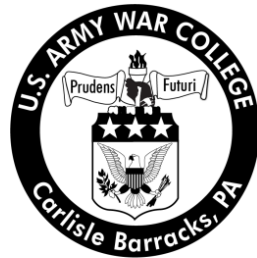


Strategy Research Project

Resurrecting Letters of Marque and Reprisal to Address Modern Threats

by

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United States Army War College
Class of 2012

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Resurrecting Letters of Marque and Reprisal to Address Modern Threats

Congress shall have power to... declare war, grant Letters of Marque and Reprisal, and make rules concerning captures on land and water.

—U.S. Constitution, Article I, Section 8¹

Introduction

The dramatic rise in security threats to global commercial interests over the last decade and efforts to curb those threats has brought increased legal debate to the forefront of academic, state, and media attention. As market globalization continues to link the fates of world economies, the U.S. and the international community have devoted exponentially greater resources to understanding and combating maritime piracy and cyber exploitation. Focused U.N. resolutions, widespread deployment of multi-national naval forces, improved reporting processes, and standardized defensive practices have made dramatic progress in reducing the overall incident frequency of maritime pirate attacks.² However, this has come at considerable monetary cost to the U.S. and its international partners, as well as to the shipping industry itself, and ability to sustain this effort in light of strained economies and diminishing national resources is uncertain. Additionally, terrorist links to maritime piracy have been made in recent years, further heightening the international community's need to continue fighting these threats effectively and efficiently. As terrorists and criminals increasingly pool resources for common gain, it is even more essential to take appropriate action.³

Meanwhile, there is a growing recognition of the cyber domain as a new frontier in which conflict resembles earlier ages of warfare and in which corporate and intellectual piracy have considerable effects on national security and the U.S. economy. Retired General Michael Hayden, former Director of both the National Security and

Central Intelligence Agencies, recently compared America's entry into the cyberspace domain to European colonization of the Western Hemisphere, drawing stark comparisons between cyber law development and maritime law development.⁴ As the U.S. looks for methods to deal with these threats, perhaps policymakers should look back through history to legal categories with which the framers of the Constitution were familiar.⁵

By the time the Constitution was ratified in 1789, the practice of privateering had been a legitimate part of Western warfare for over 500 years. Letters of marque and reprisal had been important tools for the Continental Congress under the Articles of Confederation during the American Revolution, and this power granted by the Constitution would maintain its significance in the years following its ratification. The Framers placed great import on the federal government's role in protecting maritime commerce and enforcing the common law of nations. While changes in warfare and developments in international law during the last century have largely vanquished the role of privateering, the Congressional authority to issue Letters of Marque and Reprisal remains, having never been repealed.

Does this Constitutional power have present merit as a useful instrument for dealing with modern security threats? Or has time bypassed such tools as unnecessary, outmoded, and possibly even prohibited in a world of established international law and modern military capabilities? In order to establish that the concept of letters of marque and reprisal have legal merit worth considering in the modern world, this strategy research paper first emphasizes the general context of extraterritorial security threats to U.S. interests resulting from global piracy and cyber exploitation.

Next, it examines the history, legality, and differentiation between privateering and Letters of marque and reprisal within the development of U.S. and international law. It then reviews the current state of maritime piracy and cyber exploitation. Finally, it proposes a conceptual framework for resurrecting a letter of marque and reprisal system as a means of addressing contemporary security threats within an environment of constrained military budgets and rebalanced national focus.

General Context

For the better part of human history, the primary method for dealing with maritime pirates was individual avoidance and self-defense. Over time, great powers began to address this extraterritorial threat to state sovereignty in a variety of ways and with varying degrees of success. The development of state navies, in addition to their significance for power projection and national expansion, was largely motivated by the need to protect national maritime trade from mercantile competitors and pirates. From the 13th to the 19th centuries, governments even used state-sponsored privateering as a force multiplier to engage their enemies and to fight piracy itself. By the mid-19th century, a growing body of international law also developed to address the problem. Under the influence of European colonialism and imperialism, the high seas became a cauldron for international rivalry, and the convergence of national expansion and oceanic trade led to the Western world's development of modern international law to regulate competition on the high seas.⁶

In the 21st century, the international community continues to face the extraterritorial threat of maritime piracy, as well as exploitation in a new domain -- cyberspace. While often considered threats of separate natures, there are conceptual parallels between maritime piracy and cyber exploitation that find commonality in history

and economics. Unfortunately, bringing maritime pirates and cyber criminals to justice has proven difficult under current norms of international law, and strategies focused on deterrence and prosecution have largely failed. Piracy continues to flourish as financial incentives often outweigh inherent risks. As the Global War on Terrorism has proven, due process and previously established norms of international law sometimes take a back seat to necessity when presently perceived threats are involved. As we move increasingly into a world where cyber threats rival traditional physical threats, there are legal links worth exploring that have precedence in history. However, we must first review the story of maritime privateering and letters of marque and reprisal, and examine their impact on the development of international law.

Letters of Marque and Reprisal

Although law has developed over the last 200 years to address differences between the concepts of piracy, privateering, marque, and reprisal, history is storied with debate over their interpretation. While the accepted definition of maritime piracy according to Article 101 of the U.N. Convention on the Law of the Sea (UNCLOS) is more lengthy and complex, in the historical sense, *piracy* was generally accepted by the common law of nations as “robbery or forcible depredation on the high seas, without lawful authority, done *animo furandi*, in the spirit and intention of universal hostility.”⁷ Privateering, on the other hand, was “the practice of arming privately owned merchant ships for the purpose of attacking enemy trading ships” in time of war.⁸ While piracy was universally established as an international crime, the concept of privateering in a historical setting was sanctioned by sovereign states for assistance in the prosecution of declared war, and therefore considered a legitimate form of war-like activity conducted by non-state actors.

Conversely, the origin of the “letter of marque and reprisal” stems from its use in time of peace. Although often synonymous with privateering because they were typically issued to privateers, the concept of such letters is historically distinct from privateering.⁹ The traditional law of *marque* allowed a private citizen to cross borders, while *reprisal* referred to the act of seeking restitution for a perceived slight.¹⁰ Thus letters of marque and reprisal licensed private citizens of one state to take recompense from the citizens of another for a legally recognized grievance.

Original History

In 1243, King Henry III of England became the first sovereign to formally use privateers, commissioning them to “annoy [his] enemies by sea or by land.”¹¹ Profit-driven, these early privateers sought financial gain through involvement in their King's wars.¹² Fifty-two years later, in 1295, the first “letter of mark” was issued by the Lieutenant of King Edward I to secure reprisal for an English citizen who had been defaulted of his ship and property by the King of Portugal.¹³ It is important to note that at this time, England was not at war with Portugal, nor did the two nations go to war due to the letter’s issuance. By the 16th Century, such use of letters of marque and reprisal by European sovereigns had become widespread, and constituted a respectable enterprise in which profit and patriotism were combined as “a measure short of war that did not breach international peace.”¹⁴ Eventually the distinction between commissions for privateers during war and letters of marque issued for reprisal during times of peace became blurred. Privateers armed with a letter of marque from a sovereign nation gained authorization to attack shipping in the name of that sovereign in both peace and war, without being considered a true pirate.

