piracy problem, NATO nations, along with other powers, began sending warships to patrol the Gulf of Aden. By the end of 2008, twenty-three nations had committed vessels. The force was augmented by the first naval force ever deployed by the European Union (EU) . . .”).

7. See Houreld, *supra* note 5. (“The jump in interest in private contractors—spurred by [a recent] hijacking of a Ukrainian ship loaded with tanks and other weapons—has brought new players into the market and a flood of business for well-established firms.”).

8. See *id.* (“[S]ome maritime organizations told The Associated Press that armed guards may increase the danger to ships’ crews or that overzealous contractors might accidentally fire on fishermen.”).

9. E.L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT’L L.J. 221, 221 (2008).

10. Permanent Rep. of Switzerland, Letter dated Oct. 2, 2008 from Permanent Rep. of Switzerland to the Secretary-General, U.N. Doc. A/63/467 (Oct. 2, 2008).

11. Gaston, *supra* note 9, at 229 (“Much of the controversy surrounding PMSCs has been due to frequent reports of unpublished criminal misconduct, human rights abuses, and potential war crimes by PMSC personnel.”).

issues: (1) PMSC misconduct, (2) the dearth of meaningful contractual terms, (3) the inadequate legal framework for PMSC accountability, and (4) the lack of financial consequences for PMSC misconduct.

With this history as a background, Part III examines the merits and limitations of the Montreux Document as a foundational tool to affirm international humanitarian law (IHL) and incorporate legal and financial consequences for PMSC misconduct in counterpiracy operations.

In Part IV, this Comment crafts a message to the commercial shipping industry addressing the means by which the Montreux framework can be integrated into PMSC counterpiracy operations and applied to each of the four concerns regarding PMSC activity in Iraq and Afghanistan. Furthermore, Part IV critiques the current majority position that Somali piracy is not “armed conflict” under international law, thus rendering the IHL underpinnings of the Montreux Document inapplicable. Part IV also contrasts the majority position with an opposing view of Somali piracy as armed conflict in light of its striking growth since 2008 and Security Council Resolution 1851’s explicit invocation of IHL principles and authorization of “all necessary measures” to repress piracy. Furthermore, even if piracy does not trigger IHL, the growing nexus between the ongoing armed conflict in mainland Somalia and the proliferation of piracy in the Gulf of Aden calls into question the traditional classification of piracy as a purely criminal enterprise. Ultimately, irrespective of IHL’s direct application to Somali piracy, this body of law can readily *inform* PMSC conduct through incorporation of the Montreux Document into contractual provisions. Finally, this Comment concludes that, at bottom, the commercial shipping industry will either breathe life into—or sound the death knell for—the Montreux Document in counterpiracy operations. With the lives of crew, the weight of international legal obligations, and the hope for a solution to the Somali piracy epidemic at stake, the choice is critical.

I.

THE GULF OF ADEN—“RUNNING THE GAUNTLET”¹²

The modern global economy is predicated upon the free movement of goods by sea. Approximately 90 percent of the world’s trade relies on the maritime shipping industry,¹³ which consists of approximately “twelve to fifteen million containers . . . on the world’s oceans at any one time.”¹⁴ In

12. Chip Cummins, *Piracy Grips Gulf of Aden*, WALL ST. J., Sept. 8, 2008, at A10 (quoting Gavin Simmonds, head of international affairs, British Chamber of Shipping, describing the transit of commercial vessels through the Gulf of Aden as “running the gauntlet”).

13. *Shipping and World Trade*, MARISEC.ORG, <http://www.marisec.org/shippingfacts/worldtrade/index.php> (last visited Oct. 22, 2012).

14. Peter Chalk, *The Maritime Dimension of International Security: Terrorism, Piracy, and Challenges for the United States*, in RAND PROJECT AIR FORCE STRATEGY & DOCTRINE PROGRAM 10 (2008).

recent years, an increasingly sophisticated and violent fleet of pirates in the Gulf of Aden has imperiled this security. Bounded by Yemen to the north and Somalia to the south, the Gulf of Aden is connected to the Red Sea by the narrow Bab el-Mandab Strait, a maritime “chokepoint” that serves as a “strategic link between the Mediterranean Sea and Indian Ocean.”¹⁵

FIGURE 1: A map of the Gulf of Aden¹⁶



As a gateway for oceangoing transport between the United States, the Middle East, and Asia, the Gulf of Aden has emerged as “one of the world’s most important sea lanes.”¹⁷ For example, oil-hungry markets in the West rely on over three million barrels of crude that pass through the Gulf of Aden each day, with 4 percent of global oil demand passing through the Bab el-Mandab strait alone.¹⁸ The enticing combination of high-value cargoes, coupled with the growing prevalence of automated ships run by “skeleton crews” of as few as six people, has led to a “sharp increase in both the number and severity of [pirate] attacks.”¹⁹ Furthermore, a thirty-six-fold increase in ransom payments in the last five years, averaging more than five million dollars per vessel,²⁰ has

15. *World Oil Transit Chokepoints*, U.S. ENERGY INFO. ADMIN. (Aug. 22, 2012), <http://www.eia.gov/countries/regions-topics.cfm?fips=WOTC&trk=p3>.

16. Map available at http://www.somalilandtimes.net/sl/2008/329/0280_clip_image001.gif (last visited Nov. 4, 2012).

17. Cummins, *supra* note 12, at A10.

18. *Id.*

19. United Nations Conference on Trade and Development, Geneva, Switz., *Review of Maritime Transport*, UNCTAD/RMT/2009 134 (2009); see also Freedom Onuoha & Gerald Ezirim, *Sea Piracy and Maritime Security: The Problem of Intervention in the Suppression of Piracy off the Horn of Africa*, 7 J. MAR. RES. 48, 48–49 n.3, (2010) (noting an increase in pirate attacks in the Gulf of Aden from 8 in 2004 to 116 in 2009, and an increase in hostages taken in Somali waters and the Gulf of Aden from 177 in 2007 to 857 in 2009).

20. Viola Gienger, *Piracy Syndicates Feed Off Ransom Payments, U.S. Navy Chief Says*, BUSINESSWEEK (Apr. 22, 2011, 9:00 PM), <http://www.bloomberg.com/news/2011-04-21/piracy-syndicates-feed-off-ransom-income-u-s-navy-chief-says.html> (“The average ransom payment rose 36-fold over five years to \$5.4 million last year, compared with \$150,000 in 2005.”).

emboldened pirates²¹ and facilitated their purchase of more capable attack boats and weapons.²² As of August 16, 2012, Somali piracy activity in that year alone consisted of seventy total incidents, including 13 hijackings and 212 hostages taken, while 11 vessels and 188 hostages remain under pirate control.²³

The global economic cost of piracy is now estimated at seven to twelve billion dollars per year.²⁴ This is due in part to the fact that some commercial carriers have elected to circumnavigate the Cape of Good Hope in lieu of making a treacherous voyage near Somalia, delaying arrivals and increasing fuel consumption.²⁵ Piracy also impedes the arrival of humanitarian aid, a particularly devastating outcome for the 2.4 million drought-affected Somalis who were expected to rely on food aid in 2011.²⁶

Despite a robust naval presence in the Gulf of Aden, consisting primarily of the multinational Combined Task Force 151 and NATO's Operation Ocean Shield,²⁷ conventional military forces have been unable to thwart an expanding piracy network that now strikes at vessels more than one thousand miles from the Somali coast²⁸ and nets annual ransoms in excess of \$250 million.²⁹ The pirates' "target of opportunity" technique, which involves waiting in maneuverable skiffs and attempting to board vessels transiting the area, often results in the capture of major commercial vessels just fifteen to thirty minutes after the pirates are first sighted.³⁰ With over 2.5 million square miles off the

21. *Id.* ("The increase in attacks over the last year is a direct result of the enormous amount of ransom now being paid to pirates.")

22. *Id.* ("The ransoms fuel the business; the business invests in more capability—either in a bigger boat, more weapons, better electronic-detection means to determine where the ships are So it's a business.")

23. *Piracy & Armed Robbery News & Figures*, ICC COMMERCIAL CRIME SERVS. <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> (last visited Oct. 22, 2012).

24. LAUREN PLOCH ET AL., CONG. RESEARCH SERV., *PIRACY OFF THE HORN OF AFRICA*, SUMMARY, 13 (Apr. 27, 2011).

25. *Id.* at 24.

26. *Id.* at 15.

27. *Id.* at 3; see also *Global Maritime Piracy: Fueling Terrorism, Harming Trade: Hearing Before the Subcomm. on Terrorism, Nonproliferation, and Trade*, 112th Cong. 11–12 (2011) (statement of Andrew Shapiro, Assistant Secretary, Bureau of Political-Military Affairs) ("[O]ther national navies in the area conduct counter-piracy patrols as well. On any given day up to thirty vessels from as many as twenty nations are engaged in counter-piracy operations in [the Gulf of Aden and off the eastern coast of Somalia] including countries . . . such as China, India, and Japan."); PLOCH ET AL., *supra* note 24, at 17 ("Among CTF-151, the EU's Operation ATALANTA, NATO's Operation Ocean Shield, and other navies' 'national escort' operations, roughly 3 dozen combatant ships are patrolling in the region.")

28. PLOCH ET AL., *supra* note 24, at 1; see also *id.* at 29 (Apr. 27, 2011) ("Secretary of State Hillary Clinton told Congress in March 2011, 'we have put together an international coalition, but, frankly, we're just not . . . getting enough out of it,' noting that international counter-piracy patrols do not appear to be having a deterrent effect and that the payment of ransoms continues to exacerbate the problem.")

29. *Id.* at 7.

30. *Id.* at 10.

Somali coast to be patrolled,³¹ coalition naval forces have been unable to intervene in a significant number of pirate attacks because the area is “simply too vast to prevent all incidents.”³² As a result, the commercial shipping industry has shown an unprecedented interest in the use of PMSCs to ensure an “immediate security presence aboard vessels . . . to respond to pirate attacks.”³³ Consequently, PMSCs have reported a “substantial increase in inquiries,”³⁴ with some seeing a 400 percent increase in commercial vessel escorts since late 2009.³⁵

II.

THE MODERN PRIVATE SECURITY INDUSTRY

A. PMSC Counterpiracy Operations: Resistance and Concerns

Despite the acknowledged expansion of Somali piracy and the limitations of coalition naval forces to safeguard commercial vessels in the region, powerful voices in the world of maritime commerce have vehemently opposed the employment of PMSCs aboard commercial vessels.³⁶ Among the staunchest critics of PMSC employment aboard commercial vessels are the International Maritime Organization (IMO),³⁷ the International Chamber of Commerce’s International Maritime Bureau (IMB),³⁸ and the International Chamber of Shipping (ICS).³⁹ The chief objection shared by these organizations is the fear

31. Heller, *supra* note 4.

32. PLOCH ET AL., *supra* note 24, at 29–30 (noting the number of vessels required to stop piracy in the Gulf of Aden is “probably much larger than the force currently operating there” and that “as many as 60 ships might be required to fully suppress piracy in the Gulf of Aden alone.”); *see also Global Maritime Piracy*, *supra* note 27 (“Naval operations are necessary but not sufficient for a comprehensive counter-piracy strategy. Given the immense area in which pirates operate, it is often impossible for naval forces to respond in time to stop an attack. There is just too much water to patrol.”).

33. PLOCH ET AL., *supra* note 24, at 36.

34. Katharine Houreld, *Private Ship Escorts Guard Against Pirates*, NAVYTIMES.COM (June 5, 2009, 2:09 PM), http://www.navytimes.com/news/2009/06/ap_piracy_escorts_060509w/.

35. *Id.*; *see also* Houreld, *supra* note 5 (“[M]erchant ships such as bulk carriers or oil tankers are asking [maritime security companies] for teams of armed guards, making what was once a seasonal business off Somalia a year-round enterprise.”).

36. *See* Michael L. Mineau, *Pirates, Blackwater and Maritime Security: The Rise of Private Navies in Response to Modern Piracy*, 9 J. INT’L BUS. & L. 63, 77 (2010) (“[T]he idea of vessel owners hiring armed private security forces from a company like Blackwater to defend against piratical attacks remain[s] unpalatable and even unthinkable to many . . .”).

37. INT’L MAR. ORG., <http://www.imo.org/OurWork/Pages/Home.aspx> (last visited Oct. 22, 2012) (the IMO is a United Nations “specialized agency responsible for safety and security of shipping”).

38. *See* Houreld, *supra* note 5 (“Cyrus Mody, the manager of the International Maritime Bureau . . . worries not all companies have clear rules of engagement or have sought legal advice about the consequence of opening fire.”).

39. *See* Christopher Spearin, *A Private Security Solution to Somali Piracy?*, NAVAL WAR C. REV., Autumn 2010, at 56 (discussing ICS resistance to implementation of PMSC services at sea as a proxy for traditional naval forces).

that the placement of PMSC personnel aboard commercial vessels will escalate the level of violence pirates employ when attempting to take a ship.⁴⁰ As the IMO has stated: “The carrying and use of arms for personal protection of a ship is strongly discouraged,” and “[c]arriage of arms on board ships may encourage attackers to carry firearms thereby escalating an already dangerous situation.”⁴¹

The propriety of hiring PMSC operators to protect commercial vessels has also been called into question, largely due to the controversial and well-publicized misconduct of PMSC personnel in Iraq and Afghanistan.⁴² Indeed, some PMSC firms now offering counterpiracy services in the Gulf of Aden “blame trigger-happy operators in Iraq and Afghanistan for tarnishing the reputation of legitimate businesses.”⁴³ Despite efforts by PMSCs to distinguish their services in the counterpiracy context from those in Iraq and Afghanistan,⁴⁴ the IMO, IMB, and ICS, among other maritime organizations,⁴⁵ have remained wary of PMSCs “with a reputation for being quick on the trigger in Iraq”⁴⁶ and have maintained that “armed escorts may in fact escalate an already volatile situation.”⁴⁷ The “secrecy surrounding the work of [PMSCs]” and the notoriously sparse employee information they provide exacerbate concerns

40. See generally Houreld, *supra* note 5.

41. Karl Malakunas, *WORLD: Private Armed Escorts in High Demand on Sea*, CORPWATCH (May 11, 2005), <http://www.corpwatch.org/article.php?id=12241>; see also Westcott, *supra* note 3 (quoting Captain Pottengal Mukundan, Director of the IMB: “While we understand that owners want to protect their ships, we don’t agree in principle with putting armed security on ships. Ships are not an ideal place for a gun battle.”).

42. See Houreld, *supra* note 5 (“[S]ome maritime organizations told The Associated Press that armed guard may increase the danger to ships’ crews or that overzealous contractors might accidentally fire on fisherman. The record in Iraq of security companies like Blackwater . . . raises concerns about unregulated activity and legal wrangles.”).

43. *Id.*

44. See Carolin Liss, *Privatising the Fight Against Somali Pirates* 12 (Asia Research Centre, Working Paper No. 152, 2008) (quoting John Harris, CEO of HollowPoint Protective Services, a U.S.-based PMSC, “Our purpose is singular in nature. We provide protection for vessels, their crews and cargoes. Unlike the situation in Iraq where Blackwater is involved in both peacekeeping and protection activities, we only respond to attacks on the vessels we protect. Our agents are highly trained to repel attacks with the utmost regard for the safety and security of the vessels and crews.”).

45. See Spearin, *supra* note 39, at 67 (noting that other maritime organizations opposed to the use of PMSCs include the “Baltic International Maritime Council, the International Association of Independent Tanker Owners, the International Chamber of Shipping, the Oil Companies International Marine Forum, the Society of International Gas Tanker and Terminal Operators, the International Association of Dry Cargo Ship Owners, and International Group of Protection and Indemnity Clubs, the Cruise Lines International Association, the International Union of Marine Insurers, the Joint War Committee and Joint Hull Committee, and the International Transport Workers Federation”).

46. Houreld, *supra* note 5; see also *International Piracy on the High Seas: Hearing Before the Subcomm. on Coast Guard and Mar. Transp.*, 111th Cong. 34 (2009) (statement of Giles Noakes, Chief Maritime Security Officer, Baltic International Maritime Council (BIMCO) asserting that BIMCO “resolutely opposes” the use of armed guards aboard ships due to “the risks, implications, and dangerous precedents involved in accepting such measures”).

47. Liss, *supra* note 44, at 12.

regarding PMSC recklessness.⁴⁸ Furthermore, while PMSC firms tout their employees' "vast experience" derived from past military endeavors, "[w]hether or not this experience is in the maritime sector or related to the services and tasks for which they are hired . . . is often unclear."⁴⁹

Finally, maritime industry representatives voiced practical concerns to the House Subcommittee on Coast Guard and Maritime Transportation regarding the use of PMSC forces at sea. For example, the Director of the Oil Companies International Marine Forum, an association of oil companies with an interest in crude oil shipment at sea, stated that the "use of armed guards [is] likely to lead to significant increased risk of personal injury, fire, and explosion, risk of escalation of conflict, particularly as pirates will assume all vessels are armed and attack tempo will increase accordingly."⁵⁰ Echoing concerns cited by opponents of PMSC operations in Iraq and Afghanistan, the President and CEO of the World Shipping Council also identified "operational concerns [with PMSC forces in the Gulf of Aden] such as command and control, rules of engagement, use of deadly force" and noted that "unresolved issues of liability exist if someone is injured or killed in the line of fire."⁵¹

B. PMSC Operations in Iraq and Afghanistan

While the increasing prevalence of PMSC employment in the counterpiracy context is significant, the explosive growth of the private security industry in the past decade is primarily due to the extensive use of PMSCs in Iraq and the ongoing conflict in Afghanistan.⁵² The increase of PMSC involvement in these conflicts has resulted in concerns over the "management, accountability, and transparency"⁵³ of the PMSC industry resulting from reports of excessive force,⁵⁴ cultural insensitivity, and lack of oversight.⁵⁵ Yet,

48. *See id.* at 10 ("[I]nformation concerning the [PMSC] companies past and present activities, the company itself and the people they hire if required is usually sparse.").

