

SOLDIERS AT SEA: THE LEGAL AND POLICY IMPLICATIONS OF USING MILITARY SECURITY TEAMS TO COMBAT PIRACY

JAMES W. HARLOW*

ABSTRACT

Maritime piracy is a critical challenge to global security. Piracy threatens billions of dollars worth of commerce every year, puts the lives and livelihoods of thousands of mariners at risk, and causes untold harm to pirate-controlled communities. To combat this threat, the international community has deployed military and law enforcement resources. But the present strategy is suboptimal. Some experts have argued that the private sector should lead antipiracy efforts by providing armed security contractors or fleets of armed protection vessels. Such a drastic expansion of the role of private actors, however, is inconsistent with the governmental obligation to ensure freedom of the seas. Consistent with the obligation for a public solution, this Article recommends that short-term antipiracy strategies be refocused toward the widespread deployment of military security teams (“MSTs”) onboard merchant vessels. The use of MSTs is well-grounded in historical practice and law. In addition to building the basic legal foundation for the deployment of MSTs, this Article provides a specific implementation of this strategy from both legal and policy perspectives.

I. INTRODUCTION

In the afternoon hours of February 12, 2011, a distress signal flashed from the merchantman¹ *MV Sinin* sailing 350 miles off the Omani coast—

* Copyright 2011 by James W. Harlow. J.D. 2012, Duke University School of Law; B.A. History and Political Science 2007, Johns Hopkins University. I would like to thank Commander James Kraska, JAGC, USN, for suggesting this line of inquiry and providing feedback on early drafts. I would also like to thank Professors Scott Silliman (Colonel, USAF, ret.) and Charles J. Dunlap, Jr. (Major General, USAF, ret.) for their astute comments and insights on this topic. Any remaining errors are my own.

1. A merchantman is “[a] ship conveying merchandise,” which is not a military vessel. OXFORD ENGLISH DICTIONARY (online version March 2012).

the ship was under attack by armed pirates.² International antipiracy forces in the area heard the distress call and dispatched a maritime patrol aircraft.³ But the aircraft's sole assistance was photographing two pirate skiffs tied alongside the *Sinin*.⁴ Because no warship was within sailing distance, the pirates captured the *Sinin* and held the vessel, her twenty-five crewmembers, and the cargo in Somalia for more than 180 days before ransoming them.⁵

On March 28, 2011, pirates targeted the tanker MV *Zirku* as it sailed through the Gulf of Aden.⁶ Approaching in two skiffs, pirates opened fire on the *Zirku* with small arms and rocket-propelled grenades.⁷ The *Zirku's* master and her crew tried to fend off the attack by using evasive maneuvers, firing flares, and spraying fire hoses.⁸ Ultimately, those efforts were futile—pirates boarded and hijacked the tanker and kidnapped her multinational crew.

The plight of the *Sinin* and the *Zirku* is hardly unique among the merchantmen plying the waters of the Gulf of Aden and the Indian Ocean. Operating from motherships,⁹ Somali pirates opportunistically troll these waters for vulnerable merchantmen or seek specific targets based on inside information.¹⁰ To attack a target, pirates launch skiffs from the mothership

2. ICC INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS: REPORT FOR THE PERIOD OF 1 JANUARY–31 MARCH 2011, at 24 (2011), available at <http://www.iccdanmark.dk/dox/News/April/2011%20q1%20imb%20piracy%20report.pdf> [hereinafter ICC INT'L MAR. BUREAU, 2011 FIRST QUARTER REPORT]. Press Release, EU NAVFOR Somalia, MV SININ Believed Pirated in the Arabian Sea (Feb. 13, 2011), <http://www.eunavfor.eu/2011/02/mv-sinin-believed-pirated-in-the-arabian-sea>.

3. Press Release, EU NAVFOR Somalia, *supra* note 2.

4. *Id.*

5. Press Release, EU NAVFOR Somalia, MV SININ Released from Pirate Control (Aug. 15, 2011), <http://www.eunavfor.eu/2011/08/mv-sinin-released-from-pirate-contol>.

6. ICC INT'L MAR. BUREAU, 2011 FIRST QUARTER REPORT, *supra* note 2, at 25; Press Release, EU NAVFOR Somalia, MV ZIRKU Pirated in the Eastern Part of the Gulf of Aden (Mar. 28, 2011), <http://www.eunavfor.eu/2011/03/mv-zirku-pirated-in-the-eastern-part-of-the-gulf-of-aden>.

7. ICC INT'L MAR. BUREAU, 2011 FIRST QUARTER REPORT, *supra* note 2, at 25.

8. *Id.*

9. Motherships are ocean-going vessels, such as fishing trawlers or merchantmen, which were themselves previously hijacked and serve as “floating bases” for the pirates. Jeffrey Gettleman, *A Fluke of the Wind*, N.Y. TIMES MAG., Oct. 9, 2011, at 32, 34. Pirates then launch small skiffs from motherships to carry out attacks on targets. *Id.* See also Holly Watt, *Navy Prevents Attack by Somali Pirate ‘Mothership,’* TELEGRAPH (London), Jan 12, 2012, available at <http://www.telegraph.co.uk/news/worldnews/piracy/9008682/Navy-prevents-attack-by-Somali-pirate-mothership.html>.

10. See Giles Tremlett, *This is London—The Capital of Somali Pirates’ Secret Intelligence Operation*, GUARDIAN (London), May 11, 2009,

and begin a close-quarters assault, a tactic employed against both the *Sinin* and the *Zirku*. After seizing a vessel, the pirates demand a ransom for the release of the ship, its crew, and cargo.¹¹

The success of pirate attacks demonstrates the effectiveness of their tactics. In 2010, there were 445 actual and attempted attacks on vessels,¹² resulting in 196 vessel boardings and fifty-three successful hijackings.¹³ As of March 2012, thirteen merchantmen and 197 mariners were being held hostage in Somalia.¹⁴ The economic cost of piratical attacks is staggering. Currently estimated at \$7 billion—\$12 billion annually,¹⁵ the toll is projected to increase to \$15 billion by 2015.¹⁶ Pirate bases in the Puntland region of Somalia¹⁷ sit athwart “a fundamental crossroads for world traffic.”¹⁸ Some 20,000 vessels, carrying 20 percent of the world’s shipped goods¹⁹ and 7 percent of the world’s daily oil supply,²⁰ come within range

<http://www.guardian.co.uk/world/2009/may/11/somalia-pirates-network/> (reporting that informants in London, heart of maritime insurance, gather detailed info on targets and send it to pirates).

11. James Kraska & Brian Wilson, *The Pirates of the Gulf of Aden: The Coalition Is the Strategy*, 45 STAN. J. INT’L L. 243, 248 (2009) [hereinafter Kraska & Wilson, *The Pirates of the Gulf of Aden*].

12. INT’L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS ANNUAL REPORT, 1 JANUARY–31 DECEMBER 2010, 5–6 tbl.1 (2011) [hereinafter INT’L MAR. BUREAU, ANNUAL REPORT]. The reported figure might even significantly understate the number of actual piratical attacks. See Kraska & Wilson, *The Pirates of the Gulf of Aden*, *supra* note 11, at 255 (reporting that a British parliamentary committee found “that potentially 25–50% of attacks are not disclosed” by shippers in an attempt to avoid dealing with criminal authorities and insurance investigators).

13. INT’L MAR. BUREAU, ANNUAL REPORT, *supra* note 12, at 8 tbl.2. And the threat of piratical attack only increases. Jonathan Owen, ‘Out of Control’ Piracy Set to Cost World £9bn by 2015, INDEPENDENT (London), Apr. 17, 2011, <http://www.independent.co.uk/news/world/africa/out-of-control-piracy-set-to-cost-world-1639bn-by-2015-2269013.html>.

14. *Piracy News & Figures*, ICC COMMERCIAL CRIME SERVICES, <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures> (last updated Mar. 19, 2012).

15. Anna Bowden et al., *The Economic Cost of Maritime Piracy* 25 tbl.13 (One Earth Future Found., Working Paper, 2010), available at <http://oneearthfuture.org/images/imagefiles/Cost%20of%20Piracy%20Final%20Report.pdf>.

16. Owen, *supra* note 13.

17. See Milena Sterio, *The Somali Piracy Problem: A Global Puzzle Necessitating A Global Solution*, 59 AM. U. L. REV. 1449, 1451 (2010) (noting that within these coastal bases “pirates easily blend in with other insurgent groups”).

18. *Soldiers on Ships Would Help with Piracy, Says NATO*, ANSA (Rome), Feb. 9, 2011, http://www.ansa.it/web/notizie/rubriche/english/2011/02/09/visualizza_new.html_1590433308.html (quoting an admiral in the North Atlantic Treaty Organization (“NATO”) high command).

19. *The Material Cost of Piracy*, SAVE OUR SEAFARERS, <http://www.saveourseafarers.com/the-cost-of-piracy.html> (last visited Mar. 2, 2011) (click on “Economic Cost” tab on website to access relevant information).

of Somali corsairs every year. In light of the grave threat to global commerce and security, NATO declared piracy “one of the most serious threats to both local and international security,”²¹ and President Barack Obama found that piracy constituted “a national emergency.”²²

The tales of the *Sinin* and the *Zirku* also exemplify the ineffectiveness of current antipiracy measures. Despite the presence of dozens of warships on antipiracy patrol, neither merchantman was able to receive military assistance.²³ The *Zirku*'s situation also showed that even a determined crew employing a variety of nonlethal defensive maneuvers might be overcome. One industry representative recently issued a public warning that without more impactful antipiracy measures, “[s]hip owners might soon conclude that the risk to their crews, ships and cargo is simply unacceptable and thus be impelled to boycott the region.”²⁴

This Article is not the first to propose reforms to the antipiracy effort,²⁵ but it analyzes the problem through a unique lens. In contrast to those who argue that the way forward lies with the private sector,²⁶ this Article adamantly posits that guaranteeing the freedom of the seas is inherently a governmental function. This Article also places a premium on a policy reform that can both serve as an effective short-term solution and take into account international political will and resource constraints. Thus, this Article presents a solution that could serve as a bridge to various proposed long-term solutions—such as building criminal justice capacity and developing Somali civil society—whose effects may not be immediately effective in the near future.

Specifically, this Article proposes widespread deployment of military security teams (“MSTs”) on vessels transiting pirate-infested waters. MSTs

20. Kraska & Wilson, *The Pirates of the Gulf of Aden*, *supra* note 11, at 243.

21. *Soldiers on Ships Would Help with Piracy*, *supra* note 18.

22. Exec. Order 13536, 75 FED. REG. 19,869 (Apr. 12, 2010).

23. See Eugene Kontorovich, “A Guantanamo at Sea:” *The Difficulty of Prosecuting Pirates and Terrorists*, 98 CALIF. L. REV. 243, 245 (2010) (“The piracy epidemic worsened steadily even after the global armada assembled in the Gulf in late 2008.”). The pictures taken of the *Sinin* by maritime patrol aircraft were surely of small consolation to her crew.

24. Giles Noakes, Op-Ed, *Opposing View: Provide More Naval Assets*, USA TODAY, Apr. 3, 2011, http://www.usatoday.com/news/opinion/editorials/2011-04-04-editorial04_ST1_N.htm#.

25. The resurgence of piracy has been matched by a profusion of scholarly commentary.

26. See, e.g., Theodore T. Richard, *Reconsidering the Letter of Marque: Utilizing Private Security Providers Against Piracy*, 39 PUB. CONT. L.J. 411 (2010) (calling for private contractors to play a bigger role in maritime security).

would consist of roughly ten to twelve-person detachments that would be inserted onto merchantmen shortly before they entered the high risk zone, provide security for the high risk transit, and then transferred to a new vessel as soon as practicable. Rather than the present handful of nations deploying a few dozen warships, seafaring and landlocked nations alike would contribute large numbers of troops supported by a handful of warships. This Article will demonstrate that history, recent practice, and statements by policymakers and industry spokesmen alike, commend the use of MSTs.²⁷

This Article proceeds in five further parts. Part II briefly details the toll that piracy has taken on the international community and domestic Somali society. Part III outlines the legal frameworks available for combating piracy and describes the current antipiracy efforts. Part IV discusses and critiques previous proposals to reform antipiracy efforts. Part V introduces sets forth this Article's prescriptive contribution to the antipiracy debate—the concept of MSTs. Part VI briefly concludes.

II. THE INTERNATIONAL AND DOMESTIC COSTS OF SOMALI PIRACY

Over the past five years, piracy has exacted a heavy toll from the international and domestic Somali communities. This part breaks down the economic costs to the shipping industry, which are passed to the consumers, and the human cost to mariners of capture and detention under deplorable conditions. This part also documents the distortive and damaging effect of piracy on Somali society.

A. ECONOMIC AND HUMAN COST OF PIRACY TO THE GLOBAL COMMUNITY

The economic costs attributable to piracy can be broken down into three main categories: market delays, insurance, and ransom-related expenses. Shipping companies seeking complete immunity from piratical threats have only one real alternative—rerouting to avoid the Suez Canal, Gulf of Aden, and western Indian Ocean entirely. Since these waterways carry “7.5 percent of the world's seaborne trade and 30 percent of Europe's

27. Again, I accept that the best long-term solution to piracy combines a vigorous criminal adjudication process with robust development efforts. But neither of those will have any short-term effect and endangered mariners deserve immediate protection. MSTs would provide that short-term solution.

oil,”²⁸ any disruption has serious commercial implications globally by delaying the delivery of goods to market.