The business of privateering grew throughout the Middle Ages as European rulers sought to expand colonial reach and their merchants sought prosperity in trade. Spain and England were the primary protagonists of this era, and each both benefited and was harmed by privateering. Defeat of the Spanish Armada in 1588, along with a growing requirement from the British Admiralty for its share of any prizes, reduced for a time both the need and the attractiveness of British privateering.¹⁵ While other European powers in the interim years continued to issue letters of marque and use privateers to support their naval wars, it was during the Seven Years War (known in America as the French and Indian War of 1756-1763), that privateering really gained significance.¹⁶ During this time, merchants and capitalists on both continents recognized the investment attraction of privateering, and the practice flourished.¹⁷

Development of U.S. Law

It was on the North American continent that the appeal to privateering was greatest, and as opposition to British authority grew, the ship-building resources and adventurism of the colonists made privateering a natural way of fighting back against colonial rule. When revolution arrived, the Continental Congress sanctioned privateers to seize British warships, as well as private vessels carrying military stores and provisions to British forces.¹⁸ In 1776, the Congress renewed its authorization for privateers, later codifying their acceptance of the practice in the Articles of Confederation:

The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war,... of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States, shall be divided or appropriated – [and] of granting Letters of Marque and Reprisal in times of peace.¹⁹

When the Framers contemplated the U.S. Constitution, there was little debate on whether such letters would be included, as it was widely accepted that privateers had helped win the war.²⁰ Letters of marque and reprisal were considered "both a natural component of the national war power and a concurrent aspect of the authority to raise a navy or enforce international law" and would remain explicit.²¹

As U.S. case law developed following ratification of the Constitution, Congress was specifically held to the task of regulating their power regarding letters of marque under international law. In the first case to come before the Supreme Court, *Penhallow v. Doane*, Justice Paterson wrote for the majority:

If he accepts from Congress a commission to cruise against the enemy, he must be responsible to them for his conduct. If under color of said commission, he had violated the law of nations, Congress would have been called upon to make atonement and redress. The persons who exercise the right or authority of commissioning privateers, must of course, have the right or authority of examining into the conduct of the officer acting under such commission, and of confirming or annulling his transactions and deeds.²²

This case tied U.S. law to customary international law, reinforcing the accountability of a commissioned privateer to the federal government for his acts, and reassuring the community of nations that the U.S. would take responsibility for the conduct of its privateers.²³

When the War of 1812 broke out over the Royal Navy's impressments of American sailors, the insufficient strength of the U.S. Navy left little choice but to sanction privateers to help counter British naval superiority. Congress again referred to its Constitutional authority under Article I, this time delegating power to the President "to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper, and under the seal of the

United States.²⁴ Congress also passed an act that required privateers to keep strict cruise logs and obedience to Presidential instructions, offering a reward of \$20 per man *alive* captured on board hostile ships.²⁵ U.S. case law then developed through district, appellate and Supreme Court rulings, emphasizing the relationship of privateering to customary international law. In the 1814 Supreme Court case of *The Thomas Gibbons*, Justice Story stated that:

It has been the great object of every maritime nation to restrain and regulate the conduct of its privateers. They are watched with great anxiety and vigilance, because they may often involve the nation, by irregularities of conduct, in serious controversies, not only with public enemies, but also with neutrals and allies.²⁶

Later cases established that letters of marque could also be granted to privateers who were not U.S. citizens, and more importantly, that the right of property capture was specifically a result of legislation by Congress, and not automatic upon declaration of war.²⁷

There was little U.S. Constitutional discussion of letters of marque during the years following the War of 1812, and the status of privateering remained the same until the end of the Crimean War (1854-1856), when the belligerents in that conflict (Britain, France, Russia, Prussia, Austria, Sardinia, and Turkey) entered into agreement on the first widespread pronouncement of a restriction on warfare.²⁸ Agreeing to what has since become known as the *Declaration of Paris*, they stated simply that “Privateering is and remains abolished,” with the caveat that “The present declaration is not and shall not be binding, except between those Powers who have acceded, or shall accede, to it.”²⁹ Although the U.S. was invited to join the declaration, it specifically refrained, reserving for itself the right to utilize privateering to augment its small navy in order to protect its vast shorelines.³⁰

Comparative jurist and historian Sir Henry Sumner Maine argued in 1888 that one of the chief reasons that the U.S. supported privateering was not only due to its success in preserving the young republic in its early years, but also because it preferred such methods to maintaining standing military forces.³¹ Regardless, during the War of 1812, some 500 American vessels were lost to British action while nearly three times as many British vessels were taken by American privateers alone.³² It was viewed at the time that one of the chief European (and particularly, British) motivations for the Declaration of Paris was to specifically prevent the United States of America, a growing and resource-rich nation with vast shorelines and only meager naval forces, from using privateers in any future engagement.³³ Recognizing the underlying motivations of the European powers, but not wanting to appear as impeding the cause of liberal maritime law, Secretary of State William Marcy counter-proposed that the treaty be amended to include *all* capture of non-contraband private property at sea, to include that taken by national warships.³⁴ This was a bold move, as had the European powers accepted the Marcy Amendment, the U.S. would have been extremely vulnerable to any future blockade by the immense navies of Great Britain or France, without any means to retaliate.³⁵ They did not, however, and the U.S. retracted its offer shortly thereafter.

The Declaration of Paris specifically stated that it would not apply to those countries who chose not to sign on, allowing them to continue using privateers, but also allowing other countries to commission and recognize privateers against them. Ironically, when the American Civil War broke out, the U.S. decision not to accede to the Declaration of Paris effectively allowed the Confederacy to utilize privateering.³⁶ Thus even while the United States declared privateers commissioned by the Confederate

States to be pirates (much as the British had in the Revolutionary War), those privateers were recognized as legitimate by other nations' prize courts. Of equally important note, the U.S. Congress explicitly delegated the power to issue Letters of Marque to the Executive branch during the War, but President Lincoln refrained from issuing them.³⁷ Following the Civil War, the Supreme Court upheld the privateering status of Confederate letters issued by the rebel government, noting that civil wars, by their very nature, seek to deny the legal legitimacy of the other side.³⁸ The development of international law took notice, and U.S. legal actions gained legitimacy in the eyes of the world. Despite the Declaration of Paris, privateering remained recognized as legitimate warfare (at least for those not signatory to the convention). Historian Francis Stark would conclude in his 1897 review of the treaty that:

The Declaration of Paris is, as Mr. Marcy said, truly a half-way measure... Perhaps that which is to come – the abolition of all capture of private property at sea, including the abolition of commercial blockades – is easier than that which has already been accomplished. In international law, as in other things, it is the first step that costs.³⁹

In other words, it was Professor Stark's view that until such time as all capture of private property at sea was abolished, all countries retained the right to declare which vessels comprised their public navies. However, this expected next step was never taken, at least not in the way he predicted.

International Law

Mercantilism from the 16th to the 18th centuries regarded trade, piracy, and warfare as equals in the field of international competition. As a result, international law, based largely upon Western values and European interests, developed to regulate the globalization of trade within this competitive social interaction. However, the development of internationally-recognized norms primarily reflected the interests of

those powerful enough to affect them, and must be taken into consideration. Writing for Cambridge's *Journal of Global History*, historian Michael Kempe suggests that "...a tension [exists] within modern international law, between its instrumentalization by particular interests and its status as an independent and normative authority to correct or regulate such interests."⁴⁰ His work indicates that the development and recognition of common international law which differentiated between privateering and piracy was primarily based in great power politics. Likewise, Professor Daniel Moran notes that international law "exists to legitimize certain forms of state power -- above all those concerned with self-defense -- and to define and coordinate reciprocal relationships among sovereignties, whose autonomy, authority, and equality are taken for granted."⁴¹ Evidence of this can be seen in American and European rhetorical references in the early 19th century to the "piratical activity" of North Africa corsairs, against which the fledgling United States would solidify its fighting naval heritage. Despite long-standing recognition of Algiers, Tripoli, and Tunis as sovereign political entities that tacitly supported these "Barbary Pirates," it became a calculation of political power for America and Europe not to recognize their privateering status, despite established international conventions of the time.⁴²

