

Article

**Piracy, Sea Robbery, and Terrorism:
Enforcing Laws to Deter Ransom Payments
and Hijacking**

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I. INTRODUCTION

In the middle of November 2008, supertanker *Sirius Star* was captured by Somali pirates approximately 450 nautical miles off the coast of Kenya.¹ The pirates held the ship, cargo and crew for two months, initially demanding \$25 million in ransom from the Saudi ship owner.² Over time the pirates eventually settled for \$3 million, delivered in cash by parachute drop.³ After the pirates verified and divided the ransom, they left the ship and allowed the *Sirius Star* to sail into safe waters. By capturing this large vessel far outside of the Gulf of Aden, the Somali pirates demonstrated they were committed to continuing their piratical regime in addition to expanding their territory.

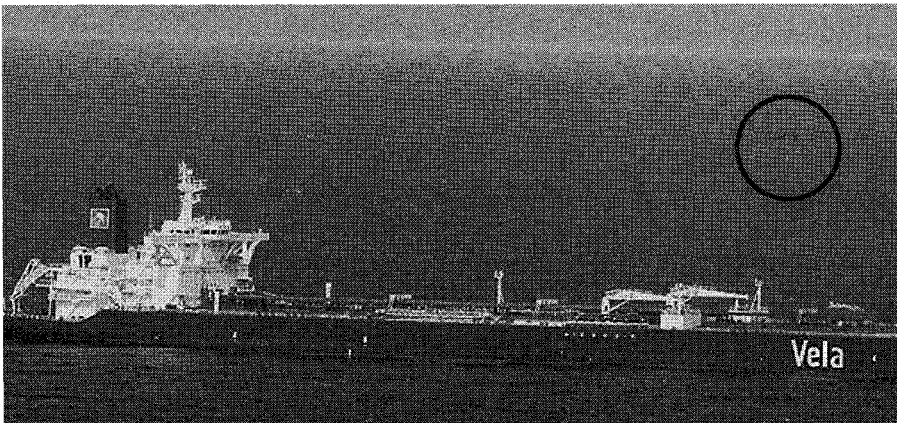


Figure 1: Ransom delivery by parachute drop onto the supertanker *Sirius Star* in January, 2009; the ransom package is circled in the upper right-hand corner.⁴

Although piracy is not limited to the navigable waters off the Somali coast, the area has had more successful recent attacks than any other region on earth.⁵ The success of these attacks is due in large part to the

1. Robert Walker, *Pirates Pass Open Water Test*, BBC NEWS, Nov. 18, 2008, <http://news.bbc.co.uk/2/hi/africa/7736472.stm>.

2. Mohammed Ibrahim & Graham Bowley, *Pirates Say They Freed Saudi Tanker for \$3 Million*, N.Y. TIMES, Jan. 9, 2009, at A6, available at <http://www.nytimes.com/2009/01/10/world/africa/10somalia.html>.

3. *Id.*

4. *Id.* (photograph)

5. Int'l Chamber of Commerce, Int'l Maritime Bureau [IMB], *Piracy and Armed Robbery Against Ships: Annual Report*, at 5 (2009) [hereinafter *IMB Annual Report 2009*].

number of years the pirates have been operating in addition to the nature of the ships and cargos they hijack.

Since 1995, former fishermen from Somalia have perfected the technique of boarding ships without causing extensive damage to a vessel, cargo, or crew.⁶ The entire operation was treated like a business transaction, where hostages were treated well (i.e. not harmed) in exchange for a guaranteed ransom payment from a grateful ship owner or insurer. However, according to recent reports, events have become increasingly violent as the attacks against ships over the past five years have grown.⁷

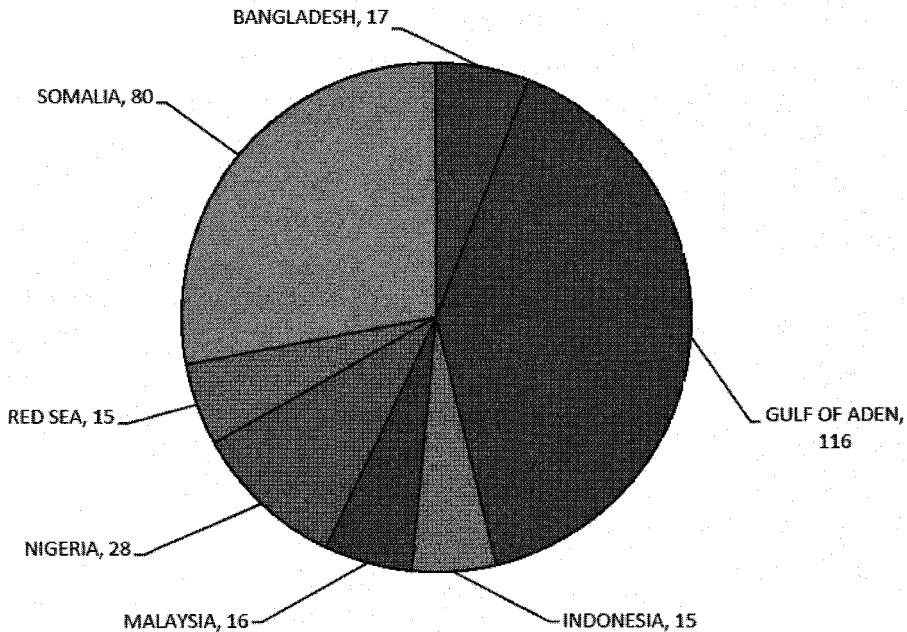


Figure 2: Chart of the regions with the greatest amounts of reported piracy; note that the Gulf of Aden and Somalia reports alone account for 196 incidents.⁸

Conversely, Asian countries saw a drop of 26% in both attempted and successful hijackings between 2004 and 2008.⁹ Among other things, this drop has been attributed to the implementation of cooperative arrangements between countries that allow for the simple and easy exchange of information, an expansive definition of piracy, and constant

6. U.S. MAR. ADMIN., *SOMALI PIRATE TACTICS* (2009), http://www.marad.dot.gov/documents/Somali_Pirate_Tactics_8May2009.pdf [hereinafter *PIRATE TACTICS*].

