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Structuring a Sustainable Letters of Marque Regime: How Commissioning Privateers Can Defeat the Somali Pirates

Todd Emerson Hutchins*

Piracy is a complex problem that threatens maritime safety and interferes with global commerce. Supported by networks of financiers and negotiators, Somali pirates viciously attack seafarers across expansive stretches of the Indian Ocean. Despite costly naval interventions, pirates continue to strike. Powerful nations from around the globe have been unsuccessful at stemming the problem because they have focused on capturing and prosecuting a relatively small number of seagoing pirates, while allowing pirate networks to operate with near impunity. To prevent future attacks, an effective and sustainable deterrence regime must be implemented to target the financiers and sophisticated kingpins who lead pirate networks.

This Comment examines a new approach based on an age-old solution—privateers. The U.S. Constitution expressly provides that Congress, by issuing letters of marque, can enable private entities to conduct maritime warfare on behalf of the nation. Successive generations of American governments have employed letters of marque to combat maritime threats efficiently. Once more, the

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commissioning of privateers might prove to be an appropriate tool in the battle to dismantle pirate networks. Given the dispersed nature of the problem and relatively limited capabilities of the pirates, this Comment argues that privateers may provide a more cost-effective and sustainable approach than deploying naval forces. It suggests how a new regime for deploying privateers against Somali pirates could and should be established consistent with international law under either international or domestic frameworks.

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INTRODUCTION

With few economic opportunities onshore, many Somalis have taken to the seas off the Horn of Africa as pirates. Last year, these pirates attacked hundreds of vessels, demanding ever-increasing ransoms for both ships and crews. More than a mere nuisance, these marauders threaten seafarers, disrupt global commerce, and frustrate the freedom of navigation. Military interventions by superpowers, including the United States, the European Union,
and China, have been unable to stop the piracy. Their failure lies in a strategy focused on deterrence and prosecution, rather than on the destruction of pirate capabilities. Even though international efforts have led to the capture of a few dozen impoverished pirates since 2008, the global military behemoths have achieved little on a systematic level. Alarmingly, a high number of attacks continue, even in patrolled areas. Moreover, piracy has proliferated, spreading across wider stretches of ocean. Pirates now utilize advanced tactics and sophisticated tools to demand exorbitant ransoms. Maritime powers need a new strategy to sustain an adequate antipiracy deterrent until a stable Somali government can maintain law and order. Increasingly, governments are exploring the possibility of directly utilizing private security forces to deal with the pirates. However, uncertainty over the legal status of such forces as well as how they would be controlled and compensated has, at least for now, precluded their employment.

Most contemporary legal scholarship on piracy narrowly focuses on jurisdictional questions, like where and how to prosecute seagoing pirates, while neglecting the more fundamental question of whether prosecutions will actually prevent further attacks. The implicit assumption in these arguments is that prosecuting seagoing pirates will deter other would-be-pirates. Yet experience and logic provide reason to doubt this assumption. Although a small number of pirates are prosecuted, the threat of prosecution may not deter other desperate young Somalis eager for the possibility of acquiring relatively substantial wealth. Even if caught, pirates may prefer imprisonment under international standards to the harshness of life in Somalia. Furthermore, the prosecution of seagoing pirates does little to deter warlords, coordinators, and financiers running criminal networks. To these “kingpins,” the seagoing pirates are easily replaced, dispensable minions. To successfully reduce and deter piracy, nations must make piracy unprofitable for the kingpins.

Recently, scholars have considered the possibility of issuing letters of marque to private actors as an antipiracy strategy. Theodore Richard suggests that the U.S. Congress, littoral governments near the Horn of Africa, and the feeble Somali government should issue letters of marque to private security forces aboard merchant vessels as a means of licensing and controlling them. Similarly, Alexandra Schwartz forcefully argues that reissuing letters of marque is a viable legal option that would enable the United States to employ seagoing pirates, see Eugene Kontorovich, “A Guantánamo on the Sea”: The Difficulty of Prosecuting Pirates and Terrorists, 98 CALIF. L. REV. 243, 251–66 (2010).


privateers in a broader array of activities. These scholars have laid the groundwork for a contemporary understanding of letters of marque. This Comment further develops the concept by considering how such a legal framework could be structured under both domestic and international regimes, and how it might effectively deter pirates while adequately compensating and controlling privateers. However, unlike prior scholars, I propose establishment of an international system of issuing letters of marque. This approach would build on the current multilateral antipiracy efforts underway in the Indian Ocean, avoid questions of legitimacy or international wrangling over the illegality of privateer actions, and enable individual nations to avoid becoming entangled in fighting and prosecuting pirates.

First, this Comment considers why current antipiracy approaches are ineffective and unsustainable. Second, it surveys privateers’ role in American and international legal contexts, specifically studying the Framers’ intention in incorporating letters of marque into the Constitution and the implications of the 1856 Paris Declaration Respecting Maritime Law (Paris Declaration) on the use of privateers against pirates. Third, it promotes letters of marque as a viable legal mechanism to counter modern piracy under international and domestic law. This Section also explains how a new letters of marque regime could address predictable concerns about the commercialization of warfare, procedural safeguards, due process, humane treatment, oversight, and efficient prosecutions. The paper concludes by proposing a new internationally-coordinated system of issuing letters of marque and explaining how this system might incentivize private action in the Horn of Africa context to sustainably address Somali piracy until a competent government can be established on land.

I. BACKGROUND

In 2008, Somali pirates attacked 111 merchant vessels, taking 815 crew members hostage. In 2009, the number of vessels attacked nearly doubled, reaching 217. In 2010 the number of attacks off the Horn of Africa remained high: Somali pirates attacked 206 vessels, hijacked 44 of those ships, and took

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5. Pirate Attacks Off Somalia Already Surpass 2008 Figures, Int’l Chamber of Commerce Commercial Crime Services (May 12, 2009), http://www.icc-ccs.org/index.php?option=com_content&view=article&id=352:pirate-attacks-off-somalia-already-surpass-2008-figures&catid=60:news&Itemid=51. A vessel is deemed attacked if pirates approach it and attempt to board. Once at least one pirate comes aboard, it is considered boarded. If the pirates take control of the ship, holding it or its crew hostage, it is considered hijacked.
929 crewmembers hostage. In late 2010, pirates intensified their activities, employing more sophisticated weaponry and advanced techniques over a broader area of the Indian Ocean than before. Naval officials from the antipiracy task force called these advancements “game-changer[s]” and warned that new approaches would be necessary to stop the spread of piracy.

Still, the number of ships attacked represents less than 0.2 percent of the 21,000 ships transiting the Gulf of Aden, and the direct financial costs to shippers of such attacks are miniscule relative to the industry’s total revenues. Yet, the indirect and cumulative effects warrant attention. Economic impacts, security, regional stability, catastrophic risks, and potential for expansion are causes for concern. When the military response, private guards, and insurance premiums are taken into account, the cost of piracy in the Indian Ocean may exceed nine billion dollars annually. Moreover, if the Somali pirates remain unchecked, they will cause serious harm to the global economy. The Gulf of Aden is the main shipping route between the Middle East, Asia, and Europe. Twelve percent of the world’s oil output transits through the Gulf annually, and regional nations depend on the free flow of goods to support their populations.


8. Lolita C. Baldor, Admiral Calls for Broader Approach to Piracy, NAVY TIMES, Jan. 26, 2011, available at http://www.navytimes.com/news/2011/01/ap-admiral-piracy-012611 (quoting Vice Adm. Mark Fox, the U.S. Naval Commander for U.S. Central Command, saying efforts should be made to follow the money trail and track where pirates get their fuel, supplies, ladders and outboard motors inside or outside of Somalia. This came in response to a jump in the number of hostages taken by pirates from 350 in September 2010 to 750 in January 2010).


and economies. Disrupting trade could result in serious economic and political ramifications.

The shipping and insurance industries, which have the most at stake in reducing pirate attacks, appear unwilling or unable to take action necessary to prevent attacks. Early on, the shippers, the International Maritime Organization, and the international Contact Group on Piracy off the Coast of Somali (CGPCS) recommended practices like installing training crews, increasing speed, installing water canons, and posting lookouts to make ships more resistant to pirate attacks. Many shippers attempted to adopt these “Best Management Practices” (BMPs), and by 2010, the CGPCS estimated that 90 percent of vessels followed the BMPs (at least in part). Still, these efforts were insufficient to deter pirates, causing shippers to look to governments to shoulder the high economic cost of protection. Further, with pirates attacking less than 1 percent of the shipping traffic off the coast of Somalia and insurance mitigating the risk while spreading costs uniformly across the entire industry, shippers lack significant economic incentive to alter their operations. Though attacks endanger crews, make recruiting personnel for dangerous routes more difficult, and stress individual businesses (particularly “smaller or thinly capitalized companies”), the “stability and efficiency” of the “overall system of international commerce has not been impaired” by the pirates. Consequently, many shippers operate ships at fuel-efficient, low speeds and choose not to install additional defensive measures. Apparently, the risks do not justify industry expenditures. Insurers similarly lack motive to fight pirates. To the insurance industry, ransom payments are “straight commercial decision[s]” that

16. This is not to suggest that all shippers shirk their responsibilities to protect their ships and crews.
are part of the costs of doing business.\textsuperscript{17} To be clear, insurers want to avoid payouts, but they amass up to $250 million annually in profits from piracy policies.\textsuperscript{18} Worse yet, insurance payments perversely incentivize more piracy.\textsuperscript{19} Without market incentives for shippers and insurers, governments and consumers bear the costs.

Thus far, the response to Somali pirates has focused on utilizing large naval warships to patrol the seas off Somalia. At present, thirty nations (deploying over forty naval vessels) patrol the Gulf of Aden.\textsuperscript{20} The costs are staggering. According to United Nations Under-Secretary-General Antonio Maria Costa, a single naval vessel off the Somali coast costs $100,000 a day, and the aggregate annual operational cost of all the nations patrolling is about $1.5 billion.\textsuperscript{21} These figures far surpass the ransoms paid to pirates, which raises the question: Why do the European Union and the United States allocate scarce resources to the problem when their economies are in shambles? Concerned governments intervene to: (1) deter attacks; (2) enhance maritime safety; (3) prevent destabilization; (4) enforce international law; and (5) appease domestic political pressures. They also fear that if left unchecked, pirates might increase their capabilities and reach, further destabilizing the global economy.\textsuperscript{22}

Beyond financial concerns, nations feel obligated to protect their citizens and vessels. Pirates employ vicious tactics, bullying seafarers with AK-47s and
rocket-propelled grenade launchers. Although one could argue that “business-like” pirates might avoid harming their captives—if only out of a desire for ransoms paid for the hostages’ safe return—confrontations have grown increasingly violent, with pirates injuring and killing mariners. The highly-publicized killings of two American couples, taken hostage while yachting in the Indian Ocean, is but one example of the continuing danger posed by the pirates. Governments are reluctant to tolerate lawlessness on the high seas. The British Parliament proclaimed that the “appalling amount of violence against the maritime community [is] completely unacceptable,” necessitating “action to reverse it.”

Pirates’ ability to take sensitive materials or arms underscores this threat; they have captured ships loaded with thirty-three battle tanks, dangerous chemicals, liquefied natural gas, and crude oil. Catastrophic geopolitical or environmental disasters could result from such attacks. But restoring order will be difficult. Over one thousand pirates are active with experts estimating that another 2,500 are in training, and millions more may be waiting for their chance to plunder.


Piracy also hampers political, social, and economic development within Somalia and further destabilizes the “failed state” by interrupting humanitarian aid and capital flows. Pirates flush with weaponry and cash manipulate community values, distort markets, and contribute to a breakdown of the rule of law.32 Their domineering presence undermines weak government institutions and bolsters lawlessness.33 Flourishing piracy perpetuates other undesirable outcomes. By intercepting the World Food Program’s maritime deliveries, pirates disrupt vital food supplies to 1.1 million people.34 Reports also suggest the Al-Shabaab terrorist group has taken to the seas in search of hostages and cash.35 Further destabilization must be prevented.

A. International Naval Response

To address the threat posed by the pirates, the international community developed an unprecedented maritime enforcement regime. The United Nations Security Council (Security Council) issued multiple resolutions and “call[ed] upon States . . . to take part actively in the fight against piracy on the high seas off the coast of Somalia, in particular by deploying naval vessels and military aircraft . . . .”36 Navies are now the predominant mechanism combating piracy with thirty warships from China, the North Atlantic Treaty Organization (NATO), the European Union, the United States, and even Iran.37 Yet the ragtag Somali pirates have the upper hand in the fight against the unified fleet, which UN Secretary-General Ban Ki-moon describes as “one of the largest

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32. Kraska & Wilson, supra note 10, at 43.
anti-piracy flotillas in modern history.\textsuperscript{38} Naval forces have pursued “deter and disrupt” and “catch and release” strategies rather than mounting a more aggressive offense targeting the pirates’ command and control networks.\textsuperscript{39} U.S. and allied naval forces have captured, disarmed, and released over 343 Somali pirates (usually after giving them fuel, food, and water).\textsuperscript{40} Proponents hoped these strategies would reduce the pirates’ capabilities and lethality while avoiding the complexities and costs of prosecution.\textsuperscript{41} But these approaches lack deterrent effect. As the U.S. National Security Council observed, “Somali-based piracy is flourishing because it is currently highly profitable and nearly consequence-free.”\textsuperscript{42} The problem of employing naval forces against pirates goes well beyond matters of policy; the entire military approach is structurally unsound and unsustainable.

Despite the impressive array of warships from around the globe, forty vessels cannot effectively patrol an area three-quarters the size of the continental United States.\textsuperscript{43} Military commanders admit that if merchants are attacked, they are essentially on their own.\textsuperscript{44} For example, when the \textit{Maersk Alabama} was attacked, the nearest warship was 300 nautical miles away.\textsuperscript{45} Assembling a critical mass of warships capable of securing the Indian Ocean would be incredibly costly.\textsuperscript{46} Even staunch advocates for utilizing military

\begin{itemize}
\item \textsuperscript{41} Guilfoyle, \textit{supra} note 37.
\item \textsuperscript{42} NSC, \textit{COUNTERING PIRACY}, \textit{supra} note 9, at 12.
\item \textsuperscript{43} Pirates operate across 2.5 million square miles in the Indian Ocean, which is equivalent to approximately 75 percent of the area of the contiguous United States. William Maclean, \textit{Somali Pirate Ambition Undeterred by Navy Patrols}, \textit{REUTERS}, Apr. 9, 2009, http://uk.reuters.com/article/idUKL9657729.
\item \textsuperscript{44} Glenn Porter, \textit{Set NATO on the Pirates}, \textit{FORBES}, Apr. 16, 2009, http://www.forbes.com/2009/04/16/pirates-armed-convoy-somalia-opinions-contributors-nato.html (quoting Commander of the U.S. Fifth Fleet Vice Admiral William E. Gortney as saying the Navy “does not have the resource to cover merchant shipping”).
\item \textsuperscript{46} “It would be wishful thinking to expect [the current] sort of a presence to continue for
forces concede that to combat pirates over vast areas it would be smarter to employ smaller, faster crafts instead of traditional naval vessels: "Marines or SEALS on smaller, faster (and obviously far less expensive) armored patrol boats would be the ideal [strategy]." The benefits of using warships to combat piracy do not justify the costs.

Far short of eliminating piracy, naval fleets have merely forced pirates to adjust their operations. Navies have captured some pirates and enhanced security along transit corridors, but "pirates have simply shifted their operations to areas which they know are not being patrolled." Pirates are intensifying attacks far away from their bases over "a vast area . . . the navies cannot realistically cover." For example, pirates now conduct attacks up to 1,100 miles from Somali shores, near the Maldives, Seychelles, Oman, and India. Despite the presence of military forces, "there has been no letup in pirate attacks, and pirates, if anything, appear to be becoming even more effective at capturing ships." European Union Naval Force Commander Major General Buster Howes admits, "[t]here is no getting away from the fact that strategically a naval presence is not deterring the pirates." By moving farther out to sea to areas that are difficult to patrol, pirates have improved their ratio of successful attacks, increased ransom demands, and become more profitable. Not surprisingly, pirate business is booming. By escalating ransoms and attacking more vessels, the kingpins have generated substantial revenue to buy sophisticated weaponry and to fund future operations farther from their shores. This expands their capabilities and reach. Unless decisive action is taken to disrupt cash flows, nothing will stop Somali piracy from spreading.

any prolonged period. . . . [W]arships are not a long-term cost effective method of providing commercial vessels with protection from Somali piracy." LENNOX, supra note 22, at 19.

47. Bahar, supra note 23, at 81.


49. INT'L CHAMBER OF COMMERCE COMMERCIAL CRIME SERVICES, supra note 5 (stating pirates intensify attacks in new areas).


53. Baldauf, supra note 51.
B. Prosecution and Deterrence

Even when navies successfully apprehend seagoing pirates, the expense of interdiction, capture, and prosecution outweighs the seemingly negligible deterrent effects. For instance, pirates apprehended at sea in a costly U.S. naval operation were flown to Kenya where they were sentenced to seven years imprisonment. Had they been aware of these potential consequences, would it have deterred them? Would they still have taken the risk? And what effect does their incarceration have on the pirate kingpins? Desperate Somalis are willing to gamble for the shot at a better life regardless of the risks, and the kingpins don’t care about their minions. Worse yet, nine out of every ten detained pirates are released immediately after capture, which reinforces the notion that piracy is consequence free. The light penalties do not justify the heavy resource expenditures—such as those of modern jails, courts, trial, and armadas—necessary to effectuate pirate capture and prosecution. In the rare instances when pirates do receive lengthy sentences, such as thirty years from the United States and twenty-two years from the Seychelles, it is unclear whether other would-be pirates are aware of these punishments and what, if any, effect they have on their likelihood of engaging in piratical acts. Strategists suggest the pirate business model “is too productive and the rewards simply too huge for them to be deterred from their activities.” Simply put: the costs incurred by nations employing military forces are grossly disproportionate to the operation’s deterrent effect.