As U.S. naval power came into its own during the late 19th and early 20th centuries, American scholars argued for the U.S. to join in the abolition of privateering, much in line with the intent of Secretary Marcy's Amendment to the Paris Declaration. The underlying reasoning for this was a growing recognition of its implications for a nation which was quickly becoming the world leader in maritime commerce. The Declaration of Paris "codified a fundamental shift in the balance of interests between

warfare and trade on the high seas,” as globalization tied the economies of all great powers to the success of their commercial enterprises.⁴³ Thus, if conflict at sea were to continue, “at least it would be reduced to a duel between Governments and their professional fighters.”⁴⁴ At the end of the 19th Century, Henry Sumner Maine stipulated that,

In a war in which aggression is kept on the old footing by the powers of armament which privateering gives, the Power which had the most property at sea was most injured. The old law took for granted the equality not only of naval strength among states, but in volume of trade and of property risked. To the amount of risk, the amount of loss will always correspond.⁴⁵

Thus, at the outset of War with Spain in 1898, President McKinley proclaimed that the U.S. would refrain from privateering, which went a long way to establishing that the principles of the Paris Declaration would apply to the U.S. in future wars.⁴⁶ U.S. legal discourse on privateering effectively disappeared from the courts following that war, as modern weapons became too cost-prohibitive for private actors.⁴⁷ This lack of legal dialogue on the subject, combined with the vague definition of “privateering” under the Declaration of Paris, and its direct association with letters of marque and reprisal has led to the generally accepted belief that the prohibition against privateering extends to *all* conceptual aspects of a letter of marque and reprisal.⁴⁸ Yet, it’s likely that this development was as reflective of politics and power as altruistic reasons.

International law continued to evolve, and subsequently shaped the world’s views regarding the role that nationalized actors could play in war and in combating international criminal activity. Professor Stark pointed out in his work that when nation-states change the track of their individual laws, historians can trace the point of those changes. However, the development of International Law is dependent on the consent

and acceptance of all (or at least most) other nation-states in turn. Therefore one can only say that “*the greater the number and weight of the states which have adopted the concept at a given time, the more fully it has become part of International Law.*”⁴⁹

Along with the Geneva Conventions, the Hague Conventions of 1899 and 1907 were among the first internationally recognized declarations of the laws of war, and the latter specifically addressed maritime rules regarding the merchant shipping of belligerent and neutral states.⁵⁰ However, neither convention spoke directly regarding the status of privateers or letters of marque and reprisal within the context of peace or measures “short of war.” Article VII of the 1907 Convention did clarify rules for “the incorporation *in time of war* of merchants in the fighting fleet,” stating that they must be “...placed under direct authority, immediate control, and responsibility of the nation whose flag it flies, ...bear the external marks [of a warship], ...observe in its operations the laws and customs of war,” and that its “...commander must be ...commissioned,” and its “...crew must be subject to military discipline.”⁵¹ The intent of this treaty was clearly to place further strict limits on wartime privateering, but whether the intent was to limit the state from redressing wrongs committed during peace via reprisals short of war is indeterminate.

The globalization that was advocated by immunity of world trade from the effects of political strife retreated in the period of the Great Wars, as restraint toward commercial interests finally took a back seat to widespread and violent strife on a global scale. The economic and social impact of war on a globally interdependent world became all too evident in the age of unlimited submarine warfare. The final breakdown of European empires following World War II revived globalization, and eventually led to

a new attempt to manage world maritime relations, under the auspices of the United Nations' Conventions on the Law of the Sea (UNCLOS), which took place from 1958-1982.⁵² While initiated in the interests of the United States following WWII, these contentious conventions have also leveled the playing field for the undeveloped world by attempting to codify in extreme detail the extent of territorial sovereignty over the sea.⁵³ The establishment of expansive Economic Exclusion Zones (EEZs) under UNCLOS raises significant concerns for major maritime states that treat those zones as "high seas for purposes of war and trade," particularly regarding freedom of navigation.⁵⁴ Conversely, the treatment of piracy under UNCLOS and its follow-on, the 1992 Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention) has also been thought by some to be further prohibitive of the concept of privateering. In the end, as a powerful maritime state (and even more pointedly, as a global hegemon), the U.S. has found its interests at odds with the full extent of these treaties, and has not fully ratified either. As long as the U.S. has the power to lead the world, its actions are more indicative of the direction in which international law will be developed. According to Moran,

In matters of international law, practice trumps theory. Or more precisely, it precedes it, both logically and for the most part historically... The deference of theory to practice... is testimony to its underlying realism and utility [and] suggest[s] that international law is probably not the place to look for leadership in solving the problems of the emergent global economy or in addressing the strategic challenges that have followed in its wake.⁵⁵

Which brings us to the present, and the current context of two extraterritorial threats facing the U.S. in the current operational environment.

Maritime Piracy

Current Context

According to *Oceans Beyond Piracy*, a non-profit organization whose work informs the International Maritime Organization, global piracy costs shipping companies, governments, and consumers \$7-12 billion per year.⁵⁶ Since worldwide maritime commerce accounts for over \$12 *trillion*, this amount may not seem significant, but perception matters, and its impact has a dampening effect, whether slight or amplified, on the world economy.⁵⁷ In addition to increased risk and associated operating costs to commercial shippers, high profile incidents attributed to piracy contribute to a general perception that the seas are lawless and cannot be effectively controlled by regional or global forces. As a result, the United States and the international community at large have devoted ever-increasing amounts of time, money, and naval assets to combating maritime piracy.

Although the global resurgence of maritime piracy began in the 1990s, an exponential rise in regional attacks in the waters off Northeast Africa over the last seven years has garnered the attention of the United States and the developed world.⁵⁸ Piracy off the coast of Somalia, in the Gulf of Aden and throughout the Indian Ocean has dominated the headlines as the lion's share of hijacking, hostage taking, and ransoms paid or resulting deaths has occurred in this geographic region.⁵⁹ With more than 21,000 ships and up to 12% of the world's petroleum passing through the Gulf of Aden annually, these waters are a critical chokepoint for world commerce, and the vast majority of these attacks have targeted tankers, container ships, and bulk carriers – large, expensive, and in many cases, hardened targets.⁶⁰

In 2009, several deeply concerning and widely reported Somali hijackings, as well as a dramatic hostage rescue by a Navy SEAL team brought very high international media profile and increased focus to the multi-national anti-piracy effort.⁶¹ As a result, the greatest percentage of the maritime interdiction effort has focused in this area of the world. At the beginning of 2012, some 30 nations were committing over 40 vessels per day to patrolling the Gulf of Aden and its approaches in the Indian Ocean, at a staggering cost of approximately \$100,000 per vessel, per day.⁶² By the end of 2011, the total economic cost of Somali piracy was estimated at \$5.3 - \$5.9 billion, of which approximately \$1.3 billion was attributed to the multi-national military effort.⁶³ The human cost has also been high – even with the decline in piracy, as of 31 December 2012, eight vessels and 127 hostage crew members of different nationalities were still being held for ransom by suspected Somali pirates.⁶⁴ Pirate attacks in the region peaked in 2010 and have fallen steadily since, as the massive influx of naval resources, combined with noteworthy changes to Somali governance, increased pressure on local pirate networks.⁶⁵ Unfortunately, piracy is not limited to any one area, and although attacks have declined regionally, indications still point to a general rise in activity throughout the rest of the world.⁶⁶ Despite the dramatic drop in pirate attacks off the coast of Africa, attacks in Indonesia doubled from 46 in 2011 to 81 in 2012.⁶⁷