7. *IMB Annual Report 2009*, *supra* note 5, at 12 tbl.8.

8. *Id.* at 6.

9. See Paul Apostolis & John Knott, *Modern Piracy at Sea: A Global Challenge*, 85 *SEAVIEW* § 6, at 1 (Spring 2009), <http://www.seatransport.org/seaview.htm#85>.

reporting on recent pirate attacks or attempts.¹⁰

This paper will focus on U.S. and international laws that address piracy and present several alternatives, or combinations of alternatives, that may help combat the unlawful attacks on a global level. Like all good policies, an ounce of prevention is worth a pound of cure. By negatively affecting the proportionality of the pirate “risk v. reward” ratio, a nation can protect itself from becoming an easy pirate target. Moreover, by enforcing current laws against terrorism, the U.S. may use its existing policy to encourage local ship owners and insurers to find alternative means to paying ransoms to pirates. Using this combination of law and policy will force carriers, owners, and insurers to create a comprehensive strategy for preventing piracy while allowing them lawful access to a government’s military force in the event of an unforeseen attack. Before addressing the legal consequences of combating piracy and sea robbery, it is important to understand its history, the law, and definitions used in U.S. and international maritime law.

II. A HISTORY OF PIRACY AND SEA ROBBERY

The terms piracy and sea robbery have evolved over the history of maritime law to have different meanings based primarily on the location of an aggressive act upon a vessel. Initially, it was stated that piracy was mere sea robbery, without giving full credit to the negative effects that piracy had on international trade, commerce, and a nation’s navy.¹¹ And, although piracy began as the random robbery of ships, especially of those engaged in commerce, it was not until piracy was sanctioned by nations in the middle ages before it elicited the complete disdain of most states.¹² By better understanding the basic history of piracy, it becomes clear why the location of a piratical act is important to its definition.

Piracy has existed in some form or other since the beginning of maritime commerce.¹³ In their earliest history, pirates would attack a vessel, seize anything of value, and even torture or murder the crew.¹⁴ In addition to these depraved acts, early pirates engaged in instances of maritime kidnapping and ransom. One of the more famous instances of kidnapping occurred in 75 B.C. when Julius Caesar’s ship was attacked by pirates.¹⁵ The pirates, noticing that the young Caesar was a wealthy man,

10. *Id.* at 1-2.

11. Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT’L & COMP. L. REV. 293, 310-11 (2006).

12. Lawrence Azubuike, *International Law Regime against Piracy*, 15 ANN. SURV. INT’L & COMP. L. 43, 45 (2009).

13. Burgess, *supra* note 11, at 301.

14. *Id.*

15. JIM WHITING, *THE LIFE AND TIMES OF JULIUS CAESAR* 7-8 (Mitchell Lane 2005).

demanded 20 talents ransom for his release.¹⁶ Upon hearing of the low ransom demand, Caesar laughed and suggested that he was worth at least 50 talents.¹⁷ When Caesar was eventually released he brought all of his captors to justice by crucifixion.

Later, specifically during the 16th century, pirates were used by nations to add to the strength and effectiveness of their naval resources.¹⁸ Known as privateers, these “pirates” were authorized by a nation to act on its behalf by “letters of mark.”¹⁹ The primary goals of these privateers were to bleed another country’s resources, to train new naval captains before battle officially began, and, in some instances, even to provoke war.²⁰ Working under these letters of mark allowed pirates to engage in terrorist acts for the first time under the legal sanction of a controlling nation. Queen Elizabeth herself believed that the use of such state-sponsored terrorism was an “ideal way to strike one’s enemy and hide the blade.”²¹

At the end of the Spanish wars, England and Spain found no need to use privateers in furtherance of war.²² In an act of good faith, King James I revoked all letters of mark and outlawed piracy in any form.²³ This act resulted in hundreds of unemployed privateers to then seek full-time employment as pirates.²⁴ No longer with a country to call their own, these pirates focused their efforts against all nations indiscriminately and raced to build their barbaric reputations to become the most ferocious.²⁵²⁶ By 1856, most of the world’s maritime powers united to sign the Declaration of Paris that abolished piracy in all forms, including privateering and any state sponsorship of piracy.²⁷

After the signing of the Declaration of Paris, it was generally accepted that piracy was a much more serious crime than the simple act of robbery at sea. Pirates acting on their own behalf, without the political motivation of a controlling nation, were considered to be engaging in acts of “maritime terrorism.”²⁸ Considering that acts of terrorism were condemned by most nations, pirates were classified in most international

16. *Id.* at 8.

17. *Id.*

18. Azubuike, *supra* note 12, at 45-46.

19. Burgess, *supra* note 11, at 302.

20. *Id.* at 303.

21. *Id.* at 302-3.

22. *Id.* at 303.

23. *Id.*

24. *Id.*

25. *Id.* at 305.