49. *Id.* at 10; *see also International Piracy on the High Seas*, *supra* note 46, at 5 n.4 (statement of Christopher Koch, President & CEO, World Shipping Council) (citing "questions regarding quality of civilian armed guards as well as with their training and experience for shipboard force protection operations" as a reason why some commercial vessels do not employ PMSCs in the Gulf of Aden).

50. *International Piracy on the High Seas*, *supra* note 46, at 31 (statement of Captain Phil Davies, Director, Oil Companies International Marine Forum).

51. *International Piracy on the High Seas*, *supra* note 49, at 5, n.4.

52. *See* MOSHE SCHWARTZ, CONG. RESEARCH SERV., DEPARTMENT OF DEFENSE'S USE OF PRIVATE SECURITY CONTRACTORS IN AFGHANISTAN AND IRAQ: BACKGROUND, ANALYSIS, AND OPTIONS FOR CONGRESS, SUMMARY (2011) ("[I]t appears that in Afghanistan and Iraq DOD is for the first time relying so heavily on armed contractors to provide security during combat or stability operations.").

53. JENNIFER K. ELSEA ET AL., CONG. RESEARCH SERV., PRIVATE SECURITY CONTRACTORS IN IRAQ: BACKGROUND, LEGAL STATUS, AND OTHER ISSUES 11 (2008).

54. *See id.* at 12. ("Many military officials reportedly also expressed concerns that the security contractors were trigger happy and 'out-of-control cowboys who alienated the same Iraqis the military is trying to cultivate.'")

55. *Id.*

even if one accepts that the employment of PMSC forces in Iraq and Afghanistan has undermined U.S. efforts in those conflicts,⁵⁶ whether and to what extent the lessons of those conflicts can inform the proper employment of PMSC forces in the counterpiracy context remains an open question. Though the fundamental differences in the operations, stakeholders, and political forces that have shaped the “War on Terror” distinguish that mission from the role of PMSC forces in counterpiracy operations,⁵⁷ the same concerns that animated the debate over PMSC forces in Iraq and Afghanistan apply to the Gulf of Aden. To this end, this Section argues that the lessons of irresponsible employment of PMSCs in Iraq and Afghanistan are critical for understanding the capacity of the PMSC industry to legitimize its counterpiracy operations under the Montreux Document’s legal framework.

PMSC operations in Iraq and Afghanistan have significantly more in common with PMSC counterpiracy actions than might first appear. Some argue, for example, that the work of PMSCs in Iraq and Afghanistan “such as the protection of convoys and people travelling [in theatre] . . . is comparable” to PMSC duties aboard ships.⁵⁸ Such comparisons are challenged on the ground that counterpiracy contractors maintain an exclusively defensive posture,⁵⁹ returning fire only when fired upon, whereas PMSC forces in the War on Terror engaged in “both peacekeeping and protection activities.”⁶⁰ The experiences of Iraq and Afghanistan, however, prove that “defensive” PMSC actions can also lead to excessive use of force and similar PMSC misconduct.

Blackwater USA (“Blackwater”), a PMSC firm that performed extensive services in Iraq and Afghanistan, provides the paradigmatic example. Though Blackwater’s service contract in Iraq was to provide “defensive services,” most of the 195 shooting engagements involving its employees in Iraq between 2005 and 2008 were self-initiated.⁶¹ Because a myopic focus on client defense can incite unnecessary violence both at sea and ashore,⁶²

56. See SCHWARTZ, *supra* note 52, at 16 (“One senior military officer reportedly stated that the actions of armed [PMSCs] ‘can turn an entire district against us.’ Some analysts also contend that [PMSCs] can be a direct threat to the legitimacy of the local government.”).

57. See Kontorovich, *supra* note 6, at 246 (“Unlike the War on Terror, the antipiracy campaign has not been the subject of intense domestic or international dispute; a coalition of diverse states has sent forces to interdict Somali pirates. The only state whose sovereign interests are at stake, Somalia, has . . . no intention of intervening on behalf of the pirates.”).

58. Liss, *supra* note 44, at 12.

59. See, e.g., *id.* (statement of John Harris, CEO, HollowPoint Protective Services).

60. *Id.*

61. *Blackwater USA: Hearing Before the Comm. on Oversight and Gov’t Reform*, 110th Cong. 3 (2007) (statement of Rep. Waxman, Chairman, H. Comm. on Oversight and Gov’t Reform).

62. See Liss, *supra* note 44, at 12 (“The use of excessive violence is . . . often the result of the single-minded protection of [PMSC] clients, with little consideration shown for those not paying for the company’s services.”).

arguments for a bright line between counterpiracy and land-based PMSC services based upon an offensive/defensive dichotomy are unconvincing.⁶³

PMSC operations at sea raise concerns similar to those identified in Iraq and Afghanistan regarding danger to the local populace. For example, PMSCs operating in Iraq were “accused of indiscriminately firing . . . and of shooting to death an unknown number of Iraqi citizens who got too close to their heavily armed convoys.”⁶⁴ PMSC violence against civilians has been attributed in part to the characterization of Iraq and Afghanistan as “conflict area[s] with active hostilities fought . . . under uncertain circumstances where combatants and civilians are difficult to separate.”⁶⁵ Likewise, counterpiracy operations in the Gulf of Aden require PMSCs to make difficult distinctions between preying pirates and innocent fishermen. As one commentator noted, Somali “[f]ishermen can . . . become targets of ‘trigger-happy’ guards, as their vessels are often difficult to distinguish from pirate vessels. Similar problems to those associated with [PMSC] operations in Iraq are therefore a possibility.”⁶⁶ On top of the existing difficulty of distinguishing between civilians and pirates, PMSCs also face a fisher-by-day-and-fighter-by-night phenomenon. Thus, Somali fishermen peacefully minding their nets one day may be pirates attempting to take over a commercial vessel the next, using the exact same boats. The pirates may themselves be aggrieved fishermen that have suffered economic injury due to illegal fishing and dumping in Somali territorial waters.⁶⁷ Furthermore, some Somali fishermen who do not directly participate in piracy activities are nevertheless willing to offer material support to pirates

63. See P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* 89 (2003). Singer notes that an attempted categorization of PMSC operations into “active” versus “passive” components “has been unsuccessful from either an analytical or theoretical perspective.” *Id.* Singer further notes that

firms, such as Armorgroup . . . which offer area defense and installation security . . . are often conceived as “passive.” Rather than attacking forces or seizing territory, they simply create a zone of security around a client’s assets. However, both their operations and the impact that their hiring has on the outcome can also be conceived as very active. Rather than being simple security guards in the domestic conception, such firms stake out the control of zones and fend off military attacks, sometimes using military-style force.

Id.

64. *Contractors Accused of Firing on Civilians, GIs*, NBCNEWS.COM (Aug. 12, 2007, 12:33 AM), http://www.msnbc.msn.com/id/20231579/ns/world_news-mideast_n_africa/t/contractors-accuse-d-firing-civilians-gis/.TOF3Zpi4LzI; see also José L. Gómez del Prado, *Impact in Human Rights of Private Military and Security Companies’ Activities*, UN WORKING GRP. ON THE USE OF MERCENARIES, 3, <http://www.privatesecurityregulation.net/files/Impact%20in%20Human%20Rights%20of%20Private%20Military%20and%20Security%20Companies’%20Activities.pdf> (last visited Oct. 22, 2012) (“As observed in many incidents, PMSC employees can use excessive force and shoot indiscriminately resulting in civilian casualties.”).

65. See Gómez del Prado, *supra* note 64, at 3.

66. Liss, *supra* note 44, at 12.

67. See PLOCH ET AL., *supra* note 24, at 9 (“Somali pirates interviewed by the international media frequently link their piracy activities to trends such as illegal fishing and dumping in Somali waters . . .”).

who can avenge their losses.⁶⁸ This phenomenon is the same vexatious scenario that “caused confusion as to who is a legitimate military target and who must be protected against direct attack” in Iraq and Afghanistan.⁶⁹ Additionally, the vessels of Somali fishermen who have no desire to pursue or support piracy are often conscripted by pirates, further blurring the line between civilian fishermen and would-be pirates.⁷⁰

The dangers of harming innocent civilians at sea are admittedly not analytically identical to the risks derived from “active hostilities fought in the heart of cities.”⁷¹ The nature of the maritime environment insulates counterpiracy operations from the general populace, thus reducing such dangers. Indeed, important differences distinguish the PMSC operations in Iraq and Afghanistan and the Gulf of Aden.⁷² Nonetheless, there are significant parallels between the challenges facing PMSCs in Iraq and Afghanistan and in the counterpiracy context, including risks to a civilian population that is in certain respects indistinguishable from potential aggressors. A commercial shipping industry attentive to the escalation of violence in the Gulf of Aden⁷³

68. See *id.* at 9 (“[C]oastal Somalis lend their fishing boats, equipment, and navigational expertise to teams of would-be pirates from inland communities.”).

69. See *Direct Participation in Hostilities: Questions and Answers*, INT’L COMM’N OF THE RED CROSS RES. CTR. (Feb. 6, 2009), <http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm> (discussing the “farmers by day and fighters by night” scenario in which civilians vacillate between routine, innocuous behavior and participation in “activities closely relating to actual combat,” blurring the line between civilian and combatant).

70. See PLOCH ET AL., *supra* note 24, at 9 (“Many pirate teams use fishing skiffs powered with large outboard motors to give chase to larger [vessels] Local Somali fishermen reportedly are forced to support pirate activities in some cases”).

71. See Gómez del Prado, *supra* note 64, at 3.

72. For example, the use of PMSCs in Iraq and Afghanistan has been challenged as contrary to a tradition in which “bearing arms and employing force in arenas of military conflict have been the sole province of the armed services.” *An Uneasy Relationship: U.S. Reliance on Private Security Firms in Overseas Operations*, 110th Cong. 1 (2007) (statement of Sen. Lieberman, Chairman, S. Comm. on Homeland Sec. & Gov’t Affairs). It may convincingly be argued that in the context of safeguarding private commercial vessels against piracy, a State’s use of force is neither traditional nor appropriate, thus nullifying such concerns about PMSC employment in the Gulf of Aden. *But see* Spearin, *supra* note 39, at 66–67 (suggesting the use of PMSCs aboard commercial vessels may “[upset] long-held understandings about who should be doing what at sea” and that the provision of force at sea by traditional naval forces alone may “bring about a degree of order on the high seas”); Alisha Ryu, *Shipping Industry Mulls Hiring Private Security to Fight Piracy*, VOICE OF AM. (Oct. 22, 2008), <http://www.wvenglish.com/en/voa/stan/2008/10/2008102328098.htm> (quoting ICC marine director Peter Hinchliffe: “I think what navies are forgetting, and perhaps governments are forgetting as well, is that we are talking about the protection of an individual piece of water. What we are talking about is the fundamental obligation of nations to provide safe passage for world trade. So, therefore, it is totally unsatisfactory for naval authorities to try to devolve that responsibility to innocent merchant ships.”).

73. See Liss, *supra* note 44, at 12 (“Oversight of [PMSCs] off Somalia is especially important, to ensure that they operate within national and international law, that violence is not used excessively and that controversial ‘incidents’ involving [PMSCs] comparable to those which occurred in Iraq, will be avoided.”).

and to its own financial security⁷⁴ overlooks these commonalities at its own peril.

Danger to the civilian population is a powerful, but by no means singular, parallel between the PMSC operations in Iraq and Afghanistan and in the Gulf of Aden. For example, articulation of a comprehensive legal regime to govern both counterpiracy and the War on Terror has stymied legislators.⁷⁵ Specifically, scholars have acknowledged that “the anti-piracy campaign and the so-called War on Terror both raise questions about the legal status of conflicts between states and diffuse armed networks with international operations.”⁷⁶ Drawing on these similarities, the following Sections argue that the conflicts in Iraq and Afghanistan revealed four fundamental problems that the commercial shipping industry must address in order to responsibly employ PMSCs: (1) individual PMSC conduct, (2) a dearth of meaningful contractual terms, (3) absence of a substantive legal framework for PMSC accountability, and (4) a lack of financial and other business consequences for unacceptable conduct. These issues provide the framework for fashioning PMSC industry standards that honor international legal obligations and eschew ills that befell PMSCs in Iraq and Afghanistan.

1. Individual Private Security Contractor Conduct in Iraq and Afghanistan

With the expanded outsourcing of U.S. government services over the past decade, the employment of PMSCs in Iraq and Afghanistan increased exponentially. As evidence of this trend, forty cents of every taxpayer dollar spent on federal programs now goes to private contractors, in areas ranging from private security to tax collection to emergency response.⁷⁷ Lawrence Peter, former director of the Private Security Company Association of Iraq,⁷⁸ estimated that in 2008, 30,000 private security employees representing fifty private security contractors worked in Iraq, with clients ranging from the United Nations to the Iraqi government.⁷⁹ By March 2011, 90,339 private

74. See, e.g., PLOCH ET AL., *supra* note 24, at 41 (“The use of armed security may create third-party liabilities if security officers harm innocent mariners or vessels.”).

75. See Kontorovich, *supra* note 6, at 245 (“Issues that have impeded countries’ efforts on both these fronts include: potential confusion about pirates’ prisoner of war (POW) status, the use of prolonged detention, rendition of suspects to countries with poor human rights records, claims of abuse by detainees, the difficulty of proving in civilian courts cases arising from active military operations, and the legality of ‘targeted killings’ of suspected hostile civilians.”).

76. *Id.*

77. See *Blackwater USA*, *supra* note 61, at 2 (“Our Government now outsources even the oversight of outsourcing.”).

78. The Private Security Company Association of Iraq was a nonprofit organization formed to address matters of mutual interest and concern regarding PMSC operations in Iraq. The Private Security Company Association of Iraq was disestablished on December 31, 2011. PRIVATE SEC. CO. ASS’N OF IRAQ, <http://www.psc.ai.org/> (last visited Oct. 22, 2012).

79. ELSEA ET AL., *supra* note 53, at 3.

contractors operated in Afghanistan and 64,253 operated in Iraq,⁸⁰ approximately 10–20 percent of whom performed security functions.⁸¹ With these increases in PMSC presence came highly publicized incidents of PMSC misconduct and mounting disdain for the private security industry.

a. Iraq

The scope of private security employment in Iraq was largely unknown to the American public until 2004. On March 31 of that year, Blackwater became a household name when tactical mistakes in Fallujah⁸² led to the death of four employees, whose bodies were dragged through the streets before being hung on display.⁸³ Media seized upon these gruesome deaths, which precipitated one of the major battles of the Iraq War,⁸⁴ and quickly incited a heated congressional debate over the future of PMSCs in U.S. military operations.⁸⁵

Unfortunately, Fallujah was not an isolated incident. On September 16, 2007, Blackwater guards killed seventeen Iraqi civilians while guarding a diplomatic convoy in Nisoor Square, an act that multiple witnesses described as unprovoked.⁸⁶ A subsequent memorandum released by the House Committee on Oversight and Government Reform described Blackwater's use of force as "frequent and extensive resulting in significant casualties and property damage."⁸⁷ By 2008, 122 Blackwater employees in Iraq had been dismissed for "improper conduct," including an inebriated employee who shot the Iraqi Vice President's bodyguard within the fortified confines of the Green Zone.⁸⁸ Such misconduct ultimately led Secretary of Defense Robert Gates to testify in January 2009 that PMSCs operated "without any supervision or without any coherent strategy . . . and without conscious decision about what we will . . . and . . . won't allow contractors to do."⁸⁹ That same month, the Iraqi government refused to reissue Blackwater's operating license.⁹⁰ Having been ousted from operations in Iraq, Blackwater announced in February 2009 that it

80. MOSHE SCHWARTZ & JOYPRADA SWAIN, CONG. RESEARCH SERV., DEPARTMENT OF DEFENSE CONTRACTORS IN IRAQ AND AFGHANISTAN: BACKGROUND AND ANALYSIS 11, 28 (May 13, 2011).

81. *Id.* at 22.

82. *Blackwater USA*, *supra* note 61, at 3.

83. ELSEA ET AL., *supra* note 53, at 11.

84. *Blackwater USA*, *supra* note 61, at 3.

85. ELSEA ET AL., *supra* note 53, at 11.

86. *Id.* at 12.

87. *Id.*

88. *Id.* at 39 n.184. The Green Zone is "the heavily fortified part of Baghdad where U.S. headquarters are located." Andrew F. Krepinevich, Jr., *How to Win in Iraq*, FOREIGN AFF., Sept.–Oct. 2005, at 87, 94 (2005).