Economics

Modern maritime piracy is, as it has been throughout much of history, primarily a socio-economic endeavor. While social factors most often compel piracy, financial gain sustains it. Most attempts to curb piracy have focused on the pirates themselves, but as much as 70 percent of ransom payments collected by pirates ends up in the hands of financiers, arms suppliers, government officials and other sponsors, each of whom do

not generally face the same threat of death, injury and imprisonment as the actual pirates.⁶⁸ The economic consultancy company *Geopolicity* concluded in 2011 that “[p]irates who have not been press-ganged into being pirates would appear to be the very essence of rational profit-maximizing entrepreneurs as described in neo-classical economics,” and estimated that the annual damage inflicted by Somali pirates alone would exceed \$15 billion by 2015, while the number of pirates could grow by as many as 200-400 each year.⁶⁹ Their unique research used “value chain analysis” to establish an accepted model which identifies each stage and actor within the Pirate Value Chain, and that differentiates between pirates and the “profiteers” who support them.⁷⁰

Even beyond the immediate Pirate Value Chain, substantial secondary income is derived by insurers, private security firms, money handlers, and producers of deterrent technologies. In other words, while the social factors of a failed state may have first driven coastal fishermen to undertake highly criminal and dangerous pirate activities, it has been the profiteering motive of its land-based activities that has truly sustained and expanded the extent of piracy.⁷¹ In this sense, it also becomes self-sustaining, as the overall economic and social impact of piracy additionally suppresses legitimate (non piracy-based) development. This has been particularly evident in lawless areas such as Somalia and the Gulf of Aden. Therefore, while the pirates themselves may be the weakest link in the chain, a more holistic approach to combating the enterprise as a whole is needed to defeat it. Although international strides in this effort have been made in recent years, to include freezing financier assets and the passage of U.N. resolutions that allow multi-national military forces to attack pirate infrastructure within

Somali territorial waters and on land, the bulk of the effort still comes from naval patrols which target protection of shipping from actual pirates on the high seas.⁷²

Unfortunately, with much of the Western world in financial distress, many developed nations are finding themselves with less to spend on defense and international security efforts. In response to the overall reduced number of attacks during 2012, the commander of Operation *OCEAN SHIELD*, NATO's counter-piracy mission in the Gulf of Aden and off the Horn of Africa, warned that "if navy ships would disappear, the piracy model would still be intact," and implied it could surge quickly if the large number of international warships currently patrolling the Indian Ocean were reduced.⁷³ If this is true, then the United States' current budgetary predicament is of particular concern to international merchant shipping, as the U.S. component of Combined Task Force 151 (CTF-151) provides a great share of these naval vessels and maritime airborne surveillance assets.⁷⁴ As the U.S. shifts its economic focus internally, looks for ways to cut defense spending, and "rebalances" its military forces to the Pacific, sustaining the anti-piracy effort in the Gulf of Aden and other areas will become even more difficult. This is where a new approach could present opportunities. The next section will look at the threat of cyber exploitation, making parallels between it and maritime piracy, and the final section will suggest a modern letter of marque regime that could be applied to both.

Cyber Exploitation

Current Context

Just as the majority of the world's traded goods travel by water, the majority of the world's financial trade is exchanged today via international cyber networks. Even beyond the financial markets themselves, originating sales of goods is becoming ever

more internet-driven. Developed largely absent of government controls, the global Internet has become vital to the world economy, a universal and fundamental service relied upon in the daily lives of billions of individuals, and integral to thousands of institutions around the world.⁷⁵ Unfortunately, within this domain non-state actors abound and state boundaries are essentially irrelevant, creating security threats which are only beginning to be discussed in earnest. Within the United States, there are currently few regulatory organizations in place to govern its use, and none to effectively ensure its security.⁷⁶

According to former Deputy Secretary of Defense William J. Lynn, III, “Every year, an amount of intellectual property many times larger than all the intellectual property contained in the Library of Congress is stolen from networks maintained by U.S. businesses, universities, and government agencies.”⁷⁷ According to the FBI, the loss of such intellectual property through cyber theft – essentially piracy – costs American businesses billions of dollars every year.⁷⁸ A growing number of high-profile incidents in recent years involving exploitive cyber attacks on U.S. companies such as Google, Microsoft, GM, and Lockheed Martin have highlighted the extent of the cyber threat. These examples highlight the strategic importance of combating cyber attacks – and extent of their impact denotes the intersection of national security and private business interests.

President Obama highlights the inherent challenges in facing the current cyber threat in the 2010 National Security Strategy, stating that:

Cybersecurity threats represent one of the most serious national security, public safety, and economic challenges we face as a nation. The very technologies that empower us to lead also empower those who would disrupt and destroy. They enable our military superiority, but our

unclassified government networks are constantly probed by intruders. Our daily lives and public safety depend on power and electric grids, but potential adversaries could use cyber vulnerabilities to disrupt them on a massive scale. The Internet and e-commerce are keys to our economic competitiveness, but cyber criminals have cost companies and consumers hundreds of millions of dollars and valuable intellectual property.⁷⁹

The National Security Strategy continues by offering two general ways to “deter, prevent, detect, defend against, and quickly recover from” such cyber intrusions: 1.) “Investing in People and Technology” to create resilience and personal awareness, and 2.) “Strengthening Partnerships” with industry and international organizations to develop acceptable norms, laws, and responses to address cyber incidents.⁸⁰

Surprisingly however, Congress has passed very little legislation regarding cyberspace regulation to date, and U.S. policymakers continue their struggle to appropriately match ways and means to the ends stated in the National Security Strategy. One reason for this is the complexity of cyberspace, while another stems from the fact that its borderless medium blurs distinctions between government and private targets.⁸¹ Federal laws currently in place are designed to protect *all* computer systems from unauthorized access, and as a result, prohibit private companies attacked from retaliation or even “tracing back” to the originator.⁸² While the NSA likely has the capability and authority to take such actions, their involvement in most private sector cases would further blur military-civilian roles and likely violate the Posse Comitatus Act in the case of domestic issues.⁸³

But the most glaring deficiency is the lack of a conceptual framework with which to look at the growing convergence of interstate and commercial rivalry that is developing in this new domain. Much of the current national security and military network discussion compares the dynamics of cyber security and its development within

international relations, particularly as regards China, to the nuclear cold war standoff between the U.S. and the Soviet Union.⁸⁴ As such, it generally seeks to apply territorial rules and conventions regarding the Law of Armed Conflict (LOAC) from the physical world to a man-made domain of technological communication and commerce. As a result, many of today's cybersecurity debates promise adversarial threat inflation, future 'cyber arms' races, and resultant doomsday hysteria. While this may well develop in the public arena, the danger of financial crime and commercial espionage is largely being ignored, despite the fact that it is the more imminent issue of national security and economic prosperity, particularly in light of current U.S. economic woes. As one recent article aptly put it, "While would-be Cold Warriors stare at the sky and wait for it to fall, they're getting their wallets stolen and their offices robbed."⁸⁵ As lawlessness characterized early activity on the high seas, the same can be said of today's cyber domain. Maritime privateers were held only marginally liable for their misdeeds; the same can be said of modern cyber profiteers and hacktivists, whether state-sponsored or not.

The broad picture that emerges is one of competition interacting within traditional interstate relations, but within the cyber domain.⁸⁶ Much as in the maritime environment, those states most skilled at harnessing the cyber domain for social and economic gain are also those most exposed to the dangers lurking within it.⁸⁷ Looking then at piracy, terrorism, and cyber threats from their entrepreneurial convergence in the global common of cyberspace could generate interest in using the free enterprise system as a method to help deal with them.

Application

This paper postulates that an environment of non-state and state-sponsored privateering already exists within cyberspace. It recommends that the United States either: a.) recognize that environment overtly and work to abolish it within the international community as Great Britain did with the Paris Declaration, or b.) or use its Constitutional power to issue Letters of Marque and Reprisal to allow private U.S. companies to maintain dominance in the cyber domain until such time that the U.S. has a sufficient “Cyber Force” that can dominate the high seas of that domain.

