

# Piracy Ransoms—Conflicting Perspectives

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**Abstract**

This paper presents both sides of the debate over whether States should allow payment of ransoms to pirates. United States Executive Order 13536 and other recent national and international legislation have brought increased awareness to this issue. This paper does not attempt to settle the ransom debate, but instead highlights the key issues, which perhaps will inspire progress in the fight to curb piracy.

In their simplest distillations the positions are the *pro-ransom* stance advocating use of all means available to limit immediate threats of violence and disaster; versus the *anti-ransom* stance advocating use of all means available to limit acts of piracy over a longer term.

Maritime industry practitioners assert that paying ransoms are the only tool available once a ship has been hijacked. Paying ransoms, they claim, minimizes risks of escalated violence, revenue liability, and environmental disaster. Those individuals/States opposed to paying ransoms believe that each ransom payment fuels and perpetuates the menace of piracy and that the eventual outcome of this escalation would likely be military intervention.

In the final section of this paper, we briefly examine recent legislation and a small sample of international views that illustrate the practical complexity of ransom policies. A reader unfamiliar with the laws and opinions concerning this issue may find it useful to read this section before jumping into the arguments.

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### **List of Acronyms**

BIMCO – Baltic and International Maritime Council

EO – Executive Order

IMB – International Maritime Bureau

MEND – Movement for the Emancipation of the Niger Delta

OFAC – Office of Foreign Assets Control

POEA – Philippine Overseas Employment Administration

SDN – Specially Designated National

UN – United Nations

UNODC – United Nations Office of Drugs and Crime

## Introduction

Recent international legislation has brought increased awareness to the debate over whether ransoms should be paid to gain the release of captured mariners. There is much staunch opinion, but very little in the way of clear and thorough argument on either side. This paper develops each side of the ransom debate. The exercise does not attempt to provide a definitive answer to the question, but instead presents the opposing arguments for examination. The goal is to build a deeper understanding of the problem and perhaps inspire a more robust solution.

For the most part nations publicly denounce ransoms, but often furtively permit them to be paid absent other alternatives for hostage and vessel release. Opportunities for release are rarely plentiful. Even less likely are opportunities for release that do not rely on significant military intervention, which is often violent and dangerous.

In their simplest distillations the opposing arguments are the *pro-ransom* position asserted mainly by practitioners advocating all possible means of limiting threats of violence and disaster, against the *anti-ransom* position for doing everything possible to reduce acts of piracy. The *pro-ransom* view holds that ransoms are the only means available to the maritime industry for minimizing risks of escalated violence, revenue liabilities, and environmental disasters once a vessel has been captured. The ‘anti-ransom’ view holds that each additional ransom payment fuels and perpetuates the piracy menace, which will continue to increase in violence and expense until military intervention is required. Before diving into either argument, it may be helpful to briefly review some facts and narratives about the ransom process upon which both sides of the debate would agree.

Pirates appear to operate in organized syndicates. Generally they are composed of a maritime militia, which conducts the attacks, a ground militia, which handles pre- and post-capture logistics, and a figurehead responsible for financing.<sup>1</sup> Ransoms are usually paid in cash, and are divided among the pirates in accordance to their position within the organizations. Payments seem to be steadily rising. The average ransom used to be a few thousand dollars but now is between \$2-3 million and rising.<sup>2</sup> Somali Pirates earned approximately \$100 million in 2009<sup>3</sup>, and are likely to earn as much this year.<sup>4</sup>

Each year roughly 33,000 ships transit the Gulf of Aden.<sup>5</sup> This traffic is concentrated in a relatively small area. Recent international military patrols along the International Recommended Transit Corridor through the Gulf of Aden have now caused pirate activities to shift further offshore into the Arabian Sea and Indian Ocean.

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<sup>1</sup> U.N. Sec. Council, Monitoring Group on Somalia, *Report of the Monitoring Group on Somalia Pursuant to Sec. Council Resolution 1811 (2008)*, ¶ 140, U.N. Doc. S/2008/769 (Dec. 10, 2008).

<sup>2</sup> John Drake, *Ships Face Greater Attack Risk in Indian Ocean*, LLOYD’S LIST, Feb. 19, 2010, <http://www.lloydslist.com/ll/sector/piracy-and-security/article10199.ece>.

<sup>3</sup> *Somalia’s Pirates, A Long War of the Waters*, THE ECONOMIST, Jan. 7, 2010, <http://www.economist.com/node/15214052>.

<sup>4</sup> Antonio Maria Costa, *The War on Piracy Must Start on Land*, N.Y. TIMES, June 8, 2010, <http://www.nytimes.com/2010/06/09/opinion/09iht-edcosta.html>.

<sup>5</sup> William Matthews, *Lawmakers Have Many Ideas, Few Answers to Piracy*, DEFENSE NEWS, Apr. 16, 2009, <http://www.defensenews.com/story.php?i=4043805>.