89. *Challenges Facing the Department of Defense, Hearing Before the S. Comm. on Armed Servs.*, 111th Cong. 1 (2009) (statement of Robert Gates, Secretary of Defense of the United States).

90. Dana Hedgpeth, *Blackwater Sheds Name, Shifts Focus*, WASH. POST, Feb. 14, 2009, at D01.

would change its name to “Xe,”⁹¹ a clear attempt to distance the company from the conduct of its past.

b. Afghanistan

Controversy also marks the history of PMSC operations in Afghanistan. Of particular note was the crash of “Blackwater 61,” a flight carrying a cargo of mortars and three U.S. Army soldiers.⁹² A subsequent National Transportation Safety Board (NTSB) investigation revealed that the pilot’s “inappropriate decision to fly a non-standard route and his failure to maintain adequate terrain clearance”⁹³ caused the crash. Furthermore, the NTSB reported that the two pilots were “behaving unprofessionally” and “deliberately flying the nonstandard route low through the valley for fun.”⁹⁴

Blackwater was not the single bad apple in the PMSC bunch—the Project on Government Oversight (POGO), a private government watchdog, publicized similar conduct by ArmorGroup North America (AGNA). In September 2009, POGO reported that AGNA—hired to protect the U.S. Embassy in Kabul—had committed acts of “hazing, sexual misconduct, and drunkenness.”⁹⁵ The POGO investigation also revealed that some AGNA guards and supervisors regularly engaged in “deviant hazing and humiliation” of subordinate employees, including “peeing on people, eating potato chips [from between buttocks],” and “various stages of nudity.”⁹⁶ The investigation further alleged that AGNA supervisors brought prostitutes to Camp Sullivan, a base near the U.S. Embassy in Kabul.⁹⁷ Commentators evaluating these events characterized AGNA contractors as having a “profound disrespect for local cultural and religious norms and Afghan law, further damaging the local perception of [PMSCs] and, potentially, the legitimacy of the United States and its allies.”⁹⁸

2. Dearth of Meaningful Contractual Terms

A lack of specific performance benchmarks or standards of conduct in PMSC contracts imperiled efforts to control PMSC operations in Iraq and

91. *Id.*

92. MAJORITY STAFF OF COMM. ON OVERSIGHT & GOV’T REFORM, 110TH CONG., MEMORANDUM ON THE CRASH OF BLACKWATER FLIGHT 61 (2007).

93. *Aircraft Accident Brief, Accident Number IAD05FA023*, NAT’L TRANSP. SAFETY BD. (Nov. 8, 2006).

94. *Id.*; see also *Specialist’s Factual Report of Investigation: Cockpit Voice Recorder Transcript*, NAT’L TRANSP. SAFETY BD. 19 (Oct. 18, 2005) (recording flight captain stating that “I swear to god they wouldn’t pay me if they knew how much fun this was. . . . It takes an extraordinary day that you can actually get down in . . . and do some [expletive] like this.”).

95. Jake Sherman & Victoria DiDomenico, *The Public Cost of Private Security in Afghanistan*, CTR. ON INT’L COOPERATION, N.Y. UNIV. 2 (Sept. 2009).

96. Letter to Secretary of State Hillary Clinton regarding U.S. Embassy in Kabul, (Sept. 1, 2009), in PROJECT ON GOV’T OVERSIGHT 6.

97. *Id.* at 7.

98. Sherman & DiDomenico, *supra* note 95, at 2.

Afghanistan. Reason suggests that PMSC misconduct contravened contractual terms, and would therefore result in contract termination, disgorgement, or a similar remedy. However, the disturbing reality was a PMSC market in Iraq and Afghanistan governed by vague contracts with tenuous provisions for contractor accountability.⁹⁹ In 2005, for example, not one of the sixty publicly available Iraqi contracts awarded by the U.S. Department of Defense contained “specific provisions requiring contractors to obey human rights, anticorruption, or transparency norms.”¹⁰⁰ A recent study of waste, fraud, and abuse in U.S. operations in Iraq and Afghanistan further highlighted pervasive contractual deficiencies such as inadequately defined performance requirements and poor management of individual contracts.¹⁰¹

After the Nisoor Square incident of September 2007 the U.S. government could no longer afford, either monetarily or politically, inept PMSC contracting. By December 2007, the U.S. Departments of Defense and State signed a memorandum of understanding governing the “selection, vetting, training, equipping, and accounting” of PMSCs in Iraq.¹⁰² In 2011 the Department of Defense promulgated detailed PMSC conduct requirements including a use-of-force continuum,¹⁰³ limits on defensive action in response to hostility, and provisions for PMSC prosecution by the United States or a foreign host nation for the inappropriate use of force.¹⁰⁴ However, this road to meaningful PMSC contracting in Iraq and Afghanistan was reached only after a deluge of wasted funding and expended political capital.

The commercial shipping industry, staring down an expanding piracy threat in the Gulf of Aden, is still in the early stages of incorporating PMSC forces to secure its assets. The American missteps in Iraq and Afghanistan serve as a case study in the importance—indeed the necessity—of meaningful contractual drafting as PMSC maritime employment expands.

99. See Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT’L L. 383, 403 (2006).

100. *Id.* at 403–04; see also Laura A. Dickinson, *Contract as a Tool for Regulating PMCs, in FROM MERCENARIES TO MARKET 220* (2007) (“[T]he foreign affairs contracts (at least those publicly available) [in Iraq] possess so few guidelines, requirements, or benchmarks that they effectively contain no meaningful evaluative criteria whatsoever.”).

101. COMM’N ON WARTIME CONTRACTING IN IRAQ & AFG., *TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS* 81 (2011), available at http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf. This report correctly observed that the U.S. government “accepts great risk when it fails to effectively define detailed requirements before it awards a contract.” *Id.*

102. *Id.* at 62.

103. See *Federal Law Enforcement Training Center Legal Division: Use of Force*, DEP’T OF HOMELAND SEC., <http://www.fletc.gov/training/programs/legal-division/podcasts/fletc-legal-division-use-of-force/> (last visited Oct. 22, 2012) (“The Use of Force continuum is one name for a visual model that depicts progressive escalation and de-escalation of force based on a subject’s actions. . . . They are also known as Use of Force Models, Use of Force Ladders, and Subject to Control Matrices.”).

104. 76 Fed. Reg. 49,650–58 (Aug. 11, 2011) (to be codified at 32 C.F.R. pt. 159).

3. *Inadequate Legal Framework for PMSC Accountability*

The maxim *nullum crimen sine lege, nulla poena sine lege* (“no crime without law, no punishment without law”) underscores the difficulty of expecting PMSC accountability without sufficient legal parameters. PMSC contractors in Iraq operated under the purview of three legal regimes: “(1) the international order of the law and usages of war and resolutions of the United Nations Security Council; (2) U.S. law; and (3) Iraqi law.”¹⁰⁵ Yet strikingly, despite these multiple sources of applicable law, no legal framework effectively held PMSCs accountable.

In the context of international law, PMSCs existed in a legal “grey area,”¹⁰⁶ due in part to the fact these entities “challenge the traditional notions”¹⁰⁷ of international humanitarian law (IHL). IHL envisions a binary understanding of protected persons as either “combatants” or “civilians”¹⁰⁸—PMSCs are arguably neither.¹⁰⁹ Further, because IHL only applies to armed conflict, international debate over whether the U.S.-led War on Terror is an armed conflict further exacerbates these complications. While the U.S. Supreme Court held in *Hamdan v. Rumsfeld*¹¹⁰ that the War on Terror is an armed conflict, international legal scholars and bodies such as the International Committee of the Red Cross (ICRC) have vigorously opposed this conclusion.¹¹¹

In addition, commentators have acknowledged that where international law does offer guidance to PMSC operations, such laws have been “rendered outdated by the new way in which [PMSCs] operate.”¹¹² Furthermore, Peter

105. ELSEA ET AL., *supra* note 53, at 14.

106. *Id.* at 15.

107. Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 401 (2004).

108. *But see Direct Participation in Hostilities: Questions & Answers*, INT’L COMM. OF THE RED CROSS RES. CTR. (Feb. 6, 2009), <http://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm>. This statement merits clarification, as a binary understanding of IHL does not account for the concept of “direct participation in hostilities.” *Id.* This categorization has emerged in recognition of the fact that

[o]ver recent decades, the nature of warfare has changed significantly, and several factors have contributed to blur the distinction between civilians and combatants. . . . Persons participate directly in hostilities when they carry out acts, which aim to support one party to the conflict by directly causing harm to another party. . . . If and for as long as civilians carry out such acts, they are directly participating in hostilities and lose their protection against attack.

Id.

109. *See* Vernon, *supra* note 107.

110. 548 U.S. 557 (2006).

111. *See, e.g.,* Marko Milanovic, *Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing Hamdan and the Israeli Targeted Killings Case*, 89 INT’L REV. RED CROSS 373, 375–76 (2007) (noting the ICRC comment that “the ‘war on terror’ is legally no more a war than the ‘war on drugs’”).

112. P.W. Singer, *War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law*, COLUM. J. TRANSNAT’L L. 521, 526 (2004); *see also id.* at 524 (“[T]he very definitions that international law uses to identify mercenaries include a series of vague, albeit

Singer, a PMSC scholar and senior fellow at the Brookings Institution, has suggested that laws governing PMSCs at the national level are largely ineffectual for three reasons: (1) mobile and adaptive PMSC firms can evade regulation and prosecution by incorporating in areas where governmental controls are minimal;¹¹³ (2) local authorities lack the capacity to challenge PMSC operations given their extraterritorial nature, or attempts by a foreign State to exercise legal authority in the sovereign territory of another State fail;¹¹⁴ and (3) domestic law systematically ignores or underrepresents PMSCs and often defers to the vague or outdated international law standards referenced above.¹¹⁵

The absence of a meaningful legal framework governing PMSC conduct in Iraq and Afghanistan has thus fueled concerns over PMSC impunity. Indeed, a recent study of the legal framework governing PMSC conduct indicated systemic underinvestigation and prosecution of alleged abuses.¹¹⁶ Specifically, the 2007 Nisoor Square incident, which occurred during a Blackwater escort of a Department of State convoy, revealed a “gaping hole” in the PMSC regulatory regime.¹¹⁷ The Military Extraterritorial Jurisdiction Act (MEJA)—which governs PMSCs contracted by the Department of Defense¹¹⁸—did not reach services contracted by the Department of State.¹¹⁹ Initial responses to the incident were promising, but ultimately fruitless. The FBI promptly launched an investigation at the behest of the Department of State, and a House-initiated bill sought to expand MEJA to all federal contractors.¹²⁰ Despite FBI findings that fourteen of the seventeen killings were without cause, no legal action was taken against any Blackwater employees and the proposed MEJA amendments

restrictive, requirements, such that it is nearly impossible to find anyone in any place who fulfills all of the criteria, let alone a firm in the [PMSC] industry.”).

113. *Id.* at 535; see also KATERI CARMOLA, PRIVATE SECURITY CONTRACTORS AND NEW WARS: RISK, LAW, AND ETHICS 130 (2010) (“[I]t is the inability of private contracting entities—national governments—to find any workable legal status under which contractors can operate that makes it seem as if these seemingly lawless mercenary-like forces are intended to be that way.”).

114. Singer, *supra* note 112, at 535.

115. *Id.*

116. See HUMAN RIGHTS FIRST, PRIVATE SECURITY CONTRACTORS AT WAR: ENDING THE CULTURE OF IMPUNITY (2008), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/08115-usls-psc-final.pdf>.

117. Surabhi Ranganathan, *Between Complicity and Irrelevance? Industry Associations and the Challenge of Regulating Private Security Contractors*, 41 GEO. J. INT’L L. 303, 351 (2010). This lack of prosecution has been contrasted with the much stricter standards of conduct enforced against U.S. soldiers under the Uniform Code of Military Justice (UCMJ). See *Blackwater USA*, *supra* note 61, at 10 (discussing a drunken Blackwater contractor shooting the Iraqi Vice President’s guard within the protected Green Zone, and noting “[i]f a drunken U.S. soldier had killed an Iraqi guard, the soldier would face a court martial. But all that happened to the Blackwater contractor is that he lost his job.”).

118. See Ranganathan, *supra* note 117, at 346.

119. See *id.* at 351.

120. *Id.*

fizzled in the Senate.¹²¹ The most tangible outcome of the incident, a joint Department of Defense–Department of State memorandum clarifying PMSC rules of engagement, neglected to elucidate any legal consequences for violation of the rules.¹²²

With the benefit of hindsight, the commercial shipping industry has every incentive to recognize that the responsible employment of PMSC forces requires a comprehensive legal framework with reliable means of redress for violations. Indeed, commentators evaluating PMSC regulatory regimes have recognized that “if laws are absent, unclear, or seen as inappropriate, the respect for them and their resultant effectiveness . . . will be diminished.”¹²³ Part V extends this discussion to consider the suitability of IHL as a substantive legal framework to govern PMSC counterpiracy operations.

4. *Lack of Financial and Other Business Consequences for Misconduct*

The growth of the PMSC industry despite a demonstrated lack of legal accountability for misconduct is troubling. In light of PMSCs’ “perverse, illegal and inhumane treatment”¹²⁴ of others, which has caused “swift and far-reaching”¹²⁵ political fallout, the growth of PMSC use is puzzling. Yet, it may be the very absence of firm legal footing for PMSC prosecution that has enabled PMSCs to flourish.¹²⁶ Simply put: ready access to force, divorced from the traditional international legal constraints that govern its implementation, is a valuable commodity.¹²⁷ This Section considers how business consequences might serve to prevent or punish PMSC misconduct where legal constraints have fallen short. It examines the lack of financial consequences for PMSC misconduct in Iraq and Afghanistan and highlights meritless hiring and retention practices that have proven endemic in the War on Terror.

Market forces drive the PMSC industry. Indeed, this “new global industry”¹²⁸ arose to meet the operational needs of an “overstretched American

121. *Id.* at 352.

122. *Id.*

123. Singer, *supra* note 112, at 524.

124. *Id.* at 525.

125. Jonathan Finer, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT’L L. 259, 259 (2008).

126. *Id.* at 260 (“In explaining the paucity of prosecutions, scholars, military and political officials, and the security companies themselves have long maintained that security contractors operate outside the bounds of an effective legal regime.”).

127. See Gaston, *supra* note 9, at 236 (“Hiring PMSCs to act in [the place of conventional military troops] may also allow states to avoid political costs at an international level, thus unhinging some of the informal, normative restraints on the use of force. . . . [T]he independence of PMSCs may erode state responsibility for the conduct of war making and more generally weaken international humanitarian law compliance.”). Absent legal constraints and business consequences for PMSC forces aboard commercial ships, we might expect that restraints on the use of force and adherence to IHL principles will be similarly eroded in counterpiracy operations.

128. Singer, *supra* note 112, at 521.

military” fighting “simultaneous wars in Iraq and Afghanistan.”¹²⁹ Firms including DynCorp, Combat Support Systems, and Anteon Corporation, among others, now vie for business in the PMSC market.¹³⁰ In light of such competition, market forces can and should be leveraged to control PMSC conduct and promote accountability.¹³¹

Contracts awarded to ill-performing PMSC firms undermine the free market theory that the “fittest” market actors should survive. A striking example of this involves the prominent PMSC firm DynCorp. The company’s Bosnia site supervisor videotaped himself raping two young women,¹³² and other DynCorp employees allegedly obtained illegal weapons, forged passports, and participated in other “immoral acts.”¹³³ Despite these alleged offenses, all of which avoided criminal prosecution, the U.S. government awarded DynCorp a contract worth \$250 million for the training of Iraqi police forces.¹³⁴

While the unmerited acquisition of lucrative contracts suggests there was a marginal incentive to “earn” new U.S. government business, one would think that rescission of contracts already in force would still be a means of influencing PMSC conduct. Yet, despite a number of contracts containing termination provisions, contract rescission in Iraq was “an extreme measure” rarely employed.¹³⁵ For example, when sources “implicated [a prominent U.S.-based PMSC company] in the abuse at Abu Ghraib, not only did government actors fail to terminate [the company’s] contract, they actually *expanded* its terms.”¹³⁶ Furthermore, an absence of “clear benchmarks or output requirements” plagued publicly available contracts in Iraq.¹³⁷ The reins should have been tightened. Instead, they were handed over; private contractors were “often hired to write the procedural rules governing contracting rules and monitoring protocols.”¹³⁸

Before the dust settles on nearly a decade of trial and error in the employment of PMSCs in Iraq and Afghanistan, their misconduct, amorphous contractual provisions, a porous legal framework, and meritless renewal of

129. Finer, *supra* note 125, at 260.

130. Vernon, *supra* note 107, at 379.

131. See Gaston, *supra* note 9, at 222 (“Market forces have been pushing PMSCs to be more compliant than mercenaries in the past with international and domestic legal regulations. This is particularly true of PMSCs seeking contracts from international actors and states that care about hiring reputable privatized forces.”).

132. Singer, *supra* note 112, at 525.

133. *Id.*

134. *Id.*; see also TRANSFORMING WARTIME CONTRACTING, *supra* note 101, at 81 (“Other problems ranged from awards with no justification for the absence of competition to awards with no audits of proposals—even for billion-dollar task orders. For the Iraqi police training program, State awarded a \$1.4 billion task order to DynCorp, foregoing competition.”).

