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Payment of Piracy Ransoms

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PEACE NEGOTIATIONS
POST-CONFLICT CONSTITUTIONS
WAR CRIMES PROSECUTION

NAVIGATING UNCERTAIN SEAS: PIRATE RANSOM PAYOR ISSUES

Legal Memorandum

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Practice Lab**

Public International Law & Policy Group

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Confidential

I. EXECUTIVE SUMMARY

Piracy is a global issue that requires a uniform global response. Costs associated with piracy continue to grow exponentially in a self-perpetuating cycle where more frequent attacks lead insurers to raise maritime insurance rates, which companies are increasingly willing to pay, making future attacks more likely. To put a halt to this dangerous pattern, the international community must uniformly enforce criminal liability for corporations that pay ransoms to pirates. The United States material support statutes provide a workable mechanism for applying liability to corporations in this context and should therefore be used as a model while the international community updates laws on the domestic level to hit pirates in the pocketbook via corporate ransoms.

International conventions in this area provide support for domestic developments. For example, the U.N. Conventions on the Law of the Sea and for the Suppression of Unlawful Acts Against Maritime Navigation incorporate a definition of piracy that states should apply in domestic frameworks. International conventions also provide a useful link between piracy and terrorism that states can use as the foundation for anti-terrorism financing laws as they apply to corporate ransoms to pirates.

This international guidance is particularly necessary because under their current legal regimes, states rarely undertake national prosecution of piracy. This is due to challenges posed by geographical concerns, lack of evidence, and questions of jurisdiction. States have attempted to address these obstacles by consolidating all piracy prosecutions to a single geographical area and by increasing coordination of law enforcement in piracy hot zones with regional groups. Unfortunately, both of these

solutions create their own complications and neither approach gets to the root of the problem: the self-perpetuating financial cycle

Instead, the energy of the international community must be oriented towards corporate liability. Ransoms paid from corporations to pirates, to secure the release of cargo ships and hostages, provide the financial incentive to engage in piracy; establishing corporate liability may be the most effective legal avenue through which to approach this problem. While such an approach is currently underutilized in the American legal system, U.S. material support statutes could offer a link between ransom payments by insurers of maritime corporations and the proliferation of piracy. As other states develop their own anti-terrorism financing statutes with respect to corporate ransom payments to pirates, the relevant U.S. statutes can serve as an instructive model. Paired with updated corporate codes that fill the gaps left between international and domestic law in this area and the adoption of internationally recognized best practices in maritime security, states can create a consistent and effective approach to stifling the financial systems that fuel piracy.

II. FACTUAL CONTEXT

When corporations pay ransoms to the pirates that hijack their ships and kidnap their crews, they put their enemies on the payroll. Piracy is now big business for the failed Somali state, and business is booming.¹ As of August 30, 2011, pirates off the coast of Somalia held 448 hostages and twenty-one ships.² The pirates are expanding

¹ *Id.*

² The Secretary-General, *Report of the Secretary-General on Somalia*, ¶ 20 delivered to the Security Council and the General Assembly, U.N. Doc. S/2011/549 (Aug. 30, 2011) [hereinafter Report on Somalia].

their area of operations through the use of mother ships that carry smaller attack vessels.³ Pirate attacks stretch over 2.8 million square miles.⁴ These attacks are becoming more expensive in terms of blood and treasure, as the pirates use increasingly violent tactics and demand ever higher ransoms.⁵ To date, the lackluster efforts of the international community to contain the pirate threat have focused on more traditional, paramilitary aspects of combatting piracy.⁶

Pirates have become technologically savvy, Nicole Stracke, of the Gulf Research Centre in Dubai has noted.⁷ "[P]iracy has developed its own dynamic and now resembles a professional and highly organized business venture, starting from the selection of maritime targets to the final stage of receiving and dispensing the ransom."⁸ Pirates attack commercial ships from speedboats supported by a larger mother ship.⁹ They used GPS, sophisticated weaponry, and satellite phones¹⁰ to engage in 142 attacks worldwide in the first three months of 2011—an all-time high.¹¹ The total cost of piracy in 2010 is

³ Press Release, Security Council, In Race Between Pirates and International Community, Pirates Clearly Winning, Secretary-General's Top Legal Adviser on Piracy Warns Security Council: Pirates Expanding Geographic Reach in More Sophisticated, Better Organized Attacks, Says Jack Lang, Seeking Prosecution of Sea-Borne Raids in Domestic Courts, U.N. Doc. SC/10164 (Jan. 25, 2011) [hereinafter Race Between Pirates] available at <http://www.un.org/News/Press/docs/2011/sc10164.doc.htm>.

⁴ The Secretary-General, *Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-Piracy Courts*, Annex 1 ¶ 1, delivered to the Security Council and the General Assembly, U.N. Doc. S/2011/360 (June 15, 2011) [hereinafter Somali Anti-Piracy Courts].

⁵ Report on Somalia, *supra* note 1, ¶ 20.

⁶ Race Between Pirates, *supra* note 3.

⁷ Jumana Al Tamimi, *Military Action Could Make Pirates More Aggressive*, GULF NEWS, (May 7, 2009, 10:51 PM), <http://gulfnews.com/news/gulf/uae/general/military-action-could-make-pirates-more-aggressive-1.67936>.

⁸ *Id.*

⁹ Raneen Khooshie Lal Panjabi, *The Pirates of Somalia: Opportunistic Predators or Environmental Prey?* 34 WM. & MARY ENVTL. L. & POL'Y REV. 377 (2010).

¹⁰ *Id.* at 453.

¹¹ International Maritime Organization, Maritime Knowledge Centre, 2011, <http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/Pages/default.aspx>

estimated between seven to twelve billion U.S. dollars.¹² And the sophistication of pirates business operations goes even farther. Per Gullestrup, CEO of Danish shipping company the Clipper Group, recounted finding pirate time sheets onboard a hijacked ship after pirates withdrew, in an April 2009 radio interview.¹³ The abandoned time sheets recorded which pirates had been onboard, the duration of their stay, and how many dollars per day they earned.¹⁴

Instances like this indicate the high level of sophistication of modern piracy operations and, even more significantly, the strong economic incentives that make modern piracy such a robust phenomenon. Geopolicity, an international management consultancy group, reported in its publication “The Economics of Piracy” that the total income to pirates off the coast of Somalia in 2010 was U.S. \$75-238 million.¹⁵ This is projected to increase to U.S. \$200-400 million by 2015.¹⁶ Individual yearly pirate income (as extrapolated from fifteen-hundred pirates) is estimated at U.S. \$33,000-79,000 from the low to high end for 2010.¹⁷ This is compared to the next-best alternative available in Somalia, which yields an estimated U.S. \$14,500 for a would-be pirate over his entire working life.¹⁸ Income earned by pirates through ransoms is apportioned through a complicated web. Approximately twenty percent goes to bribe officials and fifty percent is apportioned for “expenses and payroll.”¹⁹ The leader of an attack earns U.S. \$10,000-

¹² Kaija Hurlburt, et al., *The Human Cost of Piracy* (Oceans Beyond Piracy, Study) available at <http://oceansbeyondpiracy.org/cost-of-piracy/human-cost-somali-piracy>.

¹³ *All Things Considered: Behind the Business Plan of Pirates Inc.*, NATIONAL PUBLIC RADIO (Apr. 30, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=103657301>.

¹⁴ *Id.*

¹⁵ *The Economics of Piracy* (Geopolicity, Study) available at <http://www.geopolicity.com/publications.php>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *All Things Considered*, *supra* note 13.

20,000 and the pirate financier who invested seed capital into the operation receives approximately thirty percent.²⁰

To further complicate the situation, the regions where piracy flourishes are also those least equipped to combat it effectively: Somalia, Nigeria, and Southeast Asia.²¹ To date, states have been relatively ineffective in combatting piracy through domestic channels due to many obstacles described below.