Wherever the attack occurs, the Somali pirates tend to bring captured ships to the relatively lawless Puntland coast to anchor and hold the crews hostage while awaiting ransom negotiations. Although detailed information is difficult to obtain, at this writing it seems that pirates are holding approximately 23 vessels and more than 424 seafarers.<sup>6</sup>

To begin the process of negotiation, a ship owner or charterer hires professional *kidnap negotiators*, often with the assistance of an attorney, who work to reach agreeable terms with the pirates who have engaged their own negotiators.<sup>7</sup> Negotiations are usually complicated<sup>8</sup> and take a great deal of time, typically between 10-13 weeks before the ship and cargo and crew are released.<sup>9</sup> Ransom payments have been delivered by parachute, delivery vessel, or even by the unofficial Somali money transfer system of Hawala.<sup>10</sup> Despite the crew trauma, logistical difficulties, and resulting expenses, the UK High Court has noted the positive aspect of ransom payment, in that it is “not aware of a case in the past with Somali hijackings where the ship and crew and cargo have not been released.”<sup>11</sup>

The prospect of limiting the ability to secure release of captured vessels with ransom payments is particularly troublesome to the maritime industry. The Baltic and International Maritime Council (BIMCO), a global trade association, has argued that if ships are not released after six months, insurers will consider them a constructive total loss, necessitating full payment for the value lost to all insured. BIMCO’s concern is that this will lead to wildly increased premiums.<sup>12</sup>

Most shipping companies seem to consider payment of a ransom as a low-probability event and a cost of doing business because fewer than one-third of one percent of ships are attacked.<sup>13</sup> According to Middleton (2008) “Shipping firms, and sometimes governments, are prepared to pay these sums since [the sums] are relatively small compared with the value of a ship, [and the lives] of crew members.”<sup>14</sup> For the shipping

<sup>6</sup> Salem-News.com, *Government And Media: Pirating the Truth About Seafarers in Somalia?*, Jul. 6, 2010, <http://www.salem-news.com/articles/july062010/pirate-truth.php>.

<sup>7</sup> E-mail from Jai Sharma, Head of the Casualty & GA Dep’t, Dolphin Maritime & Aviation Services, to author (May 17, 2010, 06:00 CST).

<sup>8</sup> Scott Eden, *Pirates’ Toll (Part 3): The Art of the Ransom Deal*, THE #STREET, Mar. 18, 2010, <http://www.thestreet.com/story/10704571/1/pirates-toll-part-3-the-art-of-the-ransom-deal.html> (noting that the process of negotiation is long and laborious, the pirates will make threats, change their minds halfway through, and lie). The article also cites James Christodoulou, CEO of Industrial Shipping Enterprises whose ship was captured, and who, while acting as negotiator, expressed his frustration with the communication skill of his pirate counterpart: “You’re negotiating life and death -- a multimillion-dollar, life-and-death contract -- on a *second-grade level*. I mean please! It was hard, man!”

<sup>9</sup> INCE & CO, *PIRACY: RESPONDING TO A PIRACY INCIDENT 2* (2010), *available at* <http://www.incelaw.com/documents/pdf/Strands/Shipping/Article/Piracy-responding-to-a-piracy-incident.pdf>.

<sup>10</sup> INCE & CO, *supra* note 9, at 3.

<sup>11</sup> *Masefield AG v. Amlin Corporate Member Ltd.*, [2010] EWHC (Comm) 280, [22], *available at* <http://www.scribd.com/doc/28789566/MasefieldAG-v-Amlin-2010>.

<sup>12</sup> Keith Wallis, *US Ransom Ban Could Drive up Premiums*, LLOYD’S LIST, Apr. 29, 2010, <http://www.lloydlist.com/ll/sector/ship-operations/article7714.ece>.

<sup>13</sup> *Ib.*

<sup>14</sup> Roger Middleton, *Piracy In Somalia: Threatening Global Trade, Feeding Local Wars* 6 (Chatham House Africa Programme, The Horn of Africa Project, Briefing Paper AFP BP 08/02, 2008), *available at* [http://www.chathamhouse.org.uk/files/12203\\_1008piracysomalia.pdf](http://www.chathamhouse.org.uk/files/12203_1008piracysomalia.pdf).

industry the payment of ransoms is simply a good business decision. It is an economic strategy that minimizes larger costs.

Despite the perception of piracy's low-impact on commercial shipping, the impact of piracy on the region is devastating. Piracy "endangers lives, curbs trade, kills tourism, steals food aid, enriches criminals, funds insurgents, and perverts the regional economy."<sup>15</sup> Perhaps because most of the commercial shipping industry is not a major stakeholder in the concerns of East Africa, "it seems unlikely that shipping firms will be prepared to risk the loss of life and equipment for the greater good."<sup>16</sup>

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<sup>15</sup> Antonio Maria Costa, *The War On Piracy Must Start On Land*, N.Y. Times, June 8, 2010, <http://www.nytimes.com/2010/06/09/opinion/09iht-edcosta.html>.

<sup>16</sup> Roger Middleton, *Piracy In Somalia* 6 (Chatham House Briefing Paper, AFP BP 08/02, 2008), available at [http://www.chathamhouse.org.uk/files/12203\\_1008piracysomalia.pdf](http://www.chathamhouse.org.uk/files/12203_1008piracysomalia.pdf).

## Chapter One: Pro-Ransom Maritime Industry Perspective

### I. *Pro-Ransom* Introduction

“Currently the only avenue available to the ship owner [for the release of pirated boats or hostages] is the payment of ransom,” argues Cyrus Mody, Manager of the International Maritime Bureau (IMB), a body established in 1981 to act as a focal point in the fight against maritime crime and malpractice.<sup>17</sup> Prohibiting ransoms is ill-considered it eliminates a proven tool for hostage resolution, putting crews and vessels at risk. Paying ransoms promotes the continued humane treatment of merchant seafarers that are captured, is cost effective, and limits risk of environmental disasters.