Despite the increased military presence and prosecutions, more Somalis are turning to piracy than ever before. Threats of incarceration fail to


55. Xan Rice, Somali Pirates Should Face Special Court, Says UN Envoy, GUARDIAN (London), Jan. 26, 2011, http://www.guardian.co.uk/world/2011/jan/26/somali-pirates-jack-lang-report (quoting United Nations Legal Advisor Jack Lang); see also Groves, supra note 40 (“Somali pirates captured by the Royal Navy are being given fuel, food and water and sent on their way.”).


57. European Union Naval Force, supra note 52.

discourage Somalis weighing a bleak existence in a failed state where the average worker earns $226 a year and pirates make $30,000 per attack.\textsuperscript{59} Officials also worry that pirate kingpins are no longer directly participating in attacks. Instead, they are employing children as young as eleven years old to conduct operations.\textsuperscript{60} The situation is such that “younger and younger children in Somalia are being pushed into piracy, which is proving immensely lucrative,” while “the established pirates, who have got rich, are no longer sailing out on raids.”\textsuperscript{61} The taking of a pirate ship captured by the Indian Navy after a gun battle revealed that over 40 percent of the seaborne pirates were under the age of fifteen.\textsuperscript{62} Prosecuting these “child pirates” seems unlikely to interrupt pirate activities or dissuade other youths from joining pirate networks. Thus, prosecution will not interrupt the flow of willing labor to support kingpin operations.

Admittedly, the current naval approach and prosecutions do further some laudable objectives, such as providing due process for pirates, a sense of justice for victims, and vindication for the international community. And the collective military efforts of sometimes-adversarial navies reinforce international partnership rather than conflict, the bolstering of faltering regional coast guards builds maritime capacity in the developing world, and military operations do mildly disrupt pirate activities.\textsuperscript{63} Intangible benefits like military cooperation, joint training, emergency response, and bringing wrongdoers to justice are difficult to quantify. Nevertheless, these benefits do not seem to justify their heavy financial costs, especially when “pirates are fast becoming ‘the masters of the Indian Ocean.’”\textsuperscript{64} Alternative cost-effective and sustainable steps should be taken proactively to prevent pirates from attacking ships.

\textit{C. Alternative Approaches to Counter-Piracy}

In addition to the deployment of naval forces, scholars and policy makers have considered a wide range of alternative counter-piracy approaches, including land-based political and economic development strategies (nation-building), maritime patrol areas (intensely guarded transit corridors), arming merchants, positioning private security forces aboard vessels, and developing the capacity of regional states to defend against pirates. A brief review of these

\begin{itemize}
\item \textsuperscript{61} Id. (quoting an Indian official).
\item \textsuperscript{62} Id. (noting that twenty-one of sixty-five pirates were below the age of fifteen).
\item \textsuperscript{64} Rice, supra note 55.
\end{itemize}
approaches illustrates the complexity of the Somali piracy problem as well as the capabilities and limitations of various stakeholders.

Undoubtedly, a permanent solution to Somali piracy will entail establishing a government capable of restoring law and order while encouraging the growth of industries to provide economic alternatives to piracy. Numerous case studies illustrate that when a credible government exists on land, the surrounding seas will be safe from piracy. Indeed, Somali history indicates that the existence of a land-based authority dissuades pirates in the region. Before the Barre regime fell and again during the Union of Islamic Courts’ brief reign, piracy was rare. The recent resurgence occurred only after the U.S.-backed Ethiopian invasion installed the weak Transitional Federal Government (TFG). Further, it is obvious that the modern instability, dire conditions, and desperation within Somalia are the predominant causes for piracy’s growth. In the absence of law enforcement, pirates thrive—even going so far as to establish a public “stock exchange” to raise capital for future attacks. Piracy dominates the economy, society, and even government. Pirate leaders confess that the government “gets a percentage of every ransom.” Some regions function “effectively . . . [as] pirate kingdom[s].” In such circumstances, it can be difficult to distinguish between legitimate government functions and piracy. For example, the “Somali National Coast Guard” gang impounded Taiwanese trawlers for illegally fishing in Somali waters. Their


68. For a full discussion of the correlation between Somalia’s socio-economic and political status as a failed state and piracy, see Mario Silva, Somalia: State Failure, Piracy, and the Challenge to International Law, 50 VA. J. INT’L L. 553, 556–64 (2010).

69. Mohamed Ahmed, Somali Sea Gangs Lure Investors at Pirate Lair, REUTERS, Dec. 1, 2009, http://www.reuters.com/article/idUSTRESBO1Z20091201?sp=true (noting that, for example, the investment of a grenade launcher returned $75,000 in thirty-eight days).


71. David Blair, Collapse into Anarchy was Perfect for the Pirates of Puntland, DAILY TELEGRAPH (London), Nov. 19, 2008, at 17.

72. Peter Lehr & Hendrick Lehmann, Somalia—Pirates’ New Paradise, in VIOLENCE AT SEA: PIRACY IN THE AGE OF GLOBAL TERRORISM 12–14 (Peter Lehr ed., 2007); see also Donna Hopkins, Counter Piracy Update, U.S. DEP’T OF STATE (Dec. 3, 2010, 11:00 AM), http://fpc.state.gov/152316.htm (“There was a self-serving narrative at one point that Somali pirates were there to protect their waters from the depredations of horrible, illegal fisherman and toxic dumping. I am not going to dispute that . . . but that could never justify the kind of hostage taking that Somalia’s pirates have wreaked on the international trade routes.”).
actions appeared lawful, until they demanded ransoms for the crew. In the foreseeable future, local authorities are unlikely to establish rule of law, effective bureaucracies, and credible deterrence mechanisms. Piracy, power struggles, clan warfare, poverty, and religious extremism are likely to continue undermining the formation of government institutions. Government officials “have virtually no support base,” while well-funded and well-armed pirate leaders have gained de facto control over most coastal cities. These trends portend difficulty establishing a government capable of curbing piracy. Many politicians, military leaders, and academics agree that the “ultimate solution for piracy is on land,” but solving that problem is too vexing and risky for outside nations to pursue, so rather than engaging in ground operations, the international community has established a naval task force to patrol for pirates off the coast.

Moreover, international military forces and even aid organizations are reluctant to engage in stabilization, state building, and humanitarian operations within Somalia. After the dismal failures of the United Nations and the United States in the “Black Hawk Down” incident, foreign militaries remain wary of

73. Id.
land-based interventions. Similarly, many international aid organizations refuse to operate directly from within Somalia and instead oversee their Somali projects from bases in neighboring Kenya. Only one maritime patrol nation, France, has sent troops ashore to capture pirates. In 2008, the Security Council authorized the use of force against pirates in Somalia; however, just Ethiopia, operating under an African Union mandate, put troops on the ground. Even optimistic forecasts predict a “long and protracted” period until a stable government exists in Somalia.

Unable to deter pirates with naval forces or to establish a robust government ashore, military leaders and strategists hoped providing security in frequently traveled areas would protect the majority of ships. The coalition of nations fighting the pirates has established a Maritime Security Patrol Area (MSPA) through the Gulf of Aden to provide greater defensive coverage and

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78. The Battle of Mogadishu, popularly known as Black Hawk Down in reference to the U.S. Army helicopters shot down by militiamen of the Hadr Gidr gang, took place on October 3 and 4, 1993. U.S. Special Forces acting under a United Nations mandate launched a mission to capture a senior Somali warlord in the city center of Mogadishu. During the mission two U.S. helicopters were shot down causing the United States to launch an ultimately unsuccessful rescue mission along with Malaysian and Pakistani troops in a very hostile urban environment. At the end of the engagement, twenty U.N.-backed troops had been killed along with up to seven hundred Somalis. In military circles, the battle represents the challenges of conducting military operations in Somalia and hostile urban settings. For a complete account and description see Mark Bowden, A Defining Battle, PHILA. INQUIRER, Nov. 16, 1997, http://inquirer.philly.com/packages/somalia/nov16/rang16.asp; see also Walter Clarke & Jeffrey Herbst, Somalia and the Future of Humanitarian Intervention, 75 FOREIGN AFF. 70, 72 (1996) (concluding “no massive intervention in a failed state—even one for humanitarian purposes—can be assuredly short by plan, politically neutral in execution, or wisely parsimonious in providing “nation-building” development aid. Nations do not descend into anarchy overnight, so intervenors should expect neither the reconciliation of combatants nor the reconstruction of civil societies and national economies to be swift.


quicker responsiveness in a concentrated corridor. There is much debate about the effectiveness of the MSPA. Critics note that attacks are increasing even in “protected” areas, which suggests pirates are not particularly wary of run-ins with naval forces and that funneling merchants into predictable paths may actually make it easier for pirates to target them. Other strategists defend the MSPA, hypothesizing that the number of attacks would be greater without protection corridors. Both Russia and China have taken this approach further by providing warships to escort vessels through the Gulf. While this approach may provide benefits to a limited number of ships, to constitute a solution for the majority of the merchant traffic such an approach would require many escorts while abandoning the many other ships traveling outside of the major shipping lanes. Either way, protecting ships traveling across vast seas requires substantial resource expenditures.

Other experts advocate arming merchant vessels as “the lowest cost, and quickest means of deterring piracy.” This strategy presupposes that pirates would be less likely to attack armed ships. Others disagree. The International Maritime Organization (IMO) warns that arming merchant vessels may endanger crews by placing them in battles with well-armed pirates or by subjecting seamen to greater cruelty if captured. Instead, the IMO advocates nonlethal tools like fire hoses, acoustic devices (like sonic cannons), electrical fences, “safe rooms,” and tactical maneuvers. Further, many nations do not allow merchants to carry weaponry to their ports, which raises the question of how to get weapons on and off ships. Nevertheless, some American politicians propose subsidizing military-like forces aboard merchants. The

88. Porter, supra note 44 (noting convoys worked in World War II against hard-to-kill U-boats).
91. Id. at 11.
92. Staub, supra note 89, at 266 (arguing ships could throw arms overboard or risk penalties).
idea appears to have taken hold. The U.S. Maritime Transportation Security Act provided the U.S. Coast Guard with the power to issue a security directive to all American vessels requiring them to “supplement ship’s crew with armed or unarmed security” depending on the piracy threat and to embark military security personnel.\(^\text{94}\) Military leaders promote private security on ships as a “best practice” to prevent pirate attacks.\(^\text{95}\) Xe Services, formerly Blackwater, recently began providing armored escorts for transiting vessels.\(^\text{96}\) In some cases, embarked private security forces stalled pirates until naval warships arrived.\(^\text{97}\) Citing these incidents, some commentators advocate security teams with rifles, grenades, and night scopes onboard every ship.\(^\text{98}\) While this option might be less costly than stationing a naval fleet in the area, it is still prohibitively and unnecessarily expensive.\(^\text{99}\) Already operating with almost no profit margin due to the global recession, shippers would have difficulty assuming these additional costs.\(^\text{100}\) Moreover, teams on every ship would be extraneous since pirates attack very few of the 20,000 ships transiting the Gulf of Aden.

International circles tend to support cooperative regional approaches focused on building the capacity of Somalia’s neighbors to patrol the coast. U.N. Secretary-General Ban Ki-moon advocates “a long-term strategy to promote the closure of pirates’ shore bases and effectively monitor the coastline,” recommending “that Member States consider strengthening the capacity of the coast guards both in Somalia and the region.”\(^\text{101}\) Such an approach proved successful in combating pirates in the Straits of Malacca.\(^\text{102}\)

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99. With over 20,000 ships annually, many $10,000 per day security squads would be needed. Berger, *supra* note 17.


102. Asian nations halted piracy in the Straits of Malacca via the Regional Cooperation
Several African initiatives appear promising. Ten countries have already signed the Djibouti Code, a pact to facilitate regional coordination and training. Kenya, Tanzania, and Yemen are establishing, with IMO assistance, a joint center to coordinate maritime operations, patrols, and intelligence. But regional coast guards will not be a panacea. As pirates become increasingly sophisticated and operate farther from land, these coastal patrols and regional tracking centers will encounter greater difficulties fighting pirates.

Another recent regional strategy utilizes local port authorities to ensure ships are configured to discourage pirate attacks. Under the International Ship and Port Facility Security (ISPS) Code, governments, shipping companies, and port authorities have an obligation to ensure merchant vessels are equipped to "detect security threats and take preventive measures against security incidents affecting ships or port facilities used in international trade." Regional officials could review safety and security plans for merchant mariners and assess ship vulnerability. Their reports could be sent to insurance companies for consideration in determining premiums. If vulnerable ships had to pay more, shipping companies likely would change their ways. However, this circuitous approach does not directly discourage pirate attacks.

While the efforts discussed above hold promise for achieving some limited objectives, they do not provide a strategy for proactively dismantling pirate networks and uprooting the kingpins that fund, direct, and profit from piracy.


103. The Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the western Indian Ocean and the Gulf of Aden signatories includes Djibouti, Egypt, Ethiopia, Kenya, Madagascar, the Maldives, the Seychelles, Somalia, Tanzania and Yemen (Egypt joined after the other nine). Nine Countries Sign Deal to Fight Somali Piracy, AL ARABIYA, Jan. 29, 2009, http://www.alarabiya.net/articles/2009/01/29/65299.html. Code of Conduct text accessible via INT’L MAR. ORG., Sub-regional Meeting to Conclude Agreements on Maritime Security, Piracy and Armed Robbery Against Ships for States from the Western Indian Ocean, Gulf of Aden and Red Sea, Apr. 3, 2009, http://www.sjofartsverket.se/pages/20647/102-14.pdf. See also Pham, supra note 48 at 24 (explaining the benefits of regional efforts: “Coastal patrol forces would not only be more sustainable from the fiscal point of view, but, precisely because they would concentrate on the littorals [coastal waters], have a more manageable area of responsibility than the naval forces which are currently sailing all over the western Indian Ocean. Moreover a coast guard is within the reach of states in the region as well as some of the effective authorities in Somalia.”).

104. Guilfoyle, supra note 37, at 150.

D. Legal Context for Addressing Somali Piracy

Legally, pirates have long been considered enemies of all mankind.\textsuperscript{106} International law, as codified in the authoritative 1982 United Nations Convention on the Law of the Sea (UNCLOS), grants universal jurisdiction so that “every State may seize a pirate ship” on “the high seas, or in any other place outside the jurisdiction of any State,” but also includes complicit functions, like inciting and facilitating piratical activities, within the definition of piracy.\textsuperscript{107} Article 100 states that repressing piracy is the collective duty of every nation, even outside its jurisdictional waters.\textsuperscript{108} In the Somali context, the Security Council provides greater authority to interdict pirates by passing several resolutions that permit enforcing nations to apply force to suppress piracy using “all necessary means,” even within Somali territorial waters.\textsuperscript{109} Going further, the Security Council even extends authority for enforcers to pursue pirates onto land.\textsuperscript{110} Consequently, multiple jurisdictional avenues exist to interdict pirates and disrupt their criminal networks. But a framework for a sustainable, cost-effective deterrence is still lacking.

\textsuperscript{106} Kontorovich, \textit{supra} note 1, at 251; see also United States v. Brig Malek Adhel, 43 U.S. (2 How.) 210, 232 (1844) (noting that pirates “commit[] hostilities upon the subjects and property of any or all nations, without any regard to right or duty, or any pretense of public authority”).

\textsuperscript{107} United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS], arts. 100–101, 105 (defining piracy as “any illegal act of violence, detention, or depredation committed for private ends by the crew, or the passengers, of a private ship and directed against a ship, aircraft, persons, or property on the high seas or in any other place outside the jurisdiction of any state”). Coastal states may exercise domestic legal jurisdiction in the territorial sea (extending twelve nautical miles from the coastal baseline). UNCLOS Art. 2, 3; see also Barry Hart Dubner, \textit{Recent Developments in the International Law of the Seas}, 33 INT’L L. 627, 632 (1999).

\textsuperscript{108} UNCLOS, \textit{supra} note 107, at art. 100.


\textsuperscript{110} Pursuant to Security Council Resolution 1851:
States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary-General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG . . . to bring to justice those who are using Somali territory to plan, facilitate or undertake criminal acts of piracy and armed robbery at sea.

For instance, even if caught, pirates are unlikely to face prosecution and conviction. In theory, the widely ratified Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (SUA Convention), which requires member states to prosecute pirates brought to their countries, provides an international legal framework for prosecution, but in practice the process is complex, political, and unpredictable. Nascent African and Yemeni legal systems “are notoriously lacking in resources for law enforcement and judiciary [processes].” These countries may also impose seemingly unfair punishments, lack due process protections, or house prisoners in penal facilities that do not meet international standards for humane treatment. As such, littoral nations may be inappropriate venues for trials.

But there is hope. Regional nations, signatories of the Djibouti Code aimed at combating piracy, have—at least on paper—committed to developing the capacity to enforce international laws against pirates. And, to help these
nations fulfill their obligations, international partners are assisting signatories by providing legal training, funding due process initiatives, and bringing prisons up to international standards. Yet regional nations lack the financial and political wherewithal and legal infrastructure necessary to prosecute pirates. “Tanzania declined to do anything; [the] Seychelles took on a few but is too small to cater for too many, Yemen took on a few but lacked sufficient capacity.”