Piracy in the modern era presents new challenges as weak state infrastructure and the veritable treasure chest ransoms provide create a toxic mix. Now, the international community seeks to disrupt the financial flows that make piracy a profitable industry.²² One mechanism that is currently being explored is the establishment of specialized anti-piracy courts. But whether the courts should focus on the perpetrators of acts of piracy at sea or on the financiers and planners of piracy, or on both, remains an open question.²³

The pirates and their financiers are part of a network of pirate militias and local political organizations.²⁴ The militias began as a response to illegal overfishing by foreign parties.²⁵ However, as the pirate industry has expanded the pirates have become more interested in capturing lucrative cargo vessels than in defending territorial fishing rights. In Somalia, local politics can involve ties to al-Shabaab,²⁶ a designated terrorist

²⁰ *Id.*

²¹ Michael Gagain, *Neglected Waters: Territorial Maritime Piracy And Developing States: Somalia, Nigeria, and Indonesia*, 16 NEW ENG. J. INT'L & COMP. L. 169 (2010).

²² Somali Anti-Piracy Courts, *supra* note 4, Annex IV ¶ 3.

²³ *Id.* at Annex IV ¶ 1.

²⁴ *Id.*

²⁵ See Somali Anti-Piracy Courts, *supra* note 4, Annex IV ¶ 3.

²⁶ See Matt Bryden, Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1811, ¶ 237, *delivered to the Security Council*, U.N. Doc. S/2008/769 (Dec. 10, 2008) [hereinafter Report of the Monitoring Group 1811]; Press Release, Security Council, Despite Strong Counter-Efforts, Piracy Off Coast Off Somalia Still Major Problem, Security Council is Told: Regional Economies Hurt, U.N. Doc. SC/10431 (Oct. 31, 2011) *available at* <http://www.un.org/News/Press/docs/2011/sc10431.doc.htm>.

organization.²⁷ The pirates share ransoms among financiers, sponsors, maritime militias, ground militias, and associates in the communities.²⁸ Restricting the flow of money to pirates could stunt the pirate industry.²⁹ Secretary General Ban Ki-moon said in a report to the U.N. Security Council that effective prosecution will require broader criminal legislation, including crimes of extortion, kidnapping, conspiracy, and money laundering.³⁰ The Security Council has underscored the importance of criminalizing under domestic laws incitement, facilitation, conspiracy, and attempts to commit piracy and emphasized the need to investigate those who plan and profit from pirate attacks.³¹ The Security Council urges states and international organizations to share evidence and information for anti-piracy law enforcement purposes.³²

III. ANALYSIS

A. International Law

This Part examines the framework of international conventions at the core of world piracy jurisprudence. It begins with an examination of the Anti-Terrorism Convention because acts of piracy off the coast of Somalia are at least indirectly linked to providing support for terrorism and may even be considered terrorism themselves. It next examines the international conventions on the law of the sea and the safety of maritime navigation. Together, these conventions provide the definition of acts of piracy. They

²⁷ See Somali Sanctions Regulation, 75 Fed. Reg. 24,394-02 (May 5, 2010) (codified at 31 C.F.R. 551, Appeal. A); see also U.S. Dept. of State, Foreign Terrorist Organizations: Office of the Coordinator for Counterterrorism, <http://www.state.gov/s/ct/rls/other/des/123085.htm>, ¶ 4.

²⁸ See Matt Bryden, Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1853, Annex III, *delivered to the Security Council*, U.N. Doc. S/2010/91 (Mar. 10, 2010) [hereinafter Report of the Monitoring Group 1853]; Report of the Monitoring Group, *supra* note 10, ¶¶ 139-40.

²⁹ Somali Anti-Piracy Courts, *supra* note 4, Annex IV ¶ 3.

³⁰ *Id.* at ¶ 5.

³¹ *Id.* at ¶ 6 (citing S.C. Res. 1976, U.N. Doc. S/RES/1976 (Apr. 11, 2011)).

³² *Id.* at ¶ 8.

represent international consensus on what constitutes piracy and have achieved the status of customary international law. This Part recommends that the international community adopts a uniform standard of jurisprudence for piracy based on the U.S. model that is described in Part B(2)(a) *infra*.

1. Anti-Terrorism Convention

Many ideological and social causes contribute to the piracy explosion of recent years. One contributing factor is the rise of pirate organizations as “militias” engaged in a conflict with foreign fishermen poaching off Somalia’s territorial seas.³³ Focusing on this source allows the International Convention for the Suppression of the Financing of Terrorism to be used in the piracy context. The Convention prohibits financing any act intended to cause death or serious bodily injury outside situations of armed conflict, for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act.³⁴ The wording of that clause supports inclusion of pirates involved in a quasi-political struggle to capture civilians in order to fund aggressive operations against intruders from overseas.³⁵ This interpretation of the Convention reduces the need to connect pirates to designated terrorist organizations. It also enables the Secretary of State to designate the pirate groups as a terrorist organization in their own right. It does, however, require a strained reading of the treaty language. Due to the purported linkage between al-Shabaab and the Somali pirates,³⁶ this

³³ See Somali Anti-Piracy Courts, *supra* note 4, Annex IV ¶ 3.

³⁴ Organization of American States Convention on Terrorism, art. 1-2, Oct. 20, 1976, 27 U.S.T. 3949, T.I.A.S. No. 8413, 1976 WL 166939.

³⁵ *Id.*

³⁶ See Report of the Monitoring Group 1811, *supra* note 41; Press Release, Security Council, Despite Strong Counter-Efforts, Piracy Off Coast Off Somalia Still Major Problem, Security Council is Told: Regional Economies Hurt, U.N. Doc. SC/10431 (Oct. 31, 2011) *available at* <http://www.un.org/News/Press/docs/2011/sc10431.doc.htm>.

paper will assume the ransoms fund terrorism at least indirectly. Other international treaties offer alternative avenues to combat piracy.

The Organization of American States Convention on Terrorism states that “kidnapping, murder, and other assaults against the life or personal integrity of those persons to whom the state has the duty to give special protection according to international law, as well as extortion in connection with those crimes. shall be considered common crimes of international significance, regardless of motive.”³⁷ Therefore, if any persons “entitled to special protection”³⁸ are onboard a ship the pirates capture then the Convention on Terrorism again comes into play.

The Convention prohibits kidnapping, murder, and extortion in connection with terrorism.³⁹ A person commits an offence within the meaning of the Convention if he directly *or indirectly*, unlawfully, and willfully provides or collects funds with the intention that they should be used *or in the knowledge* that they are to be used in full *or in part* in order to carry out an act which constitutes terrorism.⁴⁰ Regardless of whether the pirate militia is a terrorist organization or simply connected to al-Shabaab, when a corporation pays a ransom it is at least indirectly providing funds with the knowledge that money could be used to carry out acts which constitute terrorism. Thus, the Convention of the Organization of American States approaches the problem from the corporate side rather than the pirate side.

International treaties can also be used to modify the behavior of insurance companies. When the insurance companies contract with corporations to pay pirate

³⁷ Organization of American States Convention on Terrorism, art. 1, Oct. 20, 1976, 27 U.S.T. 3949, T.I.A.S. No. 8413, 1976 WL 166939.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* (emphasis added).

ransoms, they too subject themselves to possible liability. The insurance company provides funds to the corporation to provide to the pirates, who either are terrorists themselves or are providing some portion of those funds to terrorists.⁴¹ The insurance companies are therefore also liable under the Convention for the Suppression of the Financing of Terrorism.

Liability could attach to the corporations and insurance companies even if the insurance company never pays a ransom. The Convention prohibits “providing or collecting” funds with the knowledge that they will be used to fund terrorism. Through the payment and collection of the insurance premiums, the corporation and insurers have already fulfilled the *actus reus* element of the prohibition even absent any involvement by terrorists. They also already possess the knowledge that the funds will be used, at least indirectly, to fund terrorism. If the corporations and the insurance companies have already engaged in prohibited conduct, then they should disclose this potential liability on their balance sheets. Similarly, that the subject matter of the contract may be the provision of illegal funds, opens the possibility that the contract is void.⁴² The Security Council currently keeps under review the possibility of applying targeted sanctions to individuals and entities who illicitly finance pirate attacks off the coast of Somalia.⁴³

⁴¹ See Matt Bryden, Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1811, ¶ 237, *delivered to the Security Council*, U.N. Doc. S/2008/769 (Dec. 10, 2008) [hereinafter Report of the Monitoring Group 1811]; Press Release, Security Council, Despite Strong Counter-Efforts, Piracy Off Coast Off Somalia Still Major Problem, Security Council is Told: Regional Economies Hurt, U.N. Doc. SC/10431 (Oct. 31, 2011) *available at* <http://www.un.org/News/Press/docs/2011/sc10431.doc.htm>.