Yet despite these benefits of paying the ransom, a spate of recent policy development by the United States, the European Union, and the United Nations appears to limit this proven ability to secure the release of a captured vessel quickly and peacefully.

Pirates who have successfully hijacked a ship are able to threaten its destruction or violence to the crew. This leverage leaves government and military authorities with very few opportunities for rescue without incurring significant risks.<sup>18</sup> Naval forces generally abstain from recapturing vessels despite their overwhelming firepower except on limited occasions because of the risk of endangering the lives of the crew aboard.<sup>19</sup>

Efforts at diplomacy are plagued by the lack of an authority in Somalia willing or capable of dealing with the pirates.<sup>20</sup> Justice David Steel of the Queens Bench has recognized that “[in Somalia] any attempt to intervene by diplomatic means is fraught with difficulty.”<sup>21</sup> As both alternate avenues for resolution are so hindered, the justice noted that: “In short the only realistic and effective manner of obtaining the release of a vessel is the negotiation and payment of a ransom.”<sup>22</sup>

Given the existing constraints on the ability of public actors to rectify the general and specific incidents of piracy, it makes little sense to remove the only avenue open to the ship owner. In a specific hijacking incident a ship owner stands to lose the ship, the crew, and to suffer financial burdens. Anti-ransom policies only add legal burdens to these complications. As the primary users of the high seas, ship owners, cargo owners, and insurers are the largest stakeholders in general incidents of piracy. Keeping the means of

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<sup>17</sup> William Marx, *Ransom Payments Give Wing to More Somali Piracy*, AOL NEWS, Nov. 19, 2009, <http://www.aolnews.com/world/article/ransom-payments-give-wing-to-more-somali-piracy/19262064>.

<sup>18</sup> Cmdr. James Kraska & Capt. Brian Wilson, *Fighting Piracy*, ARMED FORCES J., Feb. 2009, <http://www.afji.com/2009/02/3928962>.

<sup>19</sup> *Ransom and the Moral Maze*, LLOYD’S LIST, Feb. 22, 2010, <http://www.lloydslist.com/ll/sector/piracy-and-security/article10201.ece>; see also Xan Rice & Lizzy Davies, *Hostage Killed as French Storm Yacht Held by Somali Pirates*, GUARDIAN (London), Apr. 11, 2009, <http://www.guardian.co.uk/world/2009/apr/10/hostage-killed-as-french-storm-pirate-yacht> (noting that military force used by French Special Forces to free the crew of the yacht *Tanit* resulted in the inadvertent death of one of the hostages).

<sup>20</sup> Thomas L. Friedman, Op-Ed., *In the Age of Pirates*, N.Y. TIMES, Apr. 14, 2009, <http://www.nytimes.com/2009/04/15/opinion/15friedman.html>.

<sup>21</sup> *Masefield AG*, [2010] EWHC (Comm) 280, [13].

<sup>22</sup> *Ib.* (emphasis added).



release within their control allows them to best manage the risks and rewards of transiting through the designated high-risk zones.

## II. Humanitarian Reasoning

### A. *The Somali Kidnap and Ransom Model is Professionally Conducted and Values Hostage Lives*

Somali piracy is unique because it functions under a model of kidnap and ransom in which hostages are taken and traded for payments. The United Nations Monitoring Group on Somalia, in its report of August 22, 2005, to the UN Security Council, stated that the aim of the attacks on ships sailing off the coast of Somalia is to secure ransom demands.<sup>23</sup>

Under the current model, ransoms are extracted by leveraging the lives of the hijacked crew. Roger Middleton, an expert on Somali piracy at Chatham House notes, “The reality in Somalia is that the pirates are not trying to steal the cargo or the ship itself — they're trying to take control of crew so they can ransom them.”<sup>24</sup> Somali pirates claim openly that the revenues generated from acts of piracy are used for their own sustenance. After hijacking the Ukrainian freighter *Faina* loaded with a cargo of arms and tanks in September of 2008, Somali pirate spokesman Sugule Ali said that the pirates had no plans to offload the weapons: “We just want the money.”<sup>25</sup>

Although the situation is admittedly distasteful, the Somali pirates have consistently upheld their promises, and after capturing vessels have conducted themselves with a modicum of respect for the crew and with professionalism in negotiations. After the release of the French yacht *Le Ponant*, Agence France Presse reported that a pirate *Good Conduct Guide*, outlining appropriate methods for hostage treatment, was found onboard.<sup>26</sup> If there is anything good about the Somali piracy it is that for right now it is a predictable business transaction.<sup>27</sup> The hijackers are more interested in the ransom money than trying to sell the cargo or ship.<sup>28</sup> When ransoms are paid, the pirates release the ship, crew, and cargo.<sup>29</sup>

The highly publicized case of the Chandlers, a British yachting couple captured by Somali pirates on October 23, 2009, and still held today due to their inability to pay a

<sup>23</sup> U.N. Sec. Council, Monitoring Group on Somalia, *Report of the Monitoring Group on Somalia Pursuant to Sec. Council Resolution 1587 (2005)*, U.N. Doc. S/2005/625 (Oct. 4, 2005).