26. Azubuike, *supra* note 12, at 46.

27. *Id.*

28. Burgess, *supra* note 11, at 330.

laws as “hostes humani generis,” or the “enemy of all mankind.”²⁹ By identifying pirates as those who were “at war” against all of civilization, the law would provide for any nation attacked by pirates to exercise universal jurisdiction over them. Typically, pirates are brought to justice under the jurisdiction of the nation who captures, and in turn takes responsibility for, the pirates. However, in accordance with the concept of universal jurisdiction, this responsibility could be asserted by any nation in the interest of justice.³⁰

III. DEFINING MODERN PIRACY

Although piracy is considered a crime against society, the United Nations Convention on the Law of the Sea (“UNCLOS”) and U.S. maritime law have narrow definitions of what constitutes piracy.³¹ This narrow interpretation is in large part due to the restrictive language contained in the laws themselves. Specifically, the language of Article 101 of UNCLOS, and 18 U.S.C. § 1651, limit piratical acts to those occurring on the “high seas.”³² Only those areas outside a nation’s territorial waters are considered the high seas.³³ Under UNCLOS, nations have the right to establish the breadth of their territorial waters not exceeding twelve nautical miles from their coastline.³⁴ As a consequence, if a possible “piratical” act occurs in any nation’s territorial waters the act may only qualify as sea robbery. This territorial limit distinguishing piracy from sea robbery, could be attributed to the sordid history of the effects of privateering and the heinous nature of attacking a ship while on the high seas far from the safety of any port.

In contrast to the definitions of piracy set forth under U.S. and U.N. law, the International Maritime Bureau (“IMB”) has classified piracy and sea robbery together: “An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with

29. See *United States v. Smith*, 18 U.S. 153, 156 (1820).

30. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES - UNIVERSAL JURISDICTION TO DEFINE AND PUNISH CERTAIN OFFENSES § 404 (2010) (“A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy . . . even where none of the bases of jurisdiction indicated in Sec. 402 is present.”).

31. See United Nations Convention on the Law of the Sea art. 101, Dec. 10, 1982, 1833 U.N.T.S 397, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%201833/volume-1833-A-31363-English.pdf> [hereinafter UNCLOS]. See generally 61 AM. JUR. 2D Piracy § 1 (2010) (describing what constitutes an act of piracy).

32. 18 U.S.C. § 1651 (2006); UNCLOS, *supra* note 31.

33. BLACK’S LAW DICTIONARY (9th ed. 2009) (seas, high seas: “The seas or oceans beyond the jurisdiction of any country. Under traditional international law, the high seas began 3 miles from the coast; today the distance is generally accepted as 12 miles.”).

34. See UNCLOS, *supra* note 31, art. 3.

the apparent intent or capability to use force in furtherance of that act.”³⁵ Expanding the UNCLOS and U.S. definitions of piratical acts into a single definition allows the IMB to gather important data on existing credible threats regardless of arbitrary territorial sea boundaries. Once this information is assembled, the organization can easily identify high-threat areas, issue warnings to carriers, and possibly prevent future attacks in those regions. This important task, of acting as a central organization in compiling information on worldwide maritime attacks, is one reason the IMB was created.³⁶

For the purposes of this paper, the term “piracy” will be used in accordance with the definitions set forth under United Nations (“U.N.”) and U.S. law. In examining the recent surge in piracy, data will be used from all attacks, as compiled by the IMB, to better understand the locations of “hot spots” and identify an appropriate course of action for dealing with known pirates.

IV. LEGAL STRATEGIES FOR DEALING WITH PIRACY

In addition to defining modern piracy, the nature of modern pirates must be better understood in order to formulate an effective plan for dealing with them. From recent acts of piracy off the Somali coast, it is evident that there are at least two classes of modern day pirate.

One class includes poor fishermen (especially of Somalia), who have had their waters exploited by foreign commercial fishing, turning to a life of piracy as a way to supplement their meager existence.³⁷ These fishermen-pirates board ships with the intent of stealing personal belongings from the crew or anything of liquid value from the vessel. They do not intend to hijack the ship, kidnap the crew, or demand a ransom. In most instances, these pirates use their own fishing boats or homemade skiffs to launch attacks on opportune vessels.³⁸

The other class of pirate is an organized, armed, and motivated group of career-pirates with the skills and support required to coerce larger rewards.³⁹ In most cases, these career-pirates operate further from the Somali coast, near the Seychelles and in the Gulf of Aden. By employing the use of a “mother ship,” these pirate crews can quickly launch an attack on a vessel by deploying small speed-boats to chase a vessel once it has been targeted.⁴⁰ After a show of force by the strategic use of

35. IMB *Annual Report 2009*, *supra* note 5, at 3.

36. *Id.* at 2.

37. PIRATE TACTICS, *supra* note 6, at 2.

38. See generally PIRATE TACTICS, *supra* note 6 (showing pirate attack tactics).

39. GlobalSecurity.org, Military, *Pirates*, <http://www.globalsecurity.org/military/world/para/pirates.htm> (last visited Nov. 1, 2010).

40. PIRATE TACTICS, *supra* note 6, at 2.

AK-47's and RPG's, the career-pirate crew will board a ship with the intent of hijacking the vessel, kidnapping the crew, and holding them both for ransom.⁴¹ These career-pirates have developed the infrastructure necessary to coordinate ransom drops, anchor a ship, and procure large amounts of weapons. In 2008, the yearly worldwide costs associated with these career-pirates were estimated between \$13 and \$16 billion.⁴² In order to better combat piracy, a comprehensive approach must be established to deal with both types of pirate. Several countries have implemented successful strategies for dealing with a majority of pirate attacks that are commensurate with both international and local law. One strategy includes the use of preventative measures as a primary objective. Included among these measures is the use of an information center for reporting piracy and promulgating defensive tactics in preventing an attack. Another strategy is to form cooperative agreements between neighboring countries to allow for the quick administration of justice when pirates are captured. Finally, a group of nations may form a well-armed task force of naval vessels that are able to deploy in quick response to a pirate attack or neutralize a pending threat. These strategies used in concert may tend to reduce the overall number of piratical attacks, but without incorporating an approach for eliminating ransom payments they may do little to deter piracy altogether.