⁴² *Tiffany v. Boatman's Sav. Inst.*, 85 U.S. 375, 385 (1873) (“[A] contract to do an act forbidden by law is void, and cannot be enforced in a court of justice.”).

⁴³ See Report of the Monitoring Group 1811, *supra* note 41, ¶ 123; Report on Somalia, *supra* note 1, Annex IV ¶ 11.

2. Legal Framework From Conventions Safeguarding Sea Travel

Under the U.N. Convention on the Law of the Sea⁴⁴ (“UNCLOS”) piracy consists of any illegal violent acts committed for private ends by the crew of a private ship, directed at another ship on the high seas or outside the jurisdiction of any state.⁴⁵ Participating in the operation of a pirate ship and acts inciting or intentionally facilitating piracy also fall within this definition.

Because the UNCLOS bans “any act inciting”⁴⁶ piracy, it could cover corporations that secure ransom insurance in order to traverse pirate-infested waters. It may be faster and less expensive for the corporations to send their ships through pirate hot zones. But if they choose to use such risky routes with the intent to pay the ransom on any captured ships, they may fall within the ban in the Convention for inciting piracy. Clearly, despite being the victims of the pirate activities, businesses knowingly facilitate pirate activity by paying ransoms. Because the Convention requires an intent to facilitate,⁴⁷ the shipping companies must have intended to pay the pirates in order to violate the Convention. Arguably, under this view of the Convention, entities would still be able to pay ransoms if they were attacked in a one-off pirate attack, but they could not knowingly enter pirate-infested waters, planning to pay the ransom on some percentage of their shipping as a cost of doing business. Instead, the companies should opt to pay more for fuel costs and skirt the range of the pirate ships.

⁴⁴ U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, U.N.Doc. A/CONF. 62/122, 21 I.L.M. 1261 (1982), *reprinted at* 1992 WL 725374 (which the United States has signed but not ratified).

⁴⁵ *Id.* at art. 101. (“(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State”).

⁴⁶ *Id.*

⁴⁷ *Id.*

Under the U.N. Convention for the Suppression of Unlawful Acts Against Maritime Navigation (SUA) article 3(1)(f),⁴⁸ it is an offense for any person unlawfully and intentionally to communicate information which he knows to be false, thereby endangering the safe navigation of a ship.⁴⁹ This provision could operate to criminalize deceitful practices from corporations. On its face, the intentionality prong only applies to the first action, “communicates information which he knows to be false.”⁵⁰ The second half of the prohibition, “thereby endangering the safe navigation of a ship;”⁵¹ appears to be strict liability. Therefore, if a corporation knowingly makes a false statement, such as a false assessment of the relative probability of interaction with pirates during a voyage, and that statement endangers the safe navigation of the ship, they could be liable under the Convention even though the corporation did not intend to endanger the navigation of the ship.

According to article 3(2)(b) of the SUA Convention, it is unlawful to abet the commission of the offenses set forth in the preceding paragraph, which are related to piracy.⁵² Under the rationale set forth above, with regard to the UNCLOS, corporations or other entities that budget out the cost of paying ransoms may be abetting the seizure of

⁴⁸ Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, IMO. Doc. Sua/Conf/15.Rev.1 (1988), *reprinted at* 27 I.L.M. 668 (which the United States has signed and ratified) [hereinafter SUA Convention].

⁴⁹ *Id.* at art. 3(1)(f).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at art. 3 (“1 Any person commits an offence if that person unlawfully and intentionally: (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or (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; or (c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or (d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or (e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or (f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or (g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).”).

that ship. The Maritime Navigation Convention applies even before the ship begins its journey as long as the ship is scheduled to navigate beyond the territorial seas of a single state.⁵³ Corporations could perhaps weaken the inference that they are abetting seizure of their ships by implementing the International Port Facility and Security code system instituted as a provision in the Convention.

3. Hostage Taking

Piracy for ransom involves taking hostages. The U.N. Security Council strongly condemns the growing practice of hostage-taking by pirates operating off the coast of Somalia and calls upon states to cooperate on the issue.⁵⁴ The International Convention Against the Taking of Hostages prohibits unlawful capture of individuals to compel another entity to do or abstain from doing anything.⁵⁵ This provision applies to pirates who capture sailors for financial gain by compelling a corporation to pay a ransom in exchange for their release. The International Convention Against the Taking of Hostages encompasses acts taken by corporations as “juridical persons.”⁵⁶ A key part of the International Convention Against the Taking of Hostages is that states must refrain from taking any act as an explicit or implicit condition for the release of the hostage.⁵⁷ It is therefore unlawful under the Convention for any state, and by extension, any agent of a state, to pay the ransom or to fulfill pirates’ demands as a condition for the release of their sailors. While this is less applicable to U.S. shipping companies, for corporations in which a state owns a substantial share of the stock, or any nationalized corporation,

⁵³ *Id.* at art. 4(1).

⁵⁴ S.C. Res. 1976, U.N. Doc. S/RES/1976 (Apr. 11, 2011).

⁵⁵ Terrorism Taking of Hostages Convention Between the United States of America and Other Governments, art. 1, June 3, 1983, TIAS 11081 *reprinted in* 1983 WL 144724.

⁵⁶ *Id.* art 1.

⁵⁷ *Id.*

payment by the corporation could be akin to payment by the state, thereby bringing it under the scope of the Convention. Each state party to the Convention also agreed to make hostage taking a domestic offense in their own state punishable by appropriate penalties.⁵⁸ Therefore, there should be an abundance of jurisdictions that have criminal statutes sufficient to put the pirates on notice and to prosecute the pirates when they are captured.

The Convention frames the requirement to act on this issue in the strongest possible terms: states must prosecute or extradite.⁵⁹ An *aut dedere aut judicare* requirement, coupled with widespread domestic practice criminalizing hostage taking and universal jurisdiction over pirates as *hostis humani generis*, theoretically makes prosecution of every captured hostage-taking pirate inevitable. However, as is often the case, theory diverges from state practice. Many pirates are caught and released without ever facing prosecution, as described in Part B *infra*.⁶⁰ Outside of Kenya, states generally appear reluctant to prosecute acts of piracy. However, Kenya lacks the resources and human capital to shoulder the entire judicial burden of the piracy courts. If many states are unwilling to prosecute every pirate they catch, and Kenya is unable to prosecute many of the cases arising from Somalia, then there may be need of a hybrid tribunal for piracy located in Kenya with the mandate and the resources to do the job.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See S.C. Res. 1976, U.N. Doc. S/RES/1976 (Apr. 11, 2011) (“Further expressing concern over a large number of persons suspected of piracy having to be released without facing justice, *reaffirming* that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community and *being determined* to create conditions to ensure that pirates are held accountable”).

B. National Responses

The power to defeat piracy ultimately lies with states. In an era of global financial hardship, with accompanying reductions in world naval forces, states must put additional emphasis on legal rather than kinetic mechanisms for combating piracy. State prosecution of piracy is therefore not only advisable, but necessary.

1. Challenges to Domestic Prosecution

Three obstacles, geography, evidence, and jurisdiction, stand in the way of successful state prosecution of pirates in national courts. This Part illustrates what states face when they attempt to try pirates in domestic proceedings and tracks two examples of the limited state effort to prosecute pirates. The Part recommends the international community adopt uniform procedures to limit financing to piracy via anti-terrorism financing states based on the American approach. Though the full potential of the material support statute has not yet been fully realized in the U.S., it provides a useful link between ransoms to pirates and facilitation of terrorism, which could apply smoothly in the domestic contexts of many states.

a. The First Obstacle: Geography

This problem results from a very narrow definition of piracy in pertinent international treaties, state sovereignty issues, and the collective action problem. Most definitions of piracy limit it to the “high seas” making it an exclusively “extraterritorial crime.”⁶¹ Because most piracy activity occur in territorial waters (from 1989-1993, almost sixty-two percent of the attacks made by pirates occurred in territorial waters),⁶² foreign law enforcement is precluded from pursuing pirates where most criminal activity

⁶¹ Bento, *supra* note 75, at 415 (citing UNCLOS).