<sup>24</sup> Nick Wadhams, *Somali Pirates vs. Islamists: A Dispute Over Business*, TIME, May 7, 2010, <http://www.time.com/time/world/article/0,8599,1987855,00.html>; see also Jerry Frank, *Ransom for Seafarers Could Rocket to \$50m*, LLOYD'S LIST, Sept. 15, 2008, <http://www.lloydslist.com/ll/sector/Insurance/article44463.ece> (noting that so far, pirates have shown a good code of honor by returning victims on receipt of cash).

<sup>25</sup> Jeffrey Gettleman, *Somali Pirates Tell Their Side: They Want Only Money*, N.Y. TIMES, Sept. 30, 2008, <http://www.nytimes.com/2008/10/01/world/africa/01pirates.html>.

<sup>26</sup> *Pirates Used 'Good Conduct Guide' in French Yacht Siege: Source*, AGENCE FRANCE-PRESSE, Apr. 17, 2008, <http://afp.google.com/article/ALeqM5ic4IMhcdvj6BV5HsRB-uabBjyUmA>.

<sup>27</sup> Telephone Interview with Stephen Carmel, Senior Vice President of Maritime Services, Maersk Line Limited (June 11, 2010).

<sup>28</sup> *Masefield AG*, [2010] EWHC (Comm) 280, [22].

<sup>29</sup> *Ib.*

ransom, illustrates the professionalism of the Somali model. Despite threats and the emotional toll, the pirates have provided the Chandlers with modest medical attention and some respite as the situation has progressed.<sup>30</sup>

To date, Somali pirates have not made a practice of torturing or killing crews of hijacked vessels. This would seem to be a logically necessary component of the kidnap and ransom model. Because Somali pirates are in the business for money alone, it is in their interest to make sure hostages survive.<sup>31</sup> According to Sugule Ali, spokesman for the pirates who hijacked the *Faina*, “Killing is not in our plans.”<sup>32</sup>

To minimize provocation of violent incidents, merchant mariners are now trained and counseled to offer no resistance once pirates are onboard the vessel.<sup>33</sup> Mona Intong, director of Marlow Navigation’s government-mandated anti-piracy training program for Filipino mariners stated, “Apparently, the pirates do not wish to harm the crew inasmuch as they will expect to get a better ransom term if no member is dead.”<sup>34</sup> However, she did note that the treatment of captured mariners is still far from humane. The pirates do observe decorum despite a degree of emotional and psychological stress on the crews and their families.<sup>35</sup>

#### *B. Existing Alternative Models Lack Respect for Hostage Lives*

In most other regions of the world the target of pirate attacks is not the crew. Off the West coast of Africa piracy is generally conducted under a different model, *political terror and criminal opportunism*. Nigerian pirates claim affiliation with the Movement for the Emancipation of the Niger Delta (MEND), and proclaim to be motivated by a political desire to regain control of the region’s oil reserves from multi-national corporations. They employ violence and “terror” tactics.<sup>36</sup>

In the Niger Delta, marauders in armed speedboats attack tankers and work with militants in the delta swamplands.<sup>37</sup> Unlike Somali pirates, who do not convincingly claim to be perpetrating the crime for any objective beyond a better standard of living for themselves, the motivations of MEND and the copycat criminals are obfuscated by political

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<sup>30</sup> Mail Foreign Service, *British Yacht Couple Paul and Rachel Chandler Held by Somali Pirates ‘Temporarily United,’* DAILY MAIL, Mar. 8, 2010, <http://www.dailymail.co.uk/news/worldnews/article-1256318/British-yacht-couple-Paul-Rachel-Chandler-held-Somali-pirates-temporarily-reunited.html>.

<sup>31</sup> *Chandler Pirates Increase Pressure for Ransom Money*, BBC NEWS, Feb. 2, 2010, [http://news.bbc.co.uk/2/hi/uk\\_news/8492731.stm](http://news.bbc.co.uk/2/hi/uk_news/8492731.stm).

<sup>32</sup> Jeffrey Gettleman, *Somali Pirates Tell Their Side: They Want Only Money*, N.Y. TIMES, Sept. 30, 2008, <http://www.nytimes.com/2008/10/01/world/africa/01pirates.html>.

<sup>33</sup> INT’L ASS’N. OF INDEP. TANKER OWNERS ET AL., BEST MANAGEMENT PRACTICES TO DETER PIRACY IN THE GULF OF ADEN AND OFF THE COAST OF SOMALIA 12 (version 2, 2009), *available at* <https://www.warrisk.no/?module=Files;action=File.getFile;ID=604>.

<sup>34</sup> E-mail from Mona Lisa Intong, Training Director, Marlow Navigation Philippines, to author (May 16, 2010, 23:56 CST).

<sup>35</sup> *Ib.*

<sup>36</sup> *Crime, Not Politics, Drives Nigeria Oil Delta Unrest*, REUTERS, Jan. 21, 2009, <http://www.reuters.com/article/idUSTRE50K2OI20090121>.