Kenya inked deals with several nations to accept pirates for trial, but Kenyan politicians became concerned that its judicial resources were insufficient, its prisons overcrowded, and its international status might be tarnished if it became a pirate dumping ground. In early 2010 Kenya announced that it would no longer accept pirates. Only after the United Nations guaranteed funding to a special Kenyan court in Mombasa to try pirates brought in by foreign navies did the government reverse its position. But the issue is far from resolved: in November 2010 a Kenyan High Court judge ruled that there was no jurisdiction in Kenya’s courts to try cases of piracy on the high seas.

The Code of Conduct recognizes the extent of the problem of piracy and armed robbery against ships in the region and, in it, the signatories declare their intention to cooperate to the fullest possible extent, and in a manner consistent with international law, in the repression of piracy and armed robbery against ships, with a view towards sharing and reporting relevant information through a system of national focal points and information centres; interdicting ships suspected of engaging in acts of piracy or armed robbery against ships; ensuring that persons committing or attempting to commit acts of piracy or armed robbery against ships are apprehended and prosecuted; and facilitating proper care, treatment, and repatriation for seafarers, fishermen, other shipboard personnel and passengers subject to acts of piracy or armed robbery against ships, particularly those who have been subjected to violence. Code of Conduct is open for signature by the 21 countries in the region, of which nine—namely, Djibouti, Ethiopia, Kenya, Madagascar, Maldives, Seychelles, Somalia, United Republic of Tanzania and Yemen—signed it during the closing ceremony in Djibouti.


118. Id.

119. Id.

120. Id.
In contrast to the limited capacity of littoral states on the Gulf of Aden, nearby India, which maintains a strong navy and a well-developed judicial system, may prove to be a regional maritime security leader. The Indian government has demonstrated its willingness to use lethal force against pirates. After the 2008 Mumbai terrorist attack, which was launched from a hijacked ship, India may be even more inclined to take an aggressive stand against piracy in the Indian Ocean. India stressed its potential role during a recent IMO meeting by calling for the establishment of multinational maritime peacekeeping efforts in the Gulf of Aden under the auspices of the United Nations. With developing naval capabilities, political will, bases in the region, and an established (if slow) legal system, India could assume the lead in prosecuting pirates by spearheading a regional effort. The cost of trying pirates in Indian courts is likely to be less than trying them in the West or developing special courts in Yemen or Eritrea that meet international standards. Even so, an Indian-focused approach would run into the same problems of resource limitations as coalition forces. While regional efforts by India or Somalia’s neighbors might be helpful in bringing some pirates to justice, they are unlikely to dismantle global piracy networks.

Much of the legal research surrounding piracy has focused on issues of prosecution. A number of scholars have discussed the dizzying process of determining which country should be responsible for bringing captured pirates to justice. Two key points of agreement emerge from this literature: (1) On the high seas, any nation can assert jurisdiction because piracy is a universal crime; and (2) most states prefer to avoid the expense and risks associated with prosecution. Theoretically, the state where a vessel registers—the flag

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122. Praveen Swami, Pointed Intelligence Warnings Preceded Attacks, HINDU TIMES, Nov. 30, 2008, at 15; see also Angel Rabasa et al., The Lessons of Mumbai, Occasional Paper, RAND, 2009, at 3–4; Bhatia, supra note 1218 (noting that top Indian diplomats suggest India should take a more prominent role against Somali pirates).


125. These arguments are detailed and draw on many strands of international law, which I will not attempt to duplicate here in full.

126. See generally S.C. Res. 1851, supra note 366 (calling on all nations to prosecute pirates, if capable).

state—has the greatest interest in protecting that ship. But in reality most vessels are registered to "flag of convenience" states, like Panama, Liberia, and Mongolia, incapable or unwilling to ensure the safety of their registered ships. While some of the pirates' home states might be well situated to provide justice, domestic authorities in the Somali context are either nonexistent, corrupt, controlled by the pirates, or likely to impose disproportionate punishments. States whose citizens are often hostages, like Ukraine and the Philippines; vessel-owner states, like the United States, Japan, EU countries, and Singapore; cargo-owner states; origination and destination states; capturing states; or nearby nations are all sufficiently tied to the problem to bear a responsibility to act, yet only in rare circumstances where their immediate interests are challenged do they make any effort to bring pirates to justice. The ultimate consequence of this reluctance to prosecute is a lack of justice. Despite a growing consensus that universal jurisdiction exists, few nations seem willing to prosecute Somali pirates. The United States tried the one surviving Somali pirate from the Maersk Alabama attack and five others who mistakenly attempted an attack on a warship, the French prosecuted three in Paris, the Dutch convicted a small group, Germany is trying ten, and five are awaiting trial in South Korea. But outside of these limited examples, developed nations have refused to prosecute pirates.

Countries are understandably reluctant, due to the costs of transport, housing, security, legal representation, and asylum claims, to bring thousands
of pirates into their legal systems. For example, the British and Danish navies release captured pirates onto Somali beaches to avoid the asylum claims that may result if the pirates were brought to Europe for trial.\textsuperscript{137} Although scholars have questioned the legitimacy of such concerns, European governments fear that pirates will seek asylum should they be tried.\textsuperscript{138} In other places, the prosecution and imposition of significant punishments against young Somali pirates violates notions of fairness and justice. Harshly punishing these children, who are victims of desperation and exploitation by kingpins, seems unfair. For example, in Malaysia three alleged “child pirates” under fifteen years old could face the death penalty if convicted.\textsuperscript{139} In the U.S. prosecution, attorneys defending a young pirate said they would ask for leniency rather than punishment on account of their client’s young age.\textsuperscript{140}

While jurisdictional questions of where and how to try pirates are important, the scholarly and diplomatic focus on prosecuting individual pirates neglects the more crucial problem of how to stop systematic maritime piracy networks. In the absence of capable land-based governments, global powers must bring order to the seas by limiting the capabilities of pirate networks. This can be achieved by making piracy unprofitable not only for the young Somalis at sea, but also for those who control the operations—the elaborate, organized crime syndicates operating out of London, Dubai, and other Persian Gulf states.\textsuperscript{141} An effective enforcement mechanism must target these ring leaders and their assets instead of their seagoing pawns.

II.

LETTERS OF MARQUE

The solution to piracy in the waters off of Somalia may lie in letters of marque, which are legal authorizations enabling private entities—privateers—to use force on behalf of the state to harass or prey on vessels belonging to


\textsuperscript{138} For full discussion, see Yvonne Dutton, \textit{Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice?}, 34 FORDHAM INT'L L.J. 236 (2010).


foreign nations or individuals. The Framers incorporated letters of marque into the U.S. Constitution to protect America's seagoing interests, and Congress can issue them to encourage private, profit-making military ventures to undertake activities that align with the national security interests of the sovereign.

In both the United States and abroad, privateers provided cost-effective services without the long-term employment commitments and capital investment associated with the use of the armed forces. Under the system, merchants underwrote the venture and were guaranteed between one-third and one-half of the returns; captain and crew shared the remainder. As a risk speculation, based upon hopes of seizing enemy merchant shipping, the crews were commonly enlisted on a "No Prize, No Pay" basis. The merchants gambled their ship and its outfit, and the seamen gave their time and risked their lives. Quite often these speculations paid fine dividends.

Throughout America's history, from the Barbary Wars to World War II, Congress authorized letters of marque so the United States could flexibly and cost-effectively respond to maritime threats. Although essential in early conflicts, recently letters have been issued more sparingly due to concerns that the government could not properly supervise privateers and because America's modern navy was better suited for the mission. Now, technology makes it possible for governments to exercise the control necessary to meet international law standards for privateers and the rigors of public scrutiny, while bulky naval assets seem ill suited to battle pirates over expansive areas.

A. Historical Development of Letters of Marque and Reprisal

Initially, letters of marque provided a form of international redress for wrongful maritime takings. The doctrine evolved out of the concept of international reprisals. Under international law, states are the primary actors;
consequently they were responsible for seeking international redress for their subjects who had been injured by foreign sovereigns and their subjects. If diplomacy failed, the injured party's sovereign could issue a letter of marque authorizing the victim to seize the property of the offender or the offender's countrymen to compensate for the damage done. This evolved into a wartime mechanism allowing sovereigns to authorize privateers on the high seas to seize foreign ships and property in exchange for part of the proceeds. The practice had the distinct advantage of weakening enemies at no direct cost to the state.

Letters of marque have a long history. Deeply rooted in the common law as a "right acknowledged by all nations," letters of marque date back to 1205. Henry II issued licenses in 1243 to coastal seafarers to "annoy our enemies by sea or by land," even though the individuals had not suffered personal loss. During the fourteenth and fifteenth centuries, procedural safeguards to provide rudimentary due process emerged, such as admiralty courts to adjudicate disputes. Simultaneously, letters of marque came to be used primarily as a means of conducting public warfare with private actors, rather than as an instrument for private retribution during peacetime. Keeping with the idea that privateers were arms of state war making, it became customary for governments to commission privateers. During the Dutch

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1. Vattel, supra note 144, at ch. II, sec. 72 (1758).
2. Vattel asserts that "we seize the property of the subject, just as we would that of a state or sovereign," so that personal property of individuals could be seized as property under the control of the state. FRANCIS H. UPTON, THE LAW OF NATIONS AFFECTING COMMERCE DURING WAR 95 (1863) (paraphrasing Vattel).
3. Cf. Vattel, supra note 144, at ch. VII, sec. 81 ("Even the property of individuals is, in the aggregate, to be considered as the property of the nation, with respect to other states.").
4. Even opponents of letters of marque recognized as doctrine that one government is entitled to enforce from another, redress for all wrongs done to subjects of the government making the application for redress, and if that redress is denied, it may justly be obtained by reprisals from the nation so refusing. UPTON, supra note 146. The practice of sovereigns authorizing private actors to conduct acts of war dates back to the English Grant to the Captor of Ships in 1205. ENGLISH GRANT TO THE CAPTOR OF SHIPS (1205), http://www.hillsdale.edu/dep/History/Documents/War/Med/Naval/1205-Captor.htm.
7.RALPH M. EASTMAN, SOME FAMOUS PRIVATEERS OF NEW ENGLAND 1 (1928).
8. Germany, France, Spain, and England forbade private citizens to "cruise against the
Golden Age, privateers played a key role, protecting merchant trade because the government granted them a portion of the captured property, as well as indemnity. As powerful state navies, such as the Spanish Navy and the global British Navy, emerged, the need for privateers to conduct warfare diminished, but the practice continued, notably in the Western Hemisphere and during wartime.

B. Early American Understanding of Letters of Marque

Privateering was not restricted to Europe, and the practice was particularly pronounced in the colonies. In America, letters of marque date back to the first settlements. Early on, Queen Elizabeth employed privateers against the Spanish. But when James I ascended to the throne, he reversed Elizabeth's policies and refused to issue letters of marque. Tens of thousands of out-of-work English privateers soon moved their operations to the Caribbean, finding that a loophole in James's policies permitted privateering for colonization and the establishment of plantations. These colonial privateers were poorly supervised and lacked discipline; many essentially became pirates.

At the same time, colonial privateers were the "de facto navy, intelligence enemy" without a letter of marque. Upton, supra note 146, at 101, 110 (stating "a ship furnished with a letter of marque is manifestly a ship of war").

153. Id. at 177. Grotius' seminal work, De Jure Praedae (Of the Law of Prize and Booty), is often considered the foundation for modern international law, but was essentially a defense of Dutch privateers using letters of marque to raid Spanish shipping. See generally Grotius, De Jure Praedae Commentarius (Commentary on Prize and Booty) (1608), reprinted in The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade vi (James Brown Scott ed., Ralph Van Deman Magoffin trans., 1916). See also Virginia West Lunsford, Piracy and Privateering in the Golden Age of the Netherlands 12–13 (2005).

154. The Royal Navy's ascendance after Trafalgar reduced the need and profitability of privateers. Cooperstein, supra note 150, at 224.

155. Many view Queen Elizabeth's commission of Sir Francis Drake as a privateer in 1572 to mark the beginning of the end of the Spanish Empire. Drake attacked numerous Spanish ports and shipping in the Americas. Id.; see also Stark, supra note 149, at 282–83; Harry Kelsey, Sir Francis Drake: The Queen's Pirate (1998).


158. The English governor of Jamaica issued Sir Henry Morgan, the fabled Captain Morgan, a colonizing letter of marque. Over his career Morgan looted hundreds of thousands of pounds of Spanish treasure, killed thousands of troops, and held countless Caribbean towns hostage. Richard, supra note 2, at 426. Edward Teach, also known as Blackbeard, began his career as a British privateer, but when the War of Spanish Secession ended he turned to piracy. He blockaded Charleston Harbor and kidnapped residents of the city. He accepted a royal pardon in exchange for part of his treasure and a promise not to plunder (but he was later killed for breaking this promise). See Samuel Nelson Dickerson, The Pirates Own Book 311–20 (1855); see also Charles Johnson, A General History of the Pirates 18 (1724) (recounting a letter from British Governor, Nicolas Laws, to the Spanish governor of Cuba accusing him of supporting pirates masquerading as privateers using pretend letters of marque commissions).
service, and infantry” of British enterprises in the Americas.159 During the French and Indian War, colonial American privateers attacked French and Austrian shipping on behalf of the British.160 Royal governors were appointed as vice-admirals, giving them authority to issue letters of marque to “suitable persons under adequate safeguards,” and to appoint admiralty judges to hear prize cases.161 This system of governance went on relatively independently, as oversight came from appeals to the High Admiralty Court in London, which was an ocean away.162 Even when appeals were made to London, colonial supreme courts occasionally issued final binding decisions before the High Admiralty Court had ruled.163

C. Letters of Marque Under the Articles of Confederation

Letters of marque also played a key role during the Revolutionary War. When the American colonies rebelled, the British encouraged privateers to seize colonial ships and cargoes. In response, the Continental Congress issued an embargo of British goods and authorized its own privateers to cruise against and seize “all such ships of war, frigates, sloops, cutters, and armed vessels as are or shall be employed in the present cruel and unjust war against the United Colonies.”164 Authorization encompassed “all vessels to whomsoever belonging” that provided supplies to the British.165 The Continental Congress incentivized privateers by allowing them to keep half the value of British prizes.166 In 1776, Congress stated letters of marque were “necessary to provide for [the colonies’] defense and security, and justifiable to make reprisals upon their enemies, and otherwise to annoy them, according to the laws and usages of Nations.”167

The importance of privateers during the Revolutionary War cannot be overstated. First, the privateers significantly disrupted British trade.168 Their

159. Cooperstein, supra note 150, at 427.
160. Goods of neutral nations were subject to attack if carried by belligerent-flagged ships. In 1758, the British announced that any merchants carrying cargoes to enemy colonies were subject to seizure. Stark, supra note 149, at 294.
161. John Franklin Jameson, Introduction to Privateering and Piracy in the Colonial Period: Illustrative Documents 7–8 (John Jameson ed., 1923) available at http://www.munseys.com/diskfive/privol.pdf. The privateers were to bring their prizes and cargo to England or a British colony for proper adjudication, so the Crown got its share. Stark, supra note 149, at 347 (HM George II’s instructions). Rhode Island issued the first colonial letter of marque in 1694. Id. at 288. See also Cooperstein, supra 150, at 224.
163. Id. at 225, n.17 (referring to Taxier v. Sweet, 2 U.S. (2 Dall.) 81 (1766) in which the Pennsylvania Supreme Court ruled it had jurisdiction in common law to hear matters the Lords Commissioners had determined to be Admiralty).
164. Id.
165. 3 J. Cont. Cong. 373 (Nov. 25, 1775).
166. Id. at 375.
168. See Andrew Jackson O'Shaughnessy, An Empire Divided: The American
attacks disrupted the plantation economy of the Caribbean colonies and made cross-Atlantic transit so risky it was no longer profitable.\textsuperscript{169} By February 1777 all four of the major British West India merchant companies had collapsed.\textsuperscript{170} Second, privateersmen assisted the Continental Congress in conducting diplomacy with the neutral French colonies of the Caribbean.\textsuperscript{171} Third, the privateers provided supplies to the Continental Army.\textsuperscript{172} Fourth, the privateers engaged the British directly. The first battle fought by an American ship in foreign waters was by the privateer, \textit{Reprisal}, against H.M.S. \textit{Shark}.\textsuperscript{173} In South America, they cut loose the mooring lines on British ships, while Britain invaded Nassau in the Bahamas and attempted to take Tobago twice.\textsuperscript{174} The privateers also aided the fledgling American Navy, working in tandem to attack the British on several occasions.\textsuperscript{175}