In 2008, the large Danish shipper AP Moller-Maersk (“Maersk”) announced that its most vulnerable ships, including its fleet of oil tankers, would no longer transit the Gulf of Aden, and would instead be rerouted around the Cape of Good Hope.²⁹ Since then, several other shippers have joined Maersk in charting courses away from Somalia.³⁰ These modifications result in significantly longer transit times, thereby increasing operating costs. For example, sailing around the Cape of Good Hope adds approximately 2,700 miles to a voyage from the Persian Gulf to the United States, or about fifteen to twenty days from the Persian Gulf to Europe.³¹ Longer voyages also greatly reduce a merchantman’s annual carrying capacity. For vessels carrying cargos of core goods like grain or oil, the effects of these delays are felt well beyond the shipping industry because global commodity prices adjust upward.³² Rerouting is estimated to reduce the delivery capacity of the global merchant fleet by 17 percent³³ and cost nearly \$3 billion each year.³⁴

The maritime industry’s piracy related insurance costs have skyrocketed over the last few years.³⁵ In particular, base premiums on

28. Kontorovich, *supra* note 23, at 250.

29. Graham Tibbets, *Somali Pirates Force Shipping Firm Maersk to Reroute Vessels Away from Gulf of Aden*, TELEGRAPH (London), Nov. 21, 2008, <http://www.telegraph.co.uk/news/worldnews/piracy/3494201/Somali-pirates-force-shipping-firm-Maersk-to-reroute-vessels-away-from-Gulf-of-Aden.html>.

30. Bowden et al., *supra* note 15, at 12. In some instances, these modifications may have been forced on shippers by insurers who refused to cover voyages through geographic regions within the range of pirates. Christopher M. Douse, Comment, *Combating Risk on the High Sea: An Analysis of the Effects of Modern Piratical Acts on the Marine Insurance Industry*, 35 TUL. MAR. L.J. 267, 288 (2010).

31. Bowden et al., *supra* note 15, at 13. Depending upon the voyage, this may equate to an increase in travel time by 30 percent. Robert S. Jeffrey, *An Efficient Solution in a Time of Economic Hardship: The Right to Keep and Bear Arms in Self-Defense Against Pirates*, 41 J. MAR. L. & COM. 507, 510 (2010).

32. See Kontorovich, *supra* note 23, at 252 (“[Pirate] attacks also raise the price of commodities, so that even nations not directly involved in shipping suffer.”).

33. Bowden et al., *supra* note 15, at 13.

34. *Id.* at 14 tbl.4.

35. Shippers have not suffered these insurance costs in silence. Some have recouped part of the expense by levying a “piracy tax” on each container carried on their ships transiting the Gulf of Aden. See Kraska & Wilson, *The Pirates of the Gulf of Aden*, *supra* note 11, at 249 (estimating that the piracy tax of \$23 per container on a ship holding 10,000 containers “could top \$300,000 for a single transit, impacting the delivery cost of electronics, clothing, cars and food”).

voyages transiting the Suez Canal and Gulf of Aden substantially increased.³⁶ In addition, shippers now face the costs of carrying special “war risk insurance” and “kidnap and ransom” coverage.³⁷ War risk charges alone may amount to \$150,000 per ship per voyage.³⁸ Even as more shippers purchase kidnap and ransom policies, the heightened risk of payment on the policy has led to a tenfold increase in premiums in only two years.³⁹ The cost of hull insurance—policies that cover physical damage to the ship—has doubled.⁴⁰ One commentator also noted that insurance might perversely lead shippers not to resist pirate attacks or undertake rescue efforts.⁴¹ Because most policies “do not allow claims to be filed for expenses associated with rescuing or averting loss,” it may be more financially expedient for shippers to avoid any defensive costs and instead write-off a captured ship and its cargo.⁴²

Aside from the expense of rerouting ships and insuring voyages, significant expense accompanies the ransom of a pirated vessel. Perhaps the most obvious expenditure is the ransom payment itself. Ransom payments are either dropped by light aircraft to pirates ashore or sent by electronic wire transfer and then quickly laundered through criminal networks.⁴³ A representative of the European Union naval force lamented, “the size of ransoms is rising inexorably.”⁴⁴ Between 2005 and 2010, the average ransom paid to secure the release of a vessel and crew rose from \$150,000 to \$5.4 million.⁴⁵ Although some scholars have criticized

36. Douse, *supra* note 30, at 286, 288.

37. *Id.* at 286. Insurers specify war risk areas and levy additional charges on ships transiting these geographic regions. The Gulf of Aden, Horn of Africa, and Indian Ocean were designated war risk areas. *See* Bowden et al., *supra* note 15, at 14.

38. Bowden et al., *supra* note 15, at 10. War risk charges from \$25 to \$100 per cargo container—a hefty sum for ships that can carry thousands of containers. *Id.* at 11.

39. *Id.* at 11.

40. *Id.*

41. Geoffrey Christopher Rapp, *Salvage Awards on the Somali Coast: Who Pays for Public and Private Rescue Efforts in Piracy Cases?*, 59 AM. U. L. REV. 1339, 1401 (2010).

42. *Id.* *See also* Gotthard Gauci, *Piracy and Its Legal Problems: With Specific Reference to the English Law of Marine Insurance*, 41 J. MAR. L. & COM. 541 (2010) (describing various definitional gaps and ambiguities relating to piracy coverage in maritime insurance policies).

43. *Piracy: No Stopping Them*, ECONOMIST (London), Feb. 3, 2011, <http://www.economist.com/node/18061574/>.

44. *Id.*

45. Bowden et al., *supra* note 15, at 9.

shippers for negotiating with pirates and paying ransoms,⁴⁶ a ransom may be economically justified compared with a total write-off of ship and cargo.⁴⁷

Nonetheless, the ransom payment represents just a fraction of the ship owner's total outlays arising from the seizure of a vessel.⁴⁸ Other expenditures include negotiation fees, arranging for the physical delivery of the ransom, chartering a new crew, and psychological counseling for those crewmembers held by pirates.⁴⁹ A cargo owner may also pay significant damages based on failure to meet contractual obligations to the cargo's end purchaser.⁵⁰

A straight economic impact study of piracy would fail to account for the suffering of captured mariners. In 2010, Somali pirates took hostage over 1000 seafarers of many nationalities and killed eight of them.⁵¹ At the end of March 2011, nearly 600 of them remained hostages.⁵² If captured, mariners can expect to be held for three to four months on average.⁵³

Adding to the emotional toll, hostages are sometimes held in deplorable conditions and treated badly.⁵⁴ Those lucky enough to be released reported that they were held at gunpoint,⁵⁵ malnourished,⁵⁶ and

46. See Sterio, *supra* note 17, at 1452 (arguing that shipping companies have counterproductively "exacerbated the problem of Somali piracy by paying increasingly high ransoms").

47. See Rapp, *supra* note 41, at 1400 ("Even a small chance of a total loss for a ship (or massive liability in the event of a petrochemical spill or similar disaster) far outweighs a seven-figure payout to modern-day pirate gangs.") (internal citation omitted).

48. See Greg Torode, *Ransom Payment in a Sea of Costs*, S. CHINA MORNING POST, Nov. 22, 2009 (estimating the ransom payment as only 25 to 30 percent of the total expenditures arising from a vessel's seizure).

49. Bowden et al., *supra* note 15, at 9–10.

50. For example, while the *M/V CEC Future* was hijacked and awaiting ransom, delivery of McDermott International's cargo onboard the *Future* was delayed for months. This caused McDermott to incur \$15 million in replacement costs for new cargo and risk paying liquidated damages for breach of contract to the cargo's ultimate purchaser. Gov't's Sentencing Mem., *United States v. Ibrahim*, No. 10-231(PLF), 2010 WL 6430188 (D.D.C. Nov. 22, 2010).

51. INT'L MAR. BUREAU, ANNUAL REPORT, *supra* note 12, at 11 tbl.8.

52. ICC INT'L MAR. BUREAU, 2011 FIRST QUARTER REPORT, *supra* note 2, at 19.

53. Bowden et al., *supra* note 15, at 9.

54. See James Kraska & Brian Wilson, *Piracy Repression, Partnering and the Law*, 40 J. MAR. L. & COM. 43, 45 (2009) [hereinafter Kraska & Wilson, *Piracy Repression, Partnering and the Law*] (relating how one former captive said, "I wouldn't even wish this for my enemies").

55. See *id.* at 45 (reporting that captives were "kept at gunpoint 24 hours").

subjected to psychological abuse. In one egregious incident, a pirate captain threatened to cut up a captive “in spare parts and sell his organs.”⁵⁷ Another hostage was forced to call his ill and pregnant wife to relay the pirates’ demand for ransom money.⁵⁸ One merchant captain was beaten because his captors mistook a coffee maker for a satellite phone.⁵⁹ A British couple captured on their yacht by pirates was beaten viciously during captivity. The husband and wife were whipped with a tree root by the pirate-gang leader, who also smashed the back of his rifle into her jaw, shearing off a tooth.⁶⁰

The psychological trauma of hostages does not end with release. Some suffer from post-traumatic stress disorder and are severely incapacitated.⁶¹ Others are extremely reluctant to return to their profession. One ship captain, who returned to sea after his release, said that subsequent moments of parting from his family “turn into torture and panic.”⁶² As knowledge spreads of the conditions in which hostages are held and of the long-term scars, shippers may face increasing difficulties in finding crewmembers willing to brave the journey.⁶³

B. PIRACY’S EFFECT ON SOMALI SOCIETY

Beyond the international community, piracy has a damaging effect on domestic stability in Somalia, frustrating efforts to create a functioning nation-state. Nearly all Somalis who become pirates are driven by economic necessity.⁶⁴ One fisherman-turned-pirate described his career change: “I [saw] friends doing piracy and getting rich . . . I thought I’d give it a try.”⁶⁵ Locals also aid the endeavor from shore “by contributing money,

56. Taiwanese crewmen of a captured fishing trawler reported being “forced to eat rice with sand in it and to drink water mixed with diesel fuel and salt water.” Gov’t’s Sentencing Mem., *United States v. Muse*, No. 1:09CR00512, 2011 WL 523404 at *8 (S.D.N.Y. Feb. 9, 2011).

57. *Id.*

58. Kate McGeown, *Somali Piracy Takes Heavy Toll on Philippine Sailors*, BBC NEWS, Dec. 18, 2011, <http://www.bbc.co.uk/news/world-asia-pacific-15259042>.

59. *Id.*

60. Gettleman, *supra* note 9, at 38.

61. Gov’t’s Sentencing Mem., *United States v. Muse*, *supra* note 56, at 12.

62. Gov’t’s Sentencing Mem., *United States v. Ibrahim*, *supra* note 50, at 4.

63. *See Sterio*, *supra* note 17, at 1456 (“[S]ome crewmembers may simply be unwilling to expose their own lives to the dangers posed by piracy.”).

64. *Piracy: No Stopping Them*, *supra* note 43.

65. Scott Baldauf, *Pirates, Inc.: Inside the Booming Somali Business*, CHRISTIAN SCI. MONITOR, May 31, 2009, <http://www.csmonitor.com/World/Africa/2009/0531/p06s03-woaf.html>.

weapons, or other materials” in exchange for a share in any ransoms.⁶⁶ In a country where the average annual income is \$500, a pirate may net approximately \$33,000 to \$79,000 per year.⁶⁷ Indeed, in 2010, pirates collectively reaped more than \$238 million in ransom payments.⁶⁸

Far from modern-day Robin Hoods, Somali pirates and their supporters act to the detriment of local society. The elders, who traditionally led Somalia’s clan-based society, “disapprove of high-seas robbery.”⁶⁹ Young pirates flush with cash spend money on khat (a narcotic) and prostitutes.⁷⁰ Although there is evidence that some port towns that play host to the pirates derive a tangible benefit,⁷¹ it is one not enjoyed by much of the country’s impoverished population.

Due to the upsurge in piracy, humanitarian aid shipments to Somalia, including those of the World Food Program, have decreased 50 percent.⁷² Somalia’s foreign minister recently characterized the plight of the country’s people as “a double tragedy.”⁷³ Not only has piracy led to a decrease in the number of aid ships reaching Somalia, but also the Somali people “pay much higher prices for basic necessities [like food, fuel, and medicine] than the rest of the world.”⁷⁴

The presence of pirate-controlled towns also undermines attempts by the Transitional Federal Government (“TFG”) to establish the rule of law in Somalia. Continued piracy in the face of Somali antipiracy laws highlights

66. Sterio, *supra* note 17, at 1451 fn.13.

67. GEOPOLICITY, THE ECONOMICS OF PIRACY: PIRATE RANSOMS & LIVELIHOODS OFF THE COAST OF SOMALIA 12 tbl.1 (2011).

68. *Piracy: No Stopping Them*, *supra* note 43. Somali pirates are dealing with so much cash that they reportedly purchased currency-counting machines to ensure ransom payments contain no forged bills. Michael Nicholson, *Spirit of Adventure: Behind the Rise of the Somali Pirates*, THE TELEGRAPH (London), Feb. 2, 2011, <http://www.telegraph.co.uk/travel/travelnews/8298095/Spirit-of-Adventure-Behind-the-rise-of-the-Somali-pirates.html>.

69. Baldauf, *supra* note 65.

70. *Id.*

71. See Nicholson, *supra* note 68 (reporting that a percentage of ransoms received by pirates operating from Harardhere, a major piracy base, funds the town hospital, school, and other social services).

72. Richard, *supra* note 26, at 422.

73. Deena Kemal Yousef, *Maersk Line’s Piracy Costs to Double*, GULFNEWS, Apr. 22, 2011, <http://gulfnews.com/business/shipping/maersk-line-s-piracy-costs-to-double-1.797523>.