<sup>37</sup> *Pirates Threaten West Africa’s Oil Boom*, UNITED PRESS INT’L, Jan. 28, 2010, [http://www.upi.com/Science\\_News/Resource-Wars/2010/01/28/Pirates-threaten-West-Africas-oil-boom/UPI-12381264695428/](http://www.upi.com/Science_News/Resource-Wars/2010/01/28/Pirates-threaten-West-Africas-oil-boom/UPI-12381264695428/).

demands.<sup>38</sup> Rather than utilize the somewhat complicated and slow Somali kidnap and ransom model, funding for Nigerian pirates is largely derived from the illegal sale of fuel stolen from aboveground pipelines in the delta region.<sup>39</sup> The attacks are notable for the willingness of the pirates to use violence.<sup>40</sup> This is a model of political terror, which often deteriorates into simple violent robbery.<sup>41</sup>

Though there are some incidents of kidnapping by the Niger Delta pirates, they have generally rejected ransoms and instead sought political concessions.<sup>42</sup> Of 21 pirate-boarding incidents reported in Nigeria during 2009, only one vessel was hijacked.<sup>43</sup> Instead, piratical attacks are focused on stealing ship equipment and crew belongings,<sup>44</sup> such as in the recent attack on the cargo ship *M/V North Spirit* off Cameroon.<sup>45</sup>

In Southeast Asia, the kill and sell cargo model is commonly employed. In the case of the Japanese bulk carrier *Tenyu*, the vessel was stolen only to be recovered months later after having been repainted and re-flagged.<sup>46</sup> The cargo was gone and the crew was presumed dead.<sup>47</sup> These ships are repainted and reflagged and often used as “phantom ships” for illegal trade.<sup>48</sup> Although it may be difficult to sell some cargos due to storage and handling constraints, cargo nevertheless remains an alternate source of income or vehicle for threat of disaster.

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<sup>38</sup> *Somali Pirates are Criminals, Not Patriots*, VOICE OF AMERICA, Dec. 23, 2009, <http://www1.voanews.com/policy/editorials/a-41-2009-12-23-voa2-84657997.html> (noting that any claims that pirate acts are justified as protection of fishing grounds against are a smoke screen for criminal behavior because attacks have occurred more than 1,000 miles from the Somali coast).

<sup>39</sup> *Pirates Threaten West Africa's Oil Boom*, *supra* note 37.

<sup>40</sup> *IMB Reports Surge in Violent Attacks on Vessels off Nigeria*, Dec. 4, 2009, [http://www.icc-ccs.org/index.php?option=com\\_content&view=article&id=383:imb-reports-surge-in-violent-attacks-on-vessels-off-nigeria&catid=60:news&Itemid=51](http://www.icc-ccs.org/index.php?option=com_content&view=article&id=383:imb-reports-surge-in-violent-attacks-on-vessels-off-nigeria&catid=60:news&Itemid=51) (website of International Chamber of Commerce Commercial Crime Services).

<sup>41</sup> *Pirates Threaten West Africa's Oil Boom*, *supra* note 37.

<sup>42</sup> *PBS NewsHour* (PBS television broadcast Jan. 26, 2007) (interview by Margaret Warner with Sebastian Junger) (transcript available at [http://www.pbs.org/newshour/bb/africa/jan-june07/nigeria\\_01-26.html](http://www.pbs.org/newshour/bb/africa/jan-june07/nigeria_01-26.html)).

<sup>43</sup> ICC INT'L MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT, 1 JANUARY – 31 DECEMBER 2009, at 25 (2010).

<sup>44</sup> *IMB Reports Surge in Violent Attacks on Vessels off Nigeria*, *supra* note 40.

<sup>45</sup> *Pirates Attack M/V North Spirit*, HELLENIC SHIPPING NEWS WORLDWIDE, May 20, 2010, [http://www.hellenicshippingnews.com/index.php?option=com\\_content&task=view&id=102049&Itemid=33](http://www.hellenicshippingnews.com/index.php?option=com_content&task=view&id=102049&Itemid=33); see also Sarah Simpson, *A Rise in Pirate Attacks off Nigeria's Coast*, CHRISTIAN SCI. MONITOR, Mar. 20, 2008, <http://www.csmonitor.com/World/Africa/2008/0320/p01s01-woaf.html> (vessel stripped of navigational and communication equipment, air-conditioning units, and crew personal possessions); Jon Gambrell, Associated Press, *With Rusty Ammo, Nigeria Confronts Pirates*, MSNBC.COM, Mar. 30, 2010, [http://www.msnbc.msn.com/id/36104144/ns/world\\_news-africa/](http://www.msnbc.msn.com/id/36104144/ns/world_news-africa/) (money, mobile telephones and computer gear stolen, resistant crew was clubbed with rifles and captain stabbed); *Five Chinese Ship Crew Hospitalized After Pirates Attack in Nigeria*, XINHUANET, May, 18, 2010, [http://news.xinhuanet.com/english2010/china/2010-05/18/c\\_13299794.htm](http://news.xinhuanet.com/english2010/china/2010-05/18/c_13299794.htm) (pirates shot the master and ship owner's representative, then collected money from the crew and disembarked immediately).

<sup>46</sup> Carl Mortished, *Hijackers Pulled into Net of Justice*, TIMES (London), May 3, 2003, <http://business.timesonline.co.uk/tol/business/columnists/article876609.ece>.

<sup>47</sup> *Ib.*

<sup>48</sup> Marcus Hand, *Grounded Indonesia Detains Kraton Pirates*, LLOYD'S LIST, Sept. 27, 2007, <http://www.lloydlist.com/ll/sector/piracy-and-security/article64598.ece?src=Search>.

In contrast with the rarity of injury and death among victims of Somali pirates, the incidents of Nigerian pirate attacks regularly leave dead and wounded.<sup>49</sup> IMB Director Pottengal Mukundan (2009) has recognized that “[t]he attacks in Nigerian waters are frequently much more violent in nature than those off Somalia.”<sup>50</sup> Additionally, “[t]he incidence of violent attacks against ships’ crews has also recently spilled over into neighboring states.”<sup>51</sup> The low threshold for restraint against violence is likely due to the diminished value of the hijacked crews in the eyes of their captors.