Colonists were also mindful of the risks posed by the profit motive. At times privateers focused more on protecting their assets than achieving military objectives; nonetheless, they contributed in a significant way to military success.\textsuperscript{176} Privateers functioned as a force multiplier, reducing British capacity at little cost to the Continental Congress. During much of the Revolutionary War, the number of commissioned privateers equaled the number of soldiers in George Washington’s armies.\textsuperscript{177} The Congress issued over 2,000 commissions

\begin{thebibliography}{9}
\bibitem{169} \textsc{Jackson O'Shaughnessy}, \textit{supra} note \textit{168}, at 158.
\bibitem{170} \textit{Id.}
\bibitem{171} \textit{Id.} at 155.
\bibitem{172} \textit{Id.} at 156.
\bibitem{173} \textit{Id.}
\bibitem{174} \textit{Id.}
\bibitem{176} Historians have often faulted privateers for the failure of the Continental attack on the British naval base at Penobscot River. Privateers refused to engage the fort directly and abandoned the Continental Navy when the British fleet arrived. C. Kevin Marshall, \textit{Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars}, 64 \textit{U. Chi. L. Rev.} 953, 970 (1997). However, military strategists, including General Washington, recognized the strategic and economic advantage “rascally privateersmen” provided. \textsc{John C. Fitzpatrick, Writings of Washington} 128 (1931) (letter to Major General Philip Schuyler at Camp at Cambridge, MA, Nov. 28, 1775), \textit{available at} http://etext.virginia.edu/etcbin/toccer-new2?id=WasFi04.xml&images=images/modeng&data=/texts/english/modeng/parsed&tag=public&part=113&division=div1. \textit{See also Nelson, supra} note 79, at 79 (quoting Gen. Washington: “Finding we had no great prospect of coming to close Quarters with the Ministerial Troops in Boston, I fitted out at the Continental Ex pense [sic], several Privateers.”). Washington, convinced that privateers were the only way to acquire the provisions necessary to win the Revolutionary war, commissioned the \textit{Lee}. The \textit{Lee} seized British merchant ships including the \textit{Nancy}, which held 2,000 muskets, 2,000 bayonets, 3,000 rounds of shot for 12-pounders, some gunpowder and 50 fire shells. The \textit{Nancy}'s capture provided much needed provisions for the colonies. \textit{See Shipping: Fortunes at Sea}, \textit{Time}, Jul. 4, 1976, http://www.time.com/time/magazine/article/0,9171,712256-2,00.html.
\bibitem{177} \textit{See Michael Aye, HMS Seawolf} 12 (2008) (noting approximately 11,000
to more than 440 privateer ships, which captured 2,000 enemy vessels and 16,000 enemy combatants—more than the entire Continental Army.\textsuperscript{178} British General William Howe lamented that American privateers “will hurt us more effectually than any thing [the Army] can do by Land.”\textsuperscript{179} Additionally, the “success of the privateers compensated for British seizures of American military supplies while subsidizing a significant portion of the economy.”\textsuperscript{180} Americans could buy goods taken from captured British ships at low prices. Cruising for prizes was an honorable calling that combined patriotism and profit.\textsuperscript{181}

The Continental Congress carefully oversaw the activities of these privateers by detailing provisions for the capture of enemy goods transported by neutral shipping, the recapture of American property previously seized by the British, and the percentages of the prize money to be spent to develop a navy.\textsuperscript{182} Courts held privateers accountable for their actions. In addition to a substantial security bond, privateers could be liable for misfeasance, illegal actions, or attacks on neutral ships or cargo.\textsuperscript{183} They held the “master or commander” responsible for “mischief” if he violated the restrictions of his license.\textsuperscript{184} Violations “might not only lead to forfeiting the bond but also to liability for damages.”\textsuperscript{185}

The Articles of Confederation regulated the use of letters of marque. Article VI of the Article of Confederation mandated that “no State shall issue letters of marque, except:

after a declaration of war by [Congress] . . . against a Kingdom or State and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by [Congress], unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the [U.S] in Congress assembled shall determine otherwise.\textsuperscript{186}

Article IX states that Congress:

shall have the sole and exclusive right and power . . . of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of

\begin{thebibliography}{99}
\bibitem{178} EDGAR STANTON MACLAY, A HISTORY OF AMERICAN PRIVATEERS 12–14 (1899).
\bibitem{179} NELSON, supra note 175, at 248.
\bibitem{180} Cooperstein, supra note 150, at 228.
\bibitem{181} UPTON, supra note 146, at 170–76.
\bibitem{182} 21 J. CONT. CONG. 1153–58 (Nov. 28, 1781).
\bibitem{183} Richard, supra note 2, at 453. \textit{See also} 4 J. CONT. CONG. 247 (Apr. 2, 1776); Talbot \textit{v. Commanders and Owners of Three Brigs}, 1 U.S. (1 Dall.) 95 (1784) (holding that recapturing a British vessel that had been lawfully captured under a letter of marque amounted to theft).
\bibitem{184} \textit{See} Purviance \textit{v. Angus}, 1 U.S. (1 Dall.) 180 (1786).
\bibitem{185} Marshall, supra note 176, at 962.
\bibitem{186} ARTICLES OF CONFEDERATION of 1781, art. VI.
\end{thebibliography}
granting letters of marque and reprisal in times of peace—appointing
courts for the trial of piracies and felonies committed on the high seas
and establishing courts for receiving and determining final appeals in
all cases of captures. 187

The Congress also required nine states to approve of the issuance of letters of
marque during peacetime. 188 Also, tellingly, the only national judicial body
the Continental Congress created was an admiralty appeals court intended to
hear prize cases related to privateer compensation. 189 The founding
generation considered privateers useful and incorporated letters of marque
into American jurisprudence.

D. Letters of Marque and the Constitution’s Framework

Given the popularity of privateering during the Revolutionary War and
the incorporation of letters of marque in the Articles of Confederation, it is not
surprising that the Framers uniformly supported the practice. A number of
deleagates had personally profited from privateering and many viewed the
practice as the only viable way to exert American influence at sea. 190 Letters of
marque provided nations with the flexibility to redress grievances and to take
hostile action without resorting to war. 191

While the Framers carefully discussed letters of marque, their debates
focused on which branch of government should wield issuance power, not
whether such power existed. 192 Under the Continental system the President of
the Congress had the power to issue letters of marque, but the Framers
purposely transferred this power to the legislative branch. 193 Consistent with
the founding generation’s confidence in local militiamen and fear of standing
armies, the Framers included letters of marque in the Constitution to allow the
citizenry to assist in military operations. 194

187. ARTICLES OF CONFEDERATION of 1781, art. IX.
188. Id.
189. 20 J. CONT. Cong. 761 (Jul. 18, 1781).
190. Cooperstein, supra note 150, at 230 (most notably Robert Morris, Nathaniel Gorham,
and John Langdon); see also FORREST MCDONALD, WE THE PEOPLE 38, 43 (1968) (providing
detailed accounts of Gorham and Langdon’s pecuniary interest in privateering).
191. JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED
STATES: CONTAINING A BRIEF COMMENTARY ON EVERY CLAUSE, EXPLAINING THE TRUE
NATURE, REASONS, AND OBJECTS THEREOF 121 (Harper & Brothers ed. 1869) (1840).
192. The Framers were concerned that a new centralized government might lead to military
However, they were keenly aware that a strong executive would be needed during times of war.
See John Yoo, The Continuation of Politics by Other Means: The Original Understanding of War
193. U.S. CONST. art. I, § 8, cl. 7. As with war declarations, Congress was seen as the
appropriate branch to determine whether military operations should be conducted using privateers.
U.S. CONST. art. I, § 8, cl. 11 (“Congress shall have Power . . . To declare War, grant Letters of
Marque and Reprisal, and make Rules concerning Captures on Land and Water”).
194. See Alexander Tabarrok, The Rise, Fall, and Rise Again of Privateers, 11 INDEP. REV.
Despite the benefits letters of marque provided, they were not without problems. In some cases, the practice devolved from legitimate strikes on belligerent merchants to attacks on neutral shipping. Even powerful maritime nations were often unable or unwilling to prevent privateers from violating their commissions by attacking nonbelligerent merchants. Not surprisingly, many nations came to view such piracy as an odious outgrowth of privateering and responded by blocking privateers from their ports. International relations were strained when privateers went unpunished for violations, such as attacks on neutral shipping. Although governments that issued letters of marque were supposed to police their privateers, supervision was rare due to distance, difficulty acquiring evidence, and government indifference. During the Quasi-War, the United States became keenly aware of the risks of an improper letters of marque regime, as French privateers seized officially neutral American merchants and France adjudicated the seizures in sham tribunals without due process. Congress responded by authorizing private American vessels to act against the French. The United States also concluded several treaties that stated that "if the subjects of either party [violate international law], they shall be considered and punished as pirates." The Founders were aware of other risks. Benjamin Franklin observed: "the mass of adventurers are losers—the whole expense of fitting out all privateers during a war being much greater than

195. STARK, supra note 149, at 86, 306.
196. Id. at 139, 356.
197. Attacks on neutral shipping frequently went unpunished. Id. at 132–39 (noting that the burning of potential neutral vessels “without trial usually produces ill-feeling and diplomatic difficulties . . . ” which “aroused in habitually neutral states an unconquerable aversion to privateers.”).
198. CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 189, 239 (James Brown Scott ed., 1915) (illustrating the U.S. willingness to support the creation of standard rules to protect neutral shipping during wartime (Convention XIII) and an International Prize Court (Convention XII) and designed to "settle in an equitable manner the difference which sometimes arise in the course of a naval war in connection with the decisions of national prize courts."). American diplomat Pickering noted in 1797 “that the merchants in the ports of France who constitute the tribunal of commerce in which our captured vessels are tried and, on the most frivolous and shameful pretenses, condemned, are often, if not commonly, owners of the privateers on whose prizes they decide.” See id. at 250 (discussing French privateersmen confiscating an entire ship for having an improper role d’équipage, when by treaty the ship was not required to carry one). See also Gray v. United States (Gray’s Case), 21 Ct. Cl. 340 (1886); Holbrook v. United States, 21 Ct. Cl. 434 (1886); Cushing v. United States, 22 Ct. Cl. 1 (1886) (French spoliation cases).
199. See GREG H. WILLIAMS, THE FRENCH ASSAULT ON AMERICAN SHIPPING 1793–1813, at 25–26 (2009). The Acts of May 27, June 25, and July 11, 1798 gave to private armed vessels the same rights to “seize and capture” that U.S. public armed vessels had. This statute therefore authorized private armed vessels to recapture American vessels and to take any armed French vessel found within the jurisdictional limits of the United States or elsewhere on the high seas.
200. The United States signed treaties with France (1778), the Netherlands (1782), Sweden (1783), Prussia (1785), Great Britain (1795), Spain (1795), and Colombia (1824). UPTON, supra note 146, at 185.
the whole amount of goods taken,” and even when they do take valid prizes, they spend “what they get in riot, drunkardness and debauchery, [losing] their habits of industry . . . serving only to increase the number of housebreakers.”

But despite these negative experiences, Americans generally viewed privateers positively for their vital role in bolstering naval operations during national crises, such as its early naval challenge—the Barbary Pirates. Initially, America paid annual tribute to these pirates in exchange for safe passage for its vessels. Congress’s subsequent refusal to pay tribute led to two Barbary Wars, attacks on American ships, and the enslavement of American crews. Congress authorized the issuance of letters of marque to privateers, permitting them to attack not only pirates at sea, but also their financial backers on land, namely the Pasha of Tripoli, the Dey of Algiers, and the Dey of Tunis. Historian Thomas Bailey suggests the Framers took potential conflicts with the Barbary pirates into account when calling for a stronger central government, particularly on issues of national security. They sought to create a national government that would be capable of addressing national security threats using all available tools, including the issuance of letters of marque, rather than a piecemeal approach. Because the Constitution’s language incorporated letters of marque, the United States was able to respond flexibly to the national security threat posed by the Barbary pirates.

The nation’s early presidents differed sharply on how to respond to the Barbary pirates. George Washington begrudgingly accepted the status quo, John Adams favored paying off the pirates, and Thomas Jefferson earnestly believed paying tributes sullied America’s honor. Jefferson thought a decisive war might be better than perpetual payments; as president, he

201. UPTON, supra note 146, at 184 (quoting Benjamin Franklin at the 1783 signing of the Court of St. James Peace marking the end of the American Revolutionary War).

202. In 1795, 115 sailors were ransomed for one million dollars and annual tribute payments. Id. at 20. When Jefferson took the presidency, Tripoli was asking for an immediate payment of $225,000 and an annual payment of $25,000. Gerard W. Gawalt, America and the Barbary Pirates: An International Battle Against an Unconventional Foe, LIBRARY OF CONG., http://memory.loc.gov/ammem/collections/jefferson_papers/mtjprece.html (last visited Apr. 3, 2011).

203. EASTMAN, supra note 151, at 45 (reproducing a letter of marque signed by President James Madison directing the privateer, Grand Turk, to seize “Algerine vessels, public or private, goods and effects, of or belonging to the Dey of Algiers”).

204. THOMAS A. BAILEY, A DIPLOMATIC HISTORY OF THE AMERICAN PEOPLE 65 (1955) (stating that “the brutal Dey of Algiers was a Founding Father of the Constitution,” because his actions enraged the masses, who demanded action be taken against the pirates).


207. Adams made all tribute payments and even built and delivered two warships to the Algerian Corsairs. Williams, supra note 206.

208. Id.
blockaded pirate harbors and bombarded the palaces of pirate financiers. Under Jefferson, privateer merchant vessels transported marines to battle pirates at Tripoli, in what Admiral Horatio Nelson described as "the most bold and daring act of the age." During their presidencies, Jefferson and James Madison controlled privateer conduct by holding them to the strict regulations contained in their letters of marque.

Early in the nation’s history, privateers contributed to America’s victories, first in the Quasi-Wars against France and again during the War of 1812 against the British. Realizing the vulnerability of the American fleet made up of small revenue cutters and less than a dozen naval vessels, Congress authorized private merchantmen to arm themselves and capture French vessels at the outset of the Quasi-War. In the course of the war, the United States commissioned 365 private vessels. These ships battled French vessels on several occasions and achieved some significant victories. Similarly, during the War of 1812, America’s economy depended on seagoing trade, but the U.S. Navy had only 16 vessels compared to the British Royal Navy’s 1,048. Privateers were the only economically viable way to provide meaningful resistance.

E. Development of Letters of Marque in the American Legal System

During the War of 1812, Congress passed comprehensive laws defining the rights of privateers and providing guidance for their endeavors. These acts: (1) gave the president the power to revoke letters of marque and reprisal; (2) required privateers to describe their ownership and operation; and (3) provided strict procedures to ensure privateers conformed to international and domestic laws. This laid the groundwork for the deployment of privateers to disrupt British supply lines far from home. By the end of the War of 1812, American


210. UPTON, supra note 146, at 180 (privateers that violated their letters of marque were tried as pirates); see, e.g., EASTMAN, supra note 151, at 45 (reproducing the letter of marque James Madison issued to the ship Grand Turk).

211. The Quasi-War, an undeclared war between the United States and France fought from 1798–1800, was the result of disagreements over treaties and America’s status as a neutral in the Wars of the French Revolution. Fought entirely at sea, it was largely a success for the United States, whose vessels captured numerous French privateers and warships. At the outset, Congress granted the President the power to do everything necessary to win, which tacitly included issuing letters of marque. Sidak, supra note 142, at 481; Act of June 25, 1798, ch. 60, 1 Stat. 572.

212. GARDNER WELD ALLEN, OUR NAVAL WAR WITH FRANCE 59 (1909).

213. Id. at 226–33 (chronicling the battles of the Eliza, Charming Betsey, Mount Vernon, and Planter as well as the Genius’ capture of the French ship Columbus).

214. See MIRIAM GREENBLAT, WAR OF 1812 82 (1941).

215. UPTON, supra note 146, at 181.

216. In 1813, the Grand Turk alone took over ten large British vessels from off Brazil to the English Channel. STANTON MACLAY, supra note 178, at 392. For a detailed account of the privateer activities and adjudication of their prizes, see GEORGE COGGESHALL, HISTORY OF THE
privateers had proved instrumental in defeating the British and had made a twenty-eight million dollar profit.\textsuperscript{217}

After the war, the United States continued to issue letters of marque. In 1834, President Andrew Jackson used letters of marque to help address France’s continued failure to protect American rights in French courts.\textsuperscript{218} Later, when Texas rebelled against Mexico in 1835, the First Revolutionary Assembly of Texas immediately issued letters of marque to harass Mexican shipping.\textsuperscript{219}

Later, during the Mexican-American War, American leaders noted that letters of marque were generally legal, but forcefully distinguished between valid letters and illegal licenses. When Mexico issued blank letters of marque, President Polk protested, calling them an unlawful "invitation to all freebooters to cruise against American commerce," noting "our courts of justice [shall] decide whether ... these Mexican letters of marque and reprisal shall protect those who accept them ... from the penalties of piracy."\textsuperscript{220} Polk’s message was clear: it would treat Mexican letters of marque as valid only if they were properly offered to individuals who were properly commissioned and thus subject to Mexican control.\textsuperscript{221} At the same time, the United States prosecuted Americans who illegally cruised for other nations.\textsuperscript{222} Legal observers at the time considered reprisals "a species of hostility, an imperfect war" allowing nations to secure indemnity without direct conflict.\textsuperscript{223}

\textbf{F. The Paris Declaration}

In 1856, at the close of the Crimean War, the world’s maritime powers signed a treaty banning the use of letters of marque amongst themselves. The most-accepted European account explains that prior to the Crimean War, France and the United Kingdom signed a \textit{modus vivendi} to refrain from issuing letters of marque because neither side felt they could effectively control privateers.\textsuperscript{224} As the story goes, after the war, politicians and merchants on both sides appreciated that the agreement had limited damage to civilian property.\textsuperscript{225}

\begin{footnotesize}
\begin{enumerate}
\item[218.] \textsc{Upton}, supra note 146, at 175.
\item[219.] Eugene C. Barker, \textit{The Finances of the Texas Revolution}, 19 \textsc{Pol. Sci. Q.} 612, 620 (1904).
\item[220.] \textsc{Upton}, supra note 146, at 182 (quoting President Polk).
\item[221.] President James Polk, State of the Union Address (Dec. 8, 1846), http://www.infoplease.com/t/hist/state-of-the-union/58.html.
\item[222.] The Santissima Trinidad, 20 \textit{U.S.} (7 Wheat.) 283 (1822) (holding that U.S. citizens could not take commission from a foreign power [in this case the United Provinces of Rio de La Plata] to cruise against Spanish ships).
\item[223.] \textsc{Upton}, supra note 146, at 175.
\item[224.] Cooperstein, supra note 150, at 245.
\item[225.] \textsc{Sir Travers Twiss}, \textit{Belligerent Right on the High Seas Since the}
\end{enumerate}
\end{footnotesize}
Britain, France, and other powers met in Paris to establish a prohibition on letters of marque during war and peace, which became known as the Paris Declaration. Cynics—and Americans—believe that the Paris Declaration was a British and French ploy to prevent “[t]he Maritime population of the U.S. [from furnishing] to Russia the elements of a fleet of privateers, which attached to its service by Letters of Marque and covering the seas with a network would harass and pursue [their] commerce even in the most remote waters.”