135. Dickinson, *supra* note 100, at 224.

136. *Id.*

137. Dickinson, *supra* note 99, at 411.

138. Dickinson, *supra* note 100, at 226.

contract services will have left an indelible mark on the people of Iraq and Afghanistan, as well as the reputation of the United States and its armed forces. The deleterious consequences of PMSCs' disproportionate use of force and disregard for the local populations¹³⁹ has highlighted the limitations of existing international law to effectively constrain PMSC conduct.¹⁴⁰ Accordingly, the National Defense Authorization Act for Fiscal Year 2008 "required the Secretary of Defense . . . to prescribe regulations and guidance relating to screening, equipping, and managing private security personnel"¹⁴¹

III.

THE MONTREUX DOCUMENT: SOURCE AND SUBSTANCE

The PMSC misconduct in Iraq and Afghanistan was a predicate to the U.S. government's recognition that central to maintaining legitimacy on the world stage was a more robust code of conduct for private security forces. This realization led the United States, along with sixteen other nations, to endorse the Montreux Document, which affirms "legal obligations and . . . good practices for states related to operations of private military and security companies during armed conflict."¹⁴² Forty-one States now participate in the Montreux Document framework.¹⁴³

Put simply, the Montreux Document is "the result of an international process . . . intended to promote respect for international humanitarian law and human rights law" with regard to PMSC conduct.¹⁴⁴ During three years of negotiation, governmental experts, industry stakeholders, and members of civil society¹⁴⁵ representing seventeen nations sought a "clarification of pertinent legal obligations" necessary to achieve this goal.¹⁴⁶ Commentators have suggested that the Montreux Document may "provide the basis for improved

139. See, e.g., Gaston, *supra* note 9, at 229 ("[M]any have argued that PMSC contractors in Iraq and Afghanistan generally treated local civilians disrespectfully and exacerbated local hostility to coalition operations.").

140. See Singer, *supra* note 112, at 526 ("[I]nternational law, as it stands now, is too primitive in [the area of private military actors] to handle such a complex issue that has emerged just in the last decade.").

141. SCHWARTZ & SWAIN, *supra* note 80, at 23. A senior official in the Government Accountability Office hailed the consequent Department of Defense improvements in the "management, oversight, and coordination of [PMSCs] in Iraq" as a "success story." However, other analysts have noted that "substantial gaps still remain in DOD's management of [PMSCs], particularly in Afghanistan." SCHWARTZ, *supra* note 52, at 18–19.

142. James Cockayne, *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 13 J. CONFLICT AND SEC. L. 401 (2009).

143. *Participating States of the Montreux Document*, SWISS FED. DEP'T OF FOREIGN AFFAIRS (June 9, 2012), <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html>.

144. Permanent Rep. of Switzerland, *supra* note 10, at 1.

145. Montreux Document, *supra* note 2, at 5.

146. Permanent Rep. of Switzerland, *supra* note 10, at 3.

standards and accountability in PMSC activity.”¹⁴⁷ Those skeptical of State willingness to give credence to the Montreux provisions note that it is not legally binding.¹⁴⁸ Nevertheless, it is difficult to dispute that the Montreux Document represents the “clearest statement to date of the legal norms and business, administrative and regulatory practices that shape the relationships between states and PMSCs.”¹⁴⁹

To understand the applicability of the Montreux Document to counterpiracy operations, it is first necessary to understand the structure and content of the document itself. The document is divided into two parts: The first part acknowledges “certain existing international legal obligations of States regarding private military and security companies.”¹⁵⁰ The second part provides a description of seventy-three “good practices that [aim] to provide guidance and assistance to States” to ensure compliance with the international humanitarian and human rights laws applicable during armed conflict.¹⁵¹ Both parts are further delineated into obligations of Contracting States (“States that directly contract for the services of PMSCs”), Territorial States (“States on whose territory [PMSCs] operate”), and Home States (“States of nationality of a PMSC”).¹⁵²

The question of whether the Montreux provisions apply to PMSC conduct in the counterpiracy context has been disputed.¹⁵³ As some commentators have recognized, the Montreux Document does not specifically mention or address the employment of PMSCs on ships.¹⁵⁴ However, the document utilizes inclusive language to define PMSCs as private businesses that provide “security services . . . irrespective of how they describe themselves,” whose stock in trade is “armed guarding . . . of persons and objects.”¹⁵⁵ Language that sweeps so broadly arguably evidences the drafters’ intent to govern PMSC conduct in all its myriad forms.

Further, Christopher Spearin argues that three factors weigh in favor of Montreux Document applicability in the maritime context. First, through development of practices “germane to the wider development of responsible

147. Cockayne, *supra* note 142, at 402.

148. See Permanent Rep. of Switzerland, *supra* note 10, at 3.

149. Cockayne, *supra* note 142, at 401–02.

150. Montreux Document, *supra* note 2, at 7. The first part contains “hard” international humanitarian law and human rights law obligations that states must follow independent of the Montreux framework.

151. *Id.* at 12.

152. *Id.* at 6.

153. An important aspect of this analysis is whether Somali piracy can rightly be characterized as “armed conflict,” the stated context in which the Montreux provisions apply. This matter is taken up in detail in Part V, which discusses the potential applicability of international humanitarian law (IHL) as a substantive legal framework to govern PMSC counterpiracy operations.

154. See Grace Rodden & James Walsh III, *The Legal Issues of Private Armed Security on Commercial Ships*, 58 FED. LAW. 30, 33 (2011).

155. Montreux Document, *supra* note 2, at 6.

PMSC employment independent of context,” the Montreux drafters solidified the document’s applicability to peacetime missions in addition to its most obvious application in the context of armed conflict.¹⁵⁶ Second, the document utilizes inclusive language to define PMSCs.¹⁵⁷ Furthermore, the drafters urged that these “good practices may be of value for other entities such as international organizations, NGOs [nongovernmental organizations] and companies.”¹⁵⁸ In addition, the document’s use-of-force provisions, weapons posture, and PMSC training are not unique to PMSC conduct on land, but rather form the “patchwork of hard law obligations”¹⁵⁹ incumbent on States by virtue of their obligation to adhere to IHL and human rights law (HRL).¹⁶⁰ Finally, the explanatory comments to the Montreux Document specifically identify “contracting of PMSCs to protect merchant shipping against acts of piracy” as a context where the document offers “practical guidance.”¹⁶¹ Recognizing that counterpiracy operations are “best understood” as a matter of maritime law enforcement rather than armed conflict, the drafters nonetheless reaffirmed the applicability of the Montreux Document’s jurisdictional guidance.¹⁶² As Ambassador Maurer stated in his informal summary of the Montreux Document, PMSCs governed by the Montreux provisions are “contracted for a range of services.”¹⁶³ Thus, the letter and spirit of the document suggest that PMSC counterpiracy operations in the maritime environment fit within these broad contours.

A. *Limits of the Montreux Document: Barriers to Implementation*

The conclusion that the Montreux Document’s provisions can be applied to PMSC antipiracy operations, however, does not answer the difficult question of the document’s effectiveness as a normative tool to influence PMSCs’ “boots on deck” conduct. Before answering that question, it is first helpful to air the concerns and potential enforcement gaps in the Montreux framework.

The failure to create legal obligations is the document’s first and most obvious limitation.¹⁶⁴ The introduction in the first part of the document

156. Spearin, *supra* note 39, at 65.

157. *See id.*

158. *Id.* (quoting Montreux Document, *supra* note 2, at 5, ¶ 8); *see also id.* (noting that “state and nonstate actors can become savvy about the [PMSC] industry in terms of background checks, past activities, and performance requirements”).

159. Cockayne, *supra* note 142, at 404.

160. Spearin, *supra* note 39, at 65.

161. INT’L COMM. OF THE RED CROSS, THE MONTEUX DOCUMENT ON PERTINENT INTERNATIONAL LEGAL OBLIGATIONS AND GOOD PRACTICES FOR STATES RELATED TO OPERATIONS OF PRIVATE MILITARY AND SECURITY COMPANIES DURING ARMED CONFLICT (2009), available at http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

162. *Id.*

163. Permanent Rep. of Switzerland, *supra* note 10, at 3.

164. *See* Montreux Document, *supra* note 2, at 5, ¶ 3.

acknowledges this limitation in no uncertain terms,¹⁶⁵ as does the second part, which states: “[N]o State has the legal obligation to implement any particular good practice.”¹⁶⁶ While conceding that the Montreux Document is replete with solid recommendations for responsible PMSC conduct, one commentator lamented that its provisions are “soft-peddled as reminders and suggestions, couched in the language of ‘best practices’ that evokes corporate good governance”¹⁶⁷

One of the principal rebuttals to these concerns regarding the lack of legal obligation is that the Montreux Document, while not *creating* obligations, does *affirm* obligations to which States are bound under IHL. Indeed, the drafters relied on the universally ratified Geneva Conventions and the widely recognized, if controversial, ICRC study on customary international law.¹⁶⁸

However, this rebuttal loses purchase in the purely commercial context of private shipping companies employing PMSCs, because State obligations under IHL and HRL do not apply to private entities. That the “direct use of PMSCs by governments” is “the exception rather than the rule” only exacerbates the enforcement problem.¹⁶⁹ Thus the document’s limited ability to compel private employers of PMSCs to recognize international obligations provides a loophole for PMSCs to evade IHL and HRL.

A second limitation of the Montreux Document is the vagueness of the international legal obligations and proffered “good practices.” Some of this vagueness exists independent of the document itself. For example, the provisions of the first part recall and affirm obligations under IHL, a body of law that “often sets out general principles for states to follow without specifying how such principles should be implemented.”¹⁷⁰ Some commentators, however, lamented that the document could have included more specific terms. Amnesty International argued in statement that the document’s first part “does not elaborate with enough detail and precision the applicable international law, so limiting its utility as guidance to states and PMSCs on their existing legal obligations or as a solid legal framework within which to implement” the recommended practices.¹⁷¹ Similarly, industry representatives praised the Montreux framework in the main, but expressed concerns about its

165. *See id.* at 7.

166. *See id.* at 12.

167. CARMOLA, *supra* note 113, at 105.

168. Cockayne, *supra* note 142, at 405.

169. CARMOLA, *supra* note 113, at 106 (quoting W. Hays Parks, former defense department attorney and special assistant to the Army Judge Advocate General).

170. Gaston, *supra* note 9, at 244.

171. Amnesty Int’l, *Public Statement on the Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to the Operations of Private Military and Security Companies During Armed Conflict*, AI Index IOR 30/010/2008 (Oct. 14, 2008).

capacity for implementation, arguing that “mere implementation through governments’ internalization” of the document’s standards was insufficient.¹⁷²

Furthermore, even the second part, which offers an extensive list of good practices, contains a number of ambiguous terms. For example, Contracting States are to provide “adequate resources” and draw on “relevant expertise” when selecting PMSCs for employment,¹⁷³ while making sure that PMSCs are “sufficiently trained” for deployment.¹⁷⁴ While this part seems to suggest that a “sufficiently trained” PMSC operator must obtain a number of core training competencies,¹⁷⁵ the brief list of competencies is neither exhaustive nor prescriptive of a standardized training regimen. Unsurprisingly, the amorphous standards allow a profit-driven private security industry to interpret what is “adequate,” “relevant,” or “sufficient” in a manner that supports its financial or administrative objectives.

A final limitation of the Montreux Document’s implementation in PMSC counterpiracy operations is a lack of international pressure and consequent unwillingness of governments and private organizations alike to expend political capital to preserve pirates’ rights. With the exception of terrorists, one is hard-pressed to find a pariah so consistently reviled as pirates. Indeed, pirates were long ago deemed the *hostes humani generis*—the common enemies of all mankind.¹⁷⁶ The Afghan and Iraqi governments have both the power and media platform to make public statements following harm to their citizens at the hands of PMSCs, thus exerting significant political pressure on States employing PMSCs to implement regulations that closely monitor their conduct.¹⁷⁷ By contrast, Somali pirates lack the forum, inclination, and legitimacy within the international community to make appeals for reform should they be injured or killed in the course of a PMSC engagement.¹⁷⁸ In short, “common enemies of mankind” have no constituency. As Professor Amitai Etzioni notes, limiting enforcement actions against pirates to customary international use-of-force thresholds “is to set a high price on human rights of pirates at the expense of

172. Cockayne, *supra* note 142, at 426; *see also id.* (quoting Erik Westropp, former director of Control Risks Group, a risk consultancy, stating that the current approach was akin to “a bible which has no enforcement power”).

173. Montreux Document, *supra* note 2, at 13, ¶ 3.

174. *Id.* at 14, ¶ 10.

175. *See id.*

176. *See* Zou Keyuan, *Seeking Effectiveness for the Crackdown of Piracy at Sea*, 59 J. INT’L AFF. 117, 117 (2005).

177. *See generally* Joshua Partlow, *Afghans Rebuff Security Contractors: Karzai Wants Companies Out U.S. Calls 4-Month Deadline ‘Very Challenging,’* WASH. POST, Aug. 17, 2010, at A01 (discussing a surprise announcement by Afghan President Hamid Karzai’s spokesman calling for a four-month withdrawal timeline of PMSCs operating in Afghanistan, and comparing this announcement to earlier Iraqi government protests regarding PMSC conduct that resulted in expanded legal provisions by which PMSCs in Iraq could be held accountable).

178. *See* Kontorovich, *supra* note 6, at 246 (“[P]irates lack ideological fellow-travelers who might draw attention to their cases. Terrorists have political goals and thus sympathizers, lobbyists, and often state support.”).

rights of the hostages.”¹⁷⁹ Finally, where a veritable brigade of international news agencies can expose PMSC misconduct with almost real-time efficiency in Iraq and Afghanistan, PMSC misconduct aboard vessels in the Gulf of Aden may be effectively insulated¹⁸⁰ from public exposure and consequent calls for reform.

IV.

A MESSAGE TO THE COMMERCIAL SHIPPING INDUSTRY: MAKING MONTREUX YOUR OWN

The limitations of the Montreux Document clearly demonstrate that it has no talismanic power to immunize commercial shipping vessels from PMSC misconduct. This Comment posits, however, that the Montreux Document is anything but a dead letter. Rather, the commercial shipping industry should recognize that it “will take significant leadership . . . to breathe life into the Montreux Document”¹⁸¹ and rise to the occasion. It is only through such leadership that the commercial shipping industry can employ PMSCs in a way that ensures their conduct does not mar the industry’s reputation and safety record, as occurred in Iraq and Afghanistan.¹⁸² This Part addresses how PMSC antipiracy operations can apply the Montreux framework to each of the concerns regarding PMSC activity in Iraq and Afghanistan. In this way, the commercial shipping industry can mitigate the document’s limitations by leveraging the Montreux framework to create a disciplined, accountable cadre of PMSC operators. This would convince hesitant voices within the maritime industry to embrace the PMSC mission aboard commercial vessels and provide the most viable solution to the scourge of piracy in the Gulf of Aden.

179. Amitai Etzioni, *Somali Pirates: An Expansive Interpretation of Human Rights*, 15 TEX. REV. L. & POL. 40, 52 (2010); see also John Bolton, *A World Turned Upside Down? U.S. Now a Judicial Target for Defending Lawful Commerce*, WASH. TIMES, Apr. 17, 2009, at A21 (quoting Bolton, former permanent representative to the UN, stating that “due process is only that process that is due, and the pirates have already had more than enough”).

180. See Carolin Liss, *Losing Control? The Privatisation of Anti-Piracy*, 63 AUSTL. J. INT’L AFF. 390, 399 (2009) (“PSC services that are conducted at sea often take place out of sight of authorities or (locatable) witnesses. It is, consequently, particularly difficult to hold PSC employees responsible for their actions.”).

181. Cockayne, *supra* note 142, at 427.

182. As Part V will demonstrate, inherent in this leadership is a willingness to employ reputable PMSC services that have demonstrated the knowledge and willingness to comport with the Montreux Document. See Carolin Liss, *Privatising Anti-Piracy Services in Strategically Important Waterways: Risks, Challenges and Benefits* 11–12 (Graduate School of Public Policy Working Paper Services, Univ. of Tokyo, Working Paper No. E-09-003, 2009) (“It is indeed important for clients to employ a reliable [PMSC] because the consequences of hiring an unreliable company can be problematic at best or disastrous at worst—not only for the client The ‘right’ choice may be particularly hard to make when employing [PMSCs] to conduct anti-piracy services because the maritime sphere (maybe more than most other environments) offers incentives for clients of [PMSCs] to disregard, or at least not insist on operations in accordance with, international laws and standards.”); see also *id.* at 12 (“If clients insist on work in accordance with international values and local and international laws, [PMSCs] will (most likely) comply.”).