The risk of minimizing the value of each crew life is a significant problem. Under an alternate model, the likelihood that each crewmember would be seen as a liability to the pirates instead of an asset for recovery of ransom would be high. Currently, a Philippine government order requires all merchant mariners to attend anti-piracy training.<sup>52</sup> This is a commendable and important measure for defense, but in addition one could imagine requirements for also training merchant seamen in offensive tactics due to escalating violence against mariners if ransoms are prohibited. As director of one of these mandated programs, Mona Intong thinks a refusal to pay ransoms will lead to increased deaths on both sides. She worries that violence against mariners would escalate, and there would be difficulty predicting what training would be required to protect mariners against violence once pirates have boarded.<sup>53</sup>

### *C. It is Too Risky to Alter the Somali Model Without a Clear Alternative*

If the traditional payoff is eliminated from the existing kidnap and ransom model, Somali pirates may seek an alternate form of revenue generation that most likely will be less conducive to peaceful resolution. These alternatives may have the effect of making the captors less willing to care for hijacked crews. International Chamber of Shipping Marine Director Peter Hinchliffe has estimated that as of April 27, 2010, as many as 300 merchant mariners were being held hostage and their lives would be put at risk with a ban on ransom payments.<sup>54</sup>

Stephen Carmel of the Danish shipping company, Maersk believes that Somali pirates are likely to test the resolve of those ship owners unwilling to pay ransoms.<sup>55</sup> By holding multiple hostages, Somali pirates have the potential to publicly and horrifically sacrifice captives one at a time until the resolve of the nation prohibiting payment falters.<sup>56</sup> Despite prohibition, a ship owner may simply decide that paying a ransom for crew release and incurring any prosecutorial liability will be a better option than allowing his

<sup>49</sup> *Nigeria Becomes World Piracy ‘Hotspot,’* AGENCE FRANCE-PRESSE, May, 20, 2008, <http://afp.google.com/article/ALeqM5hINUtEcWBV3WFuzzDv5keVUVYR4A>.

<sup>50</sup> *Pirates Threaten West Africa’s Oil Boom*, UNITED PRESS INT’L, Jan. 28, 2010, [http://www.upi.com/Science\\_News/Resource-Wars/2010/01/28/Pirates-threaten-West-Africas-oil-boom/UPI-12381264695428/](http://www.upi.com/Science_News/Resource-Wars/2010/01/28/Pirates-threaten-West-Africas-oil-boom/UPI-12381264695428/).

<sup>51</sup> *Ib.* (describing the first known hijacking in Benin waters); *see also* *IMB Reports Surge in Violent Attacks on Vessels off Nigeria*, *supra* note 40.

<sup>52</sup> Alistair McIndoe, *Filipino Seamen Learn to Fight Pirates*, ASIA NEWS NETWORK, Jan. 22, 2010, <http://www.asianewsnet.net/news.php?id=9722&sec=1>.

<sup>53</sup> E-mail from Mona Lisa Intong, *supra* note 34.

<sup>54</sup> Keith Wallis, *Obama Ransom Order Raises Fears Over Crew Safety*, LLOYD’S LIST, Apr. 27, 2010, <http://www.lloydlist.com/ll/sector/ship-operations/article7567.ece?src=Search>.

<sup>55</sup> Telephone Interview with Stephen Carmel, *supra* note 27.

<sup>56</sup> *Ib.*

employees to be harmed. The ship owner would probably argue that he acted under duress. This is an argument that would likely have merit.<sup>57</sup>

As rational actors exploiting a “business” model, Somali pirates are employing a strategy with proven success. However, a restriction on their ability to derive ransom payments will most likely prompt them to alter their strategy to maintain their accustomed reward. There are already signs that pirates have been taking a certain portion of hostages to be held in captivity ashore as reciprocity for the arrest of Somali pirate suspects by foreign naval powers, and as leverage for their exchange.<sup>58</sup>

Pirate organizations could turn from the kidnap and ransom model to a capture, kill, and sell cargo model similar to Nigeria or Southeast Asia. The possibility of an illicit trade in hijacked goods exists throughout Somalia no less than it does anywhere else in the world. Buyers may participate willingly, or may be unable to resist low prices and so are unwilling to ask too many questions.<sup>59</sup> Love (2009) notes that “[a] high degree of informal economic interconnectedness exists across the entire Horn region, underpinning the ability of market forces to adapt and connect across borders, and of their participants to establish mechanisms of payment and receipt of goods which can function outside the formal sector . . . .”<sup>60</sup> In addition to potential ruthless treatment of captured crews, this would create a secondary source of enforcement challenges in trying to apprehend dealers of black market goods.