⁶² *Id.* at 419.

takes place. When pirates expand their activities to the high seas, they often limit the foray to times when law enforcement is out of sight. When faced with a naval force, pirates generally race back into the safe zone of territorial waters. Because the UNCLOS does not allow reverse hot pursuit (where a ship pursuing pirates follows the pirates from the high seas into the territorial waters of another state), law enforcement cannot follow.⁶³ Where territorial waters are poorly monitored by the state (as in Somalia) pirate activity flourishes. The limitations posed by international treaties are just one part of the geographical conundrum states face, however. They must also contend with issues of sovereignty.

In Southeast Asia, where many states encroach on a high-piracy region, the issue of sovereignty creates another obstacle. Piracy is a particular problem in the Straits of Malacca and Singapore, a high-traffic route between the Indian Ocean and the South China Sea.⁶⁴ The narrowest point in this shipping lane is 1.2 nautical miles⁶⁵ thus the high seas to territorial seas problem described above is less of an issue. Unfortunately, this challenge is replaced by struggles in the region to face piracy within the constraints of state boundaries. Indonesian and Malaysian law enforcement have historically been limited to their respective territories due to “strong regional concerns over infringement on littoral states’ sovereignty.”⁶⁶ This hampers the movement of law enforcement and the exchange of information necessary to form a coordinated response towards pirates who do not respect such geographic boundaries. A lack of mutual trust has created a haven for

⁶³ *Id.* at 420.

⁶⁴ J. Ashley Roach, *Enhancing Maritime Security in the Straits of Malacca and Singapore*, 59 J. INT’L AFFAIRS, 97 (Fall 2005).

⁶⁵ *Id.*

⁶⁶ *Id.* at 98.

piracy activity in the Straits of Malacca.⁶⁷ This is exaggerated by the collective action problem experienced not only in Southeast Asia, but throughout the world.

The collective action problem results from a high number of actors who each face a small risk of falling victim to piracy and the high cost of counter-piracy measures. Piracy is a transnational problem that generally involves many states—pirates may be of many nationalities and are very mobile. The flag that the ship overtaken by pirates flies may be different than the nationality of the crew, which may be different than the headquarters of the corporation transporting goods. And though instances of pirate attacks are very frequent in the “hot zones” (e.g., Somalia, Nigeria, Straits of Malacca), these areas are so frequently trafficked that any given ship has a fairly small chance of being attacked.⁶⁸ Capping the collective action problem is the fact that counter-piracy efforts are very expensive.⁶⁹ Thus, piracy becomes a tragedy of the commons where states have the incentive to stick to the status quo, hoping their citizens and business interests are not targeted by pirates and that someone else foots the bill to counteract this threat.⁷⁰

b. The Second Problem: Evidence

The evidentiary problem states face with respect to prosecuting pirates is exaggerated by the geographic problems described above. If states cannot pursue pirates and apprehend them, it becomes nearly impossible to prosecute them. Moreover, international statutes fail to address inchoate crimes related to piracy. UNCLOS makes

⁶⁷ *Id.* at 103.

⁶⁸ *See* Pt. C(1) *infra*.

⁶⁹ *See generally* Economics of Piracy *supra* note 15.

⁷⁰ *See* Bento, *supra* note 75, at 409.

no mention of attempted piracy, solicitation of piracy, or aiding and abetting of piracy.⁷¹ This requires law enforcement actually catch pirates “in the act” and makes it less likely pirates will be caught at all.⁷²

This systematic evidentiary deficiency has led to the common practice of “catch-and-release” where law enforcement is forced to let pirates go for lack of conclusive evidence that the detainees are in fact pirates.⁷³ If suspected pirates are taken into custody, a lack of evidence may make it impossible to detain them for the time necessary to build a case against them, creating a circular problem where states would rather let pirates go than risk spending time and money in a futile effort.⁷⁴ Uncertainty over the legality of detainment also contributes to jurisdictional problems, as illustrated below.

c. The Third Problem: Jurisdiction

Despite the prevalence of piracy as an international problem throughout history, there has never been a comprehensive international legal system for dealing with that problem.⁷⁵ State responses to piracy have always been inconsistent.⁷⁶ Until the mid-1800s, the state practice of conscripting pirates as seafaring mercenaries in wartime further complicated international response.⁷⁷ Pirates could become “state-sponsored privateers” with a license granted by a special maritime court that regulated ships during wartime.⁷⁸ This effectively changed how states responded to individuals conducting piratical acts during non-wartime—pirates were effectively a commodity. In 1865, the

⁷¹ *Id.* at 423.

⁷² *Id.*

⁷³ *Id.* at 411.

⁷⁴ *Id.*

⁷⁵ Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*, 29 BERKELEY J. INT'L L. 399, 401 (2011).

⁷⁶ *Id.*

⁷⁷ *Id.* at 402.

⁷⁸ *Id.*

Paris Declaration Respecting Maritime Law abolished the delineation between privateering and piracy.⁷⁹ This was a turning point in the international response to piracy—from this point on, states began to treat piracy as a “serious and definite crime.”⁸⁰

Piracy is the oldest crime to which customary international law gives states universal jurisdiction because pirates are deemed to be *hostis humani generis*, or the enemies of all mankind.⁸¹ But universal jurisdiction is rarely used by states to prosecute pirates.⁸² In addition to the narrow jurisdictional scope provided by relevant international treaties,⁸³ confusion over the treaties’ applicability to domestic law and a lack of jurisprudence make states hesitant to use treaties as a basis of jurisdiction at all.⁸⁴ Instead, states have used other sources of jurisdiction in the rare cases they choose to prosecute individuals suspected of piracy.

Pirates held in custody in domestic courts have frequently been released by states that eventually decided they lacked a jurisdictional basis to try the pirates.⁸⁵ European states often release suspected pirates rather than transferring them to domestic courts because the states fear the pirates will plea amnesty. Members of the European Convention on Human Rights are unable to extradite the accused to their home countries if the detainees would risk death or torture upon return.⁸⁶ It appears these fears are not

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See Yvonne M. Dutton, *Bringing Pirates to Justice*, 11 CHI. J. INT’L L. 197, 203-204, 226 (2010) (citing *United States v. Brig Malek Adhel*, 43 U.S. 210, 232 (1844); see also *United States v. Smith*, 18 U.S. 153, 161 (1820)) (recognizing pirates attack people and property from all nations, making it a problem of human kind, and that therefore states can exercise universal jurisdiction.).

⁸² Gagain, *supra* note 21, at 179-180.

⁸³ See Pt. A *supra*.

⁸⁴ See Gagain, *supra* note 21, at 179-180.

⁸⁵ Bento, *supra* note 75 at 431 (citing 2010 Danish case).

⁸⁶ *Id.*

baseless. Recently, two accused pirates in the Netherlands have expressed the intention to claim asylum.⁸⁷

Taken together, geographical constraints, evidentiary obstacles, and jurisdictional confusion make states at best reticent to effectively prosecute pirates and at worst functionally unable. Yet even in the face of these significant odds, states have found creative ways to address piracy, as seen below.

2. State Response to Piracy

Piracy can refer to two offences.⁸⁸ The first, discussed above, is piracy *jure gentium*, or piracy under the law of nations.⁸⁹ The second is violation of a state's municipal laws and is called municipal piracy.⁹⁰ Municipal piracy is more flexible and allows states to define the act however they please.⁹¹ However, states can only prosecute acts of municipal piracy with a jurisdictional nexus to the state that promulgated the municipal law.⁹² By contrast, general piracy has a less flexible definition, as it is the agreed upon definition in the international community, but greater jurisdictional flexibility. Any state can prosecute individuals for committing acts of general piracy.⁹³

a. United States Domestic Law

In the Define and Punish Clause, the U.S. Constitution explicitly authorizes the U.S. Congress “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”⁹⁴ The U.S. Congress explicitly intended to

⁸⁷ *Id.* at 430-431.