A. PMSC Conduct Aboard Commercial Vessels

This first case of a pirate fatality due to PMSC action garnered the attention of the international community and sparked fears that PMSC employment on commercial vessels would increase piracy-related violence in the Gulf of Aden.¹⁸³ In the days following the shooting, a legal consultant for the United Nations' antipiracy program promised that the shooting would be "scrutinized very closely," adding that "[t]here's always been concern about these [private security] companies."¹⁸⁴ By contrast, senior U.S. military personnel have argued that PMSCs can be an effective component of a multifaceted response to piracy, which includes shipping industry best practices, coalition naval forces, and transit through designated shipping lanes. In response to written questions submitted by Senator Frank Lautenberg to U.S. Coast Guard Rear Admiral Brian Salerno regarding the employment of PMSCs aboard commercial ships, Salerno reiterated the U.S. government's position that, "on certain vessels determined to be at high risk, properly screened and certified third-party security providers with firearms . . . can be an effective deterrent to pirate attacks off the Horn of Africa."¹⁸⁵ Salerno also indicated that the Department of Defense views naval forces in the Gulf of Aden and PMSCs aboard merchant ships as "mutually supporting measures."¹⁸⁶

Individual choices made by PMSCs defending commercial vessels against pirate attacks will shape the ongoing debate surrounding PMSC operations in the Gulf of Aden. Diligent adherence to the standards enunciated in the Montreux Document and the incorporation of those standards in contractual provisions will buttress the arguments for expanded PMSC employment in the Gulf of Aden. One false move, however, will just as surely vindicate the concerns voiced by the IMO, among others, regarding PMSC employment at sea.

B. Contracting Legitimacy: Meaningful Contractual Terms

Contract law is a capable, yet underutilized, resource to infuse private-sector dealing with international legal norms.¹⁸⁷ Professor Laura Dickinson, a distinguished scholar who has written extensively on the privatization of the military, notes that "[c]ontractual terms can specify norms and structure the contractual relationship in ways that spur contractors to implement those

183. See *Shooting of Pirate by Security Guards Is Raising Concerns*, *supra* note 1.

184. *Id.*

185. *Piracy on the High Seas: Protecting Our Ships, Crews, and Passengers: Hearing Before the Subcomm. on Surface Transp. and Merchant Marine Infrastructure, Safety, and Security*, 111th Cong. 54 (2007) (Response to Written Questions Submitted by Hon. Frank R. Lautenberg to Rear Admiral Brian M. Salerno).

186. *Id.* at 62.

187. Dickinson, *supra* note 99, at 402.

norms.”¹⁸⁸ Through its perfunctory contractual drafting and oversight in Iraq and Afghanistan, the U.S. government surrendered perhaps its most adept and calibrated tool for holding PMSCs accountable.

Professor Dickinson argues that more precise contractual terms specifying baseline certification requirements would improve regulation of PMSC conduct.¹⁸⁹ Specifically, Dickinson stresses that “contracts could explicitly require contractor-employees to receive training in international human rights and humanitarian law.”¹⁹⁰

The Montreux Document’s recommended criteria for the selection of PMSCs underscores the wisdom of Dickinson’s assertion. It calls for “sufficiently trained” operators “under the specific contract” to receive training in “international humanitarian law and human rights law,” use-of-force rules, religious and cultural literacy, and techniques to resist corruption.¹⁹¹ The transfer of the Montreux Document provisions into contractual terms would thus empower commercial shipping entities to elicit binding contractual standards for PMSC training and qualifications that were virtually absent from PMSC employment contracts in Iraq.¹⁹²

The contract itself, however, is not the end of the story. Painstakingly drafted contractual terms mean little in the absence of effective contractual oversight. Carolin Liss, a scholar who has written extensively on the use of PMSCs in counterpiracy operations, notes that PMSCs’ “lack of accountability . . . may facilitate or even encourage operations that are not conducted in line with international values and national and international laws.”¹⁹³ Oversight is particularly necessary in the context of PMSC services, which are driven by profit maximization.¹⁹⁴ PMSC contractual oversight, however, is made difficult by the financial impracticality of perpetual

188. *Id.*

189. *See* Dickinson, *supra* note 100, at 221–22.

190. *Id.*

191. Montreux Document, *supra* note 2, at 14, 16. A specific example of a Montreux Document provision translated into contractual terms is the use-of-force restriction: “[U]sing firearms only when necessary in self-defence or defence of third persons” and requiring “immediate reporting and cooperation with competent authorities, including the appropriate contracting official, in the case of use of force and firearms.” *Id.* at 16.

192. *See* Dickinson, *supra* note 100, at 222 (noting that “although a few of the [publicly available Iraq contract] agreements require that contractors hire employees with a certain number of years’ experience, none specifies that the contractor must provide any particular training at all.”). As a further incentive for commercial shippers to obtain binding contracts, the “good practices” outlined in the second part of the Montreux Document lend themselves to ready integration as contractual terms.

193. Liss, *supra* note 182, at 12; *see also* Liss, *supra* note 44, at 15 (“[G]iven that the employment of armed guards [on commercial vessels] is already a reality, improved regulation and oversight of companies operating in the waters off Somalia and other waters is needed.”).

194. *See* Liss, *supra* note 182, at 6 (discussing concerns regarding “the lack of transparency and public oversight . . . of [PMSCs],” which fall outside the “domain of governments” and within the “profit motivated private sector”).

supervision¹⁹⁵ and the fact that a PMSC's fulfillment of its contractual duties is predicated to an extent on the actions of its adversaries.¹⁹⁶ For example, because pirates have shown both restraint and a propensity towards violence and destruction at different times,¹⁹⁷ PMSC contract fulfillment would have to be measured against the circumstances and exigencies of the PMSC response to a given pirate attack.

A licensing regime is a viable means of ensuring that contractual requirements are met, particularly with regard to initial qualification for PMSC operations. The Montreux Document drafters included authorization and licensing provisions among the document's list of best practices. Under the Montreux framework, Territorial States would require both PMSCs and individuals seeking employment in PMSC firms to "register or obtain a license in order to carry out military or security services."¹⁹⁸ The commercial shipping industry could likewise prescribe baseline licensing requirements, such as training in IHL principles, demonstrated knowledge of a promulgated use-of-force continuum, and weapons carriage and handling procedures. In addition, States could require PMSC firms that are licensed to operate aboard commercial vessels to purchase a refundable bond, to be forfeited upon breach of contractual terms.¹⁹⁹ These licensing regimes would allow an employer to "exercise a limited form of indirect principality over [PMSCs]," ultimately shaping PMSC roles and powers.²⁰⁰ Further, the commercial shipping industry is uniquely positioned to coalesce around a uniform licensing regime, as nearly 100 percent of the world's container shipping industry is controlled by just ten corporations.²⁰¹

The United Nations can also play an important role in the supervision of PMSC conduct. Peter Singer has suggested that the UN Secretary General's

195. See SINGER, *supra* note 63, at 157 ("[A] contractual danger is . . . that firms may not perform their missions to the fullest. The principal cannot be present at all times and places (otherwise why contract at all?) and must rely on its agent's good faith execution of the contract.").

196. See *id.* ("[T]he measures of [PMSC] output are often imprecise, as military success depends on the opponent as well.").

197. See PLOCH ET AL., *supra* note 24, at 11 ("While pirate attacks may involve violence and use of weaponry, reports suggest that most Somali pirate groups have not wantonly harmed captives taken in the course of their raids. Somali pirates have, however, demonstrated an increasing willingness to use violence in order to capture a ship, and . . . their treatment of hostages appears to be worsening.").

198. Montreux Document, *supra* note 2, at 18, ¶ 25.

199. See ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 307 (2006) (describing a licensing regime adopted by the Iraqi Ministry of the Interior in which PMSCs "have to submit a minimum refundable bond of \$25,000 and that 'any breaches of Iraq or other applicable law by employees or companies may result in forfeiture of the bond'").

200. JAMES COCKAYNE, *Principal-Agent Theory and Regulation of PMCs*, in FROM MERCENARIES TO MARKET 204 (2007).

201. See John Konrad, *Container Shipping Companies—The Ten Largest Visualized*, GCAPTAIN (Mar. 7, 2009), <http://gcaptain.com/the-ten-largest-container-shipping-companies-visualized?678>.

Special Rapporteur on Mercenarism could establish a UN oversight regime.²⁰² Singer envisions a public international body charged with the dual function of PMSC vetting and approval, which would encourage private entities to comply with UN provisions. Vetted PMSCs would then enter the market with the imprimatur of a UN body, increasing their chances of being awarded security contracts. Teams of “neutral and independent military observers” would buttress the oversight regime by ensuring “that the firm not only followed the laws of war, but also was not engaged in any breach of its operating obligations.”²⁰³ This two-prong method of precontractual screening and postcontractual oversight would bolster the transparency of PMSC conduct while affording the PMSC firm tangible market advantages.

The proffered methods of PMSC contractual oversight and a UN-vetted approval process or a similar licensing regime are not meant to be the exclusive or exhaustive solutions to problems of contractual oversight. Furthermore, the realistic implementation of these or other contractual oversight methods would require permission from commercial shipping companies. Simply put, viable solutions for incorporating the Montreux provisions into measurable contractual benchmarks exist, but can be realized only if the commercial shipping industry is willing to pursue them. James Cockayne, codirector of the Center on Global Counterterrorism Cooperation, referring to the Montreux Document, phrased the pertinent question well: “[N]ow that states have a yardstick—imperfect as it may be—by which to measure their own and each other’s practice in dealing with PMSCs, will they be prepared to use it?”²⁰⁴ Recalling that the missteps of States employing PMSCs in Iraq and Afghanistan provide relevant and timely lessons that parallel the concerns voiced in the counterpiracy context, this Comment argues that this question is appropriately directed not only to States but to the commercial shipping industry as well.

Granted, contractual mandates for training, conduct, and oversight come at a price that PMSCs and the commercial shipping industry are likely unwilling to pay. Indeed, the cost of such requirements may undermine the purported flexibility and cost savings that have justified expansive PMSC employment.²⁰⁵ This view does not fully appreciate, however, the degree to which shoddy contractual draftsmanship can lead to even greater costs. A final report to Congress in August 2011 estimated that as much as \$60 billion has been lost in Iraq and Afghanistan from fiscal years 2002 to 2011 due to poor contracting, including vague contractual requirements.²⁰⁶ The significant costs

202. Singer, *supra* note 112, at 545.

203. *Id.* at 546.

204. Cockayne, *supra* note 142, at 426–27.

205. Dickinson, *supra* note 100, at 225.

206. TRANSFORMING WARTIME CONTRACTING, *supra* note 101, at 5. It should be acknowledged that private security expenditures were only one component of reported contingency

of mandated PMSC training, detailed contractual drafting, and external contract monitoring are dwarfed by such astounding potential losses.²⁰⁷

In addition to increased oversight and accountability, detailed contract provisions are in the best financial and legal interests of PMSCs and commercial shipping companies. Part one of the Montreux Document, reflecting “hard international law,”²⁰⁸ states that “[s]uperiors of PMSC[s] . . . may be liable for crimes under international law committed by PMSC personnel under their effective authority and control.”²⁰⁹ A reasonable interpretation of this language is that either a commercial vessel’s master or the executive leadership within the PMSC firm is a “superior” within the meaning of the Montreux Document. Thus, both the guarded and the guardian have a vested interest in ensuring contractual provisions are sufficiently explicit to guarantee “effective authority and control” over PMSC conduct.

C. *International Humanitarian Law and Counterpiracy Operations*

PMSCs have become key players in modern armed conflicts, both international and noninternational.²¹⁰ In recognition of this fact, the Montreux Document sets out “rules and good practices relating to private military and security companies operating *in armed conflict*.”²¹¹ As mentioned previously, IHL provides the legal framework for conduct in armed conflict. IHL thus has important implications for PMSC personnel, ranging from their “status and treatment upon capture, the use of force by or against them, or state or individual responsibility for their actions.”²¹² However, the expansive use and disparate duties performed by PMSC personnel in modern armed conflicts has led many commentators to conclude that the status of PMSCs in such conflicts exists in a legal “grey area.”²¹³ This is due in large part to the “fundamental distinction” within IHL between members of the armed forces and civilians—PMSCs being square pegs in each of these respective round holes.²¹⁴ Despite a

contracting losses that included defective construction, diversion of funds to local insurgent groups via subcontractors, and insufficient resources for contract oversight, among others. However, PMSC contract losses were highlighted in the report and it was noted that “[a]t the contract level, there [was] a frequent failure to define requirements within reasonable timeframes” and agencies repeatedly “favored using existing task- and delivery-order contracts . . . over creating more competitive and more targeted contract vehicles.” *Id.* at 5, 6, 9.

207. See Dickinson, *supra* note 100, at 225 (suggesting that “[c]ontractual terms that mandate comprehensive outside monitoring and require contractors to engage in self-evaluation, combined with increased resources for monitors, can therefore result in savings down the line.”).

208. Cockayne, *supra* note 142, at 403.

209. Montreux Document, *supra* note 2, at 11, ¶ 27.

210. See Louise Doswald-Beck, *Private Military Companies Under International Humanitarian Law*, in FROM MERCENARIES TO MARKET 115 (2007).

211. Permanent Rep. of Switzerland, *supra* note 10, at 1 (emphasis added).

212. Doswald-Beck, *supra* note 210, at 116.

213. ELSEA ET AL., *supra* note 53, at 15.

214. Doswald-Beck, *supra* note 210, at 116.

dearth of bright lines in IHL regarding the conduct of PMSCs, it is “not accurate to say that there is no law applicable to [PMSCs] at all.”²¹⁵ This Section examines whether IHL provides a substantive legal framework governing the conduct of PMSCs engaged in counterpiracy operations aboard commercial vessels. It ultimately concludes that even if IHL does not govern, it can readily *inform* such operations through well-crafted PMSC contracts.

The assertion that IHL is an appropriate legal framework to govern PMSC counterpiracy operations is subject to challenge on two main grounds: (1) counterpiracy operations do not comport with traditional conceptions of armed conflict, precluding IHL applicability; and (2) IHL provisions pertain to states and not private entities, again precluding IHL applicability to counterpiracy operations in which both parties to the conflict are non-state actors.²¹⁶ Addressing these arguments in turn, this Section first analyzes the majority view that piracy does not meet the definition of armed conflict, rendering IHL inapposite as a legal framework. This view is then contrasted with the argument that, read in light of a series of recent UN Security Council resolutions and growing levels of piracy-related violence, counterpiracy operations in the Gulf of Aden are increasingly being viewed as a noninternational armed conflict (NIAC), triggering IHL. While acknowledging the current dominance of the majority view, this Comment concludes that a nexus between piracy in the Gulf of Aden and the ongoing NIAC in Somalia has the potential to change the calculus of IHL applicability in the future. Addressing the second argument above, this Comment concludes that the incorporation of the Montreux Document’s IHL requirements via specific contractual terms with PMSC operators obviates any state action requirements as a predicate to IHL application.²¹⁷

1. Piracy as Armed Conflict?

a. International Law Definitions of Armed Conflict

International Humanitarian Law applies only during armed conflict.²¹⁸ The International Criminal Tribunal for the Former Yugoslavia determined in *Tadić* that “armed conflict exists whenever there is a resort to armed force

215. *Id.* at 115.

216. *See, e.g.,* CARMOLA, *supra* note 113, at 106 (“[M]ilitary Judge Advocate General (JAG) W. Hays Park noted that since IHL and the law of armed combat pertains to states and not private entities, the laws are not usually applicable.”). The two non-state actors to which I refer in the counterpiracy context are commercial shipping owners, employing the PMSCs, and Somali pirates.

217. *See* Dickinson, *supra* note 100, at 221.

218. *What Is International Humanitarian Law?*, INT’L COMM. OF THE RED CROSS ADVISORY SERV. ON INT’L HUMANITARIAN LAW (2004), available at http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf.

between States or protracted armed violence between governmental authorities and organized armed groups . . . within a State.”²¹⁹

IHL further divides armed conflict into two categories: (1) international armed conflicts (IAC), and (2) noninternational armed conflicts (NIAC).²²⁰ IACs are those involving two or more opposing States.²²¹ Because pirates are not state actors, scholars have uniformly rejected classification of Somali piracy as an IAC.²²²

NIACs, however, have a more nuanced definition. The notion of “armed conflicts not of an international character occurring in the territory” of a State comes from Article 3 of the universally ratified Geneva Conventions (“Common Article 3”) of 1949.²²³ Because the Common Article 3 definition of an NIAC is quite general, the International Committee of the Red Cross has proposed an NIAC definition culled from case law²²⁴ and scholarly commentary,²²⁵ which I adopt here: “*protracted armed confrontations* occurring between governmental armed forces and the forces of one or more armed groups, or between such groups, arising on the territory of a State” that is a party to the Geneva Conventions.²²⁶ In addition, two fundamental requirements distinguish an NIAC from lesser forms of violence such as civil unrest or rioting: hostilities must reach a “minimum level of intensity,”²²⁷ and non-state actors involved must be “parties to the conflict,” meaning they are an armed force sufficiently organized to sustain military operations.²²⁸ Utilizing this definition, the following two Sections will examine arguments for and against classification of piracy as an NIAC.

219. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). Of the many formulations that aim to elucidate what an “armed conflict” entails, the 1995 International Criminal Tribunal for the Former Yugoslavia (ICTY) case of *Prosecutor v. Tadić* definition has been widely recognized.

220. *How Is the Term “Armed Conflict” Defined in International Humanitarian Law?* INT’L COMM. OF THE RED CROSS (Mar. 2008), <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

221. *Id.*

222. See Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?*, 11 MELB. J. INT’L LAW 141, 144 (2010) (“The actors involved could not seriously justify characterization as an international armed combat for the simple reason that pirates are not state forces.”).