The Paris Declaration bound signatories not to seize enemy goods on neutral vessels, or neutral goods on enemy vessels. It explicitly and emphatically stated it would be binding only amongst signatories. Nonsignatories were not included. The declaration was not intended as a universal ban (as it was not relevant to situations where signatories were at war with nonsignatories), nor did it purport to regulate behavior of nonsignatories. Most maritime powers signed or acceded to the Declaration, except for the United States, Spain, Bolivia, Uruguay, New Granada, and Mexico.

Important in the piracy context, the signatories did not reference the use of privateers against pirates, despite their familiarity with pirates and knowledge that privateers were used against such pirates. This suggests the Declaration’s ban was never meant to limit any nation’s use of privateers to suppress piracy.

The United States abstained from the Declaration on two grounds. First, the Americans sought a guarantee against the capture of all noncontraband private property at sea (so that it could safely trade with both sides of a European conflict). Second, the nation “could not forego the right to send out

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DECLARATION OF PARIS (1856) 7 (1884) (quoting a French official, “([t]he system inaugurated by the war of 1854 responded so well . . . that it took . . . the character . . . of International Law”).


227. TWISS, supra note 225, at 10 (citing the memoir of M. Drouyn de Lhuys, the French Foreign Minister, as saying: “What influenced especially the English Government was the fear of America inclining against us, and lending to our enemies the co-operation of her handy volunteers [privateers].”). Id.

228. See 1856 Paris Declaration, supra note 226, at 64–65 (noting that except for contraband “the neutral flag covers enemy’s goods” and “neutral goods . . . are not liable to capture under the enemy’s flag.”).

229. Id. at 65.

230. Id. at 61–62 (the initial signatories were Britain, France, Russia, Prussia, Austria, Sardinia, and the Ottoman Empire).

231. The British government had hired privateers to chase pirates in 1715; the colonial governor of South Carolina commissioned privateers to hunt pirates in 1718; and Britain passed statutes enabling private entities to capture pirates. Richard, supra note 2, at 433–36. See also Farley M. Foster, Woodes Rogers Privateer and Pirate Hunter, 29 HIST. TODAY 522, 530–31 (1979).

232. TWISS, supra note 225, at 3. The United States hoped the other nations would accept the “Marcy” amendment, but when the United Kingdom rejected its exemption of noncontraband
privateers, which in the past had proved her most effective maritime weapon in time of war." 233 Abolishing privateers would have enabled European navies to dominate the small American fleet. 234 After the signing of the Paris Declaration, Congress reaffirmed the U.S. right to commission privateers by authorizing the President to issue letters of marque. 235

G. Post-Paris Declaration Use of Letters of Marque

Since the Paris Declaration, the United States has played an important role in the ongoing development of customary international law associated with letters of marque. During the American Civil War, the Union government declared that it would abide by the principles of the Paris Declaration during hostilities; the South did not and sought to hire British and French privateers. 236 Because the Paris Declaration prevented nationals from one signatory cruising against another signatory, the Union requested that Britain and France allow it to accede to the Declaration, which would have prevented British and French privateers from cruising against it. But Great Britain and France declined, thus enabling British controlled ships to function as Confederate privateers against the Union. 237 In this instance, two major signatories tacitly acknowledged that the United States and the Confederacy were not included in or bound by the Declaration. 238 It also suggests that neither Britain nor France considered the

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234. Id. Secretary of State Marcy explained the United States "could not forego the right to send out privateers, which in the past had proved her most effective maritime weapon in time of war." Id.

235. Schwartz, supra note 2, at 511 (citing An Act Concerning Letters of Marque Prizes, and Prize Goods, ch. 85, 12 Stat. 758 (1863)).


238. STARK, supra note 149, at 375 (noting "[h]ad the United States acceded to the Declaration of Paris ..., the Southern States then certainly part of the Union, would have been bound by it, and [the United States later] might justly have invoked the assistance of foreign nations to prevent its violation"). Thus, by supporting the South's privateering operations, Britain and France tacitly implied that the United States was not a party to the Declaration and that nonsignatories were not bound by it.
Paris Declaration to have created a customary international law obligation against the use of letters of marque. For its part, the Union did not explicitly issue letters of marque, but it engaged in similar tactics, paying commercial merchants to maintain a blockade against the Confederate ports and issuing prize money to Union naval officers for taking Confederate merchants.\textsuperscript{239}

After the war, the United States sought damages against Great Britain for providing various forms of assistance, including privateers, to the Confederates in violation of international law. An international tribunal ruled that Great Britain, as a neutral state, should not have participated in the conflict; but it made no finding that letters of marque were outlawed as a matter of international law or that British privateers' assistance to the South was per se illegal.\textsuperscript{240} The Tribunal essentially allowed a nonsignatory, the Confederates, to issue letters of marque and allowed a signatory, the United Kingdom, to construct, furnish, and crew ships to be used in commerce raids against a nonsignatory, the United States.\textsuperscript{241} This decision illustrated the contours of the international letters of marque regime: letters of marque were generally allowed in war, but officially neutral states could not participate in the conflict by sending privateers.

Letters of marque continued in Europe as well. During the Franco-German War from 1870–1871, Prussia (a Paris Declaration signatory) invited commercial vessels to attack French ships of war, offered bounties, allowed them to fly the federal flag (rather than the merchant flag), and trained merchant mariners crews under naval discipline.\textsuperscript{242} These privately armed and commanded civil merchants made up what Prussia called a volunteer navy.\textsuperscript{243} The French government protested the use of a volunteer navy, believing it violated the Paris Declaration's prohibition on employing privateers.\textsuperscript{244} The Law Offices of the British Crown, as a neutral arbiter, concluded that there was

\textsuperscript{239} See Cooperstein, supra note 150, at 248.
\textsuperscript{240} The Tribunal merely found that Britain was barred from participation by its declaration of neutrality. Presumptively, Britain's involvement (essentially operating privateer vessels on behalf of the Confederacy) would have been tolerated under international law but for its declaration of neutrality. Commentators note "when anyone talks now of British friendship I cannot help thinking of the [cruiser Florida], built in England, built with English capital, armed with English guns, manned with English men to prey upon the commerce of a friendly nation [the United States]." THOMAS WILLING BALCH, THE ALABAMA ARBITRATION 10 (2009) (citing GROSVENOR P. LOWREY, ENGLISH NEUTRALITY: IS THE ALABAMA A BRITISH PIRATE? (1863)).
\textsuperscript{241} JOHN LALOR, Cyclopedia of Political Science, Political Economy, and the Political History of the United States 500 (quoting The Alabama Arbitration Tribunal, Geneva (1872) holding "[t]he effects of a violation of neutrality, committed by means of the construction, equipment and armament of a vessel, are not done away with by any commission which the government of the belligerent power benefited by the violation of neutrality may afterward have granted to that vessel").
\textsuperscript{242} TWISS, supra note 225, at 12 (referring to the Prussian Government Decree on the Constitution of a Volunteer Naval Force, Jul. 24, 1870).
\textsuperscript{243} Id.
\textsuperscript{244} Id.
a substantial difference between a government-sanctioned, privately-owned
volunteer force and the system of privateering the Paris Declaration outlawed.
The decision focused on the military nature of the volunteer navy and the
targeting of warships rather than merchants, as well as the amount of discipline
and government control the Prussians exercised.245

At the time, prominent international law scholars believed volunteer
navies were legitimate if in “close connection with the State,”246 or if
composed of privateers under sufficient state control.247 This suggests that even
signatories of the Paris Declaration did not intend an outright ban on the use of
government-sanctioned, private individuals in maritime war; rather they
intended a prohibition of undisciplined and unregulated maritime forces
operating under the guise of a sovereign.

The Spanish-American War provides further support for the idea that
letters of marque do not violate customary international law. Prior to the
outbreak of the Spanish-American War in 1898, the United States and Spain,
both nonsignatories to the Paris Declaration, issued statements proclaiming
their intentions to conform to the Declaration’s provisions prohibiting letters of
marque.248 The issuance of these statements suggests customary international
law at the time did not prohibit nonsignatories from issuing letters of marque.

While at first glance an international law scholar might be tempted to view this
agreement among two nonsignatories as opinio juris, which would support the
notion of the formation of customary law, such an argument is diminished by
the express reservations of the right to issue letters of marque in the future, as
well as by the practices of the parties in the conflict. The United States and
Spain seemed to believe that, absent specific agreement, states had the right to
use privateers. In fact, at the outset of the war Spain expressly reserved the
right to issue letters of marque in later conflicts and stated its intent to outfit
merchant vessels to function as auxiliary cruisers.249

245. Id. at 13. The French government submitted the issue of the Prussian decrees to the
British government.
246. See Twiss supra 225, at 13 (citing M. Charles Calvo, Ancien Marine 303 (Le
Droit Int’l, Troisieme Ed., 1880)).
247. Id. at 18–19 (discussing the difference between a volunteer (auxiliary) force and
privateers, by contrasting the views of William E. Hall, who believed the Prussian volunteer force
should be privateers for lack of a surety bond to maintain control, and Professor Geffcken, who
believed that the Prussians commissioning of the ships officers were sufficient to control to
constitute a volunteer navy rather than privateer.).
248. President William McKinley, Proclamation on the War with Spain (Apr. 26, 1898),
available at http://www.spanamwar.com/McKinleywardec.htm (declaring “that war exists . . .
between the U.S. and Spain [and] it being desirable that such war should be conducted upon
principles in harmony with the present views of nations and sanctioned by their recent practice, it
has already been announced that the policy of this Government will be not to resort to
privateering, but to adhere to the [Paris Declaration]”); Spanish Declaration of War, Apr. 23,
249. Spanish Declaration of War, supra note 248, sec. 4 (“[Upholding] our right to give
letters of marque for Privateers, that was reserved by note of May 16, 1857, when Spanish
Both the Spanish and the Americans pushed the bounds of their agreement not to issue letters of marque by augmenting their traditional naval forces with merchant ships commanded by naval officers. These officers earned handsome returns through military prize, essentially a letter of marque regime with a quasi-military, quasi-commercial purpose. Yet neither country claimed the other had violated international custom. Moreover, even after Spain signed the Paris Declaration in 1901, it continued to advance the idea that issuing letters of marque was permissible under international law.

The Hague Convention of 1907 is also instructive in understanding the evolution and scope of privateers under international law. The impetus for the Convention, inter alia, was the Russo-Japanese War. During the war, the Russians fought the Japanese and British utilizing a volunteer naval force. These merchant ships captured multiple British vessels, but drew criticism due to their deceptive practice of transforming from commercial to military vessels. In response, the 1907 Hague Convention stated that “no merchant ship transformed into a war vessel can have the rights and obligations attaching to [military vessels,] unless it is placed under the direct authority, the immediate control and the responsibility of the power whose flag it carries.” Additionally, transformed merchant ships had to show the external signs of their country’s war vessels, commanding officers had to be in the service of the state and be properly commissioned, the list of officers of the combatant fleet had to include each officer’s name, and the crew had to be subject to the rules of military discipline. These provisions refer to military functions rather than

Government answered to French Government about the Spanish attachment to the Maritime Law’s agreement of Paris, Spanish Government shall fit out, with Spanish Merchant Ships, a service of Auxiliary Cruisers that co-operate with the navy during the war and under its command.”

250. Arthur D. Hall, Uncle Sam’s Ships: Being a History of the American Navy 167 (1899) (explaining the division of prize spoils among admirals, commanding officers, officers, and crew during the Spanish American War, especially noting that some, like Admiral Farragut, earned $140,000 [$3.5 million inflation adjusted to 2009] in prize money).


252. Privateers, supra note 237.


254. Id.; see also Privateers, supra note 237 (interpreting the 1907 Hague Convention to mean “no merchant ship transformed into a war vessel can have the rights and obligations attaching to this condition unless it is placed under the direct authority, the immediate control and the responsibility of the power whose flag it carries. Merchant ships transformed into war vessels must bear the distinctive external signs of war vessels of their nationality. The officer commanding must be in the service of the state, and properly commissioned by the competent authorities. His name must appear in the list of officers of the combatant fleet. The crew must be subject to the rules of military discipline. Every merchant ship transformed into a war vessel is bound to conform, in its operation, to the laws and customs of war. And the belligerent who transforms a merchant ship into a war vessel must, as soon as possible, mention this transformation on the list of vessels belonging to its combatant fleet.”).
ownership or method of payment. Consistent with prior understandings from the Franco-Prussian War, the Hague Convention allowed private vessels to serve military functions and receive the rights of a military vessel—namely, the ability to attack enemy ships—so long as they were distinguished by external markings and fell under the supervision of a state. Further, the United States noted in its accession to the Hague Convention that it refused to renounce privateers.255

In World War I and World War II, Germany (a nonsignatory) employed commerce raiders against British shipping.256 The British and Americans responded by employing civilian-controlled merchant ships for military purposes, such as decoys.257 After the attack on Pearl Harbor, the private Goodyear airship *Resolute* was tacitly “confer[red] Privateer status” enabling it to conduct antisubmarine missions as a private vessel.258 Realizing the need for

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255. See Joseph H. Choate & Chandler Hale, *Report of the Delegates of the United States to the Second International Peace Conference Held at The Hague from June 15 to October 18, 1907* (June 15–Oct. 8, 1907), in *II PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES 1144, 1160–61* (1910) (the United States would give up its right only if all participants agreed to the inviolability of private property at sea during war and peace).


257. Allies used “Q-ships,” merchant vessels equipped with heavy artillery, to lure German submarines. *Privateers, supra* note 237.

258. There has been much confusion among naval aviation historians and legal scholars regarding whether a letter of marque was issued to the Goodyear airship and whether it acted briefly as a privateer at the beginning of the United States’ involvement in WWII. Some historians, including Richard Whitney, assume that because the blimp functioned as a privateer the Navy had issued a letter of marque. See Richard V. Whitney, *The Goodyear Blimps Go to War*, AM. AVIATION HIST. SOC’Y J. 66 (Spring 2001) ("The navy lost no time in issuing a ‘Letter of Marque,’ conferring ‘Privateer’ status on this airship [the *Resolute*] and its crew."). However, the *Congressional Record* does not reveal any authorization for letters of marque. Richard, *supra* note 2, at 429 n.121. Rather, it appears "[the *Resolute*, operating in Los Angeles, was armed and in service even before completing the legal technicalities of swearing in the crew and commissioning. This made the crew members temporary pirates aboard a privateer but international protocol was not much of a concern." *Id.* (quoting MAURICE O'REILLY, *THE GOODYEAR STORY* 92–93 (James T. Keating ed., 1983). Admiral Charles Rosendahl, Chief of Airship Training and Experimentation, explains:

Commander Maurice R. Pierce, one of the Navy’s airship pioneers was serving in the Inshore Patrol of the Eleventh Naval District (Southern California). Without awaiting formal negotiations [he] and the owners of the blimps got together and the Navy quickly “commandeered” one of these advertising craft, the *RESOLUTE*, which was immediately pressed into patrol in the coastal waters of the Long Beach-San Pedro vicinity. As a civil craft, the *Resolute* had neither armament nor provision for its installation.

Charles E. Rosendahl, *How Soon We Forget; US Navy Airship Operations in World War Two S* (unpublished manuscript written between 1946–1976, *available at http://www.nlhs.com/chapter.htm*). Congress did not authorize letters of marque. Some legal scholars believe the lack of a formal commission according to domestic procedures means “these vessels were not privateers.” See Richard, *supra* note 2, at 429 n.121. However, international law does not hinge on domestic
blimps at the outbreak of the war, naval authorities in Southern California pressed the private vessel into military service without awaiting orders from Washington.\textsuperscript{259} The civilian craft conducted military surveillance operations for several months before it was bought and commissioned by the Navy.\textsuperscript{260} As a constitutional matter, the commandeering of the dirigible was not valid because, according to the \textit{Congressional Record}, Congress did not issue an authorizing letter of marque as required in Article I, Section 8 of the Constitution.\textsuperscript{261} However, the fact that, as recently as the last World War, a major power employed a private vessel under the ownership and control of civilians for military purposes suggests that privateers do not necessarily violate customary international law.

After September 11, 2001, Congressman Ron Paul suggested issuing letters of marque against terrorist assets.\textsuperscript{262} He argued that using private forces to hunt terrorists would be more advantageous and cost-effective than war or regime change.\textsuperscript{263} His Marque and Reprisal Act of 2001 classified the attacks of 9/11 as "air piracy" and directed the President to issue letters of marque against Osama Bin Laden.\textsuperscript{264} Congress did not enact the proposed law.\textsuperscript{265} Instead, the Bush administration, Congress, and military leaders pursued a counter-terrorism strategy relying on conventional military forces to topple "regimes that harbor, support, and use terrorism."\textsuperscript{266} In 2007, Ron Paul again introduced the Marque and Reprisal Act authorizing and requesting the President to commission, under officially issued letters of marque and reprisal, so many of privately armed and equipped persons and entities as . . . the service may require, . . . to seize outside the geographic boundaries of the [United States] and its territories the person and property of Osama bin Laden.\textsuperscript{267}

\textsuperscript{259} Rosendahl, supra note 258.