Historically, pirates were put to death for their crimes. Taking pirates aboard a ship and holding them indefinitely for the remainder of a ship's voyage was considered dangerous, so the only feasible alternative was to put them to death.⁴³ Currently, under U.S. law, if pirates are captured they should be imprisoned for life.⁴⁴ Under international law, if a pirate vessel is captured it is the province of the courts of the state that seized the pirate vessel to impose penalties.⁴⁵ Although these laws provide certain legal consequences to piratical acts, they neglect to take into account the current real world issues of a more global economy. Many countries fail to exercise their own laws in dealing with piracy for fear of political retaliation, the imposition of economic or legal sanctions, or becoming a target for maritime terrorism.⁴⁶

41. *Id.*

42. Diana Lee, *Somalia: Who's to Blame for Piracy Spiraling Out of Control?*, UNIORB, Sept. 11, 2008, <http://uniorb.com/RCHECK/somalipiracy.htm>.

43. Bret Stephens, *Why Don't We Hang Pirates Anymore*, WALL ST. J., Nov. 25, 2008, available at <http://online.wsj.com/article/SB122757123487054681.html>.

44. 18 U.S.C. § 1651 (2006).

45. See UNCLOS, *supra* note 31, art. 105.

46. See RAPHAEL PERL & RONALD O'ROURKE, CONG. RESEARCH SERV., RS 20721, *TERRORIST ATTACK ON USS COLE: BACKGROUND AND ISSUES FOR CONGRESS* (Jan. 30, 2001), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/crs20010130.pdf> (detailing the terrorist attack on the USS Cole) [hereinafter PERL & O'ROURKE].

In lieu of exercising punitive measures in accordance with a nation's laws or international law, countries have decided to work on piracy prevention as their main goal. Although this approach fails to address the root of the problem, in dealing directly with the pirates themselves, it has the effect of eliciting positive political endorsements and few, if any, condemnations from the remainder of the world. In the Gulf of Aden, local governments have provided pamphlets on avoiding pirate attacks, best management practices for carriers and ship owners to deter piracy, and an information sharing center to keep ships informed of current or suspected pirate activity in the region.⁴⁷ These measures have contributed to an overall reduction in piracy in the region, but have forced pirate attacks further from the coast in an area southeast of the Gulf of Aden.⁴⁸ A better alternative to simple deterrence methods is to combat piracy directly with the agreement of neighboring countries.

Asia is one such region to enact a multi-national cooperative agreement on combating piracy. The agreement is known as the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, or "ReCAAP" for short.⁴⁹ Among other things, ReCAAP adopted the UNCLOS definition of piracy, but has expanded the duties of member countries. Specifically, the agreement states that members should make every effort to arrest pirates, seize their ships, and rescue victims of pirate attacks.⁵⁰ Moreover, the agreement provides for the simple sharing of information on recent attacks, or attempts, to a regional information sharing center.⁵¹ From this center, statistics, data, and information alerts are sent expeditiously among all of the contracting parties (member states).⁵² By being better informed, ships can modify their routes to avoid target areas, travel in larger and safer groups of ships (known as group transit), and recognize possible threats before they can attack. As a direct result of the implementation of ReCAAP, instances of piracy have dramatically declined in the Asian region.⁵³

47. See Int'l Maritime Org. [IMO], *Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia*, MSC.1/Cir. 1335, at annex 1 (Aug. 2009), available at http://www.imo.org/includes/blastDataOnly.asp/data_id%3D26634/1335.pdf [hereinafter *Best Management Practices*]; See, e.g., PIRATE TACTICS, *supra* note 6, at 1.

48. Sean Yoong, *Pirate Attacks Surge in South China Sea, Indonesia, but Fall Near Somalia Among Navy Patrols*, WASH. EXAMINER (Oct. 18, 2010, 9:45 AM), <http://www.washingtonexaminer.com/breaking/pirate-attacks-surge-in-south-china-sea-indonesia-but-fall-near-somalia-amid-naval-patrols-105162094.html>.

49. Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia, Nov. 11, 2004, 2398 U.N.T.S. 43302, available at <http://treaties.un.org/doc/Publication/UNTS/Volume%202398/v2398.pdf> [hereinafter ReCAAP Agreement].

50. *Id.* art. 3.

51. *Id.* art. 4.

52. *Id.* art. 7.

53. David Tran, *ReCAAP Success in Asia Prompts Call for Expansion*, GLOBMARITIME,

Recently, on April 1st and 2nd, 2010, two different ships of the United States Navy had encounters with pirate vessels off the coast of Somalia.⁵⁴ The first incident occurred near the Seychelles, approximately 1,000 nautical miles off the coast of Somalia, where a pirate vessel fired upon the USS Nicholas, a Navy guided-missile frigate.⁵⁵ Responding to the aggression, the USS Nicholas returned fire, sunk the pirate vessel, and captured the pirates' mother ship with several pirates still aboard.⁵⁶ The second incident occurred 300 miles northwest of the Seychelles, where pirates attempted to hijack a commercial vessel, but were intercepted by the USS Farragut, another guided-missile destroyer.⁵⁷ The USS Farragut proceeded to sink the pirates' mother ship and then detained eleven suspected pirates from their skiffs.⁵⁸ Each of these incidents involved intervention from U.S. Naval vessels belonging to the Combined Task Force 151 ("CTF 151").⁵⁹