Perhaps even more frightening is the concern that if pirates are unable to derive ransoms from ship owners or insurance policies, they may seek payments from other organizations willing to pay to take control of the captives. Though there is little evidence of links between Somali pirates and terrorism, frightening scenarios are not beyond imagination. Roger Middleton of Chatham House emphasizes that incidents of “seaborne terrorism” need to be taken seriously.<sup>61</sup> An organization such as al-Shabaab or al-Qaeda (with whom al-Shabaab claims to be linked)<sup>62</sup> may find it affordable and strategically useful to “purchase” pirate captives for political manipulation or terror.<sup>63</sup> Though as yet there are

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<sup>57</sup> The elements of duress would seem to apply to the case of a kidnapping and hostage of crew. “In order to establish a claim of duress, a defendant must show that (a) at the time of his conduct he was subjected to actual or threatened force, (b) the force or threat was of such a nature as to induce a well-founded fear of impending death or serious bodily harm, and (c) there was no reasonable opportunity to escape from the force or threat other than by engaging in the otherwise unlawful activity.” *United States v. Lizalde*, 38 F. App’x 657, 659 (2d Cir. 2002).

<sup>58</sup> CHATHAM HOUSE, AFRICA PROGRAMME AND INTERNATIONAL LAW CONFERENCE REPORT: PIRACY AND LEGAL ISSUES: RECONCILING PUBLIC AND PRIVATE INTERESTS 16 (2009), available at [http://www.chathamhouse.org.uk/files/15221\\_011009piracy\\_law.pdf](http://www.chathamhouse.org.uk/files/15221_011009piracy_law.pdf).

<sup>59</sup> Alex Pinto, *Counting the Costs of Seaborne Security*, LLOYD’S LIST, Dec. 8, 2005, <http://www.lloydslist.com/ll/sector/Insurance/article110322.ece?src=Search>.

<sup>60</sup> Roy Love, *Economic Drivers of Conflict And Cooperation in The Horn of Africa* 8 (Chatham House Africa Programme, Briefing Paper AFP BP 2009/01, 2009) (noting interconnectedness of informal economies in the horn of Africa), available at [http://www.chathamhouse.org.uk/files/15571\\_bp1209horn.pdf](http://www.chathamhouse.org.uk/files/15571_bp1209horn.pdf).

<sup>61</sup> Middleton, *supra* note 7, at 10.

<sup>62</sup> Peter Henne, *al-Shabaab’s Desperation?*, HUFFINGTON POST, July 15, 2010, [http://www.huffingtonpost.com/peter-henne/al-shabaabs-desperation\\_b\\_647370.html](http://www.huffingtonpost.com/peter-henne/al-shabaabs-desperation_b_647370.html).

<sup>63</sup> Telephone Interview with Stephen Carmel, *supra* note 27; see also Michael Perry, *Al Qaeda Calls for Foreign Kidnappings in Afghanistan*, REUTERS, Sept. 16, 2009.

no known cases of this happening to mariners, Al Qaeda has purchased<sup>64</sup> and subsequently executed at least one captured tourist in Mali when efforts to exchange him for a radical cleric imprisoned in the UK failed.<sup>65</sup> Additionally, a report claims that in one instance when ransom talks proved unsuccessful, Somali captors considered harvesting the crews' organs for sale.<sup>66</sup>

Former UK Foreign Secretary David Miliband has stated that the British government and the international community believe that payments for hostage taking only encourage further hostage taking.<sup>67</sup> However, while incidents of piracy may be encouraged by continuing to pay ransoms, payment of ransoms also ensures that crews who are captured will not be victims of violence leading to death.<sup>68</sup> The rational course may simply be to deal with the problem as it is now understood, rather than to encourage a potentially chaotic evolution. A prohibition on ransoms will not lessen the lure of piracy to Somalis. The existing model has kept people from getting hurt. Refusing to pay ransoms breaks the model and allows pirates to draft the replacement.<sup>69</sup>

#### *D. Prohibiting Ransoms Will Not Lessen Incidents of Piracy*

Prohibiting ransoms is unlikely to deter pirate attacks. The athletic and logistical difficulty of boarding and capturing vessels at sea will not be increased by a blanket prohibition against payment of ransoms. A ban might only slightly decrease the possibility of a pirate receiving payment for committing such an act. Joseph Cox, president of the Chamber of Shipping America, has lately been working to determine the effects of President Obama's newly issued Executive Order 13536, which with some limit, seemingly removes the ability of US ship owners and stakeholders to pay ransoms to Somali pirates if they can be connected to terrorism. Mr. Cox notes that the regulation would apply only after a ship has been pirated, which is too late in the process. "We have to be concerned about preventing [hijackings] from happening."<sup>70</sup>

It is reasonable to think that Somali pirates who have become aware of prohibitions on ransom payments may avoid attacks against ships flagged by those countries, but the

<http://www.reuters.com/article/idUSTRE58F0EW20090916>, (noting that the Al Qaeda leadership has previously called for civilian kidnappings in order to negotiate the release of Taliban and al Qaeda prisoners).

<sup>64</sup> John Swain & Bojan Panceviski, *He Wept, Hands Bound. Then I Heard Two Shots*, *TIMES* (London), June 7, 2009, <http://www.timesonline.co.uk/tol/news/world/europe/article6446276.ece>.

<sup>65</sup> Jenny Booth, *al-Qaeda Kills British Hostage Edwin Dyer, Kidnapped In Mali After Music Festival*, *TIMES* (London), June 3, 2009, <http://www.timesonline.co.uk/tol/news/uk/article6420544.ece>.

<sup>66</sup> Katharine Houreld and Dan Mihaescu, Associated Press, *Somali Pirate Cook Saves Hostages, Then Disappears*, *HUFFINGTON POST*, Jun. 18, 2010, [http://www.huffingtonpost.com/2010/06/19/somali-pirate-cook-saves-\\_n\\_618293.html](http://www.huffingtonpost.com/2010/06/19/somali-pirate-cook-saves-_n_618293.html).