74. *Id.*

the powerlessness of the TFG.⁷⁵ In one glaring example, pirates killed five TFG soldiers, easily defeating their attempt to rescue a Danish family held hostage.⁷⁶ Moreover, pirates may have struck a bargain with the Islamic insurgent group al-Shabaab, paying for the use of Islamic-controlled ports.⁷⁷

III. CURRENT ANTIPIRACY EFFORTS

All efforts to use force to detain pirates must take place under existing legal authority. Part III of this Article first discusses the various U.S. and international legal regimes under which antipiracy efforts can take place. Next, Part III describes the military and criminal justice antipiracy measures currently in place. Finally, Part III illuminates the deficiencies with current antipiracy efforts—insufficient resources, insufficient dexterity in the legal process, and a lack of political will.

A. DOMESTIC AND INTERNATIONAL LEGAL FRAMEWORK FOR ANTIPIRACY OPERATIONS

1. Prosecuting Piracy Under U.S. Law

Piracy is one of only three crimes specifically mentioned in the U.S. Constitution.⁷⁸ Under this express constitutional authorization, Congress created “two distinct offenses: (1) piracy as a violation of a nation’s municipal laws (municipal piracy), and (2) piracy as a violation of the law of nations (general piracy).”⁷⁹ Municipal piracy, requiring a jurisdictional nexus to the U.S., is encompassed within the broader crime of general piracy, which adopts the principle of universal jurisdiction.⁸⁰ In other words, general piracy includes all actions that could be brought as

75. Michael Davey, Note, *A Pirate Looks at the Twenty-First Century: The Legal Status of Somali Pirates in an Age of Sovereign Seas and Human Rights*, 85 NOTRE DAME L. REV. 1197, 1209–10 (2010).

76. *Pirates Threaten to Kill Danish Family*, INDEPENDENT (London), Mar. 12, 2011, <http://www.independent.co.uk/news/world/africa/pirates-threaten-to-kill-danish-family-in-somalia-2239786.html>.

77. Anthony Lloyd & Patrick Hosking, *Somali Pirates to Pay Militants*, AUSTRALIAN, Feb. 25, 2011, <http://www.theaustralian.com.au/news/world/somali-pirates-to-pay-militants/story-e6frg6so-1226011580763>.

78. See U.S. CONST. art. I, § 8, cl. 10. The other two are counterfeiting and treason.

79. *United States v. Hasan*, 747 F. Supp. 2d 599, 606 (E.D. Va. 2010). The U.S. municipal piracy provision is contained in 18 U.S.C. § 1659 (2006) and the general piracy provision is located at 18 U.S.C. § 1651 (2006).

80. *Hasan*, 747 F. Supp. 2d at 606; see also *id.* at 608 (characterizing general piracy as “[t]he paradigmatic universal jurisdiction offense”).

municipal piracy violations plus conduct the municipal statute does not reach.

The general piracy statute, 18 U.S.C. § 1651, ties its breadth to the crime of piracy under the law of nations.⁸¹ The Supreme Court held in 1820 that the statute's core focus is "robbery upon the sea" and declared that it was well established at common law that the offence was independent of any "municipal code."⁸² The use of universal jurisdiction to prosecute pirates reflects the historical understanding that a pirate is a stateless individual and "an enemy of the human race."⁸³ The statute has thus been held "to incorporate . . . any subsequent developments in the definition of general piracy."⁸⁴ As construed, the statute is identical to the prohibition contained in the United Nations Convention on the Law of the Sea ("UNCLOS").⁸⁵

2. Combating Piracy Under International Law

Two sources of international law provide a basis for antipiracy measures: intergovernmental treaties and customary international law. The primary international law framework for combating piracy—and the one recognized by U.S. courts to represent the law of nations with respect to piracy—is UNCLOS.⁸⁶ Described as "a constitution for the world's oceans," UNCLOS provides "a legal and policy architecture" for maritime matters.⁸⁷ Article 101 defines piracy as "any illegal acts of violence or detention, or any act of depredation, committed for private ends" occurring

81. See 18 U.S.C. § 1651 (2006) ("Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.").

82. *United States v. Smith*, 18 U.S. 153, 162 (1820).

83. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1154 (1833). See also *Smith*, 18 U.S. at 162 (noting "the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed this offence against any persons whatsoever").

84. *Hasan*, 747 F. Supp. 2d at 623. But see *United States v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2010) (concluding that 18 U.S.C. § 1651 includes only those piratical acts which Congress and the international community considered at the time of its 1819 enactment).

85. *Hasan*, 747 F. Supp. 2d at 632–33. See generally United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS]. Notably, even though Title 18 tracks UNCLOS's piracy definition, the United States is not yet a state party to UNCLOS.

86. See generally UNCLOS, *supra* note 85.

87. James Kraska, *The Law of the Sea Convention: A National Security Success—Global Strategic Mobility Through the Rule of Law*, 39 GEO. WASH. INT'L L. REV. 543, 543 (2007) [hereinafter Kraska, *The Law of the Sea Convention*].

on the high seas.⁸⁸ The high seas requirement means that piracy “must be committed outside of a state’s territorial waters.”⁸⁹ The definition also includes a type of accomplice liability by proscribing conduct that “incit[es]” or “intentionally facilitate[es]” others in carrying out piratical acts.⁹⁰

As far as enforcement, UNCLOS provides that “[a]ll states shall cooperate to the fullest possible extent in the repression of piracy.”⁹¹ In practical terms, this grants nations “the right, but not the obligation” to pursue and prosecute pirates “with which they have no direct connection.”⁹² Even if a vessel sails under the flag of one nation, warships from another country may carry out a nonconsensual boarding at sea in the name of antipiracy operations.⁹³ There are, however, several noteworthy limitations placed upon state actors. First, UNCLOS only authorizes those actions that take place on the high seas and does not extend to any operations within a nation’s territorial waters.⁹⁴ Second, only warships or other authorized government vessels—not private vessels—may seize suspected pirates.⁹⁵ Third, UNCLOS speaks only of seizing or arresting pirates,⁹⁶ and does not touch on offensive actions.⁹⁷

Although UNCLOS encourages but does not require all nations to combat piracy, its drafters emphasized that dereliction in prosecuting piracy “would be failing in a duty laid upon it by international law.”⁹⁸ There is a sound basis for recognizing such an international-law duty. Because of the ancient prohibition on piracy and the willingness to permit any motivated government to launch an antipiracy campaign, universal

88. UNCLOS, *supra* note 85, at art. 101.

89. Kraska & Wilson, *The Pirates of the Gulf of Aden*, *supra* note 11, at 264.

90. UNCLOS, *supra* note 85, at art. 101.

91. *Id.* art. 100.

92. Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT’L L. 1, 13 (2007).

93. See Kraska & Wilson, *The Pirates of the Gulf of Aden*, *supra* note 11, at 268 (“The convention also permits a right of visit or boarding on the high seas by warships of all nations, even without the consent of the flag state, for the purpose of disrupting certain universal crimes, such as human slave trafficking and maritime piracy.”).

94. UNCLOS, *supra* note 85, at art. 105.

95. *Id.* at art. 107.

96. UNCLOS, *supra* note 85, at art. 105 (referring only to the power to “seize” a pirate or hijacked vessel and “arrest” pirates).

97. Kontorovich, *supra* note 23, at 257.

98. *Id.* at 253.

jurisdiction over pirates is a matter of customary international law.⁹⁹ Thus, any nation would be within its rights to take jurisdiction over pirates.¹⁰⁰

A final source of relevant international law is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (“SUAC”).¹⁰¹ State parties to the SUAC, including the United States, are required to criminalize conduct that constitutes a piratical act. For example, the SUAC requires criminalizing the intentional seizure of a vessel through force or threat of force, as well as the injury or death of anyone aboard the vessel.¹⁰² Criminal liability explicitly extends to attempted conduct and accomplices.¹⁰³ Many flag states of vessels attacked by Somali pirates “are bound by the precise obligations” in the SUAC.¹⁰⁴

3. UN Security Council Resolutions Targeting Piracy

In 2008, as the number of Somali pirate attacks spiked, the United Nations Security Council expended much effort on crafting a response. Through a series of five resolutions,¹⁰⁵ the Security Council sought to animate the domestic and international prohibitions against piracy.¹⁰⁶ The Security Council increasingly broadened its authorization for antipiracy measures, encouraged international cooperation, and identified the appropriate legal framework for piracy prosecutions.

In June 2008, the Security Council first harnessed its power against Somali piracy by passing Resolution 1816.¹⁰⁷ Resolution 1816 authorized nations to enter Somali territorial waters and use “all necessary means to

99. Bahar, *supra* note 92, at 13.

100. *Id.* at 13–14.

101. Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221 [hereinafter SUAC]. The SUAC was adopted in the wake of the deadly hijacking of the *Achille Lauro* by members of the Palestinian Liberation Organization. Tulli Treves, *Piracy, Law of the Sea, and Use of Force: Developments Off the Coast of Somalia*, 20 EUR. J. INT’L L. 399, 410 (2009).

102. SUAC, *supra* note 101, at art. 3.1.1, 3.1.7.

103. *Id.* at art. 3.2.

104. Treves, *supra* note 101, at 410.

105. The five 2008 resolutions on Somali piracy were the most passed by the Security Council on any issue, including North Korea, the fight against terrorism, and the Arab-Israeli conflict. Kontorovich, *supra* note 23, at 247.

106. Treves, *supra* note 101, at 402 (noting how the relevant Security Council resolutions were helping to expand the authority of international law to take action against pirates).

107. S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

repress acts of piracy and armed robbery.”¹⁰⁸ The Security Council identified UNCLOS as the appropriate legal framework to combat piracy.¹⁰⁹ Although the Resolution was effective only for six months,¹¹⁰ it offered “a valuable umbrella of political support and legitimacy” for antipiracy operations.¹¹¹

Four months later, in October 2008, the Security Council passed Resolution 1838, issuing a more strident call to action.¹¹² The Security Council appealed to nations “to take part actively in the fight against piracy . . . by deploying naval vessels and military aircraft.”¹¹³ In contrast to Resolution 1816, Resolution 1838 placed no time limitation on operations and omitted the requirement of cooperation with local Somali authorities.

In November and December 2008, the Security Council passed three more resolutions—each designed to expand international antipiracy efforts. Recognizing that pirates were utilizing a global financial network, it authorized states to freeze the financial assets of pirates and their supporters.¹¹⁴ The Security Council also authorized offensive military action against pirate bases on Somali soil.¹¹⁵ Finally, the Security Council urged nations to fulfill their obligations under the SUAC to adopt appropriate criminal penalties and, if already in place, to accept and prosecute pirates.¹¹⁶

B. INTERNATIONAL OPERATIONAL RESPONSE TO PIRACY

1. Military Action

At any time, about thirty warships patrol the Gulf of Aden and the southern Indian Ocean for pirates.¹¹⁷ These warships fall into one of four separate operational groups. The first group, Combined Task Force 151, is a multinational force operating under command of the U.S. Fifth Fleet in

108. *Id.* ¶ 7. This authorization was accompanied by a proviso that incursions in Somali territory must be coordinated with the TFG. *Id.*

109. *Id.* at 1.

110. *Id.* ¶ 7.

111. Kraska & Wilson, *The Pirates of the Gulf of Aden*, *supra* note 11, at 274.

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

113. *Id.* ¶ 2.

114. S.C. Res. 1844, ¶¶ 3, 8, U.N. Doc. S/RES/1844 (Nov. 20, 2008).

115. S.C. Res. 1851, ¶ 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008). As with Resolution 1816, incursions into Somali territory must be coordinated with the TFG. *Id.*

116. S.C. Res. 1846, ¶ 15, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

117. *Piracy: No Stopping Them*, *supra* note 43.

Bahrain.¹¹⁸ The second group is comprised of warships from NATO members carrying out Operation *Ocean Shield*.¹¹⁹ The third group is a force from European Union member states under Operation *Atalanta*, which escorts World Food Program ships en route to Somali and carries out general piracy suppression.¹²⁰ The fourth group is an ad hoc collection of independent naval deployments by countries such as China, Russia, and India, primarily intended to safeguard their own merchantmen.¹²¹

Each operational group conducts some or all of three kinds of missions: search and destroy, incident response, and convoy escort. A search and destroy mission involves warships patrolling the sea-lanes and known pirate havens in the hopes of encountering and neutralizing ships or equipment that could facilitate a piratical attack.¹²² Incident response occurs when military assets are directed to a vessel that has sent out a distress call.¹²³ Ideally, a military response is able to disrupt an attempted hijacking, but naval intervention stops only about 20 percent of piratical attacks.¹²⁴ Once a ship is hijacked, the military options become limited to a hostage rescue operation by Special Forces.

118. See Kraska & Wilson, *The Pirates of the Gulf of Aden*, *supra* note 11, at 243–44 (“The goal of CTF-151 is to deter, disrupt, and criminally prosecute those involved in piracy, and several nations, including Turkey, already have joined.”).

119. See *Operation Ocean Shield*, NATO, <http://www.aco.nato.int/page208433730.aspx> (last visited Feb. 4, 2012).

120. The Council of the European Union authorized Operation *Atalanta* in November 2008 invoking the authority of the United Nations Security Council resolutions, as well as the Convention on the Law of the Sea. Council Joint Action 2008/851/CFSP of 10 Nov. 2008, art. 2, 2008 O.J. (L301) 33, 35. The E.U. force was specifically authorized to “take the necessary measures, including the use of force” to carry out its mission. *Id.* at 35.

121. These independent deployments reflect the centrality of maritime commerce to national security. For example, the deployment of the People’s Liberation Army Navy allows China to protect the 1200 Chinese vessels that sail the hostile waters, as well as the merchantmen of all nations that carry “one-third of [China’s] sea-bound trade.” Kraska & Wilson, *The Pirates of the Gulf of Aden*, *supra* note 11, at 244.