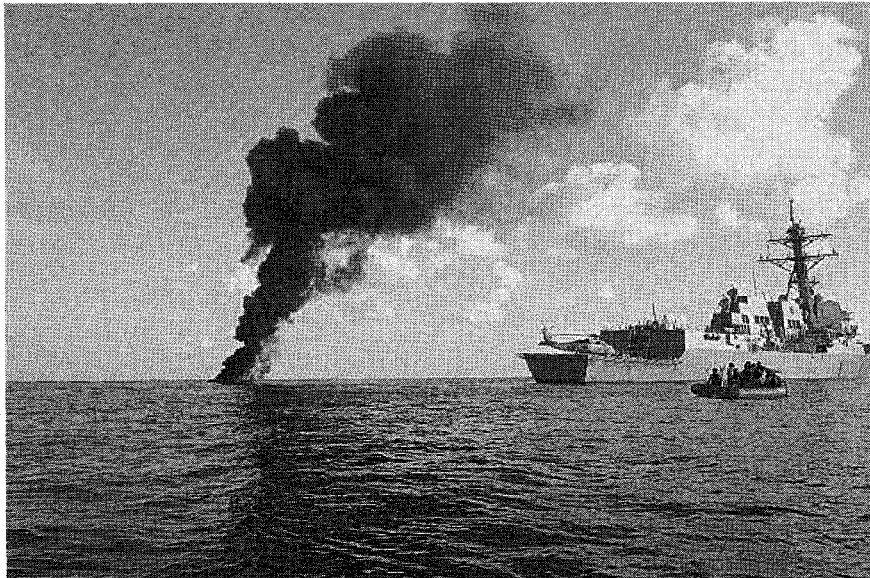


Figure 3: The USS Farragut passes by the smoke of a pirate ship it disabled in

Feb. 29, 2008, <http://www.globmaritime.com/20080229934/news/recaap-success-in-asia-prompts-call-for-expansion.html>.

54. Mike Emanuel, *Pirate Season is Heating Up*, FOX NEWS, Apr. 2, 2010, <http://liveshots.blogs.foxnews.com/2010/04/02/pirate-season-is-heating-up/?test=latestnews>.

55. Sudarsan Raghavan, *U.S. Frigate Seizes Suspected Somali Pirates*, WASH. POST, Apr. 2, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/01/AR2010040103584.html>.

56. *Id.*

57. Jack Phillips, *Pirates Captured, Released After 'Mother' Ship Sunk in Indian Ocean*, EPOCH TIMES, Apr. 2, 2010, <http://www.theepochtimes.com/n2/content/view/32630/>.

58. *Id.*

59. *Id.*

April, 2010.⁶⁰

As described on their website, the “CTF 151 is a multinational task force established in January 2009 to conduct counter piracy operations under a mission-based mandate throughout the Combined Maritime Forces (CMF) area of responsibility to actively deter, disrupt, and suppress piracy in order to protect global maritime security and secure freedom of navigation for the benefit of all nations.”⁶¹ From these recent encounters with pirates, it is clear that the CMF has developed a uniquely effective manner of dealing with piracy that is commensurate with both U.N. and U.S. maritime law.

V. MODERN INSURANCE AGAINST MODERN PIRACY

In addition to the aforementioned strategies for dealing with pirate attacks, the policy of paying ransoms must be addressed to negatively affect the “risk v. reward” ratio for a career-pirate. Only when pirate ransoms are not paid as a matter of law, will the motivation of these pirates to attack innocent vessels cease altogether. Most of these ransoms are paid by maritime insurance companies as part of their traditional coverage.⁶² However, the recent surge in piracy has resulted in a surge of additional insurance premium sales to carriers who engage in commerce through the Gulf of Aden and along the Somali coast.⁶³ By continuing to make ransom payments, the insurance companies are implicitly encouraging future pirate attacks on commercial vessels while they continue to sell additional coverage at a premium to carriers.

Since the dramatic increase in piracy, especially along the Somali coast and the Gulf of Aden, maritime insurers have benefitted from increased premiums and sales of additional riders to compensate for gaps in current insurance provisions.⁶⁴ Specifically, Lloyd’s of London (“Lloyd’s”), saw an increase in their 2009 marine premiums of more than 20% compared to the previous year.⁶⁵ This increase could be partly attributed to carriers, ship-owners, and cargo-owners who seek to add other forms of cover to protect themselves from the consequences of pirate at-

60. Navy.mil, U.S. Navy Photograph by Mass Communication Specialist 1st Class Cassandra Thompson, http://www.news.navy.mil/view_single.asp?id=83894 (last visited Nov. 1, 2010).

61. Cusnc.navy.mil, Combined Task Force (CTF) 151, Combined Maritime Forces, <http://www.cusnc.navy.mil/cmef/151/index.html> (last visited Nov. 1, 2010).

62. Eric Gilky, *When Pirates Attack: Who Pays When Bandits Board?*, CLAIMS, May 5, 2009, available at <http://www.claimsmag.com/Issues/2009/May-2009/Pages/When-Pirates-Attack.aspx>.

63. Michael Bradford, *Lloyd's Reports Record Profit for 2009*, BUS. INS., Mar. 24, 2010, available at <http://www.businessinsurance.com/article/20100324/NEWS/100329970>.

64. See *id.*

65. *Id.* (showing the increase resulted in a benefit of approximately \$2.42 billion for Lloyds).

tacks and hijacking. Or, it could be attributed to the fact that Lloyd's itself has designated the Gulf of Aden as a high risk zone for piracy thereby requiring additional insurance premiums.⁶⁶ In either event, the insurance industry has benefitted from the sale of additional premiums.