⁸⁸ *United States v. Hasan*, 747 F. Supp. 2d 599, 606 (E.D. Va. 2010).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ U.S. CONST. art. I § 8, cl.10.

adopt a flexible definition that is always current with developing international norms.⁹⁵ Tying the definition to international law did not make it unconstitutionally vague.⁹⁶ Congress derives the authority to make treaties respecting piracy from the Define and Punish Clause working in tandem with the Necessary and Proper Clause.⁹⁷ The definition of piracy continually evolves with international consensus.⁹⁸ The United States recognizes a right to prosecute piracy even when it is committed outside of U.S. territorial waters by a foreign person on another foreign person.⁹⁹

Cases brought to trial must evaluate the acts under the definition of piracy as it existed in the international community at the time the alleged piracy occurred in order to avoid *nullem crimen sine lege* concerns.¹⁰⁰ This is reaffirmed in *United States v. Said*, where the Court found the Somali defendant's actions were not piracy because unauthorized violence (in this instance firing at a United States naval vessel) did not constitute "forcible depredations" under customary international law.¹⁰¹ Therefore, it is worth the effort to develop clear legal standards by which to adjudicate cases of corporate payment of pirate ransoms as early as possible, in order to put the corporations on notice and deter the payment. The United States defines piracy by reference to the law of nations, which is a developing standard.¹⁰² The domestic criminal law states, "whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is

⁹⁵ *Hasan*, 747 F.Supp.2d at 622.

⁹⁶ *United States v. Hasan*, 747 F. Supp. 2d 599, 638 (E.D. Va. 2010).

⁹⁷ *United States v. Shi*, 525 F.3d 709, 721 (9th Cir. 2008) (citing *Missouri v. Holland*, 252 U.S. 416, 432 (1920); *see also* U.S. CONST. art. I, § 8, cl. 18).

⁹⁸ *Id.*

⁹⁹ *United States v. Furlong*, 18 U.S. 184, 185 (1820).

¹⁰⁰ *Id.*

¹⁰¹ *United States v. Said*, 757 F. Supp. 2d 554, 561 (E.D.Va. 2010).

¹⁰² 18 U.S.C. § 1651 (2006); *United States v. Hasan*, 747 F. Supp. 2d 599, 623 (E.D. Va. 2010).

afterwards brought into or found in the United States, shall be imprisoned for life.”¹⁰³ The developing international law definition incorporates elements of the law of the UNCLOS.¹⁰⁴

The United States satisfied its “extradite or prosecute” obligations from the SUA Convention by codifying the text of Article 3 of in “Violence Against Maritime Navigation.”¹⁰⁵ Because the Article 3 offenses involve forceful interference with property on the open sea they fall within Congress’s piracy powers.¹⁰⁶

b. Foreign Domestic Response

Apart from the United States and Kenya, few states have prosecuted pirates in their national courts. There are current examples of pirates being tried in Germany, the Netherlands, and France, but these instances are few compared to the hundreds of instances of piracy reported each year.¹⁰⁷

One such trial involves ten Somalis accused of piracy in Germany after a Dutch frigate patrolling the waters east of the Horn of Africa apprehended them.¹⁰⁸ The Somali defendants had attacked the *MV Taipan*, a container ship owned by a German company.¹⁰⁹ The pirates likely would have been released by the Dutch soldiers had they thrown their weapons overboard.¹¹⁰ But in the commotion they were caught with pistols, assault rifles, grenade launchers and a cricket bat and were eventually transferred to

¹⁰³ 18 U.S.C. § 1651.

¹⁰⁴ *Hasan*, 747 F. Supp. at 619.

¹⁰⁵ 18 U.S.C. § 2280 (2006).

¹⁰⁶ *United States v. Shi*, 525 F.3d 709, 721 (9th Cir. 2008).

¹⁰⁷ International Maritime Organization, Maritime Knowledge Centre, 2011

<http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/Pages/default.aspx>

¹⁰⁸ Beate Lakotta, *German Justice Through the Eyes of a Somali Pirate*, SPIEGEL ONLINE (July 4, 2011 3:49 PM), <http://www.spiegel.de/international/world/0,1518,755340,00.html>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

Germany for prosecution.¹¹¹ They have been charged with attacking maritime traffic and abduction with the intent to extort money, for which the maximum penalty is fifteen years.¹¹² Complicated human rights issues have already surfaced. As one of the defendants told German newspaper Spiegel, "I love my country . . . but I don't want to die. I wouldn't go back to Somalia for a million dollars."¹¹³

A recent Dutch case further highlights the challenges of piracy prosecution. In October 2010, a group of pirates were caught hijacking a private yacht by a Dutch naval vessel patrolling off the coast of Tanzania.¹¹⁴ During the altercation, two South African crewmembers were taken hostage by pirates who evaded the Dutch seamen and have been held since October 2010.¹¹⁵ A ransom of ten million dollars has been demanded but some fear the hostages were killed in Somalia.¹¹⁶ A group of twenty pirates were successfully apprehended by the Dutch force but fifteen were released for lack of evidence. The Netherlands tried to extradite the remaining five pirates to South Africa but South Africa declined to take them.¹¹⁷ In August 2011, the five defendants were given sentences ranging from four-and-a-half to seven years for their roles in the attack in Dutch court.¹¹⁸

These examples illustrate that while domestic prosecution of pirates does occur, it is rare because the process is often encumbered by challenges. Naval forces rarely catch pirates red handed, jurisdictional and evidentiary issues arise during trial, and questions

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Bruno Waterfield, *Somali Pirates Jailed by Dutch Court for Seychelles Attack*, THE TELEGRAPH (Aug. 13, 2011, 8:00 AM) <http://www.telegraph.co.uk/news/worldnews/piracy/8698359/Somali-pirates-jailed-by-Dutch-court-for-Seychelles-attack.html>.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

of extradition can surface even after a defendant convicted of piracy has served jail time.¹¹⁹ In response to these obstacles, states have found creative solutions to the problem of how to prosecute pirates.

c. Alternative Solutions

The two main approaches states have explored are (1) the Kenya Bilateral Agreement Solution and (2) the regional group solution. Each of these solutions seeks to overcome the geographical, evidentiary, and jurisdictional problems described above. Yet, while each makes some headway towards the effective prosecution of piracy, they each raise new problems, indicating the international community has not yet found the best way to approach the problem of piracy.

Kenya tried its first modern piracy case after the *USS Winston S. Churchill* captured ten heavily armed pirates off the coast of Somalia in January 2006.¹²⁰ The pirates were transferred to Mombasa, Kenya for prosecution based on the principle of universal jurisdiction.¹²¹ All ten individuals were convicted in Kenyan court and sentenced to seven years in prison.¹²² The decision to turn the pirates over to Kenya, and Kenya's successful prosecution, were hailed as a victory for justice and a valuable indication of regional commitment to the prosecution of pirates.¹²³ A meeting of United Nations experts in Nairobi in November 2008 created the "Nairobi Report" which recommended an enhancement of regional legal systems, particularly Kenya, to

¹¹⁹ See discussion Pt. B(1) *supra*.

¹²⁰ James Kraska and Brian Wilson, *The Pirates of the Gulf of Aden: The Coalition is the Strategy*, 45 STAN. J INT'L L. 243, 257 (2009).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

prosecute, convict, and incarcerate pirates regardless of which state apprehends them and transfers them to shore.¹²⁴

Subsequently, the United Kingdom entered into a bilateral agreement with Kenya in December 2008 through which pirates caught by British vessels would be transferred to Kenya for prosecution.¹²⁵ A bilateral agreement between the United States and Kenya soon followed in January 2009.¹²⁶ Later that year, the European Union concluded a deal to facilitate the transfer of pirates captured by EU NAVFOR (the European Union-led naval force) to Mombasa for prosecution.¹²⁷ Agreements with Denmark, Canada, and China have since followed.¹²⁸ Pursuant to the Nairobi Report, the U.N. Office on Drugs and Crime provides assistance to Kenya and the Seychelles to facilitate the establishment of effective courts to try pirates.¹²⁹ Kenya's partners in the bilateral agreements also give financial assistance in exchange for utilizing Kenyan courts to transfer pirates. It is proving to be a very expensive proposition: support is estimated within the range of \$2.4 million and Kenya has requested additional funds.¹³⁰ As of October 2009, Kenya had custody of around 123 piracy suspects of which ten had been tried and sentenced.¹³¹

These numbers indicate the mixed results that the Kenya solution yields. On one side, it is valuable because it gives the region most affected by piracy the lead role in prosecution of pirates and allows a body of relevant expertise to develop in a concentrated place. However, Kenyan courts pose feasibility concerns. Kenya has around 53,000 prisoners currently in domestic jails that have a maximum capacity of around

¹²⁴ See *id.* at 280.