223. Geneva Convention (III) Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

224. See *Tadić*, Case No. IT-94-1-I at ¶ 70.

225. *How Is the Term “Armed Conflict” Defined*, *supra* note 220 (the ICRC specifically utilizes the commentary of H.P. Gasser, *International Humanitarian Law: An Introduction, in HUMANITY FOR ALL: THE INT’L RED CROSS & RED CRESCENT MOVEMENT* 555 (H. Haug ed., 1993); D. Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 RCADI 147 (1979); M. Sassoli, *Transnational Armed Groups and International Humanitarian Law* 8–9 (Harvard Univ. Occasional Paper Series, Paper No. 6, 2006)).

226. *How Is the Term “Armed Conflict” Defined*, *supra* note 220, at 5.

227. See *Tadić*, Case No. IT-94-1-I at ¶ 70.

228. *How Is the Term “Armed Conflict” Defined*, *supra* note 220, at 3.

b. The Majority View: IHL Does Not Apply to Counterpiracy

The weight of academic commentary concludes that piracy in the Gulf of Aden does not constitute armed conflict and thus IHL is not the proper legal framework for examining counterpiracy operations.²²⁹ Furthermore, the unanimous view of governments engaged in counterpiracy activity is that they are performing “a law-enforcement operation to which [IHL has] no application.”²³⁰ Utilizing the elements of an NIAC outlined above, this Section examines the arguments supporting the conclusion that piracy is not an NIAC. Finally, given the substantial attention that the Somali piracy epidemic has garnered in the UN Security Council, this Section addresses the implications of five recent Security Council Resolutions on the applicability of IHL to counterpiracy operations.

i. “Protracted Armed Confrontations Between Governmental Armed Forces and the Forces of One or More Armed Groups, or Between Such Groups Arising on the Territory of a State”²³¹

Satisfaction of this element of the NIAC definition requires consideration of (1) the targets of Somali pirate attacks, and (2) whether the armed piracy confrontations arise on Somali territory.²³² The first element requires that pirate attacks be “directed against other armed bands or government forces” in order to constitute an NIAC.²³³ That pirates have not attacked other armed groups or naval forces²³⁴ with any regularity supports the prevailing notion that pirates

229. See, e.g., Kontorovich, *supra* note 6, at 261 (“[T]here are major preliminary doubts about whether the Geneva Conventions apply to the Gulf of Aden [piracy] situation at all, in particular whether the crisis in the region qualifies as an ‘armed conflict between . . . High Contracting Parties’ Even if an armed conflict exists in Somalia, it is not clear that it extends outside of Somali waters and into the territorial high seas.”); see also, e.g., Theodore T. Richard, *Reconsidering the Letter of Marque: Utilizing Private Security Providers Against Piracy*, 39 PUB. CONT. L.J. 411, 461 (2010) (“Maritime security contractors . . . are not recruited to ‘fight’ . . . ; ‘fighting’ might occur as they carry out their duties, but fighting is not the objective of the service. Furthermore ‘armed conflicts’ under the Geneva Conventions are international conflicts between states. Piracy suppression is not an armed conflict because the pirates are not agents of any government or other organized political movement.”).

230. Guilfoyle, *supra* note 222, at 141.

231. *How Is the Term “Armed Conflict” Defined*, *supra* note 220, at 5.

232. Whether pirates are “armed groups” composed of “combatants” is addressed, *infra*, in the discussion of the “parties to the conflict” requirement.

233. See Guilfoyle, *supra* note 222, at 144.

234. The few instances of pirate attacks on foreign naval vessels may be attributed to cases of “mistaken identity” rather than desire to take on the inevitably superior armament of such warships. See, e.g., David C. Scott, *Somali Pirates Mistakenly Attack Dutch Warship. Oops.*, CHRISTIAN SCI. MONITOR (Mar. 18, 2010), <http://www.csmonitor.com/World/Global-News/2010/0318/Somali-pirates-mistakenly-attack-Dutch-warship.-Oops> (“When [the pirates] got close enough to realize their greed was dwarfed by their opponent, the pirates turned their skiffs around and fled.”).

are private actors whose attacks are motivated primarily by financial gain.²³⁵ Likewise, commentators have noted that “the principal targets of Somali pirates are obviously private merchant vessels and crew” rather than “foreign navies.”²³⁶ In addition, pirates claim no allegiance to a particular state nor do they target any specific nation,²³⁷ facts which buttress the conclusion that Somali piracy does not meet the first element of an NIAC.

The second element of the NIAC definition would be satisfied if pirate hostilities were conducted within Somali territory. Because piracy by definition takes place on the high seas,²³⁸ some commentators have held that piracy cannot therefore take place “on the territory” of Somalia.²³⁹ Furthermore, attempts to establish a nexus between the NIAC in mainland Somalia and piracy upon the territorial waters of Somalia have been viewed by some as a dubious extension of an armed conflict to an analytically distinct brand of private hostility.²⁴⁰

ii. *Minimum Level of Intensity*

A “minimum level of intensity,” also referred to as “protracted armed violence,” is a necessary predicate to the finding of an NIAC.²⁴¹ Courts evaluating the existence of a “minimum level of intensity” have looked at factors such as (1) “the number, duration, and intensity of individual confrontations”; (2) “the types of weapons . . . used” and the “number and calibre of munitions fired”; and (3) and “the number of casualties” and “extent of material destruction.”²⁴² None of these factors, however, are individually dispositive.

235. See Rodden & Walsh, *supra* note 154, at 30 (“The Somali pirates are primarily interested in attacking opportunistic targets, regardless of flag state or citizenry of the crew, in order to kidnap crew members and seize vessels for ransom.”).

236. Guilfoyle, *supra* note 222, at 144–45; see also *id.* at 149 (“[W]hile Somali pirates continue to operate against randomly targeted vessels of disparate nationalities to compel private parties to pay large ransoms, there is no credible argument they are acting for anything other than ‘private ends.’”).

237. Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More Is Needed*, 33 *FORDHAM INT’L L.J.* 372, 372 (noting that “[pirates operate] on a supranational level . . . in the name of no particular state, and against no specific nation”).

238. United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982.

239. See e.g., Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 *TUL. MAR. L.J.* 1, 19 (2008) (“Because acts of piracy under international law occur on the high seas or outside the jurisdiction of any state, they do not arise during partial or total occupation of a high contracting party.”).

240. See e.g., Kontorovich, *supra* note 6, at 261 (“Even if an armed conflict exists in Somalia, it is not clear that it extends outside of Somalia waters and into the high seas.”).

241. See also *Prosecutor v. Haradinaj*, Judgment, Case No. IT-04-84-T, ¶ 49 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) (“The criterion of protracted armed violence has . . . been . . . interpreted as referring more to the intensity of the armed violence than to its duration.”).

242. *Id.*

Taking up the first factor, recent scholarship has suggested that confrontations between pirates and naval vessels are “sporadic” and “brief.”²⁴³ Likewise, pirate attacks in the Gulf of Aden have been described as “more akin to acts [of] banditry”²⁴⁴ than sustained periods of armed fighting. In addition, claims of intensity are undermined by pirates’ default “flight” rather than “fight” response in the face of the superior armament possessed by patrolling naval vessels. For example, Somali pirates commonly dump their weapons overboard to avoid detention.²⁴⁵

Closely related to the intensity of the fighting itself, the second factor evaluates the types and caliber of weapons employed. The pirate arsenal typically consists of “a variety of small arms” including AK-47 rifles and rocket propelled grenade (RPG) launchers.²⁴⁶ While perhaps more potent in land warfare, commentators have suggested that such weaponry represents “small-scale” naval firepower.²⁴⁷

Turning to the third factor, the comparatively modest capacity of the pirate arsenal and the necessity to preserve the well-being of hostages to secure a ransom has minimized the number of casualties and amount of destruction as a result of piracy. A 2011 report on Somali piracy found that “[w]hile pirate attacks may involve violence and the use of weaponry . . . most Somali pirate groups have not wantonly harmed captives”²⁴⁸ Furthermore, would-be pirate attacks interrupted by the presence of a patrolling naval vessel are sometimes rebuffed without the exchange of any shots, let alone lethal ones.²⁴⁹

iii. *Parties to the Conflict*

The requirement that pirates be a “party to the conflict” considers whether pirates qualify as “combatants” under international law.²⁵⁰ To qualify as combatants, an armed group must (1) operate under a responsible command, (2) wear a distinctive sign, (3) carry arms openly, and (4) obey the Law of Armed Conflict.²⁵¹

243. Guilfoyle, *supra* note 222, at 144.

244. Beth Van Schaack, *A Response to Douglas Guilfoyle by Beth Van Schaack*, OPINIO JURIS (Nov. 24, 2010, 8:30 AM), <http://opiniojuris.org/2010/11/24/a-response-to-douglas-guilfoyle-by-beth-van-schaack/>.

245. Luis Martinez, *Somali Pirates Attack Spanish Warship and Lose*, ABC NEWS (Jan. 12, 2012, 8:15 PM), <http://abcnews.go.com/blogs/politics/2012/01/somali-pirates-attack-spanish-warship-and-lose/> (describing pirates immediately disengaging from an attack of a Spanish warship when the warship returned fire and dumping weapons overboard before surrendering).

246. PLOCHET AL., *supra* note 24, at 9.

247. Guilfoyle, *supra* note 222, at 144.

248. PLOCHET AL., *supra* note 24, at 11.

249. Guilfoyle, *supra* note 222, at 144 (“[Pirate] attacks are, on occasion, seen off by foreign naval vessels with (on fewer occasions still) shots being exchanged and pirates killed as a result.”).

250. *How Is the Term “Armed Conflict” Defined*, *supra* note 220, at 3.

251. Geneva Convention (III), *supra* note 223, art. 4.

Evaluating pirate command structure under the first element, Professor Guilfoyle notes that while Somali pirates have “some degree of organization and leadership,” this organization along “clan lines or upon business models” is “not sufficient of itself.”²⁵² Similarly, other commentators have noted that “command responsibility” is a legal term of art indicative of responsibility for a subordinate’s actions, a notion particularly difficult to “apply to pirates because it may be impossible to determine who their formal leader is even if they have one.”²⁵³

Although some pirates do wear uniforms, satisfaction of the second element of combatant status—a distinctive sign—is frustrated because pirates operate boats bearing no flag or other clear indicia of pirate affiliation.²⁵⁴ Turning to the third element, there is no dispute that pirates bear arms openly.²⁵⁵ Regarding the fourth element—obeying the Law of Armed Conflict—Professor Guilfoyle emphasizes that “no pirate conducts his piracy operations in accordance with the laws and customs of war because the act of piracy itself is outside the law of war.”²⁵⁶ Finally, the conclusion that pirates do not qualify as combatants is supported by their historic treatment as criminals rather than prisoners of war.²⁵⁷

c. Implications of Recent UN Security Council Resolutions on the Applicability of IHL to Counterpiracy Operations

An important consideration in contemporary discussions of whether piracy constitutes armed conflict is the issuance of Security Council Resolutions 1816, 1838, 1846, 1851, and 1853 between June and December 2008.²⁵⁸ Resolutions 1816, 1838, and 1846 authorize the use of “all necessary means”²⁵⁹ or “the necessary means”²⁶⁰ to repress acts of piracy or armed robbery at sea. Resolution 1851, going even further than its predecessors, authorized States cooperating with the Somali Transitional Federal Government (Somali TFG) to “undertake all necessary measures . . . in Somalia, for the

252. Guilfoyle, *supra* note 222, at 145.

253. Passman, *supra* note 239, at 23–24.

254. *See id.* at 24 (“Some modern pirates actually wear uniforms. However, pirates who use civilian ships without affixing their own distinctive sign or flag will not qualify as having a distinctive sign recognizable at a distance even if they are wearing uniforms.”).

255. Guilfoyle, *supra* note 222, at 145.

256. *Id.* at 146 (quoting Passman, *supra* note 239, at 24).

257. *See id.* at 142–43; *see also* Passman, *supra* note 239, at 16–17 (“Piracy has historically been outside the law of war. . . . Captured pirates were not prisoners of war, and in some cases had fewer rights than domestic criminals.”).

258. *See* Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL INSIGHTS (Feb. 6, 2009), <http://www.asil.org/insights090206.cfm> (“In 2008, the United Nations Security Council passed five separate resolutions dealing with Somali piracy—more resolutions than on any other subject last year.”).

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

260. S.C. Res. 1838, ¶ 3, U.N. Doc. S/RES/1838 (Oct. 7, 2008).

purpose of suppressing acts of piracy and armed robbery at sea.”²⁶¹ In the UN Security Council’s most explicit invocation of IHL in relation to Somali piracy to date, Resolution 1851 directed that such “necessary measures . . . shall be undertaken consistent with applicable international humanitarian and human rights law.”²⁶² Through these resolutions, the Security Council authorized “unprecedented legal authority to pursue pirates,”²⁶³ causing some to query whether the resolutions inaugurate “a new international legal order” governing counterpiracy operations.²⁶⁴

Despite such assertions, piracy experts, including Judge Tullio Treves of the International Tribunal for the Law of the Sea, have pointed to various carefully chosen limitations that make the resolutions “less revolutionary than they might appear.”²⁶⁵ For example, the initial authorization to use “all necessary means” in Resolution 1816 was restricted to Somali territorial waters²⁶⁶ and was limited to a six-month period subject to reporting requirements before renewal of such authority.²⁶⁷ Resolutions 1846 and 1851 were similarly restricted to twelve-month authorizations.²⁶⁸ Judge Treves also confronted the question of whether the use of the phrase “all necessary means,” signaled the Security Council’s intent that IHL should govern the use of force against Somali pirates. Stating that it is “well known that in the parlance of the Security Council ‘all necessary means’ means ‘use of force,’” Judge Treves unequivocally clarifies that counterpiracy “is not use of force against the enemy according to the law of armed conflict, because there is no armed conflict.”²⁶⁹

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

262. *Id.*

263. Kontorovich, *supra* note 258.

264. Kontorovich, *supra* note 6, at 244.

265. Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT’L L. 399, 404 (2009); *see also id.* at 404–05 (noting that the authorizations set out in the resolutions “should not have any effect on the rights third states . . . are entitled to exercise in the territorial sea,” do not establish customary international law, and “affirm that the authorization they contain ‘shall not affect the rights obligations or responsibilities of member States under international law, including any rights or obligations under the [Law of the Sea] Convention’”).

266. *But see* S.C. Res. 1851, *supra* note 261, ¶ 6 (authorizing states, “pursuant to the request of the [Transitional Federal Government of Somalia] to undertake all necessary measures that are appropriate *in Somalia*, for the purpose of suppressing acts of piracy”) (emphasis added). The phrase “in Somalia” has been read to include action undertaken in mainland Somalia. *See* Treves, *supra* note 265, at 404.

267. Treves, *supra* note 265, at 404–05.

268. *Id.*

269. *Id.* at 412; *see also* Guilfoyle, *supra* note 222, at 146–47 (“Resolutions 1816, 1838, and 1846 [e]ach authorizes states to use ‘all necessary means’ or ‘the necessary means’ . . . in accordance with the international law governing action against pirates, as set out in UNCLOS. The resolutions thus authorise only the use of *existing powers* under the ‘laws of peace’ or extend the reach of those powers to Somalia’s territorial waters. They do not authorise recourse to force governed by the laws of war.”) (emphasis added).

Thus, Judge Treves concludes the Security Council Resolutions neither explicitly directed nor implied that IHL applies to counterpiracy operations.²⁷⁰

Finally, Security Council Resolution 1851 authorizes states cooperating with the Somali TFG to “undertake all necessary measures that are appropriate in Somalia” to suppress piracy.²⁷¹ Further, it requires that such actions “shall be undertaken consistent with applicable international humanitarian and human rights law.”²⁷² Given this explicit reference to IHL, Resolution 1851 seems the sharpest thorn in the side of those who would argue that counterpiracy and IHL are mutually exclusive. Yet, proponents of this view contend that use of “applicable” before “international humanitarian law” is dispositive textual evidence that “IHL does not apply automatically under Resolution 1851” since “if there is no armed conflict, IHL has no application.”²⁷³ Furthermore, the view that IHL has no direct application in counterpiracy operations accords with the majority of scholarly commentary²⁷⁴ and the unanimous opinion of States involved in counterpiracy operations.²⁷⁵

d. The Argument for Piracy as a Noninternational Armed Conflict

This Section surveys the arguments that Somali piracy meets the criteria of an NIAC discussed above. Furthermore, it highlights reasons why the “rapidly escalating epidemic”²⁷⁶ of piracy—which has garnered the attention of the UN Security Council and drawn a “Grand Armada”²⁷⁷ of multinational naval forces to confront it—ought not be approached with intractable notions of IHL applicability.

270. See Treves, *supra* note 265, at 412.

271. S.C. Res. 1851, *supra* note 261, ¶ 6.

272. *Id.*

273. Guilfoyle, *supra* note 222, at 147.

274. See, e.g., Treves, *supra* note 265, at 412–13 (“[I]t is a fact that practice in the waters off Somalia seems to indicate that warships patrolling these waters resort to the use of weapons only in response to the use of weapons against them. . . . Thus, self-defence against an armed attack or the threat thereof, either *in the questionable framework of the law of armed conflict* or in the discussed framework of resort to it against non-state actors, or more likely, as a self-imposed rule of engagement for police action, seems to be a guiding principle” of states engaged in counterpiracy near Somalia.) (emphasis added).