In addition to designating the Gulf of Aden as a high risk area, Lloyd's decided to offer new insurance policies to tackle the "loss of earnings" problem that accompanies a pirate hijacking.⁶⁷ According to Lloyd's, the typical hijacked vessel is held for an average period of two months before it is released.⁶⁸ During this time period, a charterer may be paying for a vessel that it has no control over, a ship-owner may be forced to suffer the financial consequences of cancelled contracts, while a cargo-owner may suffer a similar fate.⁶⁹ Although the act of piracy itself is listed as a peril that is covered under the International Hull Clauses ("IHCs"), these clauses do not provide cover for loss of earnings and are typically limited to physical harm or damage.⁷⁰ Lloyd's added their new "loss of earnings" coverage as an available additional policy in December of 2008.⁷¹

Lloyd's also offers Kidnap and Ransom ("K&R") coverage to address the costs associated with delivering ransom payments and coordinating the delivery with the pirates.⁷² Even though traditional marine policies cover the cost of ransom, Lloyd's estimates that this cost is only 25% to 30% of the entire costs associated with the hijacking.⁷³ Working with the pirates, setting up payment terms and delivery, rescuing any hostages held, and arranging security for the ransom delivery team are all costs that greatly exceed the cost of the ransom.⁷⁴ The demand for a policy that covered a ship-owner from the associated costs of a pirate attack at the moment when the vessel was seized allowed Lloyd's to cre-

66. See RAWLE KING, CONG. RESEARCH SERV., R4 0081, OCEAN PIRACY AND ITS IMPACT ON INSURANCE (2009), available at <http://www.au.af.mil/au/awc/awcgate/crs/r40081.pdf>.

67. *Piracy Insurance Policy Fills Gap in Cover*, LLOYDS, Dec. 10, 2008, http://www.lloyds.com/News-and-Insight/News-and-Features/Geopolitical/Geopolitical-2008/Piracy_insurance_policy_fills_gap_in_cover [hereinafter *Piracy Insurance Policy Fills Gap*].

68. *Id.*

69. *Id.*

70. See JOINT HULL COMM., INTERNATIONAL HULL CLAUSES (2003), art.1, § 2.1.5, available at <http://www.waltonsandmorse.com/html/bulletins/InternationalHullClauses.pdf> (listing piracy as being covered under international hull clauses).

71. *Piracy Insurance Policy Fills Gap*, *supra* note 67.

72. *Surge in Piracy Prompts Demand for K&R Cover*, LLOYDS, Oct. 28, 2008, http://www.lloyds.com/News-and-Insight/News-and%20Features/Archive/2008/10/Surge_in_piracy_prompts_demand_for_broader_cover_28102008 [hereinafter *Surge in Piracy Prompts Demand For K&R Cover*].

73. *Id.*

74. *Id.*

ate this additional K&R coverage.⁷⁵

These new insurance policies provided by Lloyd's and other underwriters, are designed to address the growing demand of ship-owners and carriers who cannot afford to take alternate routes through more peaceful waters to complete their shipments.⁷⁶ Moreover, the carriers are becoming increasingly fearful of shipping along the Somali coast without some type of limit to their liability. The fact is that these insurance policies do nothing to deter piracy in the region. In fact, by allowing carriers, ship-owners, and charterers to pay ransoms without the fear of legal recourse, the international community is essentially encouraging piracy to continue. By being complicit in allowing piracy to continue on the high seas, insurance companies will be deterred from paying ransoms if they are held to criminal penalties. The United States has codified several criminal laws dealing with piratical acts and addresses the penalties for those who provide material support to such criminals.⁷⁷ These laws may be found in the anti-terrorism section of the U.S. Code.

VI. ANTI-TERRORISM LAWS AND PIRACY

Under United States law, specifically Title 18 U.S.C. § 2332b, certain acts that transcend national boundaries are identified as Federal Crimes of Terrorism.⁷⁸ These acts include the following: (1) conspiracy to kill, kidnap, maim, or injure persons or damage property in a foreign country; (2) hostage taking; (3) violence against maritime navigation; and (4) providing material support to terrorists.⁷⁹ The reason these four acts have been separated for consideration is they are all common to any Somali career-pirate encounter where a ship and its crew are hijacked in exchange for a ransom. Addressing each section individually will clarify which law, or combinations of law, may be usefully applied to deter the payment of ransoms to pirates.

It is important to note that section 2332b of the United States Code includes a provision that defines a Federal Crime of Terrorism as an offense that "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."⁸⁰ Although the attack against the USS Cole, in October 2000, can be defined as an act of terrorism, by attempting to influence or affect the conduct of government by intimidation or coercion, it is difficult to draw

75. *Id.*

76. See Griffin-underwriting.com, Marine Hijack, <http://www.griffin-underwriting.com/4/insurance-classes/28/marine-hijack/> (last visited Oct. 11, 2010).

77. See 18 U.S.C. §§ 956, 1203, 2280, 2339A (2006).

78. 18 U.S.C. § 2332b (2006 & Supp. III 2009).

79. 18 U.S.C. § 2332b(g)(5)(B)(i) (Supp. III 2009).

80. 18 U.S.C. § 2332b(g)(5)(A) (2006).

a parallel to most modern day pirates.⁸¹ It has been suggested that terrorism is motivated by politics, while piracy is motivated by money.⁸² Additionally, it is theorized that most Somali pirates began their lucrative careers in response to the foreign exploitation of the fishing waters off their coastline.⁸³ As discussed above, at least two types of pirates are attacking ships off the coast of Somalia and the Gulf of Aden, but the link between piracy and political motivation is tenuous.⁸⁴ Regardless, several of the piratical acts themselves may be defined as acts of terrorism as described below.