¹²⁵ Kraska, *supra* note 120, at 285.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Dutton, *supra* note 81, at 220.

¹²⁹ Bento, *supra* note 75, at 444.

¹³⁰ Dutton, *supra* note 81, at 220.

¹³¹ *Id.*

16,000.¹³² Kenyan courts also face a backlog of more than 870,000 cases.¹³³ These concerns make it clear that transfer to Kenyan courts is not the final solution to dealing with apprehended pirates.

As for the second alternative approach, regional groups have made significant strides in spite of geographic, evidentiary, and jurisdictional concerns but also pose challenges tied to the expense of naval forces. Japan pioneered the regional group approach in 2004, with the Regional Agreement on Combatting Piracy and Armed Robbery (“ReCAAP”), the first treaty created exclusively to combat piracy.¹³⁴ ReCAAP boasts sixteen member nations that have established and maintain a piracy Information Sharing Center in Singapore.¹³⁵ This center allows members to work together despite the sovereignty interests that have inhibited Indonesia and Malaysia in particular from effectively pursuing pirates in the Straits of Malacca.¹³⁶

East African nations used ReCAAP as a model when they agreed to begin work on a similar network at the Djibouti meeting in January 2009.¹³⁷ An East African regional anti-piracy group would join the Maritime Organization of West and Central Africa (“MOWCA”) which was created in 1975 but has increased its efficacy in recent years to help member states manage port and vessel security. MOWCA has also established an “integrated coastguard network” amongst its twenty-five members.¹³⁸

Yet the regional approach also has weaknesses. Using law enforcement as the main mechanism to combat piracy is very expensive. In this era of austerity when law

¹³² *Id.* at 221.

¹³³ *Id.*

¹³⁴ See Kraska, *supra* note 120, at 271.

¹³⁵ *Id.*

¹³⁶ See Pt. B(1)(c) *supra*.

¹³⁷ Kraska, *supra* note 120, at 272.

¹³⁸ *Id.*

enforcement budgets are continually whittled down, constabulary efforts to respond to piracy are likely among the first to go.¹³⁹ This makes a legal solution all the more valuable. As alluded to previously, a particularly effective legal solution would be one that affixed liability to corporations and their insurers for the payment of ransoms.

C. Corporations

Because ransoms paid from corporations to pirates in order to free cargo ships and hostages provide the financial incentive to engage in piracy, corporate liability may be the most effective legal avenue to address the financial sources that fuel piracy. But this approach is underutilized in the current American legal structure though the statutory framework exists. While a few current domestic statutes deal with corporate liability, none speak to the relationship between corporations and piracy directly. Most relevant statutes address liability from bribery but not ransoms. Furthermore, these statutes focus on bribery and illegal payments to governments rather than independent third parties like pirates.¹⁴⁰ Corporations may, however, incur liability for ransom payments under domestic anti-terrorism financing statutes.

This Part first explores maritime insurance and the role insurance companies play in payment of ransoms. Second, it addresses corporate codes of conduct and their potential to fill the gap between current corporate practice in the maritime industry and states' efforts to eliminate piracy. Third, this Part addresses shipping industry best practices and how their universal adoption would lead to a more cohesive global

¹³⁹ EUROPEAN UNION NAVAL FORCE SOMALIA, <http://www.eunavfor.eu/about-us/mission/> (last visited Nov. 17, 2011) (stating funding has decreased from €8.4 million (approximately U.S. \$ 11.3 million) in 2010 to €8.05 million (approximately U.S. \$ 10.8 million) for 2011).

¹⁴⁰ The pirates consider themselves to be a militia. This may be sufficient to consider them a “government” for purposes of liability, but the link is tenuous. Similarly, due to the pirates’ links to al-Shabaab, the de facto governing body in parts of Somalia, the pirates might also be agents of the government for purposes of liability, but again, the link is tenuous. For further discussion along these lines, *see* Pt. A(1) *supra*.

approach. Finally, it examines corporate liability under United States domestic terrorism statutes. This Part argues that the U.S. approach to material support, as seen in 18 U.S.C. § 2339, offers link between ransom payments by insurers of maritime corporations and the proliferation of piracy. It should, therefore, be implemented throughout the domestic legal systems of the international community to create a consistent and effective approach to stifling the financial systems that enable piracy.

1. Insurance Companies

Maritime insurance companies, like Lloyd's of London, are generally the parties actually making ransom payments to pirates, as corporations have found extensive insurance coverage increasingly important in pirate-infested waters.¹⁴¹ The greater part of these insurance purchases is for Kidnap and Ransom insurance premiums ("K & R") that reimburse companies when ransoms are demanded and often provide for a negotiation expert to guide customers through the process.¹⁴² Insurance premiums "can range from thousands of dollars to hundreds of thousands of dollars based on the country risk, the nature of the business and the employee's profile."¹⁴³ As of 2005, eighty percent of Fortune 500 corporations had Kidnap and Ransom insurance and that number has steadily increased.¹⁴⁴ In addition, as indicated by the "high risk" label given to the Gulf of Aden by Lloyd's (the world's leader in K & R insurance) the premiums in the Gulf of Aden are

¹⁴¹ Thaine Lennox-Gentle, *Piracy, Sea Robbery, and Terrorism: Enforcing Laws to Deter Ransom Payments and Hijacking*, 37 TRANSP. L. J. 199, 209 (2010).

¹⁴² See ISO.com, ISO's Kidnap/Ransom and Extortion Insurance Program, <http://www.iso.com/Products/Policy-Programs/Kidnap-Ransom-and-Extortion-Insurance-Program-from-ISO.html> (last visited Nov. 17, 2011).

¹⁴³ Meadow Clendenin, *"No Concessions" With No Teeth: How Kidnap and Ransom Insurers and Insureds are Undermining U.S. Counterterrorism Policy*, 56 EMORY L.J. 741, 753 (2006) (citing Maria O'Brien, *Preparing for the Worst*, Latin Fin., June 2001, at 42.).

¹⁴⁴ *Id.* at 750 (citing *Kidnap Insurance: A King's Ransom*, ECONOMIST, Aug. 26, 2006, at 58).

very costly.¹⁴⁵ Corporations shipping in the Gulf of Aden often see insurance as a form of necessary risk-management since many feel they cannot afford to change shipping routes.¹⁴⁶

Through high insurance rates and a willingness to pay ransoms, the maritime insurance industry is creating a profitable market for pirates and thereby encouraging continued attacks.¹⁴⁷ Piracy has cost global shipping an estimated thirteen and fifteen billion dollars and the total steadily increasing.¹⁴⁸ While most insurance agencies require that the corporations take “every reasonable effort” not to disclose the existence of their K & R policy and take reasonable steps to prevent the kidnapping from occurring in the first place, these requirements are too board and ill-defined to be effective.¹⁴⁹ Furthermore, a policy of ransom payments is a defensive measure taken by corporations who choose to do business in dangerous waters when the gravity of the problem clearly requires preventative measures.¹⁵⁰ It appears there is a perverse incentive for insurance agencies to support the threat of piracy as they profit from the sale of additional insurance coverage for companies traveling these treacherous waters.¹⁵¹

¹⁴⁵ 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>.

¹⁴⁶ *Id.* at 753 (2006) (citing Melanie Simpson-Mills, *Spotlight on Kidnap and Ransom*, Int'l Money Marketing, Sept. 9, 2004, at 32).

¹⁴⁷ Lauren L. Hardy, *Ordering Chaos at Sea: Preparing For Somali Pirate Attacks Through Pragmatic Insurance Policies*, 55 ST. LOUIS L.J. 665, 667 (2011) (citing Nicholas Schmidle, *The Hostage Business*, N.Y. TIMES MAG., Dec. 6, 2009, at 44).

¹⁴⁸ Elliot A. Anderson, *It's a Pirate's Life for Some: The Development of an Illegal Industry in Response to an Unjust Global Power Dynamic*, 17 IND. GLOBAL LEG. STUD. 319, 332 (2010) (citing James Kraska & Brian Wilson, *Fighting Pirates: The Pen and the Sword*, 25 WORLD POL'Y J. (Winter 2008), at 41, 43).