122. For an example of a search and destroy mission, see Press Release, Allied Maritime Command Headquarters, NATO, *NATO Warship Intercepts Pirate Mother Ship and Frees 15 Hostages* (May 10, 2011), <http://www.manw.nato.int/pdf/Press%20Releases%202011/Press%20releases%20Jan-June%202011/SNMG2/10%2005%2011%20GB%20PAO%20%207%20Pirates%20surrender%20to%20NATO.pdf>.

123. For an example of an incident response, see Press Release, Allied Maritime Command Headquarters, NATO, *NATO Successfully Rescues the Crew of MV Montecristo* (Oct. 11, 2011), <http://www.manw.nato.int/pdf/Press%20Releases%202011/NATO%20Press%20release%2011102011%20NATO%20rescues%20MV%20Montecristo%20Crew%20v2.pdf>.

124. *Piracy: No Stopping Them*, *supra* note 43.

Convoy escorts involve military ships escorting cargo ships through known pirate infested waters. With the exception of the E.U. forces escorting World Food Program vessels, convoy operations are the purview of independent naval deployments and generally are not undertaken by the U.S., NATO, or E.U. forces.¹²⁵ Convoys are organized primarily for the benefit of the escorting nation's merchantmen.¹²⁶ Many convoys, however, permit merchantmen from other nations to attach themselves provided that they register in advance and adhere to strict sailing deadlines.¹²⁷

2. Criminal Prosecutions

Over the past few years, naval forces have captured large numbers of suspected pirates. As set forth in both the Security Council's resolutions and UNCLOS, the criminal justice prong of the antipiracy effort, comes into play. Early on, Kenya agreed to host the trials of suspected pirates by exercising universal jurisdiction.¹²⁸ By 2010, 105 piracy suspects were on trial in Kenya and 18 had been convicted.¹²⁹ Recently, however, efforts to prosecute pirates in Kenya have suffered setbacks from resource

125. See Gerrard Cowan, *Deter and Disrupt: NATO in the Gulf of Aden*, JANE'S DEFENSE WKLY, Nov. 9, 2009. Although U.S., NATO, and E.U. forces typically do not undertake convoy duties per se, they do patrol the Internationally Recommended Transit Corridor through the Gulf of Aden. Int'l Maritime Org., *Piracy and Armed Robbery Against Ships in Waters Off the Coast of Somalia: Information on Internationally Recommended Transit Corridor (IRTC) For Ships Transiting the Gulf of Aden*, SN.1/Circ.281 (Aug. 3, 2009).

126. For an example of convoy activities, including requirements for merchant vessels to join the escort, see *Worldwide Threat to Shipping Report: 15 Mar – 13 Apr 2011*, OFFICE OF NAVAL INTELLIGENCE, U.S. NAVY, Apr. 14, 2011, http://msi.nga.mil/MSISiteContent/StaticFiles/MISC/wwtts/wwtts_20110414100000.txt.

127. See *id.* For example, the South Korean navy warned vessels that even a delay of two hours in reaching the rendezvous point would preclude them from joining the convoy. *Id.* at 3.

128. See Mike Pflanz, *At Last, A Court for Somali Pirates*, CHRISTIAN SCI. MONITOR, July 12, 2010, <http://www.csmonitor.com/World/Africa/2010/0708/At-last-a-court-to-try-Somali-pirates> (describing the agreements); Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM. J. INT'L L. 436, 445 tbl.3 (2010) (reporting that between November 2008 and November 2009, thirteen Kenyan piracy prosecutions relied on universal jurisdiction).

129. Pflanz, *supra* note 128.

constraints¹³⁰ and a Kenyan lower court's ruling that it lacks jurisdiction to try pirates.¹³¹

Other countries have accepted the burden of prosecuting and incarcerating pirates on a limited, case-by-case basis. The U.S. has exercised jurisdiction and tried dozens of pirates, usually when the underlying conduct involves American citizens, cargo, or vessels.¹³² For example, U.S. prosecutors recently charged a Somali pirate negotiator for his role in the murder of four Americans by pirates.¹³³ Other nations, including Spain,¹³⁴ South Korea,¹³⁵ and India,¹³⁶ have on occasion opened prosecuted piracy defendants in their national criminal justice systems. Although many prosecutions take place only when a state can exercise specific jurisdiction through the involvement of its flagged vessels¹³⁷ or citizen-nationals in a piratical attack, some prosecutions have occurred under the exercise of universal jurisdiction.¹³⁸

130. See JAMES KRASKA, CONTEMPORARY MARITIME PIRACY: INTERNATIONAL LAW, STRATEGY & DIPLOMACY AT SEA 179 (2011) (noting that Kenya now agrees to prosecute pirates captured by third-party navies "on a case-by-case basis").

131. See Jillo Kadida, *Judge is Accused of Delaying Pirates Case*, STAR (Nairobi), Oct. 19, 2011, <http://www.the-star.co.ke/national/national/45199-judge-is-accused-of-delaying-pirates-case>.

132. See, e.g., *United States v. Hasan*, 747 F. Supp. 2d 599, 601, 642 (E.D. Va. 2010) (permitting a piracy prosecution against several Somali pirates who opened fire on the *USS Nicholas*); *United States v. Ali*, 793 F. Supp. 2d 386, 387 (D. D.C. 2011) (attack on a vessel carrying cargo belonging to a U.S. corporation).

133. *United States v. Shibin*, Criminal No. 2:11cr33, 2012 WL 195012 (E.D. Va. Jan. 23, 2012).

134. See *Spain Sentences Somali Pirates to 439 Years' Jail Each*, BBC NEWS, May 3, 2011, <http://www.bbc.co.uk/news/world-europe-13272669> (reporting that two Somali pirates were sentenced to 439 years imprisonment each for their role in hijacking a Spanish fishing vessel and its crew).

135. See *5 Somali Pirates Brought to South Korea for Trial*, USA TODAY, Jan. 30, 2011, http://www.usatoday.com/news/world/2011-01-29-pirates-korea_N.htm (reporting that five Somalis accused of hijacking a South Korean cargo vessel would stand trial).

136. See *Somali Pirates Handed Over to Indian Police*, BBC NEWS, Feb. 10, 2011, <http://www.bbc.co.uk/news/world-south-asia-12414734> (noting that Indian authorities had arrested for trial twenty-eight Somalis captured in the Indian Ocean and suspected of piracy).

137. A vessel's "flag state" is "[t]he state under whose flag a ship is registered. BLACK'S LAW DICTIONARY 714 (9th ed. 2009).

138. See Rb. Rotterdam, 17 juni 2010, LJN: BM8116, 10.600012-09 (Neth.), <http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BM8116> (confirming that under domestic Dutch and international law, Dutch authorities are empowered with universal jurisdiction to prosecute pirates).

C. INSUFFICIENCY OF CURRENT ANTIPIRACY EFFORTS

1. Too Few Forces for Too Great an Expanse of Ocean

Even though over twenty warships are conducting antipiracy patrols off the coast of Somalia, these ships cover but a small fraction of more than two million square miles of affected ocean.¹³⁹ To make matters worse, pirates have utilized captured vessels as motherships to increase their sea range enabling recent attacks that “have been closer to India than to Somalia.”¹⁴⁰ An estimated sixty ships, or more, are necessary to adequately protect the Horn of Africa.¹⁴¹ But coming up with substantial numbers of additional forces is unlikely given the free rider problem of uncommitted nations reaping the benefits of others’ efforts without increasing their own defense spending.¹⁴²

The inadequacy of the current force is obvious when considered against the reality that a warship must be within fifteen to thirty minutes of a vessel in distress to provide effective assistance to repel a pirate attack.¹⁴³ For example, the Turkish frigate Giresun, operating as part of NATO’s Operation Ocean Shield, illustrates this point.¹⁴⁴ In the early morning hours of April 20, 2011, the Giresun responded to a distress call from a Korean merchantman that it was under attack by pirates.¹⁴⁵ Dispatching its helicopter to the scene, the Giresun moved to assist but found no pirates aboard.¹⁴⁶ While investigating the scene on the Korean ship, the Giresun received another distress call from the Italian MV Rosalia D’Amato, also under attack by pirates.¹⁴⁷ Even though the Giresun sailed at maximum speed toward the Rosalia D’Amato, it was unable to intercept her and

139. Kraska & Wilson, *The Pirates of the Gulf of Aden*, *supra* note 11, at 250.

140. Christopher P. Cavas, *USN Chief: ‘We’ll Continue to Pursue Pirates,’* DEFENSENEWS, Feb. 28, 2011. *See also Piracy: No Stopping Them*, *supra* note 43 (describing one attack that occurred 1300 miles east of Somalia, near the coast of India).

141. John Patch, *Send the Warships Home*, ARMED FORCES J., Apr. 2010, at 28, 29.

142. For example, Norway, one of the top ten shipping nations, has declined to play a significant role in the antipiracy operations. *See* Gerard O’Dwyer, *Nordic Shippers Call for Military Forces to Guard Vessels*, DEFENSENEWS, Feb. 28, 2011.

143. Jennifer S. Martin, *Fighting Piracy with Private Security Measures: When Contract Law Should Tell Parties to Walk the Plank*, 59 AM. U. L. REV. 1363, 1366 (2010).

144. News Release, NATO Allied Maritime Command Headquarters, NATO Warship Disables Pirate Group After Attack on Merchant Ship (Apr. 21, 2011), *available at* <http://www.aco.nato.int/page42420371.aspx>.

145. *Id.*

146. *Id.*

147. *Id.*

disrupt the hijacking.¹⁴⁸ All the warship could do was destroy the now-abandoned skiff that had been used to seize the merchantman.¹⁴⁹ Despite the Giresun dashing about in a limited area of ocean, the pirates were still able help themselves to a prize.

2. Ineffective Criminal Justice Remedies

The use of military forces is undercut by a lack of international commitment to prosecuting captured piracy suspects.¹⁵⁰ Although naval forces operating in the area have captured large numbers of pirates,¹⁵¹ 90 percent of them are released for want of prosecution.¹⁵² A Finnish warship, for example, put ashore eighteen Somalis it had captured during a hijacking attempt because no state stepped forward to take custody and prosecute them.¹⁵³ In one of its resolutions targeting Somali piracy, the Security Council expressed deep concern about “the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture.”¹⁵⁴

The failure to build a streamlined and effective criminal justice process for piracy suspects can be traced back to several causes. First, an evidentiary problem arises when naval forces encounter suspected pirates on the high seas who are not committing an immediate act of piracy. As one commentator pithily described the conundrum, “International law does not criminalize being on a Somali fishing vessel, even if the only pieces of ‘fishing equipment’ on board are AK-47s and RPGs.”¹⁵⁵ Even when continued surveillance reveals that a suspected pirate mothership is “not out there for a Sunday afternoon sail,” military commanders perceive an

148. *Id.*

149. *Id.* (ironically NATO viewed the simple destruction of the pirate skiff as a victory).

150. Recall that under international law, piracy is deemed a criminal justice problem.

151. By one estimate, approximately 500 to 700 pirates were captured between 2008 and 2011. *Piracy: No Stopping Them*, *supra* note 43.

152. Patrick Worship, *U.N. Security Council Backs Somali Piracy Courts*, REUTERS, Apr. 11, 2011, <http://www.reuters.com/article/2011/04/11/somalia-piracy-un-idUSN1110223120110411>.

153. Press Release, EU NAVFOR, EU NAVFOR Releases Suspected Pirates After Prosecution Attempts Prove Unsuccessful (Apr. 21, 2011), <http://www.eunavfor.eu/2011/04/eu-navfor-releases-suspected-pirates-after-prosecution-attempts-prove-unsuccessful>. This is far from the only example of suspected pirates simply being placed ashore. *See, e.g.*, Davey, *supra* note 75, at 1212 (“On a number of occasions, the Danish Navy has released suspected pirates captured off the Somali coast onto the beach after concluding that the Danish government did not have jurisdiction over the pirates.”).

154. S.C. Res. 1851, *supra* note 115, at 2.

155. Kontorovich, *supra* note 23, at 257.

inability to act because the suspects have not yet “committed an act of piracy.”¹⁵⁶ Indeed, NATO standing orders dictate that “[p]irates are only arrested if they are caught attacking or attempting to board a ship; otherwise, [NATO forces] will simply dispose of their grappling ladders, weaponry and excess fuel.”¹⁵⁷ Thus, even though the SUAC extends criminal liability to attempts to commit piracy, the operating orders for forces in the area limit the temporal and legal scope of liability to overt acts of piracy.

Second, it seems that piracy prosecutions are incompatible with E.U. human rights law. Many warships on antipiracy patrol are from E.U. nations.¹⁵⁸ Some of these warships were instructed by their home governments that if pirates were transported back to Europe for prosecution, they would be able to claim asylum.¹⁵⁹ As a result, not only have naval forces released pirates, but also, under the tradition of helping seafarers in need, they ensured pirate skiffs were adequately provisioned to make the trip back to shore.¹⁶⁰

Finally, a resource commitment is necessary to prosecute all those Somalis engaged in piracy. Estimates place the number of active Somali pirates somewhere between 1400¹⁶¹ and 2000 people.¹⁶² The prosecution costs for 2000 pirates, including transporting evidence and witnesses from halfway around the globe, providing a defense, and dedicating prosecutors and investigative agents to the cases, would likely be exorbitant. Further, prosecution costs are minimal compared with the expense of post-conviction imprisonment. For example, the cost to incarcerate 1500 Somali

156. James Thuo Gathii, *The Use of Force, Freedom of Commerce, and Double Standards in Prosecuting Pirates in Kenya*, 59 AM. U. L. REV. 1321, 1338 (2010) (quoting a rear admiral in the British Royal Navy).