In his 1998 fictional novel, *Balance of Power*, author James Huston examines the idea of using a modern day letter of marque.⁸⁸ The book’s central theme centers on a terrorist confrontation at sea in which an American merchant ship is sunk and its crew is killed. In his novel, a forward-leaning Congress issues a Letter of Marque to authorize and direct retaliatory action. The book explores legal aspects, as well as considering the role of Congress relative to that of the President in declaring war and directing the military. Although highly fictionalized, his novel, as well as proposed Congressional acts from U.S. Representative Ron Paul following the events of 9/11, have revived the idea of issuing letters of marque for use against threats of piracy and terrorism at various times over the last decade.⁸⁹

Unfortunately, most of these ideas have focused on direct action in the physical domain, accomplished by commissioning private actors to augment national military forces in the accomplishment of their objectives. They generally recommend the use of commercial paramilitary services to hunt down terrorists or privatized naval forces to combat pirates, much in line with the maritime privateering concept. However, they have generally had difficulty describing how such private companies would be regulated

within the Law of Armed Conflict, and how they would recoup (and profit in light of) the enormous cost of bonding, equipping, operating and defending legal claims within a prize court system. Likewise, they often neglect to address existing jurisprudence and perceptions within long-established territorial and maritime domains. This paper recommends addressing such threats from their common intersection within the new domain of cyberspace.

Cyberteering

The Constitution clearly states that the power to issue Letters of Marque and Reprisal lies with the Congress. In his thesis on cybersecurity, Dr. Michael Hopkins suggests that Congress propose legislation which seeks to scale the legal principles of such letters to cyberspace, authorizing limited use of force by specified private sector entities acting as “cyberteers” to protect the system of electronic commerce.⁹⁰ This would require the creation of a new agency under the Department of Homeland Security to impose regulations and requirements, as well as a cyber-oriented judicial system to issue warrants and adjudicate claims – in essence, acting as prize courts did for maritime privateering.

One of the major drawbacks to the current approach being adopted in contemporary application of cyber law is that of attribution. The nature of multiple interconnected networks and indirect pathways for data flow creates high degrees of difficulty in pinpointing the origin of an attack. BotNets, trojan horses, self-replicating worms, and other malicious code purposely make attributing a system attack to its originator complicated. Additionally, low barriers to entry mean that any smart hacker with a computer, an internet account, and the right motivation, could feasibly present a threat. The 2001 Convention on Cybercrime, more commonly known as the Budapest

Convention, is upheld as the standard for international law in the President's International Strategy for Cyberspace.⁹¹ Unfortunately, the Budapest Convention imposes an evidentiary standard requiring proof of attribution beyond a reasonable doubt.⁹² Under this criminal law approach, no responsive action may be taken without that level of attribution, which is jurisdictionally prohibitive, difficult to prove, and therefore does not sufficiently deter cyber attacks or exploitation. This leaves cyber pirates with a similar risk-reward calculation that perpetuates modern maritime piracy.

In establishing such a system, Hopkins' recommends that Congress limit responses to three levels, grouped according to action authorized under differing standards of evidence ranging from showing probable cause, to demonstrating a preponderance of evidence, to requiring beyond a reasonable doubt. The full extent of the legal concepts behind his proposal is beyond the scope of this paper and its author, but for purposes of bringing the concept to light, his proposed levels are summarized here.⁹³

Level 1 – Trace Back: Similar to a search warrant, this first level of response would allow a cyberteer to “trace-back” the source of an attack or exploitation, and would only require the cyberteer to present evidence of probable cause. The ability of the cyberteer to trace back the source of the attack could then give insight to the originator and motive for the attack, providing evidence for further action, if warranted.

Level 2 – Sanction or Blockade: This level would require a finding by the preponderance of evidence that the target discovered in the trace-back actually initiated the attack or exploitation. It would then allow the imposition of a state or private-level restriction against the perpetrator which effectively limits their use of the Internet.

Level 3 – Active Defense Measures: Active defense measures refer to the use of an electronic countermeasure directed at the source of an attack, with the purpose of terminating the attack and preventing its recurrence. Under Dr. Hopkins’ proposal, this final level of response would only be permitted in cases where the use of force is permitted under the Law of War, and would subject the cyberterror to “super-warrant” requirements imposed under the Wiretap Act.⁹⁴ Such a level of response would be reserved for egregious cases in which major financial damage was perpetrated, would require clear and convincing evidence of attribution, and would require agency head authorization for retaliation. Cases of this level might also rise to the point in which government intervention at a higher level would be required or desired due to sensitive foreign relations.

The role of the Federal government, then, would be to provide the legal framework for the private sector not only to secure itself against cyber attack and exploitation, but also to take retaliatory or recompensatory action in its event. The overarching policy reasoning for creating such a system would be to more effectively deter would-be criminals from taking such exploitation action in the first place, as much as to punish them and to compensate those who suffer from their actions.

Any agency tasked with regulating and controlling such a system would have to be sensitive to proprietary confidentiality concerns, impose appropriate licensing and bonding requirements, implement regulations and codes of conduct, and maintain a registry database of malicious code for research.⁹⁵ By leveraging private sector talent and maintaining separation from the state through the sanction of cyberterrorists acting

under the law, the U.S. could protect its economic interests while helping defuse actions that might otherwise lead to international conflict.⁹⁶

Dismantling Cyber Havens

Another recommendation that follows from the study of history can be seen in the systematic dismantling of pirate havens during the Golden Age of piracy. The British government used its naval forces, and at times those of privateers, to dismantle pirate-friendly markets. Similar efforts could be taken under such a regime to dismantle their modern day equivalents. It is estimated that as few as 50 Internet Service Providers account for 50% of infected machines worldwide, and according to research presented at the IEEE Symposium on Security and Privacy, a mere three firms process 95% of credit card transactions resulting from phony drug advertising scams.⁹⁷ These modern-day cyber piracy havens are generally known, and should be targeted to minimize cybercrime.

Building Treaties or Norms

As the period of maritime privateering advanced, a network of bilateral and multilateral agreements was gradually established to assert the principle of open sea commerce, setting the path for global understanding “that eventually turned pirates from accepted actors into international pariahs, pursued by all the world’s major powers.”⁹⁸ Likewise, President Obama’s *International Strategy for Cyberspace* emphasizes the importance of establishing “an environment of expectations, or norms of behavior, that ground foreign and defense policies and guide international partnerships,” while noting the “increasing evidence that governments are seeking to exercise traditional national power through cyberspace.”⁹⁹ Emphasizing *Stability Through Norms*, it states that

The development of norms for state conduct in cyberspace does not require a reinvention of customary international law, nor does it render existing international norms obsolete. Long-standing international norms guiding state behavior – in times of peace and conflict – also apply in cyberspace.¹⁰⁰

Likewise, it calls for multi-stakeholder governance, affirming that “efforts must not be limited to governments, but should include all appropriate stakeholders.”¹⁰¹

The great powers of Europe, though competitors, recognized their reliance on the seas for trade and economic prosperity. In allowing privateering, they fostered competition among their corporate entities. The actions of large, private corporations such as the British and Dutch East India Companies were at times comparable with those of sovereigns.¹⁰² Each was granted great latitude by their governments to ensure their Empire’s mercantile prosperity in the face of international competition.¹⁰³

It was the maritime dominance of a few powers, primarily the British, that led to the European powers’ agreement to end privateering. For smaller (or in the case of America, less mature) nations with weak navies, permitting privateering by non-state actors was a means for states to compete and defend against that domination. Similarly today, cyber exploitation appears to stem primarily from non-state actors seeking to secure equity either with or without tacit state support. Ultimately, this can only be balanced through an accepted international understanding which ensures free and unfettered trade. The question is whether that framework must first develop through the logical and historical progression of privateering.