\textsuperscript{260} Armed with rifles and antisubmarine munitions, these civilian-crewed dirigibles patrolled the eastern Pacific for Japanese submarines from 1941–1942. See JAMES R. SHOCK \& DAVID R. SMITH, THE GOODYEAR AIRSHIPS 43 (2002).

\textsuperscript{261} Cooperstein, supra note 150, at 492 n.121.


\textsuperscript{263} Placing bounties on the heads of terrorists would cost only a few tens of millions of dollars (compared to hundreds of billions spent on the military in the "War on Terror"). Id.


These bills uniquely targeted specific individuals—Osama Bin Laden and his co-conspirators—rather than vessels of a sovereign power. If passed it would have expanded the concept of letters of marque beyond its traditional maritime domain by employing privateers to hunt terrorists on land in a foreign sovereign territory. This would have been a very different context and regime than that of using letters of marque on the high seas. Moreover, even if such an option had been legally permissible, it would have been politically untenable at the time. Reports of abuse, waste, and fraud by private military contractors in Iraq and Afghanistan caused many policymakers in Washington to distrust them. On April 15, 2009, Congressman Paul again advocated issuing letters of marque, this time to “Special Ops/Special Forces operators who are ready, able, and willing to have a go at the Somali pirates.” This proposal was in keeping with the traditional understanding of letters of marque and privateers under international law. But Congress failed to act on this proposal. Politicians assumed naval forces and shipping industry efforts would sufficiently deter the pirates. Despite failing to generate political momentum, Representative Paul’s proposals illustrate that letters of marque may be politically relevant to at least some policymakers capable of crafting and introducing legislation. Of course, many more supporters will be necessary to shift government policy. The majority of Congress must be convinced that letters of marque are a legal and prudent option in the fight against seagoing pirates.

III.

THE PRESENT STATE OF LETTERS OF MARQUE IN INTERNATIONAL LAW AND

268. The deployment of armed forces—private or otherwise—into a sovereign country, such as Pakistan where Al Qaeda forces were believed to have been hiding, without United Nations Security Council approval or being an act of emergency self-defense would have constituted a violation of Article Two of the United Nations Charter, of which the United States is a signatory. On the high seas, such territorial issues do not come into play. U.N. Charter art. 2, available at http://www.un.org/en/documents/charter/chapter1.shtml.


272. S. COMM. ON ARMED SERVS., REPORT ACCOMPANYING THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010, S. REP. NO. 111-35, at 195–96 (2009), http://www.gpo.gov/fdsys/pkg/CRPT-111srpt35/pdf/CRPT-111srpt35.pdf (noting that “naval forces of the world have a critical role to play in deterring and combating pirates, the problem is more complex and requires a holistic approach combining military efforts with industry efforts, diplomatic outreach, and robust prosecutions”).
Many contemporary international law scholars contend that the Paris Declaration "by formal accession or tacit acceptance by all the powers [has become] an established part of the general body of [customary] international law." Proponents of a broad prohibition on privateering allege that customary international law has formed since the Paris Declaration. "[I]nternational custom, as evidence of a general practice accepted as law" is recognized as a source of international law under Article 38 of the International Court of Justice Statute. It "consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way." The two key elements are state practice and opinio juris.

State practice refers to "consistent conduct," while opinio juris means States follow the rule out of "belief" that they are legally obligated to behave in a certain manner. Admittedly, the distinction is frustrating "because it is difficult to determine what states believe as opposed to what they say." But, as expressed in Article 38, the normative force of customary law derives from voluntariness to be bound. Actions can only amount to custom if accompanied by an articulation of the legality of such an action.

Following this approach, international courts have inferred customary norms based on instances of state action and acquiescence. Recently, in judicial and academic circles, this inductive approach has been replaced by a deductive method that primarily focuses on evidence of opinio juris, such as the States' attitude towards international statements. In *Military and Paramilitary Activities in and Against Nicaragua*, the International Court of Justice derived custom without considering state practice when both countries expressed willingness to be bound to a norm by consenting to the text of the agreement. The Court noted that a norm could be considered customary international law, so long as conduct was generally consistent with state norms based on instances of state action and acquiescence.

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273. JAMES WILFORD GARNER, PRIZE LAW DURING THE WORLD WAR 143 (1927).
274. Statute of the Permanent Court of International Justice (hereinafter "ICJ Statute"), art. 38.1(b).
279. Id. at 758.
280. Id.
281. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. MERITS 14, 100, para.188–189 (June 27) (noting that the States had expressed their attitude regarding legal obligations, opinio juris, by consenting to a General Assembly resolution entitled "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations" and resolution of the International Conference of American States.).
practice, and that instances of inconsistency with the practice had been treated as breaches of the rule rather than as generating a new law.\textsuperscript{282} However, this method has been criticized for failing to maintain the importance of sovereignty and voluntariness to be bound as the basis for customary law. Top scholars lament that what most “perversely persist in calling customary international law is not only not customary law: it does not even faintly resemble a customary law.”\textsuperscript{283} They argue that modern interpretation of customary international law cannot constitute binding law because it is not derived from implied individual consent or general acceptance.\textsuperscript{284} These concepts of how customary international law is formed are important in understanding that letters of marque remain valid under international law. But, one need not subscribe to a specific view of customary law formation to see that custom has not been formed.

To support their claims that letters of marque violate customary international law, critics cite British and French decisions not to issue letters of marque against China in 1860 (even though China was not a signatory to the Paris Declaration); Chilean and Peruvian decisions not to issue letters of marque against Spain (again not a signatory); and the French decision not to issue letters of marque against Prussia as indicating that customary law has developed beyond the requirements of the Paris Declaration.\textsuperscript{285} They also point to the fact that the United States concluded agreements with France, Holland, Sweden, Prussia, Great Britain, Spain, and Colombia, which forbid U.S. citizens from accepting letters of marque from a third state, as an indication that America sought to limit privateering.\textsuperscript{286} However, other scholars counter that customary international law on privateering has not been established. They argue that nations’ decisions not to issue letters of marque after the Paris Declaration were due to practical considerations, rather than to a sense of obligation to a supposed international norm.\textsuperscript{287}

Even under the modern approach, although letters of marque have not been issued since World War II (perhaps evidence of state practice), there is no

\textsuperscript{282} Id. at 98, para. 186.

\textsuperscript{283} Roberts, supra note 278, at 759 (quoting Robert Y. Jennings, The Identification of International Law, in INTERNATIONAL LAW: TEACHING AND PRACTICE 3, 5 (Bin Cheng ed., 1982)).


\textsuperscript{285} Garner, supra note 273.

\textsuperscript{286} Twiss, supra note 225, at 8; see also ADAM ROBERTS & RICHARD GUELFF, Prefatory Note to the 1856 Paris Declaration, in DOCUMENTS ON THE LAWS OF WAR 23 (2d ed. 1989) (arguing that the long-term practice of United States and other nations after the Paris Declaration suggests that a prohibition on privateers exists as a matter of customary international law).

undisputed evidence of *opinio juris* that the Paris Declaration signatories or the United States universally banned the practice. Claims that the Paris Declaration constitutes the basis for a general customary international law prohibition of privateers conflict with the text and purpose of the Declaration, and with universally accepted methods of treaty interpretation. First, the Declaration explicitly states that it was applicable only between signatories engaged in war against each other.\(^{288}\) It does not prevent the use of letters of marque among nonsignatories, nor does it prohibit signatories from using letters of marque against nonsignatories. This pact is "not binding upon [powers, like the United States], which have not acceded it."\(^{289}\) Because the Paris Declaration does not impose a universal ban, the existence of a custom cannot derive from the Declaration itself, but only from subsequent practice or, under the modern test, *opinio juris* in the form of statements of belief.

Second, in subsequent wars, privateers were employed—even by Paris Declaration signatories.\(^{290}\) This suggests that practice was neither widespread nor universal. Subsequent practice by the United States and other nations, as evidenced during the Civil War, the Spanish-American War, and the World Wars, reflects the Paris Declaration's narrow scope. When governments publicly issued letters of marque after the Paris Declaration, the international community did not lodge any objection against the practice.\(^{291}\) Finally, the widespread use of private military contractors, even by signatories of the Paris Declaration, indicates a broadening acceptance of private actors in warfare, in contrast with the narrative of an evolving trend favoring more restrictions on the use of private actors in war on which prohibitionists rely.

Additionally, the U.S. failure to issue letters of marque in conflicts after World War II should not be attributed to an observance of international norms. The United States may have chosen not to issue letters of marque in the Vietnam, Korea, and Gulf conflicts because Congress never declared war.\(^{292}\) This suggests that the conditions necessary for the issuance of letters of marque under domestic law did not arise. The international community should not construe the lack of letters of marque in these conflicts as a basis for a customary obligation.

Alternatively, even if a prohibition on privateers had become part of customary international law, the United States would not be bound due to its

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288. The Declaration states that it "is not and shall not be binding, except between those Powers who have acceded, or shall accede, to it." RONZITTI, *supra* note 226, at 65.

289. TWISS, *supra* note 225, at 4; see also WILLIAM EDWARD HALL, INTERNATIONAL LAW 453 (1880).

290. At the outset of the Spanish American War both parties agreed not to issue letters of marque. The Spanish reserved the right to later issue letters of marque. *See supra* Section II.G.

291. *See supra* Section II.G (discussing Confederate and British use during the Civil War and of United States use during World War II).

292. SETH HAROLD WEINBERGER, RESTORING BALANCE: WAR POWER IN AN AGE OF TERROR 57 (2009).
pervasive objection to the Paris Declaration. Congress’s action authorizing the
president to issue letters of marque immediately after the Paris Declaration
must be interpreted as an objection. This objection, along with subsequent
practice, plays an important role in rebuffing contemporary claims that
customary international law has formed against the use of privateers and that
the United States is bound by it. On the first point, the American rejection of
the Paris Declaration suggests that it had not been universally accepted. On the
second point, even if custom had formed against the use of letters of marque,
the United States prudently maintained the right to use letters of marque as a
persistent objector. Under international law, a nation is not bound by a
custom if it immediately and consistently objects, as the United States has with
letters of marque. Consequently, international law cannot prohibit the United
States from issuing letters of marque.

The domestic framework for issuing letters of marque and dealing with
pirates is also robust, although it is somewhat dated and at times harsh. Over
the centuries, American courts have tried hundreds of prize cases, many
involving letters of marque, which provide a well-developed jurisprudence for
modern courts. Similarly, U.S. antipiracy laws are strong, but inadequately
exercised. Title 18 of the U.S. Code prescribes that anyone convicted of piracy
“shall be imprisoned for life.” American courts have repeatedly held that the
piracy statute is applicable under universal jurisdiction to crimes committed
around the world. If there is a sufficient nexus to the United States, other

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294. To constitute a valid, persistent objection it must be: (1) timely, no “subsequent”
objection is permitted; (2) actively, unambiguously, and consistently maintained by the asserting
state; and (3) the state must intend to object, although no specific form is prescribed (i.e. it does
not matter whether the objection is shown in practice, treaty negotiation, pleadings before a
tribunal, diplomatic correspondence, or other means). David A. Colson, How Persistent Must the
Persistent Objector Be?, 61 WASH. L. REV. 957, 958–61, 965–69 (1986). See also Ted Stein, The
Approach of the Different Drummer: The Principle of the Persistent Objector in International
Law, 26 HARV. INT’L L.J. 428 (1985) (observing that “[the United States] should find in the
persistent objector principle a doctrinal basis for freeing themselves from the results of
multilateral processes that are seen as subject to the domination of a hostile majority.”) The
United States has recently stated that the doctrine of persistent objector “remains valid.” See
Letter from the U.S. Government to the International Committee of the Red Cross n.38 (Nov. 3,
2006).


296. 18 U.S.C. § 1651 (2006) (stating “[w]hoever, on the high seas, commits the crime of
piracy as defined by the law of nations, and is afterwards brought into or found in the U.S.,
shall be imprisoned for life”).

297. See United States v. Shi, 525 F.3d 709 (9th Cir. 2008) (applying universal jurisdiction
to uphold the prosecution of Chinese nationals for attacking a Seychelles-flagged, Taiwanese-
owned ship on the high seas); see also ALFRED P. RUBIN, THE LAW OF PIRACY 150–58 (2d ed.
1998) (discussing other illustrative cases); Eugene Kontorovich, International Decision: United
universal jurisdiction over difficult and politically sensitive human rights cases have not used it to
provisions may apply. For example, if a pirate takes a hostage and "the death of any person results, [the hostage taker] shall be punished by death or life imprisonment." Since the statute requires only a loose causal connection between the hostage taking and the fatality, pirates could be sentenced to death when bystanders, military, law enforcement officials, or even one of the pirate hostage-takers are killed. Pirates could also be prosecuted for terrorism, violence that endangers maritime navigation, or interference with commerce by threats or violence. In the one Somali case tried in the United States, a federal judge sentenced *Maersk Alabama* attacker Abduwali Muse to thirty-four years after he plead guilty. Thus, the American legal system appears structurally and procedurally prepared to prosecute pirates if a letters of marque system was revived.

IV. STRUCTURING A NEW LETTERS OF MARQUE REGIME

Both domestically and internationally authorized, letters of marque constitute legally viable options under international law that should be employed against modern pirate networks. Many scholars have focused on the questions of universal jurisdiction and authority to prosecute pirates. While such questions are important, answering them will not end piracy. A legal framework must be developed that can respond to the threat in a cost-effective and sustainable manner and that maintains the legitimacy of the multinational approach already being employed. To that end, letters of marque should not be viewed as antiquated legal artifacts, but rather as important tools that can be authorized by the international community when warranted.

In Somalia, letters of marque may be the only way to dismantle pirate networks. Since the Somali government lacks law enforcement capacity, foreign diplomatic measures will have little effect on changing the behavior of Somali citizens. Moreover, pirate networks operate across an expansive geographic range through a network of specialized nodes for command and

punish Somali piracy."

control, logistics, financing, and recruitment.\textsuperscript{305} Wartime strategies, such as coastal bombardment of pirate bases or shore invasion, would result in heavy casualties. The possibility of military occupation to restore law and order seems unlikely, especially given the strong public sentiment against intervention after Iraq, Afghanistan, and failed past engagements in Somalia.\textsuperscript{306} Patrolling millions of square miles of the Indian Ocean would be impracticable and cost-prohibitive for the U.S. Navy and its coalition partners.\textsuperscript{307} Allowing private professionals to operate against pirates under letters of marque is consistent with the international law of reprisal and is permissible as individual or collective self-defense.\textsuperscript{308} The 1982 United Nations Convention on the Law of the Sea defines piracy as, "[A]ny illegal acts of violence or detention or any act of depredation committed for private ends" on the high seas or in a place outside the jurisdiction of any state committed by passengers or crews of one vessel against another.\textsuperscript{309} On the high seas—and in Somali territorial waters due to Sec. Council Res. 1851—any government’s agents may board vessels suspected of piracy as an exception to the otherwise exclusive jurisdiction of the flag state.\textsuperscript{310} Since privateers conduct operations on behalf of governments, essentially functioning like military vessels, they would be entitled to board, search, and seize pirate vessels.\textsuperscript{311} Consequently, if privateers discovered evidence of piracy onboard a suspect vessel, they could seize the vessel, arrest persons on board, and subject such persons to the jurisdiction of the courts of the state that issued the letter of marque.\textsuperscript{312} Under the principle of universal jurisdiction, the state that issued the letter of marque could also take any assets of pirates and their backers within the state’s territorial jurisdiction.

Prosecuting individual Somali pirates, particularly the increasing number of minors, is not nearly as important as crippling the global network of financiers, backers, and negotiators. Issuing letters of marque allowing privateers to seize assets, such as ships, high-speed engines, weaponry, and telecommunications equipment vital to the operations of pirate backers would be a cost-effective way to halt their operations. Privateers could proactively seize pirate skiffs and mother ships with ties to the gangs from pirate controlled

\begin{itemize}
\item \textsuperscript{305} Richard, supra note 2, at 418.
\item \textsuperscript{306} Spiegel, supra note 80.
\item \textsuperscript{307} See Schwartz, supra note 2, at 504.
\item \textsuperscript{308} See U.N. Charter art. 51 (preserving each member’s “inherent right of individual or collective self-defense” until the Security Council takes action).
\item \textsuperscript{309} Geneva Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82 art. 15; UNCLOS, supra note 107, art. 101.
\item \textsuperscript{310} UNCLOS, supra note 107, arts. 92(1), 110; S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008).
\item \textsuperscript{311} UNCLOS explicitly acknowledges that ships other than “warships or military aircraft” can seize pirate vessels and property so long as they are marked and “identifiable as being on government service and authorized to that effect.” UNCLOS, supra note 107, art. 107; see also The Joseph, F. Cas. 1126 (C.C.D. Mass. 1813).
\item \textsuperscript{312} See UNCLOS, supra note 107, art. 105.
\end{itemize}
cities, such as Ey and Hadahere, as they leave port.\textsuperscript{313} Seizing these hard assets would be more effective than prosecuting personnel.

Why then have letters of marque been neglected by global policymakers and scholars? In addition to the confusion over the scope of the Paris Declaration described earlier, many mistakenly believe UNCLOS Part VII Article 107 prohibits privateers.\textsuperscript{314} It does not. The article reads, “[a] seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.”\textsuperscript{315} The second part of this article speaking to “other ships or aircraft” implies that nonmilitary ships can be used to hunt pirates. Clearly identified privateers can operate legally under the authority of letters of marque to “seize [vessels] on account of piracy,” if government authorized.\textsuperscript{316} Moreover, UNCLOS requires all states to cooperate “to the fullest possible extent in the repression of piracy.”\textsuperscript{317} This includes the ability to “seize any pirate ship or aircraft,” “arrest the persons,” “seize the property on board,” and “decide upon the penalties to be imposed.”\textsuperscript{318} Taken as a whole, UNCLOS requires substantial action against piracy, contemplates privateers, and places only modest restrictions on their operations.