157. Cowan, *supra* note 125. The strategy seems guided by a belief in the power of mild attrition. Take away the tools of piracy enough times and, in the words of one Royal Navy officer, “eventually [the pirates are] going to run out of enthusiasm.” *Id.*

158. See Pflanz, *supra* note 128.

159. See *id.* (“[M]ost Western nations have been wary of agreeing to capture pirate suspects, many of whom were expected to claim asylum in the countries where a trial is held.”).

160. See *Piracy: No Stopping Them*, *supra* note 43 (describing how warships were “ensuring [released suspected pirates] have enough fuel and other supplies to get home and, on more than one occasion, helping with engine repairs”).

161. See Kraska & Wilson, *The Pirates of the Gulf of Aden*, *supra* note 11, at 246 (estimating that in 2009, 1400 Somali men were pirates).

162. Frank Langfitt, *Inside the Pirate Business: From Booty to Bonuses*, NPR, Apr. 15, 2011, <http://www.npr.org/2011/04/15/135408659/inside-the-pirate-business-from-booty-to-bonuses> (estimating that up to 2000 Somalis were in the piracy trade).

pirates in the U.S. federal system, assuming each pirate receives at least a twenty-year sentence, would amount to an estimated \$750 million.¹⁶³

Thus, after several years of increased antipiracy efforts, the international community has little to show for its efforts. Although jurisdiction for prosecuting pirates is well established and its use is repeatedly encouraged by the Security Council, far fewer pirates are being prosecuted than would be necessary to decrease the threat in a meaningful way. Despite multinational naval forces patrolling the Gulf of Aden and western Indian Ocean at a cost of almost \$2 billion annually, the forces simply cannot provide a wide enough security blanket for all merchantmen. It is clear that the current strategy will have to be modified to respond to an undiminished threat—but how?

IV. PREVIOUS PROPOSALS FOR REFORMING ANTIPIRACY EFFORTS

With the inefficacy of current antipiracy efforts readily apparent, it is no surprise that many alternative strategies have been proposed. This Article does not contest the proposed long-term solution to piracy that focuses on combatting the endemic poverty and lawlessness in the Horn of Africa.¹⁶⁴ Such a resource and time-intensive solution is likely beyond the current capabilities and political will of the global community. Rather, this

163. This was calculated using the average \$70.59 per day cost to detain a federal inmate in fiscal year 2010 and multiplying by 1500 potential inmates serving twenty-year sentences. U.S. DEP'T OF JUSTICE, ANNUAL FINANCIAL STATEMENTS FISCAL YEAR 2010 AUDIT REPORT 11-03, at 15 (2011), available at <http://www.justice.gov/oig/reports/plus/a1103.pdf>.

164. The basic long-term framework involves stabilizing Somali society through economic and rule of law development efforts. In terms of prosecutorial efforts, a truly international criminal justice process that forces countries to equally bear the costs of antipiracy enforcement must be established. Fortunately, there are encouraging signs that prosecutorial capacity may be increased. In April 2011, the Security Council passed Resolution 1976, prescribing legal institutional development. S.C. Res. 1976, U.N. Doc. S/RES/1976 (Apr. 11, 2011). But many challenges must be overcome before implementation, particularly the need for a system on a large enough scale to process thousands of putative defendants. For the sake of comparison, as of January 2012, the International Criminal Tribunal for the former Yugoslavia had completed only 126 trials since its inception in 1993. Key U.N. INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, KEY FIGURES IN ICTY CASES (last updated Jan. 11, 2012), available at <http://www.icty.org/sections/TheCases/KeyFigures>. Incidentally, when Britain sought to combat piracy in the Golden Age of Piracy in the seventeenth and eighteenth centuries, her most effective efforts were legal reforms making it easier to convict pirates. See generally Peter T. Leeson, *Rationality, Pirates, and the Law: A Retrospective*, 59 AM. U. L. REV. 1219 (2010).

part of the Article focuses on short-term, feasible reforms that would yield immediate benefits. Thus, this Part critiques the reform proposal with the most traction—the increased use of private security forces to secure vessels against the threat of piracy.

A. SHORT-TERM PRIVATE SECTOR SOLUTIONS

The only serious proposals that would make an immediate impact would shift the point of action toward the private sector and away from government efforts. In a viewpoint shared by some politicians and members of the military,¹⁶⁵ numerous commentators have argued that future antipiracy efforts should rely heavily on the private sector.¹⁶⁶ There are two main proposals for the private sector to provide armed defensive capabilities to merchant fleets: raising private navies and placing security contractors aboard ship.

1. Private Armed Vessels

Harkening back to times when the British East India Company maintained an armed fleet to protect its merchantmen,¹⁶⁷ the idea of private escort vessels has reemerged. Perhaps the most comprehensive plan for their employment is the “Convoy Escort Program” being developed by a group of leading London insurers, including Lloyd’s.¹⁶⁸ The program would be administered through a non-profit entity and would ultimately control eighteen vessels “each with a fixed gun position and an armed crew

165. U.S. politician Ron Paul has publicly called for issuing letters of marque “to disable and capture those engaged in piracy.” Richard, *supra* note 26, at 413–14 (quoting Paul). Similarly, the commander of U.S. naval forces in Europe and Africa recently commented that “[i]t is up to the commercial industry to figure out how to deal with this” and suggested private security forces. Meredith Buel, *US Admiral: Commercial Ships Need Armed Guards to Fight Pirates*, VOICE OF AMERICA, Apr. 21, 2010, <http://www.voanews.com/english/news/US-Admiral-Commercial-Ships-Need-Armed-Guards-to-Fight-Pirates-91719979.html>.

166. See, e.g., Jeffrey, *supra* note 31, at 508; Richard, *supra* note 26, at 416; Michael G. Scavelli, Note, *Uncharted Waters: The Private Sector’s Fight Against Piracy on the High Seas*, 76 BROOK. L. REV. 343, 345 (2010) (“Shipping companies should—and can—minimize the threat of piracy to commercial vessels while also taking adequate precautions to prevent both criminal and civil liability.”).

167. For a full account of the British East India Company’s naval activities, see CHARLES RATHBONE LOW, *HISTORY OF THE INDIAN NAVY (1613-1863)* (London, Richard Bentley & Son 1877).

168. *Private Fleet to Target Pirates*, THE AUSTRALIAN, Feb. 19, 2011, <http://www.theaustralian.com.au/news/world/private-fleet-to-target-pirates/story-e6frg6so-1226008393607>.

authorized to engage pirates in battle.”¹⁶⁹ The group is reportedly developing an operational plan that would place the fleet under the control of a national navy and ensure that it conformed to internationally accepted notions on rules for the use of force.¹⁷⁰

Aside from an organized fleet, other initiatives would permit individual vessels to operate in a defensive—or offensive—capacity. Several private security firms, including XE Services (formerly known as Blackwater), offer maritime escort vessels.¹⁷¹ Other proposals call for private vessels to take a more offensive role to seek out and capture or destroy pirate vessels, however, the legality of this approach under both international and U.S. law would rely on a congressionally issued letter of marque.¹⁷² A letter of marque would cloak private security providers in the authority of government agents.¹⁷³ Theoretically, holders of the letter could then carry out U.S. government antipiracy policies the same as a commissioned warship.¹⁷⁴

2. Private Armed Guards Aboard Ship

Because floating a private navy does not come without great expense, a more prevalent suggestion is to station armed guards onboard merchantmen.¹⁷⁵ The shipping industry was opposed initially to the presence of armed guards on its ships, fearing that it might escalate violence and increase insurance costs.¹⁷⁶ The industry, however, has

169. *Id.*

170. *Id.*

171. *See, e.g.*, James Kraska & Brian Wilson, *Piracy, Policy, and Law*, PROCEEDINGS MAGAZINE, Dec. 2008, at 1270, available at <http://www.usni.org/magazines/proceedings/2008-12/piracy-policy-and-law> (“Blackwater has fitted out a helicopter-carrying security escort ship—the *MacArthur*—and offered her services to commercial ships transiting the Gulf of Aden.”).

172. *See* Richard, *supra* note 26, at 416; D. Joshua Staub, *Letters of Marque: A Short-Term Solution to an Age Old Problem*, 40 J. MAR. L. & COM. 261, 264–65 (2009) (joining the call for Congress to “issu[e] letters of marque to designate these vessels as licensed combatants (or privateers)”).

173. Richard, *supra* note 26, at 463.

174. *See* UNCLOS, *supra* note 85, at art. 107 (permitting “other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect” to seize suspected pirates).

175. *See* Michael L. Mineau, *Pirates, Blackwater and Maritime Security: The Rise of Private Navies in Response to Maritime Piracy*, 9 INT’L BUS. & L. 63, 68–69 (2010).

176. *See e.g.*, Press Release, Int’l Chamber of Shipping, Shipping Industry Changes Stance on Armed Guards (Feb. 15, 2011), available at <http://www.marisec.org/pressreleases.htm#15feb> (announcing that the company had lifted its former prohibition on the use of armed guards). *See also* text accompanying *infra* note 178.

softened its stance¹⁷⁷ for lack of alternative protective options. In early 2011, the Chairman of the International Chamber of Shipping announced that the organization had stepped back from its prohibition against armed guards and left the decision about whether to employ them to “the ship operator after due consideration of all of the risks”¹⁷⁸ Similarly, national governments from the United Kingdom¹⁷⁹ to India¹⁸⁰ have begun the process to permit private armed guards aboard their flagged vessels.

Contracts to engage the services of private armed guards range from \$25,000 to \$74,000, and depend on the amount of protection and the length of service.¹⁸¹ For some ship owners, at least, the money has been well spent. Of the sixteen attempted hijackings from mid-March to mid-April 2011, none of the three vessels with an armed security team aboard was successfully hijacked.¹⁸² The defensive measures employed by the *Pacific Opal* are typical of those used by private contractors. The vessel was attacked by two skiffs, each manned by six to eight pirates, which deployed from a pirate mothership. In response, the *Pacific Opal*'s security team fired flares and warning shots and one of the skiffs immediately aborted its attack.¹⁸³ The second skiff also turned away after more shots were fired.¹⁸⁴

B. CRITIQUE OF THE PRIVATE SECTOR OPTIONS

The shipping industry understandably turned to self-help measures after giving up hope that national governments would rethink their strategies. But the use of the private sector is fraught with problems. One

177. Nordic shipping companies, for example, first employed private armed guards in 2010. O'Dwyer, *supra* note 142.

178. Press Release, *supra* note 176.

179. See Henry Bellingham, Foreign Office Minister, United Kingdom, Speech to the British Chamber of Shipping on the UK Government's Response to Counter-Piracy (Oct. 12, 2011), available at <http://www.fco.gov.uk/en/news/latest-news/?view=Speech&id=668575182#> (announcing a policy change to develop standards with the hopeful end goal of permitting private armed guards aboard British merchantmen).

180. *Merchant Ships Get Govt Nod to Carry Armed Guards*, TIMES OF INDIA, May 10, 2011, http://articles.timesofindia.indiatimes.com/2011-05-10/mumbai/29527938_1_guards-on-indian-merchant-merchant-ships-govt-nod (reporting that the Indian government had decided to allow armed guards).

181. Sandra Jontz, *Hired Guns Secure Ships, Stir Controversy*, STARS AND STRIPES, Feb. 15, 2010, <http://www.stripes.com/news/hired-guns-secure-ships-stir-controversy-1.98968>.

182. See *Worldwide Threat to Shipping Report: 15 Mar–13 Apr 2011*, *supra* note 126.

183. See *id.* at 4 (describing the attack on the *Pacific Opal* and the vessel's response).

184. *Id.*

industry insider described it as a legal “minefield.”¹⁸⁵ When aggregated, these problems militate against putting private pirate-hunter vessels to sea or increasing the use of private guards aboard ship.

1. Standardized Training and the Use of Force

One of the main questions about employing private contractors is how to achieve and maintain standards for training and the use of force. Unlike military forces that “already have accepted and recognizable command controls and structures,” carriers worry that “private firms do not [have these controls] to the same degree.”¹⁸⁶ No international standards exist for the training and licensing of armed maritime security contractors.¹⁸⁷ Even security industry executives acknowledge the complexity inherent in a fully functional licensing scheme.¹⁸⁸ With their vessels isolated on the high seas, shippers must be able to rely on private contractors to achieve a standard of professionalism akin to that found in government forces.¹⁸⁹ Private security contractors have been known to be less than reliable in some circumstances.¹⁹⁰ Contract law may provide some relief to the shipper against an ineffectual security contract.¹⁹¹ But such post hoc remedies

185. David Hughes, *Indian Ocean Turning Into Wild West*, BUS. TIMES (Singapore), Feb. 23, 2011, at 7.

186. O'Dwyer, *supra* note 142 (quoting the deputy director, Jan Fritz Hansen, of the Danish Shipowner's Association).

187. ST. VINCENT AND THE GRENADINES MARITIME ADMINISTRATION, CIRCULAR N° APIR 006 REV. 1, GUIDANCE TO SHIP OWNERS ON CARRIAGE OF ARMED PERSONNEL FOR SHIP PROTECTION ¶ 1.1 (June 1, 2011), available at <http://www.svg-marad.com/Downloads/Circulars/Anti%20Piracy/APIR%20006%20Guidance%20To%20Shipowners%20On%20Carriage%20Of%20Armed%20Personnel%20-%20Rev.%201.pdf>.

188. See Ian Simpson, *Discussion Meeting - Private Maritime Security: Saviour or Sinner?* INT'L INST. FOR STRATEGIC STUDIES (Nov. 24, 2011), <http://www.iiss.org/events-calendar/2011-events-archive/november-2011/private-maritime-security-saviour-or-sinner/>.