Although dissuasion and deterrence are the current cornerstones of our national policy, there are likely to be times when retaliation is warranted. Until such time as a greater understanding can be developed as to the consequences of such actions, particularly when initiated at the government or cross-domain level, allowing private

entities to react via methods “short of war” (and not via the Department of Defense), is a viable option. Because there is as of yet no shared conceptual framework between the U.S. and its adversaries, potential miscalculations at the state level could easily occur. Cultivating an understanding and appreciation of the role of private companies within the current cyber domain is a first step to creating the type of international framework that the U.S. government needs for deterrence, crisis management and escalation control. Thus the “collective and concerted national action that spans the whole of government, in collaboration with the private sector” as called for in the National Strategy could include methods such as cyberteering.¹⁰⁴

Maritime Piracy

Calls have been made for application of maritime “contracts of marque” within the physical realm, creating private naval forces to patrol high-risk areas, protect shipping, and even use force to combat pirates themselves, primarily collecting bounties as an incentive for their actions.¹⁰⁵ While this could be feasible, such a proposition would likely need to be sponsored and regulated within an internationally-accepted framework under a governing body such as the United Nations, in order to avoid questions of legitimacy and acceptable oversight. Much as the U.N. has authorized the use of force on the high seas and even within territorial waters of Somalia, it has been proposed that such an organization could also authorize naval action by privatized forces. An obvious drawback to this concept would be the political implausibility of creating a non-partial bidding process to award such contracts to private companies applying from a variety of nations without perception of national favor or influence. Appropriate bonding, regulation, command, and control of such international companies would also be

problematic, as would establishing a system in which private market forces (beyond such bounties) appropriately rewards contractors for their actions.

Another proposed method for such letters is to regulate and enforce the conduct of the Private Military Security Companies (PMSCs) that have recently taken an active role in anti-piracy by providing on-board armed protection of maritime shipping.¹⁰⁶ Although the emergence of some 140 PMSCs employing over 2700 armed contractors within the last two years has created some serious legal issues, Assistant Secretary of State Andrew Shapiro stated in October 2012 that “the use of armed security teams has been a potential game changer in the effort to combat piracy.”¹⁰⁷ However, there are growing questions of legal jurisdiction regarding actions they take, and skirmishes at sea between PSMCs and pirates have already led to international disputes and impending legal battles.¹⁰⁸ As commercial revenue growth and a general vacuum of governmental regulation continue feeding the PMSC counter-piracy boom, the necessity of regulating the actions of these forces should be addressed within an international venue.¹⁰⁹ As national naval forces become resource-limited, perhaps the idea of an internationally-recognized letter of marque regime could serve as the starting point.

Finally, this paper imagines contemporary letters of marque and reprisal to combat global cyber exploitation in a similar fashion as those utilized in the “cyberteering” section above, in order to attack the networked systems of financiers and criminal organizations that profit through sustained maritime piracy. Specialized companies, operating under sanction of a governing agency and with the motivation of profit-sharing from returned assets or finder’s fees, could be incentivized to take down those organizations that recruit, finance, support pirate activities, then launder the

monies gained from ransoms. Other links between maritime security and commerce lie in this cyber sphere too, as global maritime navigation, communication and traffic control are all highly dependent on networked systems, which are all vulnerable to disruption from such threats.¹¹⁰ In the recent past, supporters of maritime piracy have gained inside access to shipping records, communication devices, and scheduling programs in order to facilitate attacks at longer ranges in the Indian Ocean. Such cyberteering entities might be enlisted to help ensure the security of these critical linkages.

Risks

Each of these modern applications of letters of marque and reprisal has possibility within the context of U.S. and International Law. Yet no proposal is without risks or drawbacks. International law is complex, politics plays an indeterminate and ever-changing role, and the technological environment of the Internet is changing faster than the bureaucratic forces of international cooperation can likely hope to keep up.

While the increasing cyber threats are intimidating and have received widespread media coverage and increased focus at the national level, the U.S. is probably still considered a relatively powerful cyber-faring nation. As such, it is questionable whether the U.S. should seek to implicitly encourage cyberteering, when it arguably has the most powerful governmental capabilities or is willing to spend the capital to develop them. In fact, in light of the history covered above, it may even be more likely that we would take the position that the great seafaring powers of the mid-nineteenth century took in establishing the Paris Declaration -- seeking thereby to limit the abilities of others to profit by cyberteering at our expense.

Conclusion

Evidence of the Framers' intent to create a strong national government can be seen in the Constitution's provisions, as well as its preamble, which states that it was established to "provide for the common defense, promote the general welfare, and secure the blessings of liberty."¹¹¹ The fact that the Congress' power to grant Letters of Marque and Reprisal has never been revoked, despite international treaties against privateering, should be considered indicative of the nation's collective desire to ensure that the United States remains adaptive to developments in the global environment and the ever-changing international relations framework. The Framers understood that the U.S. must always have a means to protect itself against foreign threats and ensure economic vitality if it is to remain the guarantor of American freedom and prosperity.

As the U.S. and the international community contemplate a host of difficult security concerns modern extraterritorial threats such as piracy, terrorism, and cyber exploitation, U.S. policymakers and legal scholars should contemplate the conceptual merit of letters of marque and reprisal as a means of combating these threats short of "war." This is not to say that the Constitutional power to grant letters of marque and reprisal should be taken lightly. As Thomas Jefferson explained, "The making of a reprisal on a nation is a very serious thing. Remonstrance and refusal of satisfaction ought to precede; and when reprisal follows, it is considered an act of war, and never yet failed to produce it in the case of a nation able to make war."¹¹² For this reason, any Department tasked with governing such power granted by Congress must be given the requisite power to properly regulate its use.

At her Senate confirmation hearing in 2009, Secretary of State Clinton stated that "the President-elect and I believe that foreign policy must be based on a marriage of

principles and pragmatism, not rigid ideology.” She further emphasized the use of “smart power,” and defining it as “using the full range of tools at our disposal – diplomatic, economic, military, political, legal, and cultural – picking the right tool, or combination of tools, for each situation.”¹¹³ While her intent was likely to highlight the need for diplomacy, this balanced approach that seeks to minimize the use of military power to solve state and non-state threats has been sorely lacking in recent years. Resurrecting well-regulated letters of marque and reprisal, not for war “profiteering,” but for effective use of the strength of American entrepreneurial ingenuity, could be seen as one more tool in this holistic approach. The United States’ center of gravity is our economic strength and vitality. In order to protect it from the ever-expanding tensions within the cyber domain, and current ambiguity of international law regarding it, perhaps the most convincing application of the letter of marque and reprisal’s potential is in this arena.

In the recent words of our new Secretary of State, “More than ever, foreign policy is economic policy.”¹¹⁴

Endnotes

¹ U.S. Constitution, art. 1, § 8.

² After three years (2009-2011) of sustained annual pirate attacks of greater than 410 in total number, 2012 saw a significant drop to 297 attacks reported globally, attributed to increased naval activity, land-based anti-piracy operations, preventative/defensive measures, and employment of Privately Contracted Armed Security Personnel (PCASP). ICC International Maritime Bureau, *Piracy and Armed Robbery Against Ships Annual Report for the Period 1 January – 31 December 2012* (Essex, U.K.: ICC International Maritime Bureau, 2013), 20.

³ Akash Chaturvedi, "Two Faces of High-Seas Crime," *United States Naval Institute Proceedings* 136.7 (July 2010): 24-28.