¹⁴⁹ See American International Companies, *Corporate Kidnap and Ransom/Extortion Insurance*, Form 81760, 10 (Nov. 2011) (attached in Appendix)

¹⁵⁰ Meadow Clendenin, *"No Concessions" With No Teeth: How Kidnap and Ransom Insurers and Insureds are Undermining U.S. Counterterrorism Policy*, 56 EMORY L.J. 741, 758 (2006) (citing William Prochnau, *Adventures in the Ransom Trade*, VANITY FAIR, May 1998, at 145).

¹⁵¹ Lennox-Gentle, *supra* note 141, at 209.

The solution to the problem created by a market that profits from the payment of ransoms to Somali pirates is to create strong legislation amongst all states to assign criminal liability to the payments. The insurance industry needs to be restructured in a way that excludes ransoms from its premiums. Many insurance companies have made similar changes in coverage with respect to acts of terrorism and no longer indemnify ransom payments companies who knowingly travel through waters as dangerous as the Gulf of Aden.¹⁵² While corporations and insurance companies may be reticent to change the status quo which is livable for shipping companies and lucrative for insurers, pirate ransoms are predicted to continue their astronomical increase in the future. The exponential cost of piracy to the maritime industry and global consumers will soon reach an untenable level. The only way to halt this cycle is for companies to stop paying pirate ransoms. The first step to this end is to prevent insurance companies from offering such indemnification.¹⁵³

2. Codes of Conduct and Best Practices

The conflict between state interests and private conduct regarding piracy and ransoms further incapacitates effective responses to this problem. In the public sphere, states' goal is to end the scourge of piracy. This can be achieved by halting ransom payments which also removes a source of funding to terrorist operations. Conversely, in the private sector, paying ransoms is just seen as a cost of doing business. An examination of a wide breadth of corporate codes (ranging from international shipping

¹⁵² Hardy, *supra* note 144 at 683, (citing Eric Danoff, *Marine Insurance for Loss or Damage Caused by Terrorism or Political Violence*, 16 U.S.F. MAR. L.J. 61, 71 (2003-2004) (providing an overview of marine insurance coverage terms)).

¹⁵³ Report on Somalia, *supra* note 1, ¶ 20; *The Economics of Piracy*, *supra* note 15; Hardy, *supra* note 144 at 326.

corporations to international oil companies to multinational corporations) reveals there is little, if any, mention of payments made to third parties that are not directly tied to contracts.¹⁵⁴ A minority of the codes in this sample refer to bribes made during the course of conducting business, but these are generally to secure business or entreat officials of foreign governments.¹⁵⁵ No codes reviewed for this paper mention ransoms in any form.

This leads to the conclusion that an important gap in codes of conduct exists when corporations are faced with ransom or kidnapping of goods or personnel. This gap threatens both state interests and corporations' long-term financial viability. For codes of conduct to be effective regulators of corporate behavior, the codes must be comprehensive enough to address the contingencies that arise in the course of doing business, including a transparent corporate policy on ransoms. The time has come for corporations to reexamine the "business as usual" policy of using insurance premiums to cover the cost of recovering hijacked company property or personnel. The price is too high and other solutions more effectively treat the causes of piracy rather than solely the symptoms.

Shipping industry—best practices could also more effectively address state security interests and streamline corporate costs in the maritime industry. Shipping Industries Best Practices includes "training of crew, implementation of the Ship Security Reporting System, use of military escort and crisis management services."¹⁵⁶ While there has been improvement in technological developments of security on seafaring ships, profit margins

¹⁵⁴ *Business Conduct and Ethics Code- Chevron*, <http://www.chevron.com/documents/pdf/chevronbusinessconductethicscode.pdf>; *McDermott International Code of Business Conduct*, http://www.mcdermott.com/News/Publications/MII_COBC_111027.pdf.

¹⁵⁵ *Shell Code of Conduct: How to live by the Shell General Business Principals*, http://www-static.shell.com/static/public/downloads/corporate_pkg/code_of_conduct_english.pdf.

¹⁵⁶ Bruce G. Paulsen, Lawrence Rutkowski, and Jonathan D. Stoian, *Troubled Waters: Combating Maritime Piracy with the Rule of Law: Mugged Twice?: Payment of Ransom on the High Seas* (citing *Tackling the Costs of Piracy*, 368 FAIRPLAY 18, 18 (2010)).

are a significant concern for the industry.¹⁵⁷ To many shipping companies, the cost of new technology appears too high and the accompanying risks too great (such as an increased possibility of injuries from arming sailors) to justify fully implementing best practices.¹⁵⁸ Because the probability of an individual ship being hijacked is relatively small given the high traffic through areas of concern, shipping companies are hesitant to adopt preventative security measures.¹⁵⁹ The best way to change corporate perception of the profitability of increased security is through better information and support for corporations willing to make the switch. International agencies such as the International Maritime Organization or regional agencies such as Maritime Security Center Horn of Africa (“MSCHOA”) are in a good position to make this information available and counsel corporations on how best to implement strategies to increase safety and reduce long-term costs.¹⁶⁰

One example of such effort is the International Ship and Port Facility Security Code (“ISPS”), which seeks to create a cohesive system of agency governance over the detection and prevention of security incidents in the maritime industry.¹⁶¹ ISPS seeks to provide all ships that have signed onto the provisions with a ship security alert system. It

¹⁵⁷ Bento, *supra* note 75, at 451 (Boot, *supra* note 158, 99).

¹⁵⁸ *Id.* (citing SUA Convention, *supra* note 48); Max Boot, *Pirates, Then and Now: How Piracy was Defeated in the Past and Can be Again*, 88 FOREIGN AFF. 94, 99 (2009); *see also* Stephen Jones, *Armed Action*, MAR. SEC. REV., Mar. 21, 2011, <http://www.marsecreview.com/2011/03/armed-action/> (calling for a code of conduct for armed guards).

¹⁵⁹ *Id.* at 452 (citing Boot, *supra* note 158, at 99).

¹⁶⁰ *Id.* at 451; E.U. Naval Force, Maritime Security Center Horn of Africa (MSCHOA), BMP3: Best Management Practices to Deter Piracy Off the Coast of Somalia and the Arabian Sea 27 (June 2010) http://www.mschoa.org/bmp3/Documents/BMP3%20Final_low.pdf.

¹⁶¹ *Id.* (citing International Ship and Port Security Shipping Code, International Maritime Organization iii (2003)). However, the enforcement of the Code is lax as only contracting Governments to SOLAS have a legal obligation to adhere to the standards set forth, leaving the private sector a choice of implementation. An additional problem with this Code is that most of the countries who are not members of SOLAS and ISPS, are countries that a large number of ships are registered under, given their standards regarding the shipping industry are lower than other countries.

also trains ship crews to analyze and prepare for threats that arise during international transit.¹⁶²

Another solution is to employ outside security services to increase ship security in order to deter pirates *ex ante*. The International Code of Conduct for Private Security Service Providers (“ICoC”) aims to provide support services and set standards of security forces.¹⁶³ As of October 2011, 211 companies had signed on to the Code.¹⁶⁴ The shipping industry’s goal must be to develop a uniform, industry-wide standard for security and to establish a governance structure capable of ensuring adherence to the policies of regional and international organizations.

3. Financial Statutes

Unfortunately, U.S. financial statutes are of little use to states trying to prevent corporations from paying ransoms. One of the most important federal protections afforded corporations in the ransom context comes from the Foreign Corrupt Practices Act (“FCPA”) which saves corporations from liability payments made to third parties under duress.¹⁶⁵ Courts have interpreted this provision of the FCPA to include extortion payments.¹⁶⁶ While the Act does carve out instances where corporations can incur liability, ransom payments do not easily fit within the scope of these exceptions. First, corporations are liable when they pay a government official. Second, corporations are

¹⁶² International Maritime Organization, Frequently Asked Questions: ISPS, <http://www.imo.org/OurWork/Security/FAQ/Pages/FAQ.aspx> (last visited Nov. 17, 2011).

¹⁶³ *International Code of Conduct for Private Security Service Providers*, 9 Nov. 2010, http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf (last visited Nov. 17, 2011).

¹⁶⁴ *International Code of Conduct for Private Security Service Providers Signatories*, 1 Oct. 2011, http://www.icoc-psp.org/uploads/Signatory_Companies_-_October_2011_-_New_Companies.pdf (last visited Nov. 17, 2011).

¹⁶⁵ 15 U.S.C. §§ 78dd-1 (2006).