Since states have a right under international law to hire contractors and private individuals to support their military efforts, it seems reasonable that international authorities would be entitled to do the same.\textsuperscript{319} Private security forces have played an increasingly important role in modern conflicts—in some instances performing functions nearly identical to their uniformed counterparts.\textsuperscript{320} For example in Iraq, private contractors have defended bases,

\begin{itemize}
  \item \textsuperscript{313} Rice, supra note 55 (quoting U.S. Vice-Admiral Mark Fox as saying that a number of pirate gangs, “pirate action groups,” are known to military forces and that they should be tracked in effort to disrupt their supply chains).
  \item \textsuperscript{314} See M.D. Fink & R.J. Galvin, Combating Pirates Off the Coast of Somalia: Current Legal Challenges, 56 NETH. INT’L L. REV. 367, 390 (2009).
  \item \textsuperscript{315} UNCLOS, supra note 107, pt VII, art. 107.
  \item \textsuperscript{316} Id. Critics mistakenly believe this article prohibits privateers, while it actually just requires them to be properly identified as such. The article is likely a response to the deceptive practices of the Russian “volunteer navy,” which pretended to be merchant vessels during the Russo-Japanese War. See discussion supra notes 243–48.
  \item \textsuperscript{317} UNCLOS, supra note 107, pt. VII, art. 100.
  \item \textsuperscript{318} Id., at pt. VII, art. 105.
  \item \textsuperscript{320} See generally Laura A. Dickinson, Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law, 47 WM. & MARY L. REV. 136, 148 (2005) (reviewing use of profit-seeking security companies over the last two decades).
\end{itemize}
trained the Iraqi army, and interrogated prisoners. Letters of marque do not alter these recognized roles, but rather change the way the government compensates contractors, allowing private enterprises to collect payment through prize courts. A new letters of marque regime would not alter the practice of employing contractors, but would merely alter their form of compensation.

Under the positivist principle of international law, state actions are deemed permissible so long as they are not forbidden by treaty or in violation of jus cogens or custom. Some might argue that the Paris Declaration outlaws the use of letters of marque against other signatories, but it does not speak to issuing them against pirates or, as explained previously, nonsignatories like the United States. Consequently, a new letters of marque regime, coupled with the UNCLOS, could provide a functional, legal framework under international or domestic authority for using privateers against pirates, while adhering to international law.

Similarly, letters of marque regimes are valid under domestic law in the United States. The Constitution directly provides for letters of marque in Article I, Section 8, bestowing on Congress the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.” There has been much debate in American scholarship regarding the distribution of war powers between the legislature and the executive branch. Advocates of a strong unitary executive assert that during war the president’s powers should expand to allow him to respond effectively

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322. See S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (holding that sovereign nations are presumed to have the ability to exercise rights unless forbidden by treaty or custom).
324. Since the Vietnam War a number of scholars have broadly interpreted art. I, sec. 8 to mean that the president cannot use troops in foreign military operations without congressional authorization. See Charles A. Lofgren, War-Making Under the Constitution: The Original Understanding, 81 YALE L.J. 672, 694–97 (1972) (arguing “that knowledge of the theory and practice of war and reprisal would have helped convince a late-eighteenth century American that the Constitution vested Congress with control over the commencement of war, whether declared or undeclared”); see also Sidak, supra note 142, at 465, 496–499 (observing that three concurring opinions in Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000) interpret the Letters of Marque and Reprisal Clause to greatly enhance congressional authority over undeclared wars). Others construe the clause more narrowly, saying limits on the president’s war powers only refer to private contractors. Douglas Kmiec, Dean of the Columbus School of Law, The Catholic University of America, testifying before the Senate Judiciary Committee, noted that Congress’s authority to “moderate or oversee private action . . . says absolutely nothing about the President’s responsibilities under the Constitution.” Hearing Before the S. Judiciary Comm., 107th Cong. (2002) (testimony of Douglas Kmiec), http://judiciary.senate.gov/hearings/testimony.cfm?id=225&wit_id=438. A third group suggests it could be used by a hawkish Congress to provide a check on “faint-hearted presidents” as a method of warfare independent of the president. See William Young, A Check on Faint-Hearted Presidents: Letters of Marque and Reprisal, 66 WASH. & LEE L. REV. 895 (2009).
Correctly understood, the power is analogous to the other war powers described in Section 8: Congress has the power to declare war, while a textual constitutional reading supports Congress exercising complete control. This suggests Congress’s level of involvement in letters of marque should be similar to that of declaring war, leaving to the Executive Branch the power to command and police privateers. An examination of the Constitution’s structural organization similarly suggests Congress was not meant to have complete control over privateers. Enforcement and employment of privateers has historically been left to the president consistent with other executive war powers.

Practice reinforces this notion: Congress has repeatedly authorized the president to issue letters of marque. During the Barbary Wars, President James Madison added specificity to privateer instructions. Special instructions attached to letters of marque included the phrase “by command of the President of the U. States of America” and were signed by the secretary of state to certify consistency with foreign affairs policy and international law.

325. Looking to the Framers, one finds support for this vision of executive competency in Alexander Hamilton’s comparison between the powers held by state governors under the Articles of Confederation and by the commander-in-chief under the Constitution. While the United Colonies operated under the Articles of Confederation governors had been given expansive powers to “kill, slay, and destroy” by any appropriate method those who threatened to harm or even “annoyed” the state. Because the president assumed the foreign policy and national defense responsibilities previously exercised by governors, logically he would be entitled to exercise similar powers as the commander-and-chief. See United States v. Curtiss-Wright Corp., 299 U.S. 304, 305 (1936); see also Yoo, supra note 192, at 253 (referring to THE FEDERALIST No. 69, at 465-66 (Alexander Hamilton) (Jacob E. Cooke ed., 1982) and observing the commander-in-chief power in state constitutions).

327. U.S. CONST. art 1, § 8 states Congress shall have the power to “[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” U.S. CONST. art 1, § 8.
328. Immediately preceding the clause granting Congress war-making and letter of marque powers, the Constitution mandates that Congress shall have power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.” Taken together with the following provision “grant[ing] Letters of Marque,” a critical gap in Congress’s power over letters of marque is revealed: Congress can craft laws to punish pirates and grant letters of marque, but cannot command the privateers. U.S. CONST. art 1, § 8.
330. As explained in detail above, during the Barbary War, supra notes 203–205, the Quasi Wars, supra notes 211–213, and the War of 1812, supra note 215, the president commissioned privateers under congressional authorization. After the Paris Declaration, Congress authorized letters of marque, but the president did not issue any.
331. James Madison specified that the Grand Turk could cruise against any “Algerine vessels, public or private, goods and effects, of or belonging to the Dey of Algiers.” EASTMAN, supra note 151, at 45 (reproducing a Letter of Marque granted in 1815 to the Grand Turk).
332. See DOUGLAS L. STEIN, AMERICAN MARITIME DOCUMENTS 1776–1860, at 5 (providing an example signed by Secretary of State James Monroe of instructions accompanying Letters of Marque, which were given to the commanders of these private armed vessels after the
Letters of marque represent Congress availing the president of another tool to protect shipping, bolster American interests, and restore rule of law to the seas.

The following Sections consider two key elements of any letters of marque regime: first, procedural safeguards to ensure fairness and due process and second, ways privateers could be incentivized to respond in the current Somali context.

A. Procedural Safeguards via Prize Court Adjudication and Oversight

Experience in domestic courts illustrates that procedural safeguards, such as prize court adjudication and careful oversight, are sufficient to protect due process rights. U.S. prize law statutes did not create new statutory procedures, but merely recognized already existing practice in accordance with existing international law. Article I, Section 8 of the Constitution states that “Congress shall have power to . . . make Rules concerning Captures on Land and Water.” The law of capture is an inherent international right that predates the Constitution. The American formulation of prize law derives chiefly from British admiralty law and the writings of Justice Story. The Supreme Court has held privateers cruising under letters of marque are entitled to seize enemy vessels subject to prize law. Congress has exercised its Article I, Section 8 powers by authorizing seafarers to take broad defensive actions, even allowing for letters of marque and retaliation against known pirate entities. As a result,
American prize law related to piracy and letters of marque is well developed with sound procedural safeguards.

Procedurally, when taking a ship, the privateer must inventory the goods and ensure the ship belongs to enemy belligerents. The captor must install a prize master to keep the prize safe for adjudication and must promptly take the prize to port. After arriving in port, the privateer must deliver, upon oath, all evidence found onboard the captured vessel to the prize court. Under the Judiciary Act of 1789 and the Supreme Court's decision in *The Sloop Betsey*, all a court of admiralty's powers, in both "instance and prize," are vested in federal district court. The crew of the captured ship must be taken to court for adjudication as well. Prize courts must determine whether the prize was legitimate. This entails finding that the prize belonged to the enemy and that the captor had appropriate authority to seize it. If the court concludes the seizure was valid, it declares the title of the captured merchant ships and cargoes transferred to the captor. Under international law and reciprocity, the new title is "good against the world" and the ships can "circulate in world trade and commerce free from any claim of previous owners, mortgagees, lien holders, or others." American courts have decided over one thousand instances of prize, and foreign and international tribunals have challenged few of these decisions.

During World War II, Congress reaffirmed its commitment to prize in a series of acts extending prize law to aircraft, expanding maritime jurisdiction to the high seas and to ports of cobelligerents, allowing prizes to be adjudicated in physically different locations than the captured prize, and appointing special prize commissioners to act abroad. Numerous jurists and scholars considered
the questions of prize law at that time to develop a robust body of modern jurisprudence.\textsuperscript{344} If prize were reinstated today, well-developed case law exists to enable principled adjudication, with fair treatment and efficient proceedings. Such courts and recognized oversight procedures would be essential to maintain fairness and due process in either a domestic or an international letters of marque regime.

Without any international or domestic legal bars, the U.S. Congress could safely and transparently reinstate letters of marque. Today, both sides of the political spectrum express openness to using private entities to fight pirates and protect merchant shipping.\textsuperscript{345} The principle objectives for politicians reinstating letters of marque should be transparency and accountability. This can be achieved by installing the following safeguards. First, letters should only be issued to trusted and disciplined professionals. Some have argued that to protect U.S. vessels, persons, and interests, Congress should authorize letters of marque to shippers.\textsuperscript{346} But it would be nearly impossible for the U.S. government to effectively train and supervise security forces onboard the 20,000 vessels that pass through the Gulf of Aden each year. Furthermore, merchants would be hesitant to participate; they are in the business of transporting cargo, not hunting pirates.\textsuperscript{347}

Moreover, international legal and economic problems would be more pronounced in a system arming merchant ships rather than creating a professional force. Under the Hague Convention, such grants of power to merchants would not be allowed unless the ships fell under the authority of the

\textsuperscript{344} Bederman, supra note 295, at 37–38 (noting that at least eleven World War II prize cases were heard in American courts).

\textsuperscript{345} Most notably, on the conservative side, is Rep. Ron Paul. Competitive Enterprise Institute Fellow Eli Lehrer notes, “[R]ight now we have a Navy designed mostly to fight other navies. The weapons we have are all excellent, but they may not be the best ones to fight these kinds of pirates. The only cost under letters of marque would be some sort of bounty for the pirates.” Andrew Grotto, senior national security analyst at the liberal Center for American Progress agrees “that if you give people incentives to fight piracy, you’ll see more action taken against it... the ocean is huge and, practically speaking, there’s no way the Navy can prevent piracy; it’s too big.” Both sides are quick to add that privateers should be kept on a short leash. Erika Lovley, \textit{Ron Paul’s Plan to Fend Off Pirates}, POLITICO (Apr. 15, 2009, 4:16AM), http://www.politico.com/news/stories/0409/21245.html.

\textsuperscript{346} See Schwartz, supra note 2.

\textsuperscript{347} Most commercial mariners lack the professional military ethics and training necessary to conduct themselves in a disciplined fashion in combat situations. See Mark Clayton & Bridget Huber, \textit{To Stop Pirates, Do Ships Need Firepower?}, CHRISTIAN SCI. MONITOR, Apr. 8, 2009, http://www.csmonitor.com/layout/set/print/content/view/print/209529 (citing Giles Noakes, a chief maritime security officer for an international ship-owners association, as saying “[t]he industry believes very strongly that it’s not for the companies to train crews to use firearms and then arm them... [c]rews could get injured or killed, to say nothing of damage to the ship”). After abuses by contractors in Iraq and Afghanistan, policy makers may be hesitant to trust them. See, e.g., Joshua Sudock, \textit{Private Security Contractors Causing US Headaches}, ORANGE CNTY. REG., Dec. 31, 2010, http://m.ocregister.com/news/contractors-281002-private-causing.html.
military and had disciplined crews. Such a program would entail great administrative costs for military overseers in training and supervising merchant mariners. For the shippers, it would not be cost effective, especially when so few ships are actually attacked. Additionally, merchant shippers would not want to be responsible for arresting and detaining pirates and would want to avoid delays and investigations.

Merchants would also resist subjugating their ships to military authorities, which might require them to change to more costly vessel characteristics or operational practices. Overall, utilizing private security on transiting vessels would be fraught with accountability and oversight problems and would burden the shipping industry with added expenses. Policymakers should avoid militarizing the merchant fleet, which would result in the relatively unchecked transport of weapons and trained mercenaries around the globe. Instead, they should seek a more tailored program that keeps merchants separate from law enforcement activities.

Domestic or international authorities, such as the United Nations Security Council or the International Tribunal for the Law of the Seas, could commission a new, professional “volunteer navy” to fight Somali pirates. Though they would function under the authority and supervision of naval forces, their compensation would be derived from prize or bounty. Such an enterprise would fulfill the requirements of the Hague Convention, as well as the Paris Declaration as understood in the *Franco-Prussian War Case*, which permitted marked and organized private volunteer navies. Under either an international or domestic system, the U.S. Navy or task-force navies could provide training, routine inspection, and back up to the privateers. The volunteer fleet would be of manageable size and could develop professional competencies. Its relatively small size would also allow it to maintain profitability. By operating under the guidance and direction of naval commanders, the volunteer fleets would avoid previous problems with authority, discipline, and supervision. Consequently, privateers could function in a regulated fashion in tandem with governmental naval forces.

Second, history suggests that unchecked privateers are likely to devolve into piracy. Therefore, issues of accountability, responsibility, and control are of utmost importance. The international body tasked with issuing letters of marque or the U.S. authorities should impose significant substantive and procedural requirements on privateers in excess of those currently required by American prize law. Under the U.S. Constitution, Congress can impose

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350. See discussion at *supra* note 158 about the difficulty of overseeing privateers.
additional qualifications on the conduct of privateer operations. Principally, authorities should create safeguards to ensure privateers take only true pirate vessels. Privateers should be required to provide a large bond to cover payments for any vessels or persons improperly seized. This would discourage unlawful takings. Additionally, privateers should be required to provide justification to regional military commanders via satellite phone, stating the evidence that a particular vessel may be involved in piratical activities. Alternatively, when military commanders glean information about pirate movements from ground intelligence or unmanned aerial vehicles, they might direct privateers to specific targets. Another approach would be to require privateers to seek judicial permission—similar to a warrant—from an international tribunal or domestic court prior to attacking a suspected target. These measures would reduce the possibility of mistakenly taking innocent vessels. Authorities could also specify disciplinary actions, such as criminal punishments, sanctions, and forfeiture of bonds for privateers that misbehave. Further, in a domestically administered system, subjecting modern privateers to the Uniform Code of Military Justice, as Congress has done with contractors engaged alongside U.S. forces in combat, and with privateers in 1812, would reinforce their subjugation to military authorities.

Modern technology could also help to eliminate the problems that led to the use of privateers falling out of favor in the past. Centuries ago, space, time, and distance prevented governments from playing an active role in privateer operations. Government involvement was limited to issuing letters of marque, dividing the spoils, and overseeing prize courts. Without supervision, privateers essentially became pirates. Today, technology allows relationships between privateers and governments to be more constructive and involved. Authorities could oversee privateer movement via GPS tracking, satellite imagery, and surprise inspections. Issuers, whether domestic or international, could require privateers to video record and instantly transmit live feeds of their operations. This would provide assurances that privateers abide by law and adhere to the guidance provided by the issuing country. Unlike in bygone eras, communication would be constant. These technological improvements aid in transparency and allow countries to exercise greater control over the privateers.

Third, any letters of marque regime should be structured to encourage low-cost prosecutions for seagoing pirates by pairing privateers with ship-

351. During the Revolutionary War any cold-blooded killing or torturing would result in severe criminal punishment, the forfeiture of the bond, and civil liability. See Marshall, supra note 176, at 962.


353. Parrillo, supra note 321, at 33–35 (privateers could be tried in courts-martial composed of naval officers).
riders from regional coastal states. Law-enforcement officials could embark on the privateer vessel to observe and to carry out any functions deemed better suited for government officials. Having a single government official onboard would be dramatically less expensive for the state than supporting an operational warship. Ship-rider agreements have long been used in the maritime drug interdiction context to facilitate law enforcement activities between capturing and prosecuting countries. In the piracy context some have noted that matters would be simplified if an official from the country conducting the trial made the arrests and gathered the evidence. This practice would heighten accountability and make the practice of issuing letters of marque more reliable. Placing a law enforcement officer onboard would also facilitate the prosecution of suspected pirates and help to ensure their procedural rights are protected. In December 2008, the Security Council called on regional governments to coordinate ship-rider programs with the extraregional navies. The Security Council could extend this mandate to privateers. This program would pair the lowest-cost enforcers (privateers) with the lowest-cost justice providers (the regional governments).