⁴ Michael V. Hayden, “The Future of Things Cyber,” *Strategic Studies Quarterly* 5, no. 1 (Spring 2011), 5-6.

⁵ Jeremy A. Rabkin and Ariel Rabkin, "To Confront Cyber Threats, We Must Rethink the Law of Armed Conflict," *Emerging Threats Essays* (Stanford University: Hoover Institution, 2011), http://media.hoover.org/sites/default/files/documents/EmergingThreats_Rabkin.pdf (accessed February 12, 2013), 3.

⁶ Michael Kempe, "'Even in the Remotest Corners of the World:' Globalized Piracy and International Law, 1500-1900," *Journal of Global History* 5, no. 3 (November, 2010), 354.

⁷ "Piracy," *Webster's Online Dictionary*, <http://www.websters-online-dictionary.org/definitions/Piracy> (accessed November 8, 2012).

⁸ Bryan A. Garner, ed., *Black's Law Dictionary*, 8th ed. (St. Paul, MN: Thompson West, 2004), 1233.

⁹ Theodore M. Cooperstein, "Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering," *Journal of Maritime Law and Commerce* 40, no. 2 (April 2009), 222.

¹⁰ *Ibid*, 223.

¹¹ Francis Raymond Stark, "The Abolition of Privateering and the Declaration of Paris," *Studies in History, Economics and Public Law*, (New York: Columbia University, 1897), 51.

¹² Cooperstein, "Letters of Marque and Reprisal," 223.

¹³ *Ibid*.

¹⁴ *Ibid*.

¹⁵ Cooperstein, "Letters of Marque and Reprisal," 224.

¹⁶ *Ibid*, 225.

¹⁷ Stark, "The Abolition of Privateering," 72.

¹⁸ Cooperstein, "Letters of Marque and Reprisal," 226.

¹⁹ *Ibid*, 227; Articles of Confederation, art. 9, http://www.ourdocuments.gov/print_friendly.php?flash=true&page=transcript&doc=3&title=Transcript+of+Articles+of+Confederation+%281777%29 (accessed: February 6, 2013).

²⁰ Cooperstein, "Letters of Marque and Reprisal," 230.

²¹ *Ibid*, 230-231.

²² William Paterson, "*Penhallow v. Doane*," U.S. Supreme Court, 3 U.S. 54 (1795), 111; Cooperstein, "Letters of Marque and Reprisal," 232.

²³ Cooperstein, "Letters of Marque and Reprisal," 233.

²⁴ Stark, "The Abolition of Privateering," 127; Cooperstein, "Letters of Marque and Reprisal," 237.

²⁵ Stark, "The Abolition of Privateering," 128; Cooperstein, "Letters of Marque and Reprisal," 237.

²⁶ U.S. Supreme Court, *The Thomas Gibbons*, 12 U.S. 421 (1814); Cooperstein, "Letters of Marque and Reprisal," 239.

²⁷ Cooperstein, "Letters of Marque and Reprisal," 240.

²⁸ *Ibid*, 245. In his book, Professor Stark notes that only Britain and France were the two strongest naval powers and therefore had the most to gain by abolishing privateering, while Russia, Prussia, Austria, and Sardinia "had more to fear from them as neutrals than to gain from them as belligerents." Stark, "The Abolition of Privateering," 143-144.

²⁹ Paris Declaration Respecting Maritime Law, art. 1 (16 April 1856).

³⁰ Mexico and Spain also refrained from signing for similar reasons. Stark, "The Abolition of Privateering," 147.

³¹ Henry Sumner Maine, "International Law Lecture V: Naval or Maritime Belligerency," *The Avalon Project*, Yale Law School Website, http://avalon.law.yale.edu/19th_century/int05.asp (accessed December 13, 2012).

³² According to Emmons' *Statistical History of the U.S. Navy*, American privateers "alone took from the British 317 ships, 538 brigs, 325 schooners, and 161 sloops – 1,341 prizes in all." Stark, "The Abolition of Privateering," 135.

³³ *Ibid*, 143.

³⁴ *Ibid*, 147-148.

³⁵ *Ibid*, 149-150.

³⁶ Cooperstein, "Letters of Marque and Reprisal," 246.

³⁷ *Ibid*, 247.

³⁸ *Ibid*.

³⁹ Stark, "The Abolition of Privateering," 159.

⁴⁰ Michael Kempe, "Even in the Remotest Corners of the World," 353.

⁴¹ Daniel Moran, "The International Law of the Sea in a Globalized World," in Sam J. Tangredi, ed., *Globalization and Maritime Power* (Washington, D.C.: National Defense University Press, 2002), 223.

⁴² Michael Kempe, "Even in the Remotest Corners of the World," 366.

⁴³ Moran, "International Law of the Sea," 228.

⁴⁴ *Ibid*.

⁴⁵ Henry Sumner Maine, "International Law Lecture VI: The Declaration of Paris," *The Avalon Project*, Yale Law School Website, http://avalon.law.yale.edu/19th_century/int06.asp (accessed December 13, 2012).

⁴⁶ Cooperstein, "Letters of Marque and Reprisal," 250-251.

⁴⁷ Cooperstein, "Letters of Marque and Reprisal," 251.

⁴⁸ Theodore T. Richard, "Reconsidering the Letter of Marque: Utilizing Private Security Providers Against Piracy," *Public Contract Law Journal* 39, no. 3 (Spring, 2010), 429.

⁴⁹ Stark, "The Abolition of Privateering," 11.

⁵⁰ "The Laws of War," *The Avalon Project*, Yale Law School Website, http://avalon.law.yale.edu/subject_menus/lawwar.asp (accessed December 19, 2012).

⁵¹ "Laws of War: Conversion of Merchant Ships into War Ships (Hague VII)," *The Avalon Project*, Yale Law School Website, http://avalon.law.yale.edu/20th_century/hague07.asp (accessed February 22, 2013).

⁵² Moran, "International Law of the Sea," 230-231.

⁵³ *Ibid*, 231.

⁵⁴ *Ibid*, 234.

⁵⁵ *Ibid*, 237.

⁵⁶ Anna Bowden, "The Economic Cost of Maritime Piracy," *Oceans Beyond Piracy* (One Earth Future Foundation: 2012), 25.

⁵⁷ Stephen Anning & M.L.R. Smith, "The Accidental Pirate: Readdressing the Legitimacy of Counterpiracy Operations," *Parameters*, (U.S. Army War College, Summer 2012): 30.

⁵⁸ Lauren Ploch et al., *Piracy off the Horn of Africa* (Washington, DC: U.S. Library of Congress, Congressional Research Service, April 27, 2011), 4.

⁵⁹ Of the total 1,848 globally attempted and actual pirate attacks from 2008-2012, 47% (880) were attributed to Somali pirates. ICC International Maritime Bureau, *Piracy Annual Report 2012*, 6.

⁶⁰ U.S. National Security Council, *Countering Piracy off the Horn of Africa: Partnership & Action Plan* (Washington, D.C.: National Security Council, December 2008), 4; According to IMB statistics, 72% of the 297 attacks in 2012 targeted these types of vessels. ICC International Maritime Bureau, *Piracy Annual Report 2012*, 13-14.

⁶¹ *MV Faina* was a Ukrainian-flagged cargo vessel carrying 33 Russian T-72 tanks and an abundance of other weapons. *MV Sirius Star* was a Saudi-flagged super tanker laden with 2.2 million barrels of oil for which pirates received a \$3 million dollar ransom. *MV Maersk*

Alabama's Captain Richard Phillips was rescued by U.S. Navy SEALs in April, 2009. Ploch et al., *Piracy off the Horn of Africa*, 12-15.