189. See U.S. COAST GUARD, U.S. DEP'T OF HOMELAND SECURITY, PORT SECURITY ADVISORY (5-09) (REV 1) (2009) (specifying the minimum guidelines for security contractors aboard U.S. flagged vessels).

190. A U.K. Foreign Office minister acknowledged that “[m]any [security providers] have a good reputation. But some are cowboys.” Bellingham, *supra* note 179. In one notable instance, the security contractors abandoned the vessel they were charged with protecting, leaving the ship and crew to be captured by pirates. See Daniel Howden & Toby Green, *British Security Guards Jump Ship to Escape Somali Pirates*, INDEPENDENT (London), Nov. 29, 2008, <http://www.independent.co.uk/news/world/africa/british-security-guards-jump-ship-to-escape-somali-pirates-1040257.html> (describing the incident).

191. See Martin, *supra* note 143, at 1374–75 (“In the event that a contract dispute over performance arises between a shipper or owner and a security provider after a pirate attack, the shipper or owner could claim breach of contract for the security contractor's unsuccessful defense of the ship.”).

would not free a captured ship, crew, and cargo.¹⁹² Moreover, due to the myriad of states involved in owning, registering, and operating a vessel, the shipping industry may not be able to rely on a streamlined, unified government licensing or oversight process.¹⁹³

2. Legal Liability Arising Out of the Use of Force

Another potential pitfall arises when security contractors use force in the defense of a ship. In March 2010, private security contractors aboard a Panamanian ship used small arms to deter a pirate attack, killing one pirate in the process.¹⁹⁴ After a use of deadly force, the ship, its crew, and the security contractors “could be delayed or detained over questions about the appropriateness of the use of force.”¹⁹⁵ The use of force in self-defense is generally permitted only in carefully circumscribed scenarios where the vessel faces an “imminent danger of death or great bodily harm.”¹⁹⁶ To address this situation, the U.S. has taken steps to limit any civil liability arising from the use of force defending U.S. flagged vessels against acts of piracy.¹⁹⁷ But to prove effective across the shipping industry, the most prominent seafaring nations would also need to enact comparable civil immunity shields. And it is worth highlighting that these laws do not touch on potential criminal liability.

Of particular concern with the private use of force are those instances that would arise from private armed fleet actions. It is easy to envision a scenario in which a private escort vessel coming across a suspected pirate

192. *See id.*

193. *See* Richard, *supra* note 26, at 454–55 (“Governmental regulation of privatized maritime security is often difficult since the personnel are operating on private vessels, which are, in turn, operating on the high seas and the territorial waters of a variety of countries”). For example, the government of St. Vincent and the Grenadines permits armed security contractors to serve onboard its flagged vessels provided that contractors are “licensed by their National Authorities and also have licenses from local Port Authorities to bring arms onboard.” ST. VINCENT AND THE GRENADINES MARITIME ADMINISTRATION, *supra* note 187, ¶ 2.2.

194. Scott Baldauf, *Commercial Ship Strikes Back in Deadly Shootout with Somali Pirates*, CHRISTIAN SCI. MONITOR Mar. 24, 2010, <http://www.csmonitor.com/World/Africa/2010/0324/Commercial-ship-strikes-back-in-deadly-shootout-with-Somali-pirates>.

195. Richard, *supra* note 26, at 462.

196. U.S. COAST GUARD, PORT SECURITY ADVISORY (3-09) 1–2 S. 3(C) (2009).

197. *See* 46 U.S.C. § 8107(a) (West Supp. 2010) (“An owner, operator, time charterer, master, mariner, or individual who uses force or authorizes the use of force to defend a vessel of the United States against an act of piracy shall not be liable for monetary damages for any injury or death caused by such force to any person engaging in an act of piracy if such force was in accordance with standard rules for the use of force in self-defense of vessels . . .”).

mothership takes immediate offensive action whereas naval forces currently wait for clear piratical intent.¹⁹⁸ Anything resembling an offensive ambush would be of dubious legality.¹⁹⁹ Aside from the use of force, there remains a legal ambiguity about the ability of a private vessel to capture pirates. UNCLOS only affords government, not private, vessels the power to seize and prosecute suspected pirates.²⁰⁰ Without the power to detain, a private security vessel would be left only with two options—kill or set adrift.

3. Firearm Prohibitions in Ports Around the World

Finally, armed security contractors must comply with firearms laws in every nation in whose waters their vessels transit or dock.²⁰¹ For example, all vessels entering U.S. ports, whether they are U.S. or foreign-flagged, must comply with federal laws restricting the importation or exportation of firearms.²⁰² Other nations have stringent prohibitions against the presence of firearms within their territory.²⁰³ Individual state policies on firearms may change, which would leave shippers with the administrative burden of tracking and rechecking a myriad of gun control laws around the world and ensuring compliance. The Suez Canal Authority, for instance, first banned weapons or armed guards on vessels transiting the Canal and then a month later permitted them if the weapons were registered with the Authority.²⁰⁴ Even if a flag nation encourages its merchant fleet to carry arms for self-defense, another country with strict gun control laws, may undercut the measure, which could create legal problems for the vessel if it visits a port

198. See Kraska & Wilson, *The Pirates of the Gulf of Aden*, *supra* note 11, at 263 (“The possible legal scenarios involving [private security contractors] are endless and could include liability for taking excessive action.”).

199. Bahar, *supra* note 92, at 61.

200. See *supra* Part III.A.2.

201. See Kraska & Wilson, *The Pirates of the Gulf of Aden*, *supra* note 11, at 262 (“[P]ort states and potentially even coastal states may express concerns over the on-board use of firearms on foreign-flagged vessels in their territorial waters.”).

202. See, e.g., U.S. COAST GUARD, PORT SECURITY ADVISORY (4-09) (REV 1) (2009) (setting forth the requirements of U.S. law with respect to transporting firearms into and out of the country).

203. See Kraska & Wilson, *Piracy Repression, Partnering and the Law*, *supra* note 54, at 47 (reporting comments from representatives of the Malaysian and Singaporean governments stating that armed security guards were prohibited in their territorial waters).

204. See EGYPTIAN MARINE INSURANCE CONSULTATIONS & SERVICES, PIRACY—WEAPONS & ARMED GUARDS ON BOARD VESSELS TRANSITING SUEZ CANAL (Oct. 2011) (on file with author) (describing the shift in authority policy based on discussion with other entities in the Egyptian government including a letter from the Port Said Chamber of Shipping with the weapons registration information).

in that country. Finally, the presence of firearms onboard a vessel, regardless of the precautions taken, may still create complications with local authorities. For example, four British security contractors were detained in Eritrea for five months for leaving a cache of weapons on an uninhabited island within Eritrean waters.²⁰⁵

Although the demand for private security forces has risen, many legal contingencies accompany their use. Shippers and security contractors must develop standardized training and rules of engagement that not only suit their needs, but also pass muster under various domestic and international laws. Shippers and contractors also face the ever-present potential for civil and criminal liability arising from a use of force incident. Self-defense is a narrowly circumscribed concept, and private actors lack the presumption of necessity that attaches to military action. The international community should seek another type of short-term solution.

V. MILITARY SECURITY TEAMS ABOARD SHIP

Part V advocates for deploying military security teams aboard merchantmen as an improved method of piracy suppression. This part begins by grounding the proposal as consistent with the government's traditional obligation to secure the freedom of the seas. It also recounts historical examples of when forces akin to MSTs were utilized. Then, it fleshes out how MSTs can be operationalized in a modern setting by modeling new programs after recent U.S. and E.U. deployments. Finally, it establishes the legality of MSTs under international law and analyzes the benefits of their use.

A. THEORETICAL JUSTIFICATION FOR A GOVERNMENT-CENTRIC RESPONSE

It is a core responsibility of governments around the world to ensure the freedom of the seas.²⁰⁶ Gone are the days when private navies like that of the British East India Company, patrolled the seas. Since the nineteenth century, the response to maritime threats has been inherently governmental.²⁰⁷ This is particularly true in the case of piracy, long deemed

205. David Smith & Amelia Hill, *British Men Held in Eritrea Freed*, GUARDIAN (London), June 12, 2011, <http://www.guardian.co.uk/world/2011/jun/12/british-men-held-in-eritrea-freed>.

206. See, e.g., U.S. CONST., art. I, sec. 8, cl. 10 (allowing Congress “[t]o define and punish Piracies and Felonies committed on the high Seas”).

207. For example, British Prime Minister Winston Churchill and President Franklin D. Roosevelt each pledged in 1941 to create “a peace [that] should enable all men to traverse

a crime under international law. Just as they do not allow vigilante justice ashore, governments should not abdicate their law enforcement responsibilities at sea. Although the shipping industry has turned to private defensive options out of necessity, it continues to suggest that governments are—and should be—the prime actors in antipiracy.²⁰⁸

B. EXAMPLES OF DEPLOYING ARMED TROOPS TO PROTECT MERCHANTMEN

1. Armed Guards Aboard Merchantmen During the World Wars

The policy debate about the deployment of military forces on merchant vessels for protection is not a new one. During World War I, both the U.S. and the U.K. vigorously contested the subject.²⁰⁹ The threat at the time was not pirates but the Imperial German Navy's submarines and surface raiders.²¹⁰ Responding to clamors for the Royal Navy to protect British merchantmen, one British admiral dismissed the idea as an inefficient allocation of limited naval resources.²¹¹ The admiral also rejected the notion of defending merchant vessels of other countries that carried British cargoes.²¹²

Nonetheless, as the U.S. moved closer to entering World War I, Congress took up the cause of defenseless merchantmen.²¹³ In February

the high seas and oceans without hindrance." Atlantic Charter, U.S.-U.K., Aug. 14, 1941, 55 Stat. 1603. *See also* Kraska, *The Law of the Sea Convention*, *supra* note 87, at 548 ("Ensuring freedom of the seas is a historic mission of the U.S. Navy and a modern necessity for securing regional and global peace and stability.").

208. *See* Noakes, *supra* note 24 (arguing that freedom of navigation must be upheld by governments); Press Release, Shipping Industry Changes Stance on Armed Guards, *supra* note 178 (reiterating the International Chamber of Shipping's position that "[t]he eradication of piracy is the responsibility of governments").

209. *See Arming Merchantmen Big Drain to Navy*, N.Y. TIMES, Feb. 19, 1917, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F40F1FFD3854147A93CBA81789D85F438185F9> (reporting that the Royal Navy estimated it would need 8000 guns and 16,000 trained gunners to protect 4000 British merchantmen from German submarines).

210. For a description of the Imperial Germany Navy's attacks on Allied shipping during World War I, see PAUL G. HALPERN, *A NAVAL HISTORY OF WORLD WAR I* 335–80 (1994).

211. *See id.*

212. *See id.* ("It may be taken for granted that we cannot arrange for the armament of neutral vessels which carry British cargoes.").

213. One U.S. Representative delivered a speech on the floor of the House of Representatives, proclaiming that the United States should "put[] proper cannon and skilled men from our navy on our merchantmen . . ." *Bennet Advocates Arming Merchantmen*, N.Y.

1917, the Armed Ship Bill passed the House of Representatives but died in the Senate.²¹⁴ Undeterred, President Woodrow Wilson invoked his authority as commander-in-chief and instructed the Navy to protect American merchantmen transiting war zones.²¹⁵ In addition to convoy escorts, the Navy stationed units of fifteen to thirty-two enlisted seamen and petty officers aboard merchant vessels to man newly-installed defensive weaponry.²¹⁶ The Navy forces were placed under the command of each vessel's civilian master in a chain of command that was "without previous naval precedent."²¹⁷ Immediately after the program's inception, Navy gun crews were engaging German U-boats.²¹⁸ Between 1917 and 1918, Navy crews successfully defended American merchantmen and troop-ships on over 1800 transatlantic voyages.²¹⁹ The program was terminated at the end of the war, but its utility was not forgotten.

The operational plans were dusted off a little over twenty years later when the Naval Armed Guard was formally created in late 1941.²²⁰ Even before the U.S. entered World War II, it was clear to officials in President Franklin D. Roosevelt's administration that the situation was dire enough to justify the expenditure of great resources to defend merchantmen.²²¹ In November 1941, Congress repealed the section of the Neutrality Act of 1939 that had forbidden the American merchant fleet from employing defensive arms when a state of war existed between nations.²²² Perhaps recalling President Wilson's willingness to unilaterally create a naval armed guard, Congress also gave blanket authorization to President Roosevelt "to permit or cause [American merchantmen] to be armed."²²³

TIMES, Feb. 23, 1917, *available at* <http://query.nytimes.com/mem/archive-free/pdf?res=9405E7DE123BEE3ABC4B51DFB466838C609EDE>.

214. JUSTIN F. GLEICHAUF, *UNsung Sailors: The Naval Armed Guard in World War II* 5 (1990). Those senators who voted against the Bill were criticized for causing Imperial Germany to believe that the United States would not stand on its rights and resort to armed conflict if necessary. *Willful Senators Blamed for War*, N.Y. TIMES, Feb. 27, 1918, *available at* <http://query.nytimes.com/mem/archive-free/pdf?res=F3071FFF345C10738DDDAE0A94DA405B888DF1D3>.

215. GLEICHAUF, *supra* note 214, at 5.

216. *Id.* at 10.

217. *Id.* at 6.

218. For examples of some of these fierce engagements, see *id.* at 7.

219. *Id.* at 10.

220. *Id.* at 19.

221. *See id.* at 15–18.