1. 18 U.S.C. § 956 – CONSPIRACY TO KILL, KIDNAP, MAIM, OR INJURE PERSONS OR DAMAGE PROPERTY IN A FOREIGN COUNTRY.

The language of this section reads as follows:

Whoever, within the jurisdiction of the United States, conspires with one or more other persons, regardless of where such other person or persons are located, to commit at any place outside the United States an act that would constitute the offense of murder, kidnapping, or maiming if committed in the special maritime and territorial jurisdiction of the United States shall, if any of the conspirators commits an act within the jurisdiction of the United States to effect any object of the conspiracy, be punished as provided in subsection (a)(2).⁸⁵

It is evident from the language in this section that if a person falls under the jurisdiction of the United States and commits any of the listed offenses abroad (ordinarily outside U.S. jurisdiction), those offenses will be treated as if they were committed within the jurisdiction of the United States. It has already been stated that pirates are “hostes humani generis,” or enemies of mankind, and as a result the United States may exercise universal jurisdiction over them.⁸⁶ Because pirates engage in acts that have resulted in the death and kidnapping of their hostages, they will be subject to the effect of this universal jurisdiction.⁸⁷ Therefore, the crimes committed by the pirates on these occasions would be considered as federal acts of terrorism under this section of U.S. law.

2. 18 U.S.C. § 1203 – HOSTAGE TAKING

The pertinent language of this section reads as follows:

81. See PERL & O’ROURKE, *supra* note 46, at 2.

82. Apostolis & Knott, *supra* note 9, at 2.

83. Ishaan Tharoor, *How Somalia’s Fishermen Became Pirates*, TIME, Apr. 18, 2009, <http://www.time.com/time/world/article/0,8599,1892376,00.html>.

84. PIRATE TACTICS, *supra* note 6, at 2.

85. 18 U.S.C. § 956 (2006).

86. See *United States v. Smith*, 18 U.S. 153, 156 (1820).

87. See *IMB Annual Report 2009*, *supra* note 5, at 12.

Except as provided in subsection (b) of this section, whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts or conspires to do so, shall be punished by imprisonment for any term of years or for life and, if the death of any person results, shall be punished by death or life imprisonment.⁸⁸

This law only applies to U.S. nationals who are being held hostage, captors who are found in the U.S., or if the U.S. government is the governmental organization being compelled to act.⁸⁹ By limiting this law to at least one of the three categories listed above, the United States ensures that it has an interest in applying its law in accordance with its jurisdictional limitations. However, in a maritime case, the jurisdictional boundaries become somewhat expansive. For instance, if a U.S. ship and its crew is held hostage by pirates who are aboard the U.S. vessel, according to maritime law and convention, they would be found within the jurisdiction of the United States. This scenario, and proper use of 18 U.S.C. § 1203, would not require the ship's crew to be U.S. nationals, because the offenders (the pirates) are found in U.S. territory (aboard the ship). Conversely, if pirates hijacked another country's vessel, but took a U.S. national as a hostage, they too would fall under a successful application of this law. In any of these instances, the United States would find the acts of piracy to commensurate with a federal act of terrorism.

3. 18 U.S.C. § 2280 – VIOLENCE AGAINST MARITIME NAVIGATION

This section includes language defining specific acts that qualify as violence against maritime navigation. As it relates to piracy and sea robbery, the most important subsections are listed below. Section 2280(a)(1) states that any person who unlawfully and intentionally:

- (A) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;
- (B) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;
- (E) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such act is likely to endanger the safe navigation of a ship;
- (G) injures or kills any person in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (A) through (F); or
- (H) attempts or conspires to do any act prohibited under subparagraphs (A)

88. 18 U.S.C. § 1203 (2006).

89. 18 U.S.C. § 1203(b)(1) (2006).

through (G).⁹⁰

This law was clearly drafted with the safe navigation of ships as its primary concern. Consequently, it is difficult to think of any instance of piracy, hijacking, or forceful and illegal boarding where a ship's safety would not be negatively affected. Moreover, several hijacked ships have contained hazardous cargo, such as crude oil, military weapons, and industrial chemicals.⁹¹ Among other things, the safe navigation of these ships is paramount in preventing environmental and maritime disasters. Because, in every instance of piracy at sea, the safe navigation of the vessel is endangered, the act of hijacking a ship would qualify as a federal act of terrorism.

4. 18 U.S.C. § 2339A – PROVIDING MATERIAL SUPPORT TO TERRORISTS

Finally, this section of Title 18 addresses those who provide material support to terrorists, the punishments available, and the types of crimes that constitute terrorist acts. The language of section 2339A(a) is as follows:

(a) Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section . . . 956, . . . , 1203, . . . , 2280, . . . , or any offense listed in section 2332b (g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.⁹²

From the language of the law, this section recognizes sections 956, 1203, and 2280 (described above) as federal acts of terrorism. All of these sections address acts that occur during a pirate attack or kidnapping. Furthermore, this section defines material support as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities.”⁹³ Typically, when a vessel has been seized by pirates they demand a ransom from the ship-owner, carrier, or insurer. This ransom cost is usually paid, in the form of cash (currency),

90. 18 U.S.C. § 2280 (2006).

91. See *IMB Annual Report 2009*, *supra* note 5, at 14.

92. 18 U.S.C. § 2339A(a) (Supp. III 2009).