⁶² Todd Emerson Hutchins, "Structuring a Sustainable Letters of Marque Regime: How Commissioning Privateers Can Defeat the Somali Pirates," *The California Law Review* 99 (2011), 825.

⁶³ Anna Bowden and Dr. Shikha Basnet, "The Economic Cost of Somali Piracy 2011 Working Paper," *Oceans Beyond Piracy* (One Earth Future Foundation: 2012), 1, 25.

⁶⁴ Bowden and Basnet, "Economic Cost of Somali Piracy," 20.

⁶⁵ ICC International Maritime Bureau, *Piracy Annual Report 2012*, 20.

⁶⁶ A comparison of total attacks attributed to Somali piracy in the region defined as comprised of the Gulf of Aden, Red Sea, Arabian Sea, Indian Ocean, and Oman versus the rest of the world shows that only the Somali piracy region has seen a decline, while pirate attacks throughout the rest of the world are holding steady or increasing. ICC International Maritime Bureau, *Piracy Annual Report 2012*, 5-6.

⁶⁷ ICC International Maritime Bureau, *Piracy Annual Report 2012*, 5.

⁶⁸ Geopolicity, Inc., *The Economics of Piracy: Pirate Ransoms & Livelihoods off the Coast of Somalia*, (Road Town, British Virgin Islands: May 2011), 11.

⁶⁹ This prediction was based on 2009-2011 trends, and do not take into consideration the dramatic drop in Somali piracy experienced in the second half of 2012. Geopolicity, *The Economics of Piracy*, 10.

⁷⁰ Value chain analysis looks at the full extent of activities that define a particular business and evaluates the various costs of each activity compared to the final value of the end product. In case of Somali piracy, actual pirates are only one link in the chain, while the full range of the piracy enterprise also encompasses financiers, recruiters, arms and equipment suppliers, ransom negotiators, money launderers, and even government officials. Geopolicity, *The Economics of Piracy*, 6.

⁷¹ Geopolicity, *The Economics of Piracy*, 15.

⁷² Ploch et al., *Piracy off the Horn of Africa*, 17-21.

⁷³ Adrian Croft, "NATO Commander: Somali Pirates' Business Model Still Intact," Reuters (December 17, 2012) <http://gcaptain.com/nato-commander-says-somali-pirates-business-model-is-still-intact/> (accessed February 19, 2013).

⁷⁴ Although other national navies contribute assets, the primary regional maritime interdiction effort is provided by the multi-national naval forces of U.S.-led CTF-151, NATO-led Operation OCEAN SHIELD, and EU-led Operation ATLANTA. Andrew J. Shapiro, "Turning the Tide on Somali Piracy," *U.S. Department of State Web Site* (Washington, D.C.: Remarks to the Atlantic Council: October 26, 2012), <http://www.state.gov/t/pm/rls/rm/199927.htm> (accessed January 22, 2013).

⁷⁵ Libby Osher, "Debugging America's Cyber Policy," *Public Interest Report* 65, no. 1 (Summer 2012), 18.

⁷⁶ As of 2012, the only major regulatory bodies were the Internet Engineering Task Force (IETF), which sets technical standards for internet protocol, and the Internet Corporation for Assigned Names and Numbers (ICANN), which assigns domain names. Osher, "Debugging America's Cyber Policy," 19.

⁷⁷ William J. Lynn, III, "Defending a New Domain," *Foreign Affairs* 89, no. 5 (Sep/Oct 2010), 100.

⁷⁸ "Cyber Crime," *The Federal Bureau of Investigation Web Site*, <http://www.fbi.gov/about-us/investigate/cyber/computer-intrusions> (accessed February 21, 2013).

⁷⁹ Barack Obama, *National Security Strategy* (Washington, D.C.: The White House, May 2010), 27.

⁸⁰ Obama, *National Security Strategy*, 27-28.

⁸¹ Michael Todd Hopkins, "The Exceptionalist's Approach to Private Cybersecurity: A Marque and Reprisal Model," *ProQuest Dissertations and Theses* (George Washington University: August 15, 2011), <http://search.proquest.com/docview/921187461> (accessed February 12, 2013), 10.

⁸² *Ibid*, 14.

⁸³ The Posse Comitatus Act forbids federal military forces from functioning in a domestic law enforcement capacity. *Ibid*, 15.

⁸⁴ Noah Shachtman and Peter W. Singer, "The Wrong War: The Insistence on Applying Cold War Metaphors to Cybersecurity is Misplaced and Counterproductive," *Government Executive* 43, no. 10 (August 2011), 30.

⁸⁵ *Ibid*, 34.

⁸⁶ Lucas Kello, "Cyber Disorders: Rivalry & Conflict in a Global Information Age," briefing slides, <http://belfercenter.ksq.harvard.edu/files/kello-isp-cyber-disorders.pdf> (accessed February 21, 2013).

⁸⁷ *Ibid*.

⁸⁸ James Huston, *Balance of Power* (New York: Harper Collins, 1998).

⁸⁹ U.S. Congress, "House Resolution 3074," *107th Congress, 1st Session*, (October 10, 2001).

⁹⁰ Hopkins, "Private Cybersecurity," 42-43.

⁹¹ Barack Obama, *International Strategy for Cyberspace* (Washington, D.C.: The White House, May 2011), 13, 19-20.

- ⁹² Hopkins, "Private Cybersecurity," 46.
- ⁹³ Ibid, 50-55.
- ⁹⁴ Ibid, 54.
- ⁹⁵ Ibid, 60.
- ⁹⁶ Ibid, 65.
- ⁹⁷ Schachtman, 36.
- ⁹⁸ Ibid.
- ⁹⁹ Obama, *International Strategy for Cyberspace*, 9.
- ¹⁰⁰ Ibid.
- ¹⁰¹ Ibid, 10.
- ¹⁰² Michael Kempe, "Even in the Remotest Corners of the World," 360.
- ¹⁰³ Hayden, "The Future of Things Cyber," 5-6.
- ¹⁰⁴ Barack Obama, *International Strategy for Cyberspace* (Washington, D.C.: The White House, May 2011), 13.
- ¹⁰⁵ Hutchins, "Structuring a Sustainable Letters of Marque Regime," 879.
- ¹⁰⁶ Richard, "Reconsidering the Letter of Marque," 464.
- ¹⁰⁷ Shapiro, "Turning the Tide on Somali Piracy."
- ¹⁰⁸ James Brown, *Pirates and Privateers: Managing the Indian Ocean's Private Security Boom*, (Sydney Australia: Lowy Institute for International Policy, September 2012), 3.
- ¹⁰⁹ Ibid, 11.
- ¹¹⁰ James G. Stavrides, "Sailing Across the Bridge," *Proceedings* 135, no. 10 (October 2009), 19.
- ¹¹¹ U.S. Constitution, Preamble.
- ¹¹² Thomas Jefferson, regarding the capture of a British Vessel in 1793, as quoted at "Privateers," *GlobalSecurity.org Website*, <http://www.globalsecurity.org/military/navy/privateer.htm> (accessed February 15, 2013).
- ¹¹³ Hillary Rodham Clinton, Remarks at Senate Confirmation Hearing, *U.S. Department of State Website*, (Washington, D.C.: January 13, 2009) <http://iipdigital.usembassy.gov/st/english/texttrans/2009/01/20090113174107eaifas0.6630213.html#axzz2LxGedvBI> (accessed February 25, 2013).

¹¹⁴ John Kerry, Remarks at Senate Confirmation Hearing, *U.S. Department of State Website*, (Washington, D.C.: January 24, 2013)
<http://iipdigital.usembassy.gov/st/english/texttrans/2013/01/20130124141423.html#axzz2LxGedvBI> (accessed February 25, 2013).