Fourth, authorities could further incentivize the spread of rule of law by only paying bounties or allowing payment via prize if pirates are successfully prosecuted. This system would encourage privateers to document their activities and to avoid using means that would invalidate prosecution. Privateers might be required to provide video footage of their entire operation and to collect evidence. It would also encourage privateers to participate in the judicial processes and to turn pirates over to competent legal authorities. Under the SUA Convention, privateers should be allowed to turn pirates over for prosecution in virtually any country.

By paying bounties only if privateers maintain certain high standards, authorities could prevent a race to the bottom, which can occur in publicly funded private contracts. Profit motive encourages privateers to achieve missions at the lowest cost, thus encouraging providers to manipulate the system or to cut corners. Conditional bounties would incentivize quality performance by making compensation outcome dependent.

A system utilizing privateers and letters of marque could provide pirates with the same, if not better, due process protections as one utilizing military

355. Guilfoyle, supra note 37, at 150.
358. Gaul, supra note 192, at 1491.
fleets. Privateers would respond to intelligence reports of pirate activity, such as distress calls from mariners or from aerial tracking. Since letters of marque are issued only against an enemy, privateers would be able to seize only actual pirate vessels—which is a higher standard than that of navies that routinely conduct inspections of merely suspicious vessels.\textsuperscript{359} Moreover, privateers could be charged in prize courts for improper seizures or other unnecessary damages. These protections would provide mariners suspected of piracy with greater due process rights than the status quo.\textsuperscript{360}

Finally, authorities could place part of the cost burden of security on shippers by allowing privateers to collect military salvage for rescuing ships from imminent pirate attack. Well-positioned privateers in the area might be able to rapidly respond to distress calls in fast boats or helicopters. This fast response might prove a more effective deterrent than large but sparsely spread fleets of naval warships. The privateers would be able to carry devices, lethal and nonlethal, that would be prohibitively expensive for shippers to carry onboard, such as long-frequency manipulators that can stall outboard engines, “dazzle” lasers, and sonic weapons.\textsuperscript{361} Responding privateers could collect bounty and salvage fees for saving ships from the pirates.

Consequently, by providing procedural safeguards and oversight, authorities can structure a letters of marque regime to avoid earlier pitfalls.

\textsuperscript{359} Letters of marque issued to commissioned privateers acting on behalf of the state would be governed by Articles 105 and 106 of UNCLOS in that on the high seas “every state may seize a pirate ship or aircraft, or ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.” Under 106 the privateers are liable via the state for seizures without adequate grounds. UNCLOS, supra note 107, arts. 105–106.

\textsuperscript{360} Under the current enforcement system, which employs large naval warships to patrol, there is no obvious avenue for Somali seafarers to challenge wrongful actions. For example, on January 22, 2011, a Dutch frigate used a sharpshooter’s bullet to destroy the outboard motors of skiffs onboard a vessel presumed to be a pirate “mother ship.” The Dutch presumed it was a pirate vessel because it did not respond to radio calls, but what if the ship was innocent? How would its owners seek redress from the Dutch? Somalia lacks a judicial system, let alone a practical mechanism for securing compensation from the Dutch. The average Dutch court might be inexperienced with prize and possibly prejudiced in favor of its navy. Under a letter of marque system all privateers would have to put up a bond, channels for redress would be clear, and prize courts might be less sympathetic to privateers than to government actors. See Taking It to the Somali Pirates: Dutch Frigate Opens Fire on Pirate Ship, EAGLE SPEAK (Jan. 22, 2011, 06:27PM), http://www.eaglespeak.us/2011/01/taking-it-to-somali-pirates-dutch.html.

V.
NEW LETTERS OF MARQUE REGIMES AS APPLIED TO THE HORN OF AFRICA SITUATION: INCENTIVIZING PRIVATEERS AND DISMANTLING PIRATE NETWORKS

Letters of marque and reprisal can motivate privateers to take action against Somali pirates. While pirate belongings such as skiffs and mother vessels usually are not valuable enough to motivate privateers via traditional prize, there are other ways privateers could be appropriately rewarded for cruising against Somali pirates: (1) bounties and rewards; (2) land-based assets; and (3) the ability to seize the assets of kingpins. However, bounty appears most appropriate for incentivizing privateers.

Bounty is a grant made by the government out of public monies to reward bravery and encourage success in naval operations. The jurisdiction of prize courts includes the power to determine on a case-by-case basis whether captors are entitled to prize bounty. Historically, courts deemed captors to have earned a share of bounty when they took an “armed ship.”

The British Naval Prize Act of 1864 and the Order in Council of March 2, 1915 rewarded captors with a share of money at five shillings per person on the enemy ship at the beginning of the engagement. During WWI British sailors were entitled to receive a bounty, even for missions on land. In America, the Continental Congress paid a bounty of twenty dollars per cannon and eight dollars per man captured. Recognizing the need to incentivize actual military effectiveness, Congress passed the Bounty Act as one of its first bills after the Constitution was ratified. Under the Bounty Act, the U.S. government paid sailors bounties for taking enemy prizes. The Supreme Court upheld the payment of substantial bounties to persons responsible for the capture or destruction of enemy fleets.

In 1899, Congress repealed the Bounty Act out of concerns that such bounties were unfair and deleterious to naval discipline. When Congress

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363. GARNER, supra note 273, at 36–37.
364. Id. at 35.
365. Crew members of the Emden were awarded for destroying a telephone apparatus on land. Id. at 36.
366. Knauth, supra note 341, at 70 n.4.
367. 1 Stat. 715 (1788).
368. Sailors received a portion of the sum of $100 times the number of enemy persons onboard if the U.S. force was superior and $200 per enemy person if the enemy force was greater. This bounty was repealed after Admiral Dewey’s fleet earned a sum of $191,400 for their efforts in the Battle of Manila in 1899. Admiral Sampson’s sailors collected similarly high bounties for taking the Spanish fleet at Santiago. See Dewey v. United States, 178 U.S. 510 (1900).
369. Id.
370. 30 Stat. 1004, 1007 (1899); see Art. 15 (revised) of the Articles for the Government of the Navy, 34 U.S.C § 1200 (1940); see also Knauth, supra note 341, at 70–71 (noting that the
made this decision, the Secretary of the Navy did not recommend abolishing bounty or prize money, because he believed it motivated sailors.\textsuperscript{371} International law scholars and military strategists have long suggested that the abolition of bounty may have been a misdirected and unnecessary step in modifying the law of capture regarding private property at sea.\textsuperscript{372} These scholars have argued that Congress could have limited the rewards in the prize money system without changing the bounty system, which rewarded victory in battle.\textsuperscript{373} In dealing with pirates, privateer bounties would reward zeal and courage in dismantling pirate networks. As a result of Congress's action, American courts have not considered bounty law in over one hundred years. All of the courts' jurisprudence on the law of capture remains unchanged and continues to hold that bounty and prize are constitutional; were Congress to reinstate the Bounty Act, that jurisprudence would be available.

The U.S. government currently uses bounties to incentivize the enlistment of private citizens in law enforcement activities, such as bail enforcement officers—also known as bounty hunters.\textsuperscript{374} The Department of Defense offers bounties to apprehend terrorists—there is currently a twenty-five million dollar bounty on Osama bin Laden.\textsuperscript{375} Scholars observe that bounty programs are popular in the United States because "they work."\textsuperscript{376} American courts have consistently upheld "bounty schemes," sometimes called "reward programs."\textsuperscript{377} The Supreme Court has upheld "moiety acts" which require the government to pay informants part of the penalty or fine imposed on a lawbreaker.\textsuperscript{378}

senior naval staff officers felt it was unfair that sailors in combat received such large bounties for their service, while their land-based support and planning teams received nothing; and citing the Brief for the United States at 132 \textit{Manila Prize Cases}, 188 U.S. 254 (1903) (Nos. 309–11), which noted that the repeal of prize and bounty money statutes was due to a sentiment that the practice was subversive to naval discipline).

373. Id.
376. Ferziger & Currell, supra note 374, at 1143.
377. \textit{See generally id.} at 1163 (citing Barker v. Lien, 366 F.23d 1307, 1310 (Fed. Cir. 1999) to illustrate judicial approval of agency discretion in administering bounty programs).
378. \textit{See John Doe v. United States}, 100 F.3d 1576, 1582 (Fed. Cir. 1996) (explaining "[n]o where did Congress indicate any intention to disturb the longstanding judicial interpretation
Privateers will be motivated by a bounty whether funded by the public coffers or via collections from civil penalties against pirate assets. Issued in tandem with bounties, letters of marque provide an efficient way to confiscate pirate vessels prior to attacks.

**A. Land-Based Seizure**

Letters of marque also provide a method of seizing or destroying land-based assets used by pirates in their “ports.” Prize jurisdiction extends to seizures made “in ports,” and such jurisdiction does not end merely because the goods have landed. In the World War I Roumanian case, the British Prize Court held that oil taken from a ship being stored on land fell under prize jurisdiction. Even though the vessel was “strictly ‘on land’” and not even “in port” the British judge still considered it to be a valid prize. U.S. district courts have held that the seizure of goods in a warehouse can be considered a maritime seizure. The Supreme Court limited this line of cases, holding that cargo transported by land outside of a port could not be condemned unless legislative action authorized the confiscation. Still, this case law suggests privateers can use letters of marque to seize and destroy the land-based assets of pirate kingpins located near the shore.

**B. Global Seizure of Kingpin Assets**

Letters of marque provide the capability to seize assets of pirate leaders on behalf of the issuing nation. Early scholars assumed pirates to be enemies of the human race, *hostis humanis generis*, under international law.

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381. *GARNER, supra* note 273, at 211–12. (quoting Judge Sir Samuel Evans). Another World War I case involved German seagoing tugs that had been transported by rail over one hundred miles inland to avoid capture, but that were eventually seized by advancing British forces. The owners claimed that the tugs could not be considered prize because they were not captured by naval forces and were not being tracked in “hot pursuit.” Nevertheless, Lord Sterndale said he “had no doubt they were the subject of maritime prize” on account of their potential for “navigation.” He further held that it did not matter what type of force, naval or otherwise, captured them. *GARNER, supra* note 273, at 221 (quoting Anichab and other Vessels and Craft, IX Lloyd 119).
382. *Id.*
383. 103 Casks of Rice, in *SAMUEL BLATCHFORD, CASES IN Prize* 211 (1862).
384. *Id.*
385. Gentilli explains that:

[p]irates are common enemies, and that they are attacked with impunity by all, because they are without the pale of the law. They are scorners of the law of nations; hence they can find no protection in that law. They ought to be crushed by us . . . and by all men. This is warfare shared by all nations. *ALBERICO GENTILLI, DE IURE BELLi LIBRI TRES* 423 (1612) (John C. Rolfe trans., William S Hein & Co. Inc. ed. 1995). The prohibition of piracy *jure gentium* is generally understood to have
American jurisprudence, the Supreme Court similarly found in *Brig Malek Adhel* that “a pirate is deemed, and properly deemed, *hostis humani generis* [b]ecause he commits hostilities upon subjects and property of any or all nations, without any regard to right or duty, or any pretense of public authority.”386 Most scholars also agree piracy has status as a *jus cogens* norm.387 All nations can enforce and punish pirates, wherever the culprits may be found and without regard to where the offense occurred.388 This allows states to determine the most appropriate way to exercise very broad enforcement jurisdiction. For the most part, states have exercised this jurisdiction exclusively through naval assets, such as warships and ocean surveillance aircraft. However, to stop modern piracy effectively, enforcement will have to operate more broadly against global criminal networks. Nations can use their universal jurisdiction to target the assets of those who direct and profit the most from piracy. Issuing letters of marque will help nations exercise their powers more effectively, while providing a compelling potential profit for privateers.

Equally important, letters of marque enable enforcers to broadly target the pirate network kingpins, who have amassed fortunes. According to experts, “[t]he commanders and generals—the financiers and the organizers behind it all—are in Dubai, Nairobi, Mombasa, and even Canada and London, sitting in their hotels, communicating via laptops, and making big money.”389 These ringleaders have turned regional piracy into a global criminal enterprise and are conducting intelligence gathering in the heart of the shipping community and at the Suez Canal.390 They also have significant U.S. assets and are rumored to be wealthy and well educated.391 Observers suggest that current strategies, which focus on seagoing Somalis, neglect the leaders who command and control pirate operations.392 Intelligence officials have long known that “Somali pirates

risen to the level of *jus cogens*, meaning that it is one of the very few peremptory norms—along with genocide, slavery, torture, and crimes against humanity—from which no country may derogate. BOSELAW A. BOCZEK, INTERNATIONAL LAW: A DICTIONARY 20 (2005).


387. RESTATEMENT (THIRD) OF FOREIGN RELATIONS OF THE UNITED STATES § 404 (1986).

388. Id.


390. See Giles Tremless, This is London—the Capital of Somali Pirates’ Secret Intelligence Operation, GUARDIAN (London), May 11, 2009, http://www.guardian.co.uk/world/2009/may/11/somalia-pirates-network (noting pirate spies have infiltrated shipping operations centers and government agencies).

391. Id. (interview with Yardimci shipping manager Haldun Dincel, who negotiated the release of his company’s ship from pirates).

392. Ken Silverstein, Pirates and the CIA: What Would Thomas Jefferson Have Done?, HARPER’S MAG., Apr. 9, 2009, http://harpers.org/archive/2009/04/hbc-90004751 (quoting a CIA official as saying, “[w]e need to deal with this problem from the beach side, in concert with the ocean side, but we don’t have an embassy in Somalia and limited, ineffective intelligence operations. We need to work in Somalia and in Lebanon, where a lot of the ransom money has
do not randomly attack vessels in the Gulf of Aden and Indian Ocean; they rather select their targets via the help of a London-based consultant group.\textsuperscript{393} These international backers are largely responsible for the growth of piracy as they finance operations and provide logistical support. They also profit the most, taking the lion’s share of ransom payments. Over the past decade they have likely amassed hundreds of millions of dollars from ransom payments.\textsuperscript{394} Letters of marque would allow privateers to seize these assets, providing them with a lucrative incentive to attack the piracy problem at its root.\textsuperscript{395}

\textbf{C. Establishing a Framework for Letters of Marque and Privateers}

An effective solution must combine incentive strategies. To eradicate deeply entrenched pirate networks, each element must be neutralized. Rewards could be given for pirate skiffs seized, outboards destroyed, pirates captured, number of attacks prevented, and successful pirate prosecutions. This would encourage privateers to properly document their activities, gather evidence sufficient for prosecution, and treat pirates humanely. Land-based assets related to piracy, like the high quality fuel stored for pirate missions, powerful outboard engines, and the records of the pirate transactions at the pirate bourse in Haradheere, could be destroyed or seized for bounty. Finally, privateers might profit via military salvage after freeing a ship or crew after an attack. A broad multipronged approach is necessary to cripple the entire global piracy network and to provide adequate incentives for privateers. This strategy would be less costly than military interventions or allowing pirates to run amok.

\textbf{CONCLUSION}

The current system of using naval forces to combat piracy is costly, ineffective, and unsustainable. Although the international community’s response can be commended for its multilateral collaboration, the deployment of naval vessels is ill conceived and has been poorly executed. The predominant approach, which entails waiting for pirates to attack, letting them go when they are caught, and focusing on the prosecution of individual pirates rather than kingpins, does little to deter or disrupt pirate operations. The system
also forces individual governments to incur high costs while the shippers and insurance companies, who are best positioned to deter pirates at the lowest cost, continue with business as usual. Although scholars and advocates have contemplated various strategies—such as ground intervention in Somalia, developing regional organizations, and arming merchants—these proposals may be unattainable or have significant drawbacks.

The fight against piracy need not be a quagmire. The international community can employ privateers through a legal and efficient letters of marque regime. Or, should the creation of a new international regime be too difficult or costly to organize, the United States can take effective actions to holistically dismantle pirate networks. Either way, a new strategy is necessary. Instead of concentrating on bringing minions-at-sea to justice, the strategy should focus on proactive, cost-efficient enforcement. Issuing letters of marque to a cadre of well-trained, disciplined privateers will enable the global community and the United States to achieve their strategic objectives. Privateers could proactively seize pirate assets and deliver the corsairs for low-cost regional prosecution under the SUA convention. From a military perspective, this would attain credible deterrence across broad stretches of ocean. Economically, it would increase the costs the enemy bears while reducing the costs of enforcement and prosecution. Further, the system could enhance rule of law by incentivizing enforcers to take action in ways that are transparent and humane.

Technological advances, discipline, and strict supervision can overcome the accountability problems that undid earlier eras of privateers. Procedural and substantive requirements can direct the conduct of modern privateers by establishing means for them to profit from good behavior. Rewarding privateers for successful prosecutions and connecting them with ship-riders can ensure pirates are brought to justice efficiently. Under a domestic regime, privateers would be regulated by Congress, supervised by the Navy, and held accountable by American courts. Creating a letters of marque system that adequately incentivizes privateers to strike at assets most valuable to kingpins, while implementing controls to maintain high ethical conduct can provide long-term, sustainable deterrence. Letters of marque offer a solution that is legally viable, sustainable, and effective, as well as consistent with domestic or international law. The U.S. Constitution and the U.N. Convention on the Law of the Seas, often considered a constitution for the oceans, both contemplate and allow for letters of marque. The private market, acting under the authority and supervision of the government, can play a crucial, if not definitive, role in subduing piracy off the coast of Somalia. The time has come for the global community and Congress to consider utilizing this proven pirate-fighting tool.