222. Pub. L. No. 294, 55 Stat. 764 (1941).

223. *Id.* Having learned from their experience in World War I, Great Britain was gravely concerned about the threat from German U-boats and established the Defensively Equipped Merchant Ships program. OFFICE OF NAVAL OPERATIONS, U.S. NAVY, U.S. NAVAL

The Naval Armed Guard was built from the ground up during the months after Pearl Harbor.²²⁴ The essential program remained the same as it had been in World War I: A Naval Armed Guard force, typically numbering twenty-four sailors and officers, embarked aboard a merchant vessel and were charged with defending the ship against submarine and air attack.²²⁵ One key difference from the 1917–1918 practice, though, was to have a Navy officer, rather than a civilian master, command the Armed Guard force.²²⁶ The Armed Guard force was solely responsible for a ship's defense and remained distinct from the regular civilian crew.²²⁷

From 1941 to 1945, Naval Armed Guard personnel defended all ships carrying U.S. cargo, or under U.S. charter, regardless of the original flag state.²²⁸ This sweeping mission led to nearly 150,000 officers and enlisted Armed Guard sailors to protect over 6000 American merchantmen in all theaters of war.²²⁹

ADMINISTRATION IN WORLD WAR II: ARMING OF MERCHANT SHIPS AND NAVAL ARMED GUARD SERVICE OPNAV-P421-514, at 2–3 (1946). Larger merchant crews allowed the British to simply conscript them into serving double-duties as gunners and stationing only small numbers of gunnery officers aboard to lead them when under attack. *Id.*

224. See GLEICHAUF, *supra* note 214, at 25 (describing how everything including training programs, equipment, and billets aboard protected vessels had to be developed anew).

225. OFFICE OF NAVAL OPERATIONS, *supra* note 223, at 141.

226. See *id.* at 140 (characterizing the Armed Guard's commanding officer as possessing a "separate and distinct command" from the ship's civilian master). That naval officer "was entrusted not only with the welfare and safety of his men but with all matters concerning opening fire in defense of the ship, with maintenance of ordnance and ammunition, and with calling attention to necessary repairs." *Id.*

227. See Paul L. Berkman, *Life Aboard an Armed-Guard Ship*, 51 AM. J. SOCIOLOGY 380, 380 (1946) ("[T]he crews were composed of two separate groups of men—one civilian and one naval—performing different functions, subject to different systems of discipline, receiving different scales of pay, and motivated by different occupational considerations."); OFFICE OF NAVAL OPERATIONS, *supra* note 223, at 140 ("[The Armed Guards'] primary duties . . . were watch standing and manning guns and maintenance of guns and defensive equipments."). Importantly, though, the Armed Guard was not regarded as an internal ship's police force. OFFICE OF NAVAL OPERATIONS, *supra* note 223, at 142–43.

228. See *Reinold v. United States*, 167 F.3d 556, 556 (2d Cir. 1948) (noting that an Armed Guard was aboard a ship of "Panamanian registry," carrying a cargo of oil from Miami to Montevideo and that the military presence "was in conformity with the usual practice aboard merchant vessels").

229. OFFICE OF NAVAL OPERATIONS, *supra* note 223, at APP. 1. Nearly 150,000 officers and sailors served in the Naval Armed Guard during World War II. *Id.*

2. Operations Guardian Mariner and Vigilant Mariner

Beginning in February 2003 and extending to the present, embarked detachments of soldiers protect cargo vessels of the U.S. Navy's Military Sealift Command ("MSC"). In Operation Guardian Mariner, from February 2003 to June 2004, soldiers from the Puerto Rico National Guard's 92nd Separate Infantry Brigade found themselves stationed at sea.²³⁰ To prepare for this unorthodox mission, the Guardsmen, many of whom had never been at sea before,²³¹ underwent a month-long training program.²³² Despite the steep learning curve with a new operation, the MSC force protection training officer noted that "the 92nd SIB adjusted to the new environment very easily . . ."²³³ Over 1400 Guardsmen rotated through tours of sea duty in twelve-man security teams.²³⁴ At the high point, 110 security teams were protecting MSC vessels.²³⁵

In June 2004, the Navy commenced Operation *Vigilant Mariner*, taking over responsibility for protecting MSC vessels.²³⁶ Twelve-person security detachments from the Maritime Expeditionary Security Force protect many vessels carrying cargo through the U.S. Fifth Fleet's area of operations,²³⁷ which includes the Horn of Africa. Typically, the security escort embarks on the MSC vessel in the Mediterranean Sea, sails with it to the Persian Gulf, and either disembarks at a Gulf port or remains on the vessel for the return voyage.²³⁸ In fiscal year 2009, nearly 120 security teams protected MSC vessels as they transited high-risk areas.²³⁹ Through the first eight months of 2011, a Navy detachment in Bahrain escorted 124

230. Lara Thomas, *Keeping MSC Safe at Sea*, MILITARY SEALIFT COMMAND (Aug. 2005), <http://www.msc.navy.mil/sealift/2005/August/safe.htm>.

231. See Gillian M. Brigham, *Guardian Mariners: Protecting the MSC Fleet*, MILITARY SEALIFT COMMAND (May 2004), http://www.msc.navy.mil/sealift/2004/May/guardian_mariners.htm ("Most of these guys had never served on ships before . . .") (quoting a Puerto Rico National Guard officer).

232. *Id.*

233. Thomas, *supra* note 230.

234. Brigham, *supra* note 231.

235. *Id.*

236. Cassandra Thompson, *Teams Keep MSC Ships Safe*, MILITARY SEALIFT COMMAND (Jan. 2006), <http://www.msc.navy.mil/sealift/2006/January/safe.htm>.

237. *Id.* For a breakdown of the equipment and watch orders of a Navy security team, see Memorandum from COMFIFTHFLT on Excerpts from C5F OpTask Operation Vigilant Mariner (U) to ALFIFTHFLT (Mar. 17, 2011), at A3 (on file with author).

238. *Id.*

239. U.S. NAVY MILITARY SEALIFT COMMAND, 2009 IN REVIEW 16 (2009).

vessels—an average of sixteen per month.²⁴⁰ And at least several of these security details have successfully deterred suspected Somali pirates.²⁴¹

Given that civilian crews operated MSC vessels, the chain-of-command issue between the civilian shipmaster and the military detachment commander that arose during the world wars was revisited. The resolution by U.S. policymakers offers a template for future actions by delineating the legal and operational relationship between master and detachment commander. Under current procedures for Operation *Vigilant Mariner*, the master retains overall responsibility for safe navigation and general ship operations while the detachment commander protects the vessel, crew, and cargo from attack.²⁴² The commander informs the master of the ship's protection plan as soon as possible.²⁴³ Before force is used to protect the vessel, "every effort" should be made to discuss the use of force before its employment with the master "time permitting."²⁴⁴ But the detachment commander solely has authority over the use of force, and correspondingly, the master is relieved of any responsibility in a use of force situation.²⁴⁵

3. E.U. NAVFOR Vessel Protection Detachments

As part of the E.U.'s Operation *Atalanta*, militaries from contributing nations have deployed so-called Vessel Protection Detachments ("VPDs").²⁴⁶ No public data is available about the total number of VPDs

240. U.S. NAVAL FORCES CENTRAL COMMAND, MISSIONS FOR MARITIME EXPEDITIONARY SECURITY SQUADRON (MAREXSECRON) DETACHMENT BAHRAIN, JANUARY–AUGUST 2011 (on file with author).

241. See *USNS Lewis and Clark Prevents Suspected Piracy Attack*, NAVY.MIL (MAY 7, 2009),

http://www.navy.mil/Search/print.asp?story_id=45081&VIRIN=68472&imagetype=1&page=1 (recounting how a Navy embarked security detachment deterred an attack by pirates against the USNS *Lewis and Clark*, an MSC command ship).

242. Memorandum from COMFIFTHFLT, *supra* note 237, at B1(4). See also Memorandum from COMSC WASHINGTON DC on Shipboard Military FP Det Authority to Use Force to ALMSC (May 27, 2003) (on file with author) (describing operational authorities and responsibilities for Operational *Guardian Mariner*). The master is also responsible for providing berths, storage areas, and communications access to "facilitate integration of the security team with minimal interruption to ship's operations." Memorandum from COMFIFTHFLT, *supra* note 237.

243. *Id.* at B1(5).

244. *Id.* at B3.

245. *Id.* at B3(4).

246. See *Mission*, EU NAVFOR SOMALIA, <http://www.eunavfor.eu/about-us/mission/> (last visited Mar. 25, 2012) (listing VPDs as one way in which a state can operationally contribute to the mission).

deployed at any one time. When employed, however, VPDs have proved effective in deterring pirate attacks.²⁴⁷ Nonetheless, the VPDs are an effective model of cooperation by small and large states. E.U. member states, including Estonia and Malta, that are unable to contribute warships have provided troops for VPDs, who then are stationed on warships from other nations.²⁴⁸ Indeed, the mission has been so successful that Estonian and French troops have trained Ugandan troops from the African Mission in Somalia to serve on VPDs.²⁴⁹

C. IMPLEMENTING THE MST PROPOSAL

The nuts-and-bolts of the proposal are simple enough. Nations would contribute troops to form MSTs under UN, NATO, or E.U. unified command. Flag states would reach umbrella agreements with the MST command entity, permitting vessels sailing under their flag to request protection from an MST. MSTs would be stationed at strategic locations at either end of the sea-lanes that are threatened by pirates. They could operate equally from land-bases in countries like the Seychelles, Djibouti, or Oman, or from amphibious assault ships at sea. Each MST member would be appropriately armed and trained in maritime security operations. As a merchantman approached hostile waters, an MST would embark by helicopter or small boat. The MST would stay with the ship until it safely transited the hostile zone. The troops would then be transferred back to base or to the next merchant vessel making the journey in the opposite direction. If a piratical attack was launched against a vessel with an MST embarked, the MST would be authorized under its rules of engagement and international law to use force in self-defense and to capture any pirates who come aboard.

247. See Press Release, EU NAVFOR Somalia, Attempted Hijacking of Ukrainian Ship *MV Lady Juliet* (Nov. 17, 2009), <http://www.eunavfor.eu/2009/11/attempted-hijacking-of-ukrainian-ship-mv-lady-juliet/> (reporting that unsuspecting pirates broke off their attack when the Vessel Protection Detachment aboard the *Lady Juliet* opened fire).

248. See, e.g., Press Release, EU NAVFOR Somalia, French Naval Ship Embarks an Estonian Vessel Protection Detachment (May 10, 2011), <http://www.eunavfor.eu/2011/05/french-naval-ship-embarks-an-estonian-vessel-protection-detachment> (reporting that a VPD from the Estonian military will be stationed aboard a French warship); Press Release, EU NAVFOR Somalia, Malta Joins EU NAVFOR in Fight Against Pirates (Apr. 16, 2010), <http://www.eunavfor.eu/2010/04/malta-joins-eu-navfor-in-fight-against-pirates> (reporting that a twelve-man VPD from the Maltese military will be stationed aboard a Dutch warship).

249. Press Release, EU NAVFOR Somalia, EU NAVFOR Trains AMISOM Vessel Protection Detachment Troops (Dec. 12, 2011), <http://www.eunavfor.eu/2011/12/eu-navfor-trains-amisom-vessel-protection-detachment-troops>.

D. EVALUATING THE PROPOSAL

1. Legality

The legality of MSTs is grounded in the universal right of all nations to use military force in self-defense. Article 51 of the United Nations Charter recognizes the “inherent right of individual or collective self-defense” retained by all member states.²⁵⁰ Moreover, the recent Security Council resolutions directed at Somali piracy contained authorizations to use “necessary means” to eradicate piracy.²⁵¹ International law provides for the use of force to protect rights at sea.²⁵² The use of MSTs in kinetic actions with pirates ensures that trained professionals are upholding international law’s requirements that force be employed only when necessary²⁵³ and remain proportional.²⁵⁴ For instance, the legal guidance provided to the Navy security teams in Operation *Vigilant Mariner* affirms the unit’s “inherent right and obligation” to exercise force in self-defense “in response to a hostile act or demonstrated hostile intent,” provided that such a use of force is necessary and “proportional.”²⁵⁵ Encompassed in the right to use force in self-defense, including deadly force, would be the capacity to detain suspected pirates.²⁵⁶ As with all military deployments, governments can craft specific rules of engagement to govern the use of force.²⁵⁷ The detachments in *Vigilant Mariner*, for example, rely on a

250. U.N. Charter art. 51. Since 2000, the standing rules of engagement for U.S. military forces assert that unit commanders may exercise an “inherent right and obligation” to take action to defend against “a hostile act or demonstration of hostile intent.” CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION, STANDING RULES OF ENGAGEMENT FOR US FORCES, CJCSI 3121.01A (Jan. 15, 2000).

251. S.C. Res. 1816, *supra* note 107, ¶ 7(b).

252. Treves, *supra* note 101, at 414.

253. *See id.* (interpreting international law to require conditions where the use of force is “unavoidable, reasonable, and necessary”).

254. *See* Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1637 (1984) (“Proportionality is closely linked to necessity as a requirement of self-defense.”).

255. Memorandum from COMFIFTHFLT, *supra* note 237, at B3. *See also* Memorandum from COMSC WASHINGTON DC, ALMSC 017/06, *Standing Rules for the Use of Force (SRUF) by MSC [Military Sealift Command] Personnel* at 3-3.A (July 10, 2006) (on file with author) (asserting the same “inherent right” to use force in self-defense by MSC civilian crews).

256. *See* Memorandum from COMFIFTHFLT, *supra* note 237, at B3(3) (“All lesser means are authorized and encouraged to deter threat prior to use of deadly force.”).