275. See Guilfoyle, *supra* note 222, at 141 (“[T]his commentary confirms the view accepted by all governments involved in counter-piracy operations: that this is a law-enforcement operation to which the laws of armed conflict have no application.”).

276. Eugene Kontorovich, *Piracy and International Law*, GLOBAL LAW FORUM JERUSALEM CTR. FOR PUB. AFF. (Feb. 8, 2009), <http://www.globallawforum.org/ViewPublication.aspx?ArticleId=96>.

277. Kontorovich, *supra* note 6, at 249.

i. Protracted Armed Confrontations Between Governmental Armed Forces and the Forces of One or More Armed Groups, or Between Such Groups Arising on the Territory of a State

The first aspect of this element requires that Somali pirate attacks be directed at other armed groups or government forces.²⁷⁸ While most Somali pirates attack commercial ships for financial gain,²⁷⁹ attacks on naval vessels, if only by mistake, appear to be on the rise.²⁸⁰ But because pirates rarely target naval warships purposefully, this element will remain unmet absent a marked change in pirates' nearly exclusive preference for commercial targets.

This element also requires that armed confrontations take place on Somali territory.²⁸¹ Piracy necessarily takes place outside the territory of Somalia, as the international law of piracy under Article 101 of the United Nations Convention on the Law of the Sea applies only on the high seas.²⁸² This definition has the "unintended effect of reducing the area where piracy can be internationally policed."²⁸³ Recognizing this limitation, UN Security Council Resolution 1816 authorizes naval presence "within the territorial waters of Somalia"²⁸⁴ to repress piracy and "essentially authorizes the use of military force in Somalia territory."²⁸⁵ This "unprecedented grant of authority to interdict coastal piracy"²⁸⁶ within twelve miles of the Somali coast²⁸⁷ indicates that armed confrontations with pirates may take place on Somali territory.

Furthermore, even absent armed confrontations in Somali territorial waters, a potential nexus may exist between mainland armed conflict and Somali piracy at sea. Even those who maintain that piracy is not armed conflict have acknowledged that this potential nexus warrants at least considering

278. See Guilfoyle, *supra* note 222, at 144.

279. See J. Ashley Roach, *Countering Piracy off Somalia: International Law and International Institutions*, 104 AM. J. INT'L L. 397, 408 ("The persons who set out to commit acts of piracy off the coast of Somalia are for the most part young Somalis attracted by the 'easy money.'").

280. See Matthew Clark, *Top Five Blunders of Somali Pirates*, CHRISTIAN SCI. MONITOR (Oct. 7, 2009), <http://www.csmonitor.com/World/Global-News/2009/1007/top-5-blunders-of-somali-pirates> ("This is the third time [between January and October 2009] that Somali pirates have attacked a Western military vessel by mistake.").

281. See *How Is the Term "Armed Conflict" Defined*, *supra* note 220, at 5.

282. See United Nations Convention on the Law of the Sea, *supra* note 238, at 61 (defining piracy as "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 . . . and directed: (i) on the high seas, against another ship . . . or (ii) against a ship . . . in a place outside the jurisdiction of any State . . ."); see also Passman, *supra* note 239, at 19 (explaining that total or partial occupation of a State under international law is not an instance of piracy as, by definition, piracy occurs only on the high seas or outside of State jurisdiction).

283. Kontorovich, *supra* note 276, at 3.

284. S.C. Res. 1816, *supra* note 259, ¶ 7(b).

285. Kontorovich, *supra* note 276, at 4.

286. *Id.*

287. United Nations Convention on the Law of the Sea, *supra* note 238, art. 3 ("Every State has the right to establish the breadth of its territorial sea up to limit not exceeding 12 nautical miles, measure from baselines determined in accordance with this Convention.").

whether piracy has itself become armed conflict.²⁸⁸ Underlying this “nexus theory” is the realization that an “increase in pirate attacks off the Horn of Africa is *directly linked* to continuing insecurity and the absence of the rule of law in war-torn Somalia.”²⁸⁹ Furthermore, the UN Security Council has alluded to the connection between the NIAC in mainland Somalia and the acts of piracy at sea, noting that acts of piracy and armed robbery “off the coast of Somalia exacerbate the situation in Somalia.”²⁹⁰

ii. Minimum Level of Intensity

As discussed previously, the minimum level of intensity requirement of the NIAC definition considers (1) the number, duration, and intensity of confrontations; (2) the types and caliber of weaponry; and (3) the extent of both casualties and damage inflicted.²⁹¹

With respect to the first element, the majority view notes that pirate confrontations are generally quite limited in duration.²⁹² However, even brief attacks assume greater significance in light of their unprecedented frequency in the Gulf of Aden. For example, 2008 provided “shocking” statistics on the growing piracy epidemic, including 293 total attacks on ships, 49 vessel hijackings, 889 crewmembers taken hostage, 11 crewmembers killed, and an additional 21 missing.²⁹³ Further, the number of vessels Somali pirates have fired upon has tripled in recent years, from a modest 42 in 2008 to 120 in 2010.²⁹⁴ As early as May 2008, recognizing an increase in both the frequency and intensity of Somali pirate attacks, specialist insurance market Lloyds of London²⁹⁵ designated the Gulf of Aden a “war-risk” zone to which special insurance premiums would apply.²⁹⁶

288. Guilfoyle, *supra* note 222, at 146 (“[I]t remains worth asking whether the fact that a non-international armed conflict in Somalia has directly or indirectly fuelled the rise of piracy changes [the conclusion that piracy is not armed conflict].”).

289. PLOCHET AL., *supra* note 24, Summary (emphasis added).

290. S.C. Res. 1851, *supra* note 261, at 2.

291. *See* Prosecutor v. Haradinaj, Judgment, Case No. IT-04-84-T, 27–28 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

292. *See* Guilfoyle, *supra* note 222, at 144.

293. *See* Mineau, *supra* note 36, at 63–64.

294. PLOCHET AL., *supra* note 24, at 11.

295. Lloyd’s of London is an international specialist insurance market with roots in the marine industry. Seven percent of its current business comes from the maritime industry, including “hull, cargo, marine, [and] liability” insurance. LLOYD’S QUICK GUIDE 1 (May 2011), http://www.lloyds.com/~media/Lloyds/Reports/Publications/7420_Lloyds_QuickGuide_UK%20AW.pdf.

296. *Id.* at 13. It is obvious that “war-risk” as perceived by the maritime insurance industry by no means parallels the definition of “armed conflict” under international law. Rather, the “war-risk” designation is cited for the simple proposition that the number and intensity of attacks in the Gulf of Aden are increasing rapidly. *Cf.* Mineau, *supra* note 36, at 67 (“The severe risk of piracy [around the Horn of Africa] has also translated into a tenfold increase in marine insurance premiums for ships transiting the Gulf of Aden.”).

In considering the second element, the types and caliber of pirate weaponry, commentators have recently observed that “Somali pirates are sophisticated and heavily armed,” utilizing RPGs, antitank rocket launchers, Kalashnikov rifles, and Tokarev pistols.²⁹⁷ In addition, Somali pirates possess “sophisticated operational capabilities and have acquired weaponry, equipment, and funds that make them on par with or more effective than the local forces arrayed against them.”²⁹⁸ Furthermore, a 2011 Congressional Research Service report on Somali piracy indicated that pirates now bring explosive devices aboard captured ships to breach “safe rooms” designed to prevent crewmembers from being captured.²⁹⁹ These observations call into question whether Professor Guilfoyle’s conclusion that typical pirate engagements involve only “small-scale fire”³⁰⁰ will hold true if the pirate arsenal continues to expand. Still, the third element, which considers the number of casualties due to piracy, remains elusive. An average of nine annual piracy-related killings occurred between 2008 and 2011.³⁰¹ This remains modest in comparison to credible arguments that have been made for categorization of other unconventional conflicts as NIACs. Thus, satisfaction of this element remains unlikely absent an increase in deaths attributable to Somali piracy.

iii. Parties to the Conflict

Again, the third element of the NIAC definition—that armed groups be “parties to the conflict”—evaluates whether Somali pirates (1) operate under a responsible command, (2) wear a distinctive sign, (3) carry arms openly, and (4) obey the Law of Armed Conflict.³⁰²

With respect to the first factor, the command structure of Somali piracy has become more coordinated in recent years. Admittedly, the loosely banded and poorly equipped Somali pirate fleet of just a few years ago fell well short of a force operating under a responsible command.³⁰³ However, a 2010 United

297. See Richard, *supra* note 229, at 418–19.

298. PLOCH ET AL., *supra* note 24, at 9; see also S.C. Res. 1838, *supra* note 260, at 1 (“Noting with concern also that increasingly violent acts of piracy are carried out with heavier weaponry, in a larger area off the coast of Somalia, using long-range assets such as mother ships.”).

299. PLOCH ET AL., *supra* note 24, at 11 (“Pirates appear to be adapting to certain self-defense mechanisms used by mariners, and have . . . used RPGs or explosives to breach a ship’s ‘citadel’ (a safe room with a reinforced door used by crew to avoid capture).”).

300. Guilfoyle, *supra* note 222, at 144.

301. See, e.g., Carina Bergal, *The Mexican Drug War: The Case for a Non-international Armed Conflict Classification*, 34 FORDHAM INT’L L.J. 1042, 1044 (arguing for classification of the “Mexican Drug War” as an NIAC and noting 30,000 drug-violence casualties in just four years).

302. Geneva Convention (III), *supra* note 223, art. 4.

303. ROBIN GEIB & ANNA PETRIG, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN 9 (2011) (“Initially, Somali pirate groups were only loosely organized, partially ill-equipped and fluid in membership.”).

Nations study revealed that Somali piracy, fueled by over \$250 million in ransom revenues in 2010,³⁰⁴ has changed dramatically:

[T]he extraordinarily lucrative nature of piracy has transformed rag-tag, ocean-going militias into well-resourced, efficient and heavily armed syndicates, employing hundreds of people in north-eastern and central Somalia. Some of these groups now appear to rival or surpass established Somali authorities in terms of their military capabilities and resources. External financiers typically provide the boats, fuel, arms and ammunition, communications equipment and pirate salaries.³⁰⁵

Similarly, the sophistication of the pirate command structure is “evidenced by the participation of dozens of men in complicated seizures and their ability to divide large amounts of ransom peaceably.”³⁰⁶ Finally, the pirates’ “capacity to sustain military operations”³⁰⁷ is now bolstered by exploiting GPS and satellite phone technology, as well as planned attacks³⁰⁸ coordinated by gathering detailed intelligence from informants.³⁰⁹ Objectors note that “command responsibility” is a legal term of art difficult to apply to pirates because of the opacity of their leadership structure and the pirates’ apparent lack of responsibility for subordinate actions.³¹⁰ However, Somali pirates’ recent organizational, technological, and financial feats described above suggest a significant measure of structure and accountability, even if those features remain imperceptible to those outside the pirate network.

Furthermore, recent pirate activity arguably meets the criteria for being parties to the conflict. With respect to the second element, wearing a distinctive sign, “some modern pirates actually wear uniforms.”³¹¹ This point is arguable because, as noted previously, pirates’ use of civilian ships with no distinctive sign may vitiate the satisfaction of this element.³¹² As to the third element, “[p]irates carry arms openly.”³¹³ Finally, regarding the fourth element—obeying IHL—recent scholarship has noted that “while they do not observe all

304. PLOCHET AL., *supra* note 24, at 7.

305. GEIB & PETRIG, *supra* note 303, at 9 (citing United Nations, Monitoring Group on Somalia, Report ¶ 122, Dec. 10, 2008).

306. Kontorovich, *supra* note 6, at 260; *see also* Gienger, *supra* note 20 (“Piracy syndicates in villages . . . solicit investors who buy shares in attack missions and gain a corresponding share in ransoms paid by the shipping industry.”).

307. *How Is the Term “Armed Conflict” Defined*, *supra* note 220, at 3 (noting that “parties to the conflict” are “under a certain command structure and have the capacity to sustain military operations”).

308. *See* Richard, *supra* note 229, at 418 (“In at least one case, the pirates had enough advanced information to rehearse their assault.”).

309. *Id.* (describing a Somali pirate network that now includes “well-placed informants in London, Dubai, and Yemen”).

310. *See* Passman, *supra* note 239, at 24.

311. *Id.*

312. *Id.*

313. *See* Kontorovich, *supra* note 6, at 260.

the customs of war, they often treat captured crews reasonably, providing a basis for the argument that they would abide by rules of reciprocity.”³¹⁴

Thus, evaluation of the extent to which pirates are (1) armed groups taking part in protracted violence on Somali territory, (2) of sufficient intensity, and (3) are “parties to the conflict,” highlights colorable arguments that challenge categorical exclusion of piracy as an NIAC. Admittedly, some considerations, such as the minimal casualties resulting from Somali piracy, clearly cut against a classification of Somali piracy as an NIAC. Others, however, including an expanding pirate arsenal and increasingly sophisticated pirate infrastructure, suggest that the majority view of counterpiracy as an exclusively law enforcement function should be reconsidered as the facts and circumstances of Somali piracy continue to evolve.

iv. Implications of Recent UN Security Council Resolutions on the Applicability of IHL to Counterpiracy Operations

Security Council Resolutions 1816 and 1838, which granted naval forces supporting the Somali TFG authorization to use “all necessary means” or “the necessary means” clearly expanded “the authority of the navies beyond acts permitted under the customary international law of piracy.”³¹⁵ However, without explicit invocation of IHL, scholars were loath to read anything more from the Security Council’s message than enhanced authority to conduct what was still at bottom a law enforcement mission.³¹⁶

Security Council Resolution 1851, however, is analytically distinct from its predecessors. By authorizing the use of “all necessary measures in Somalia” to suppress piracy and explicitly invoking “applicable international humanitarian and human rights law,”³¹⁷ Resolution 1851 appears on its face to shake the very foundation of the argument that Somali counterpiracy is not subject to IHL. Indeed, one commentator has suggested that an explicit reference to IHL in a UN Security Council Resolution regarding piracy “would . . . presumably implicate[] the [Security] Council in some measure of acceptance that certain acts of *lawful* violence could occur by pirates and armed robbers within the context of . . . armed conflict.”³¹⁸ In addition, while Professor Guilfoyle argues convincingly that the word “applicable” before “international humanitarian law” indicates that IHL does not automatically

314. *Id.*

315. Kontorovich, *supra* note 258, at 2.

316. *See, e.g.,* Dino Kritsiotis, *The Contingencies of Piracy*, 41 CAL. W. INT’L L.J. 305, 330 (“[T]he Security Council in no way viewed the piratical violence from Somalia and various responses to it as instigating or forming any part of an overarching ‘armed conflict.’ . . . No reference is made in any of these Security Council resolutions to ‘international humanitarian law.’”).

317. S.C. Res. 1851, *supra* note 261, ¶ 6.

318. Kritsiotis, *supra* note 316, at 331–32.

apply under Resolution 1851,³¹⁹ that single word may not bear the significant weight put upon it should the “increasingly violent acts”³²⁰ and “dramatic increase in the incidents of piracy”³²¹ continue their unprecedented growth in the years ahead.

Furthermore, the authorization to employ “all necessary measures” is widely viewed as Security Council parlance authorizing the use of military force.³²² Judge Treves correctly argues that the incantation of “all necessary measures” does not transmogrify any use of military force into armed conflict.³²³ However, the “unprecedented measure” of “[a]uthorizing armed action against pirates in sovereign territory”³²⁴ may signal that a “gravely concerned”³²⁵ Security Council is increasingly willing to view counterpiracy operations as approaching a bona fide armed conflict.

While Resolution 1851 did not explicitly state that IHL was applicable to counterpiracy operations in the Gulf of Aden,³²⁶ some scholars of piracy analyzing the Resolution have concluded that it “nevertheless implies the potential applicability of international humanitarian law.”³²⁷ Commentators have suggested Resolution 1851 may be interpreted in at least two ways, each of which supports the application of IHL. First, the States called upon by the Security Council to cooperate with the Somali TFG could become party to the NIAC in mainland Somalia “simply by collaborating with an entity that is already party to an ongoing [NIAC].”³²⁸ Alternatively, Resolution 1851 “could be read to mean that the counter-piracy operations in and of themselves . . . could eventually reach the threshold of a non-international armed conflict, thereby triggering the application of international humanitarian law.”³²⁹ The latter reading of Resolution 1851 animates the following discussion of IHL as a future framework for counterpiracy operations.

e. IHL as a Future Framework for Counterpiracy Operations: The Potential for a “Nexus” to Change the Calculus of IHL Applicability

Despite the arguments above for the designation of Somali piracy as an NIAC, the fact remains that the current state of law, as reflected by the majority

319. See Guilfoyle, *supra* note 222, at 147.

320. S.C. Res. 1838, *supra* note 260.

321. S.C. Res. 1851, *supra* note 261.

322. See Treves, *supra* note 265, at 412.

323. See *id.*

324. See Kontorovich, *supra* note 258, at 2.

325. S.C. Res. 1851, *supra* note 261, at 1.

326. ROBIN GEIB & ANNA PETRIG, *supra* note 303, at 132.

327. *Id.*

328. *Id.*

329. *Id.*

of scholarly commentary³³⁰ and state practice,³³¹ dictates that it is not. Nevertheless, the unprecedented growth of Somali piracy in recent years suggests that categorical exclusion of piracy as an NIAC is neither a foregone conclusion nor immune from reconsideration as the facts and circumstances surrounding the Somali piracy epidemic evolve.