93. 18 U.S.C. § 2339A(b)(1) (2006).

by a carrier's marine policy.⁹⁴ Therefore, under 18 U.S.C. § 2339A(a), an insurer that makes such ransom payment to pirates is also providing material support to terrorists and violating U.S. law.

The punishment for violating 18 U.S.C. § 2339A allows for monetary fine or jail time depending on the circumstances.⁹⁵ An insurance company may insist that a small fine is reasonable when compared to the immense cost of a lost ship and cargo as a result of pirate action. However, the insurer could still be subject to the penalty of 15 years in a federal prison (or for life if someone dies as a result of the piracy).⁹⁶

This law acts as a deterrent to those who may otherwise pay pirate ransoms. It should not be used to affect current contracts or negotiations where the lives of people, who have depended on the traditional marine policy ransom payment, are at stake. However, any future marine insurance policies must not contain provisions for the paying of ransoms, and the future insured entity should be made aware that such provisions are against U.S. law. Implementing a "no pay" policy for pirate ransoms will dramatically affect the "risk v. reward" ratio, thereby eliminating the reward (cash payments) for hijacking vessels. However, eliminating the payment of ransoms is not itself enough in combating piracy on a global level.

5. COMBATING PIRACY ON A GLOBAL SCALE

Although the anti-terrorism laws discussed in this paper could be used to deter ransom payments by U.S. companies and insurers, the number of United States ships being attacked by pirates is extremely low. Over the past five years, only twenty three attacks have been made against U.S. ships, four of which occurred last year.⁹⁷ As a consequence, the United States has never paid a ransom to pirates in exchange for the release of a ship.⁹⁸ However, these criminal penalties could be levied against the agent of a ransom paying entity if that agent resides or operates inside the jurisdiction of the United States. Irrespective of ransom payments, the United States has found a more successful manner in dealing with piracy that has its roots in old maritime law.

The United States, under 18 U.S.C. § 1651, has defined the punishment for piracy as follows: "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."⁹⁹ The

94. See *Surge in Piracy Prompts Demand for K&R Cover*, *supra* note 72.

95. 18 U.S.C. § 2339A (2006 & Supp. III 2009).

96. 18 U.S.C. § 2339A(a) (Supp. III 2009).

97. See *IMB Annual Report 2009*, *supra* note 5, at 17.

98. See KING, *supra* note 66, at 3.

99. 18 U.S.C. § 1651 (2006).

definition of “high seas” has been explored and can mean any area outside of a nation’s territorial waters. But, the statute makes reference to the crime of piracy defined by the “law of nations.”¹⁰⁰ As used in the statute, the law of nations is a collection of common law that has been compiled over time to shape current laws in the international community. In the landmark case known as “The Antelope,” the law of nations was recognized as “a collection of rules deduced from natural reason, as that is interpreted by those who adopt them, and resting in usage, or established by compact, for regulating the intercourse of nations with each other.”¹⁰¹ In evaluating this statement, the law of nations can be interpreted to mean the current definition of piracy as used in U.S. and U.N. law, specifically Article 101 of UNCLOS.¹⁰²

In recent history, the United States has successfully intercepted several pirate attacks against U.S. vessels.¹⁰³ In each case, the U.S. Navy locates the pirate ship, and if fired upon, immediately returns fire disabling the craft. Then the pirates are detained, and either held for prosecution in the U.S. or given to Kenya, where the authorities have agreed to aid in bringing the offenders to justice.¹⁰⁴ Recently, the overburdened Kenyan courts have refused to accept any more piracy cases. As a result, pirates captured by U.S. ships will be taken to the home port of a naval vessel and tried in a U.S. Federal Court.

In capturing or disabling the pirates’ ship and detaining the pirate crew for the administration of justice, the United States is in conformance with the law of nations and international law. Not only has this standard operating procedure prevented the possibility of a hijacked crew and vessel in many cases, but it also serves as a reminder to future pirates to avoid hijacking U.S. ships.

In addition to implementing a “no pay” policy to ransom demands, countries may actively cooperate in mutual agreements or task forces to take action against terrorists. This type of cooperative agreement is promulgated in Asia through ReCAAP, in the Horn of Africa through the Maritime Security Centre Horn of Africa (“MSCHOA”), and through the CMF in Bahrain.¹⁰⁵ These informational centers and task forces allow for nations to pool their resources and act as a single entity in combating piracy. Finally, the International Chamber of Commerce, through the IMB, acts as a single-source of piracy information and report-

100. *Id.*

101. *The Antelope*, 23 U.S. 66, 90 (1825).

102. *See UNCLOS, supra* note 31, art. 101.

103. Emanuel, *supra* note 54, at 1.

104. Stephen W. Smith, *Another Pirate Attack Foiled Off Somalia Coast*, CBS News, Apr. 2, 2010, http://www.cbsnews.com/8301-503543_162-20001688-503543.html.

105. *See Best Management Practices, supra* note 47.

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ing worldwide.¹⁰⁶ With increased cooperation among the nations, the IMB should be able to quickly compile credible threats of piracy and disseminate the information instantaneously to its members.

Through cooperative international laws, a comprehensive policy of prevention, an aggressive plan for dealing directly with pirate attacks, and by enforcing a “no pay” policy for the ransom of pirates, the world may increase the reliability of its maritime commerce while curbing piracy altogether.

106. See generally Int'l Chamber of Commerce [ICC] IMB website, available at http://www.icc-ccs.org/index.php?option=com_content&view=article&id=27:welcome-to-the-international-maritime-bureau&catid=25:home&Itemid=16 (last visited Nov. 1, 2010) (detailing the ICC and IMB relationship).