257. For an example of model rules of engagement that could apply to MSTs, see ALAN COLE ET AL., INT’L INST. OF HUMANITARIAN LAW, RULES OF ENGAGEMENT HANDBOOK (2009); GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN

preset plan for the escalation of force once a threat is identified, displays hostile intent, and moves closer to consummating a hostile act.²⁵⁸

2. Political Viability

The large-scale deployment of MSTs is commended for its political viability. Industry officials, the military, and politicians—all stakeholders in the fight against maritime piracy—have acknowledged the value of this initiative. For example, Nordic shipping associations petitioned their governments for the deployment of special forces on vessels vulnerable to pirate attacks.²⁵⁹ The Belgian shippers association called on the Belgian government to station VPDs on at-risk vessels and for “basing a European military task force in the danger area, to send out VPD’s very quickly whenever the need arises.”²⁶⁰ And the four largest shipowners’ organizations recently called upon U.N. Secretary General Ban Ki-Moon to deploy military units aboard merchant vessels, arguing that the measure “would do much to stabilize the situation [and] to restrict the growth of unregulated privately contracted armed security personnel”²⁶¹ The admiral chairing NATO’s Military Committee suggested that the presence of military personnel aboard merchantmen “would help” in combating piracy.²⁶² A U.K. parliamentary committee recommended stationing “military personnel from national armed forces . . . on commercial shipping on a case-by-case basis.”²⁶³ The Dutch government, acting upon a report it commissioned on how best to respond to the threat of piracy,²⁶⁴ approved a

LAW IN WAR 501–10 (2010) (outlining the basic elements of mission specific rules of engagement).

258. See Memorandum from COMFIFTHFLT, *supra* note 237, at C1.

259. O’Dwyer, *supra* note 142.

260. ROYAL BELGIAN SHIPOWNERS’ ASSOCIATION, 2010 ANNUAL REPORT 40.

261. Letter from S.M. Polemis, Chairman, Int’l Chamber of Shipping; Nicolas Pappadakis, Chairman, Intercargo; Graham Westgarth, Chairmain, Intertanko; Yudhishtir Khatau, Chairman, BIMCO, to Ban Ki-Moon, Secretary General, United Nations (Aug. 11, 2011), available at https://www.bimco.org/~media/Press/Letter_to_Ban_Ki-Moon_-_Piracy.ashx.

262. *Soldiers on Ships Would Help with Piracy, Says NATO*, *supra* note 18. In the United States, one politician transmitted the same suggestion to President Barak Obama and then-Secretary of Defense Robert Gates. See Letter from Mike Coffman, U.S. House of Representatives, to President Barack Obama (April 15, 2009), available at http://coffman.house.gov/index.php?option=com_content&task=view&id=104&Itemid=8.

263. EUROPEAN UNION COMMITTEE, COMBATING SOMALI PIRACY: THE EU’S NAVAL OPERATION ATALANTA, REPORT WITH EVIDENCE, 2009–10, H.L. 103, ¶ 50 (U.K.).

264. The report, issued by the Dutch Advisory Council on International Affairs, recommended stationing troops onboard particularly vulnerable merchantmen and reaching agreements with coastal states in the affected region for forward deployment of these

limited deployment of troops to serve on Dutch merchant vessels transiting the Gulf of Aden and western Indian Ocean.²⁶⁵

At the international level, the value of MSTs has been repeatedly recognized and their implementation is encouraged. The Contact Group on Piracy off the Coast of Somalia, an ad hoc group of more than seventy nations—including most major powers—and non-governmental organizations, declared that not only were MSTs a “means of effective military protection,” but their use also would “free[] up warships for other tasks.”²⁶⁶ The Contact Group called upon affected nations to contribute military resources, “especially partners unable to provide warships.”²⁶⁷ The member states of the International Maritime Organization’s Maritime Safety Committee have also discussed the proposal to have onboard MSTs in successive years.²⁶⁸

3. Effective Deterrence and Incapacitation

An onboard MST would ensure that any piratical attack is immediately met with a deployed, professional force. The need for a warship to be within twenty minutes sailing time for military forces to provide any assistance would no longer exist. Rather, pirates would know that soldiers with “better aim and better equipment” stood ready to protect the targeted vessel.²⁶⁹ As one commentator noted, “[m]aking pirates fear that their next victim may be heavily armed [soldiers] will certainly increase the deterrence value.”²⁷⁰ One Navy security chief reported that during Operation *Vigilant Mariner*, curious small vessels were rapidly deterred by his security team’s response: “Once they see that the ship is

protection detachments. ADVISORY COUNCIL ON INTERNATIONAL AFFAIRS, COMBATING PIRACY AT SEA: A REASSESSMENT OF PUBLIC AND PRIVATE RESPONSIBILITIES 52, 59 (2010).

265. *Dutch MPs Agree to Troops on Merchant Ship*, RADIO NETHERLANDS WORLDWIDE (Mar. 23, 2011, 10:49 AM), <http://www.rnw.nl/english/bulletin/dutch-mps-agree-troops-merchant-ships>.

266. Bureau of Political-Military Affairs, Eighth Plenary Session of the Contact Group on Piracy off the Coast of Somalia, U.S. DEP’T OF STATE (Mar. 22, 2011), <http://www.state.gov/t/pm/rls/othr/misc/158773.htm>.

267. *Id.*

268. See MARITIME SAFETY COMMITTEE, INT’L MARITIME ORG., REPORT OF THE MARITIME SAFETY COMMITTEE ON ITS EIGHTY-NINTH SESSION, MSC 89/25 (May 27, 2011); MARITIME SAFETY COMMITTEE, INT’L MARITIME ORG., REPORT OF THE MARITIME SAFETY COMMITTEE ON ITS EIGHTY-SEVENTH SESSION, MSC 87/26 (May 26, 2010) [hereinafter REPORT OF THE MARITIME SAFETY COMMITTEE ON ITS EIGHTY-SEVENTH SESSION].

269. Bahar, *supra* note 92, at 62. (reflecting that the force disparity should be of little concern when dealing with pirates; “if you illegally bring a knife to a gunfight, you do so at your own peril”).

270. *Id.* at 66.

what we call a hard target, then they go away.”²⁷¹ Raising the immediate risk for pirates carrying out their attacks should deter more of them from even going out to sea.

Aside from the deterrent effect, MSTs could serve to incapacitate the most aggressive pirates. Those pirates who are not deterred and continue to attack will face a strong likelihood of serious bodily injury or capture.²⁷² Eliminating the threat posed by the most ardent of pirates would pay dividends at sea and on shore, by safeguarding mariners from future attacks and by reducing the powers standing in opposition to Somali development.

4. Surmounting Evidentiary Obstacles

For those pirates captured by MSTs, there would be sufficient evidence to secure a piracy conviction. As discussed above, naval forces only detain suspected pirates when they are actively engaged in a piratical act, because in the absence of an overt act, the suspect’s intent remains legally uncertain. But any individual whose actions incur a response from an MST would certainly have crossed the line from innocent mariner, who happens to keep an AK-47 in his skiff, to the realm of piracy. MST members could also actively bolster subsequent criminal prosecutions if they were trained in evidence collection methods.²⁷³

5. Multinational Cooperation and Participation

A robust MST initiative would create many opportunities for international cooperation including providing bases for MSTs and contributing troops or supplies to the mission.²⁷⁴ MSTs avoid the stark choice created by current antipiracy commitments—to either contribute a warship or stay at home. Current practice shows how inclusive MSTs can

271. Thompson, *supra* note 236.

272. See, e.g., Press Release, EU NAVFOR Somalia, EU NAVFOR Transfers Seven Suspected Pirates to Kenya (Nov. 9, 2009), <http://www.eunavfor.eu/2009/11/eu-navfor-transfers-seven-suspected-pirates-to-kenya/> (describing how an EU VPD embarked on a French fishing vessel, foiled an attack, and transferred the captured pirates to naval vessel for eventual criminal prosecution).

273. See Bahar, *supra* note 92, at 58–59 (observing that members of U.S. naval boarding teams in antipiracy operations were not adequately trained to gather evidence for criminal prosecution as opposed to intelligence gathering).

274. Several commentators have noted that international cooperation is an essential component of any effective antipiracy campaign. See Bahar, *supra* note 92, at 7 (“[T]he only key to successful maritime security over the vast oceans is multilateralism.”); Kraska & Wilson, *The Pirates of the Gulf of Aden*, *supra* note 11, at 244 (“Achieving success in repressing piracy requires . . . integrated regional action, and long-term international support.”).

be with small states, such as Estonia and Malta, contributing troops to serve on E.U. Vessel Protection Detachments.²⁷⁵ Anticipating the difficulties in command and control from bringing together troops of many different nations, MSTs must operate under status-of-forces agreements between nations that contribute troops, host nations that provide bases, and merchant fleet flag states.²⁷⁶

Fortunately, current practices demonstrate that these international, multi-party arrangements are feasible. Nations contributing troops to any of the three main antipiracy task forces—led by the U.S., NATO, and the E.U.—regularly formalize the parameters of the commitment and agree to a chain of command.²⁷⁷ Several nations in the western Indian Ocean region, such as the Seychelles, have already reached status-of-forces arrangements to host foreign military forces on antipiracy missions.²⁷⁸ Moreover, several important flag states, including St. Vincent and the Grenadines and Malta—accounting for more than 2600 registered vessels between them²⁷⁹—have reached standing agreements to permit military detachments aboard their vessels.²⁸⁰ Indeed, a sample agreement to station E.U. VPDs aboard a flag nation's fleet was disseminated to members of the International Maritime Organization.²⁸¹

275. See *supra* note 248 and accompanying text.

276. Bringing the flag states to the table should not prove particularly cumbersome as thirty-five countries control over ninety-five percent of the world's large merchantmen. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, REVIEW OF MARITIME TRANSPORT 2010, at 41 tbl. 2.6 (2010).

277. See, e.g., Agreement Between the European Union and Montenegro, 2010 O.J. (L 88) 3–8 (formalizing the decision of Montenegro to contribute resources to the EU's Operation *Atalanta*).

278. See, e.g., Agreement Between the European Union and the Republic of Seychelles, 2009 O.J. (L 323) 14–19 (providing for the operation of E.U. Operational *Atalanta* military personnel within Seychelles).

279. See UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, REVIEW OF MARITIME TRANSPORT 2010, at 43 tbl. 2.7 (2010) (listing the number of ships registered in each flag state).

280. See REPORT OF THE MARITIME SAFETY COMMITTEE ON ITS EIGHTY-SEVENTH SESSION, *supra* note 268 (reporting that Malta had reached “bilateral agreements with flag States for the deployment of its vessel protection detachment teams” and Malta encouraged other flag states to reach such agreements); ST. VINCENT AND THE GRENADINES MARITIME ADMINISTRATION, *supra* note 187, ¶ 6.1 (noting that St. Vincent and the Grenadines executed a “permanent declaration” permitting E.U. VPDs aboard its ships that carry World Food Program cargos).

281. To review the E.U. model agreement, which covers the authority to use force and jurisdiction over any detained pirates, see MARITIME SAFETY COMMITTEE, INT'L MARITIME ORG., A PRELIMINARY BRIEF ON LEGAL ISSUES RELATING TO THE USE OF ARMED SECURITY SERVICES ABOARD VESSELS, MSC 89/INF.27 (May 12, 2011).

6. Cost Effectiveness

Finally, a widespread deployment of MSTs might be more—or at least comparably—cost effective to the current naval deployments. The international community currently spends \$1.3 billion to \$2 billion annually on antipiracy operations.²⁸² With MSTs assuming the primary responsibility for safeguarding merchantmen, the bulk of warships can be redeployed from the theater, saving governments hundreds of millions of dollars.²⁸³ The shipping industry would be able to curtail its private security expenditures, which would lower insurance premiums. Moreover, the shipping industry already is willing to make significant contributions to defray MST expenditures.²⁸⁴ Thus, with a reduced number of warships tasked with antipiracy missions and increased contributions from the shipping industry, governments may find that MSTs are a more cost-effective antipiracy measure.

VI. CONCLUSION

Maritime piracy is a serious global security threat that harms many individuals and costs billions of dollars each year. Despite a significant investment of resources and money, the international community has yet to craft an effective antipiracy response that incorporates military and criminal justice capabilities. Recent arguments that advocate for placing the private sector at the fore of antipiracy operations raise many serious complications and elide the fact that securing freedom of the seas is inherently a governmental function.

This Article proposed a new antipiracy strategy designed to yield immediate and effective results. Rather than having several dozen warships patrol vast sea-lanes, military resources should be reallocated toward deployment of small units onboard merchantmen that transit pirate-infested waters. Large-scale implementation of an MST program would efficiently

282. WORLD BANK, *WORLD DEVELOPMENT REPORT 2011: CONFLICT, SECURITY, AND DEVELOPMENT* 65 (2011).

283. For example, in 2009, the U.S. Central Command alone spent \$64 million on antipiracy operations. GOVERNMENT ACCOUNTABILITY OFFICE, GAO 10-856, *MARITIME SECURITY: ACTIONS NEEDED TO ASSESS AND UPDATE PLAN AND ENHANCE COLLABORATION AMONG PARTNERS INVOLVED IN COUNTERING PIRACY OFF THE HORN OF AFRICA* 33 (2010).

284. See, e.g., *Dutch MPs Agree to Troops on Merchant Ships*, *supra* note 265 (reporting how the costs of deploying Dutch troops to protect Dutch merchant vessels will be shared equally by the government and the shipping industry); O'Dwyer, *supra* note 142 (quoting the deputy director of the Danish Shipowner's Association as avowing that "Danish shipping companies are prepared to pay all costs" to station troops on their vessels).

allocate military resources to better guarantee the safety of vessels and crews. The utility of this approach is well established by similar initiatives during the world wars and, more recently, during the U.S. Operation *Vigilant Mariner* and the E.U.'s use of VPDs. It is time to consider making MSTs the front piece of the global antipiracy campaign.