Professor Van Schaack recognizes as much in her thoughtful response to Professor Guilfoyle's influential article *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?*³³² She notes that the article's "seemingly facile conclusion [that IHL does not apply to most instances of piracy in the Gulf of Aden] . . . dodges the more difficult question of the impact of a potential nexus between acts of piracy and the ongoing [NIAC] in Somalia."³³³ Similarly, Professor Van Schaack suggests that once this nexus is established, "IHL may apply to some acts of piracy committed in order to fund organized armed groups."³³⁴ The UN Security Council's recent acknowledgement that piracy may play a role "in financing embargo violations by armed groups"³³⁵ highlights the prescience of Professor Van Schaack's observation, as well as its value to future questions of IHL applicability to piracy.

Thus, when considering the future applicability of IHL to counterpiracy operations, one ought not rest on fixed assumptions about how pirates—long ago dubbed "the enemy of the human race"³³⁶—operate in the modern world. Indeed, increasingly frequent and violent attacks, business-like efficiency in financing and coordinating operations, and Security Council authorization to suppress piracy in the territory of Somalia suggest that the first strands of a potential nexus to the NIAC in mainland Somalia are already in place.

2. *State Action Requirements Should Not Impede the Applicability of the Montreux Document to Counterpiracy Operations*

The second objection to IHL as the legal framework for PMSC operations aboard commercial vessels is that IHL pertains to States and not private entities. Thus, IHL would not apply to piracy operations since both parties to the conflict are non-state actors. A prominent advocate of this view is military

330. See, e.g., Treves, *supra* note 265, at 412 (arguing that the use of force against pirates is not governed by the law of armed conflict and that "[p]irates are not at war with the states whose flotillas protect merchant vessels in the waters off the coast of Somalia").

331. See, e.g., Guilfoyle, *supra* note 222 (noting that all governments engaged in counterpiracy classify such operations as law enforcement).

332. 11 MELB. J. INT'L LAW 141, 141 (2010).

333. Van Schaack, *supra* note 244.

334. *Id.*

335. S.C. Res. 1851, *supra* note 261, at 2; see also Richard, *supra* note 229, at 419 ("Somali pirates are also linked to other criminal activity, including weapons trafficking between Yemen and Somalia.").

336. Keyuan, *supra* note 176.

Judge Advocate General (JAG) W. Hays Parks, who noted that when PMSCs are “employed by any non-governmental organizations, they are only susceptible to domestic laws, not international law.”³³⁷ This Section argues that this conception of IHL is unnecessarily narrow. It concludes that a paradigm shift in international law toward individual and corporate accountability, which is already underway, weighs in favor of reexamining the legal obligations of non-state actors, including pirates and the private security forces that confront them.

Shifting the frame of reference for assessing international legal obligations from a state-centric approach to an individual accountability approach corresponds with evolving economic, political, and social norms.³³⁸ This is not to say that such a shift will be natural or welcomed. Individual accountability of non-state actors cuts sharply against a traditional approach that insists “on the importance of states as the main actors in the international [legal] system.”³³⁹ Despite entrenched, state-centric approaches to international law, Professor Andrew Clapham argues that the international legal obligations of non-state actors should be reexamined against a backdrop of modern challenges.³⁴⁰ Professor Clapham’s insights are particularly salient in the context of PMSC-pirate conflicts in which both parties are non-state actors.

For example, Professor Clapham highlights the growing need to recognize and elucidate the international legal obligations of transnational corporations.³⁴¹ PMSC forces, made available to customers via an expanding network of global PMSC firms, have garnered criticism because their international legal obligations are decidedly amorphous. This is perhaps unsurprising as “until recently, it was hardly ever suggested that corporations have international legal personality.”³⁴² Professor Clapham’s claim is not that corporations should be considered on par with states as international subjects proper,³⁴³ but rather that such corporations have *some* limited international legal personality.³⁴⁴

337. CARMOLA, *supra* note 113, at 106.

338. CLAPHAM, *supra* note 199, at 3 (listing globalization of the world economy, privatization of various sectors, including security forces, and increases in internal armed conflict situations involving fragmentation of states as modern “phenomena” that highlight the “relevance of the question of obligations of non-state actors”).

339. *Id.* at 25.

340. *See id.* at 1 (“[O]ur appreciation of the traditional importance of the boundary between public and private may need adjusting if we are going to develop a coherent theory of human rights protections capable of practical application to protect the victims of indignities everywhere.”).

341. *Id.* at 76–80.

342. *Id.* at 76.

343. *Id.* at 78–79 n.81 (quoting ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 103 (1986)).

344. *Id.* at 79. To this end, Professor Clapham espouses the modest and reasonable proposal that once we recognize that “individuals have rights and duties under . . . international humanitarian law, we have to admit that legal persons may also possess the international legal personality necessary to enjoy some of these rights, and conversely to be . . . held accountable for violations of . . . international duties.” *Id.*; *see also id.* at 80 (“[N]on-state actors can bear international rights and

Nevertheless, the ability to hold private corporations, such as PMSC firms, accountable under international law may be hindered by an “instinctive mutual suspicion of the humanitarian and business communities.”³⁴⁵ Yet, this mutual suspicion may already be eroding in light of emerging efforts by the UN to engage the private sector and leverage the “global power and possibilities of working more closely with business.”³⁴⁶ Giving the Montreux Document teeth in the counterpiracy context, however, will require more than working more closely with business. Specifically, it will require a shift from voluntary “corporate responsibility” to mandatory “corporate accountability.”³⁴⁷ Such accountability can be accomplished through directly applying IHL (if one accepts the argument that piracy is armed conflict) or, alternately, by incorporating the Montreux Document into binding contractual provisions.

Indeed, the UN General Assembly’s work indicates that this substantive shift to personal accountability may already be afoot. A 2006 General Assembly Resolution on the right to reparation for victims of gross violations of IHL and HRL states that “where a person, a legal person, or other entity is found liable for reparation to a victim, such party should provide reparation to the victim.”³⁴⁸ Commentators have noted that this provision clearly admits “[t]he liability of non–state actors.”³⁴⁹ The commercial shipping industry should be acutely aware that this gradual paradigm shift toward individual and corporate accountability occurs as “businesses are treated, not only as partners, but as having responsibilities . . . under international law.”³⁵⁰ Thus, PMSC forces that rely on effective insulation from IHL strictures do so at their own peril. While some argue that a paradigm shift toward individual and corporate accountability is “nearer than is usually imagined,” others have argued that “we are already there.”³⁵¹

obligations Trying to squeeze international actors into the state-like entities box is, at best, like trying a force a round peg into a square hole, and at worst, means overlooking powerful actors on the international stage.”).

345. *Id.* at 269.

346. *Id.*

347. *See, e.g., Corporations and Human Rights, in HUMAN RIGHTS OBLIGATIONS OF NON–STATE ACTORS, supra* note 199, at 195 (“Christian Aid itself states that it ‘is advocating giving “teeth” to the ethical commitments of companies by moving beyond corporate social responsibility, which does not and cannot go far enough, to corporate social accountability, to ensure that companies have a legal obligation to uphold international standards.’”).

348. G.A. Res. 60/147, ¶ 15, U.N. Doc. A/RES/60/147 (Mar. 21, 2006).

349. CLAPHAM, *supra* note 199, at 73 (“The design of a set of principles focused on victims and their right to reparation would make little sense if it insisted on doctrinal division between violations committed by non–state actors in times of armed conflict and violations committed during peacetime.”).

350. *Id.* at 270.

351. *Id.*

3. *IHL Can Readily Inform Counterpiracy Operations Through PMSC Contracts*

Finally, even if the arguments above do not establish that IHL governs the conduct of PMSC counterpiracy operations, it is imperative that the commercial shipping industry recognizes that IHL can readily *inform* such operations. As indicated in the preceding Part, contract law is a capable framework to infuse PMSC operations aboard commercial vessels with substantive IHL requirements. Indeed, W. Hays Parks, who argued that IHL does not apply to PMSCs employed by non-state actors, has suggested “contractual provisions that require [PMSC] industry self-regulation” may be effective.³⁵² Likewise, contract law is an adept tool to address unique piracy conflicts in which the opposed forces are non-state actors. While dual non-state actor conflicts would otherwise present difficulties in applying a traditional IHL analysis, contract law gives teeth to PMSC standards of conduct independent of government employment or affiliation.³⁵³

In conclusion, the presence or absence of a substantive legal framework in Somali counterpiracy operations does not turn on whether one agrees that counterpiracy operations in the Gulf of Aden are properly viewed as an NIAC, or whether IHL governs the conduct of PMSCs employed by non-state actors. Irrespective of one’s answers to these important questions, contract law provides a *method* by which to incorporate IHL principles into PMSC counterpiracy operations, and the Montreux Document provides a comprehensive *means* of doing so. The Montreux Document’s complementary approach of recalling IHL obligations and introducing tangible steps to achieve these ends thus equips the commercial shipping industry with contractual machinery to hold PMSC operators to the highest standards of conduct and respect for the rule of law.³⁵⁴ As the following Section argues, a united-front commercial shipping industry can leverage market forces to make the Montreux framework, and the IHL principles it espouses, an industry standard.

D. Implementing Financial and Other Business Consequences for PMSC Misconduct

The market can serve as a vital tool for enforcing new standards of PMSC conduct. The previous discussion of meritless contract awards in Iraq and Afghanistan highlighted the negative outcomes of a PMSC market devoid of accountability through fiscal consequence. The absence of meritocracy in

352. CARMOLA, *supra* note 113, at 106.

353. Dickinson, *supra* note 100, at 221 (“[C]ontractual terms would obviate the need to show that the private actors were functioning as an extension of government. . . . Instead, the norms applicable to government actors would simply be part of the contractual terms, enforceable like any other provisions, regardless of state action.”).

354. See Montreux Document, *supra* note 2, at 3, ¶¶ 3–4.

PMSC employment in Iraq and Afghanistan lulled prominent PMSC firms such as Blackwater, Dyncorp, and AGNA into a plateau of “good enough” performance standards. As the myriad PMSC abuses previously discussed indicate, however, “good enough” was anything but. It is thus incumbent upon the commercial shipping industry to leverage the power of market forces to imbue PMSC conduct aboard their vessels with the letter and spirit of the Montreux Document. This approach is entirely consistent with the reality that PMSCs are “coming to see the advantages of human rights monitoring in order to enter the mainstream and the lucrative possibilities it offers.”³⁵⁵

Moreover, modern technological and economic realities, which allow unprecedented levels of information sharing among consumers in a given market,³⁵⁶ can help the commercial shipping industry leverage market forces. The commercial shipping industry, controlled primarily by a limited community of industry giants such as APM-Maersk and COSCO,³⁵⁷ is uniquely positioned to share information on PMSC conduct, operational adherence to contractual provisions, and PMSC familiarity with the Montreux Document framework. Such competition would force PMSC competitors to sharpen their international legal acumen or be displaced in the market by more savvy companies. By the same token, PMSCs recognized for exceptional discipline in operational conduct or comprehensive contractual terms based on the Montreux provisions would emerge as strong players in the market. Indeed, commentators have noted that, over time, such “reputational incentives” have been instrumental in generating a “cadre of more credible PMSCs that take efforts to comply with international and domestic laws and regulations to maintain credibility.”³⁵⁸ Scholars considering issues of PMSC accountability have contemplated the methodology for this information-sharing regime. Peter Singer has suggested an “internationally recognized database of the [PMSC] firms in the industry” that would incorporate “evaluation tools” and subject PMSC “personnel databases to appraisal for past violations of human rights.”³⁵⁹

While it is imperative that the commercial shipping industry puts market pressure on PMSC forces to adhere to industry and international standards of conduct, the need arises amidst an admittedly difficult fiscal environment.

355. CLAPHAM, *supra* note 199, at 304; *see also* TIM SPICER, AN UNORTHODOX SOLDIER: PEACE AND WAR AND THE SANDLINE AFFAIR 25–26 (2000) (“Given that a [PMSC] is a business, it is acknowledged that a fundamental law of successful business is that the supplier is only as good as his last contract. . . . If a particular [PMSC] performed badly or unethically, exploited the trust placed in it by a client . . . violated human rights or sought to mount a coup, then the company and its principals would find that their forward order book was decidedly thin.”).

356. *See, e.g.*, Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com 2* (Harvard Bus. Sch., Working Paper No. 12-016), available at http://www.nber.org/conf_papers/f5990/f5990.pdf (“Technological advances over the past decade have led to a proliferation of consumer review websites . . . where consumers can share experiences about product quality.”).

357. *See* Konrad, *supra* note 201.

358. Gaston, *supra* note 9, at 243.

359. SINGER, *supra* note 63, at 241.

Indeed, the commercial shipping industry will face tough decisions in the years ahead. With increasingly aggressive and violent attacks conducted by an expanding pirate network, the finite resources of the coalition naval presence may prove insufficient to adequately safeguard commercial interests.³⁶⁰ For commercial shipping firms that cannot bear the additional fuel and related costs of bypassing the Gulf of Aden through alternate shipping routes around South Africa,³⁶¹ PMSC defense of commercial vessels has the potential to emerge as the preeminent solution for secure transit through one of the world's most important—and treacherous—shipping lanes. By implementing the Montreux Document in detailed contractual provisions and ensuring compliance through tangible business consequences and criminal liability, the commercial shipping industry can bring responsible employment of PMSC forces closer to reality.

The biggest threat to this reality, and to the staying power of the Montreux Document as a meaningful guardian of PMSC conduct, is the “hold out.” Simply put, the commercial shipping industry will rise or fall together in the employment of PMSC forces. To that end, this Comment implores the commercial shipping industry to muster the collective will to ensure that the lessons of past PMSC misconduct do not go unheeded in the name of expediency or efficiency. As James Cockayne stated, the “serious harmonization of national [PMSC] regulation seems unlikely absent a commercial lobby favouring global harmonization of [PMSC] regulation.”³⁶² Indeed, all that is needed to spark a commercial shipping “race to the bottom” will be a single, major shipping company employing less contractually accountable PMSC forces working at cheaper prices.

Emerging from a battered global shipping market in 2009, a year that saw the worst global recession in over seventy years and an unprecedented decline in the global shipment of merchandise,³⁶³ the temptation for the commercial shipping industry to substitute PMSC competence and accountability for economic expediency is acute. As the lessons of Iraq and Afghanistan demonstrate, however, even a single instance of PMSC misconduct can quickly overshadow temporary savings. The U.S. government has recognized the Montreux Document as a “significant achievement”³⁶⁴ and the International

360. See Niluksi Koswanage, *IMO Worried About Arming Ships to Fight Piracy*, REUTERS (May 18, 2009, 11:06 AM), <http://af.reuters.com/article/topNews/idAFJJOE54H0HD20090518> (“Somali pirates patrol 2.5 million square miles of ocean . . . and can very easily elude capture from ships from the United States, Europe, China, Japan and others flocking to the region to protect sea routes.”).

361. See *id.* (noting that pirate attacks have “persuaded some firms to send cargoes around South Africa instead of through the Suez Canal”).

362. COCKAYNE, *supra* note 200, at 214.

363. United Nations Conference on Trade & Development, Geneva, *Review of Maritime Transport*, at xiv, UNCTAD/RMT/2010 (2009).

364. Cockayne, *supra* note 142, at 403, 406.

Peace Operations Association called it a “remarkable document.”³⁶⁵ In the counterpiracy context, the commercial shipping industry has the unique opportunity to elevate the Montreux Document to a *norm* in the fight against piracy in the Gulf of Aden.

CONCLUSION

Having discussed the relevance of the Gulf of Aden as a major venue for the conduct of world shipping, the exponential growth of the private security industry in the ongoing conflicts in Iraq and Afghanistan, as well as the conduct that marred the reputation of PMSCs on the world stage, this Comment concludes that the Montreux Document is the tool by which the PMSC industry can establish itself as a legitimate entity with a desire and obligation to uphold the rule of law. This Comment also examined the current majority position that Somali piracy is not an NIAC, and IHL does not directly apply to counterpiracy operations. In doing so, it highlighted arguments that the recent expansion of piracy and explicit invocation of IHL in Security Council Resolution 1851 suggest that piracy may increasingly be viewed as an NIAC in the years ahead. Furthermore, a growing nexus between the ongoing NIAC in mainland Somalia and the flourishing of piracy off the Somali Coast further supports a move toward viewing Somali piracy as an NIAC. Irrespective of the direct application of IHL to Somali piracy, this Comment also concludes that IHL can readily *inform* PMSC conduct through incorporation of the Montreux Document principles into specific contract provisions. Therefore, the commercial shipping industry can effectively control the conduct of PMSCs in a unique conflict in which both sides are non-state actors, ultimately restoring the credibility of the private security industry, honoring international legal obligations, and providing the most viable solution to the piracy epidemic in the Gulf of Aden.

365. *Id.* at 426.