¹⁶⁶ 15 U.S.C. §§ 78dd-1.

liable when they make such a payment with the intent of obtaining or retaining business with any person.¹⁶⁷

United States v. Gonzalez held that liability protection offered under the Act extends to payments made to pirates for the release of goods or persons because such payments are under duress and not bribes.¹⁶⁸ This holding extends to payments corporations make to pirates for ransom, as the corporations do not willfully choose to engage in market transactions with pirates. Rather, *Gonzalez* found corporations are forced to pay a ransom in return for their agents and property from which they cannot feasibly walk away.¹⁶⁹

4. Anti-Terrorism Financing Statutes

Unlike financial statutes, anti-terrorism financing statutes could be the answer to ending ransom payments to pirates through corporate liability. Under the USA Patriot Act, corporations can be held liable for supplying material support to certain foreign terrorist organizations.¹⁷⁰ Under Title VIII of the Act defining Strengthening the Criminal Law Against Terrorism, § 805 defines material support for terrorism as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services . . .” as found in 18 U.S.C. § 2339A.¹⁷¹ This definition of material support could then be applied to the pirate ransom context because such payments are used to perpetuate further hijackings. Furthermore, carrying the definition of material support over from § 2339A, liability for corporations could be established through aiding and abetting terrorist organizations in carrying out terrorist activities.

¹⁶⁷ 315 U.S.C. §§ 78dd-1 (2006)

¹⁶⁸ *United States v. Gonzalez*, 407 F.3d 118, 122 (2d Cir. 2005).

¹⁶⁹ *Id.*

¹⁷⁰ USA Patriot Act, Pub. L. 107-56, 15 Stat. 272 (2001).

¹⁷¹ *Id.*

Support for this avenue for corporate liability is found in estimates that pirates have paid one-million dollars or more to al-Shabaab and their foreign instructors.¹⁷²

The history of this statute is found in 18 U.S.C. § 2339B from the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which criminalizes provisions of material support to designated terrorist organizations.¹⁷³ The aid must be intentional and the corporation must know that the organization is a terrorist organization or one that engages in acts of terrorism.¹⁷⁴ The corporation does not need to intend to further the organization’s terrorist activities; it is sufficient that the corporation had knowledge concerning the organization’s connection to terrorist activities.¹⁷⁵ Congress’ reasoning here is expressed expansively as “all contributions to foreign terrorist organization” further the terrorist group’s activities.¹⁷⁶ This expansive approach is furthered by the Intelligence Reform and Terrorism Prevention Act of 2004 which redefines “material support” of a terrorist organization to include providing “any property, tangible or intangible, or service,” which in the context of § 2339B includes “currency or monetary instruments or financial securities.”¹⁷⁷

To create the link between pirates and terrorism, the U.S. Secretary of State can designate an organization as a foreign terrorist group under § 219 of the Immigration and Nationality Act.¹⁷⁸ Under the scope of “terrorist activities” of the Immigration and Nationality Act, which is transferred to § 2339B, hijacking or sabotage of any

¹⁷² Charles Marts, *Piracy Ransoms—Conflicting Perspectives*, One Earth Future Foundation (August 2010) (citing U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 100, ¶ 107.)

¹⁷³ 18 U.S.C. 2339B (2006).

¹⁷⁴ 18 U.S.C. 2339B(a)(1).

¹⁷⁵ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2717 (2010).

¹⁷⁶ *Id.* at 2711.

¹⁷⁷ 18 U.S.C. 2339B.

¹⁷⁸ 8 U.S.C. 118, § 219 (2006).

conveyance (including an aircraft, vessel, or vehicle) is unlawful.¹⁷⁹ Jurisdiction over these actions that occur outside the United States is established in the statute under § 2339B(d)(1), which is an extraterritorial statute providing for jurisdiction over actions that are considered Federal Crimes of Terrorism.¹⁸⁰ In addition, as stated by the U.S. Ninth Circuit Court of Appeals in *United States v. Peterson*, “a jurisdictional nexus exists when the aim that activity is to cause harm to . . . U.S. citizens or interests.”¹⁸¹

These are just a few U.S. statutes that could be used to create liability for corporations that pay ransoms to pirates. Corporations could also be held liable for aiding and abetting terrorist organizations when they provide payments to governments that support terrorist activities. In 18 U.S.C. § 2332D (b)(2)(B) a juridical person of the United States, here a corporation, can be held liable for transactions made with a foreign government that they “know or have reasonable cause to know” as a country that supports international terrorism.¹⁸² For the purpose of this paper, liability would be contingent upon whether plaintiffs could link corporate payments to Somali pirates to several major political figures in Somalia. This link could be established through research that indicates ransoms paid to Somali pirates, particularly the class of pirates who are fishermen frustrated with an over-fishing of their waters, are often used to prompt political change in the country.¹⁸³

¹⁷⁹ “ ‘Terrorist activity’ is defined by cross-reference to § 212(a)(3)(B), 8 U.S.C. 1182(a)(3)(B), of the Immigration and Nationality Act, which defines the term in subparagraph (iii).”

¹⁸⁰ Lennox-Gentle, *supra* note 141, at 209 (Fall 2010).

¹⁸¹ *United States v. Peterson*, 812 F.2d 486, 494 (9th Cir. 1987).

¹⁸² 18 U.S.C. § 2332D (b)(2)(B).

¹⁸³ Hardy, *supra* note 144, at 667 (citing Tullio Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, 20 EUR. J. INT'L. L. 399, 400 (2009)); Gwen Thompkins, Morning Edition: Battling Piracy Around the World: In Somalia, Piracy is an Attractive Career Option (NPR radio broadcast May 6, 2009), transcript *available at* <http://www.npr.org/templates/story/story.php?storyId=103815312&sc=emaf>. With an instable government and a failing economy, many Somali's have turned to piracy as a way to make a living.

A final avenue to prosecute corporations for piracy ransom payments is under the International Emergency Economic Powers Act (“IEEPA”), which states persons can be prosecuted by the United States for willfully engaging in “financial transactions” with persons determined to be “a threat to United States national security” by the President.¹⁸⁴ To defend against this charge, a corporation could raise a similar argument to that which it would raise against an FCPA charge: the corporation that pays a ransom to pirates is not willfully engaging with the pirates, because it is under duress when it pays. But the Act might still be useful if a court overcame the duress argument, reasoning that given the high volume of pirate attacks in specific regions, corporations were willfully undertaking a likely risk of engagement with pirates.

Given the overall framework of United States domestic statutes, the liability of corporations that pay ransoms to pirates needs to be reviewed in the context of anti-terrorism financing statutes. By paying the ransoms the Somali pirates demand, corporations fund future attacks by enabling the pirates to carry on their operations. Paired with changes to the maritime insurance industry, improved corporate codes of conduct, and the adoption of best practices for ship security, these steps could begin to fill the gap between state security interests and private business interests that contributes to the piracy cycle.

IV. CONCLUSION: SAFE PASSAGE THROUGH TROUBLED WATERS

The international community finds itself at a crossroads. Exponential growth in the costs of piracy threatens not only the maritime shipping industry but also state security and consumers everywhere. Though corporations and insurers may be reticent to

¹⁸⁴ 50 U.S.C. §§ 1701, 1702 (2006).

change the status quo, halting the flow of ransom payments is the only way to stop the cycle. The global business community must switch from a defensive posture to preventative one by restructuring corporate incentives. This requires the application of a universal, coherent scheme of liability for the multiple actors involved in the piracy problem. It also requires the creation of harmonized, enforceable standards for the maritime industry.

First, states should draw on the existing body of international law and use U.S. material support statutes as a model to create anti-terrorism financing statutes that target corporate ransom payments to pirates. This will remove the incentives for corporations and their insurers to fuel the pirate explosion financially. Second, this legal approach should be paired with improved corporate codes of conduct that are adapted to fill the remaining gaps between international and domestic law, thereby increasing the efficacy of this endeavor.

Finally, both of these strategies should occur within the context of improvements to ship security through adoption of best practices advocated by the International Maritime Organization or another body the international community deems most effective. And as with any effort to combat turmoil coming from weakened states, the overall approach should be undertaken in concert with development strategies designed to build infrastructure in piracy hot zones. Taken together, these solutions provide the tools to further coordinate an effective response to piracy at the international and domestic levels.