<sup>67</sup> Jenny Booth, *Britons Held Hostage by Pirates will not be Ransomed, Says Foreign Secretary*, *TIMES* (London), Nov. 20, 2008, <http://www.timesonline.co.uk/tol/news/world/africa/article5198129.ece>.

<sup>68</sup> Michelle Wiese Bockman, *Shell Warns of Rising Piracy Threat in Gulf of Guinea*, *LLOYD'S LIST*, Mar. 19, 2010, <http://www.lloydslist.com/ll/sector/regulation/article6062.ece?src=Search>, (interviewing Jan Kopernicki, VP of International Trading and Shipping for Shell, who states he disagrees with the UK's anti-ransom stance due to concern for seafarers' safety).

<sup>69</sup> Telephone Interview with Stephen Carmel, *supra* note 27.

<sup>70</sup> R.G. Edmonson, *Order Against Ransom: Executive Order Raises New Questions on Piracy s It Imposes Restrictions on Ransom for Somali Pirates*, *JOURNAL OF COMMERCE*, May 10, 2010, <http://www.joc.com/maritime/order-against-ransom>.

pirate's ability to distinguish actual ownership or even the identity of insurers or freight owners by a vessel's flag are scant to none.

Jai Sharma, head of the Casualty & GA department of Dolphin Maritime & Aviation Services, notes that pirates might be able to recognize a ship flying the US flag, but due to widespread use of flags of convenience, a US flag ship is a relatively uncommon thing; consequently, it is quite probable that ships controlled by US interests will continue to be taken by pirates.<sup>71</sup> Furthermore, even if the ship is not US controlled, the pirates will not know the identity of the insurers and cargo owners, and therefore will be unable to determine whether these parties are going to be able to contribute to the ransom and associated expenses in general average.<sup>72</sup> Any difficulty in that regard may make the ship owners more reluctant to pay ransoms demanded if contribution from cargo is barred by reason of illegality.<sup>73</sup>

#### *E. Prohibiting Ransoms Will Increase Incidents of Violence and Terror*

At best, the deterrent aspect of a ransom payment restriction will have only a marginal effect. The decision of a potential pirate to venture to sea for piratical ends will still be based on his few alternatives. As long as legitimate income opportunities for Somalis are limited, it is likely that desperation will continue to drive some to sea for even a remote chance of economic reward.

Due to the complex international relationships in modern shipping, only international legal solidarity against ransom payments would be likely to alter this ransom component of pirate motivations. Even widespread prohibitions against ransom may prove difficult to enforce. Therefore, without significantly decreasing the incentives of pirates to capture vessels and lawlessly disrupt trade, a policy of restricting ransoms will increase incidents of violence and murder of merchant mariners once the Somali model adapts.

### **III. Economic Reasoning**

At the moment ransoms may be an affordable cost of doing business for the shipping industry. Ship owners note that the cost of maintaining armed security, increased insurance premiums, and time and resources consumed debating solutions to threats of piracy may actually exceed costs of simply paying ransoms.<sup>74</sup> Armed security costs Maersk Line Limited more than a million dollars per year for each vessel in the region, and as yet their security has not been required to repel any pirate attacks.<sup>75</sup>

Losses due to delays are another key aspect of economic concern. Crew wages must be paid, as well as costs associated with contracts on the cargo carried, even when the vessel

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<sup>71</sup> E-mail from Jai Sharma, Head of the Casualty & GA Dep't, Dolphin Maritime & Aviation Services, to author (May 17, 2010, 06:02 CST).

<sup>72</sup> *Ib.* General average is a legal concept whereby all parties to a voyage share in any losses necessary to save the ship.

<sup>73</sup> *Ib.*

<sup>74</sup> Ken Menkhaus, *Pirates in Somalia: Abduction, Negotiations*, WASHINGTON POST, Apr. 10, 2009, <http://www.washingtonpost.com/wp-dyn/content/discussion/2009/04/10/DI2009041001303.html> (noting that ransoms are little more than a nuisance for global shipping).

<sup>75</sup> Telephone Interview with Stephen Carmel, *supra* note 130

is detained due to hijacking.<sup>76</sup> In addition, protection and indemnity (P&I) insurance covering crew and environmental damages would also increase as the ability to quickly recover the crew and vessel is reduced.<sup>77</sup>

Another major concern of the shipping industry is exposure to liability.<sup>78</sup> Many vessels passing through high-risk waters are now often equipped with weapons.<sup>79</sup> Ship owners are concerned that the legal outcomes of repelling a pirate attack could be worse than simply paying the ransom. There are no international standards for rules of engagement and the issue of liability is unclear regarding the possibility that a mariner injures or kills someone who attacks the ship.<sup>80</sup> Winstanley (2008) points out the likely no-win consequences of either alternative, asking, “Which is worse for the crew, waiting for ransom in an anchored ship, or sitting in a sweltering Pakistani prison?”<sup>81</sup> The IMO has issued guidance strongly discouraging the use of weapons due to the complexity of staying within the laws of various States, as well as the legal risk of defending against suspected pirates.<sup>82</sup>

The argument that a ban on ransoms may cause ship owners to cease shipping activities, eventually diminishing the target pool and driving pirates into alternative legitimate pursuits, is unconvincing. The slim opportunities for rewarding legitimate work within Somalia,<sup>83</sup> as well as the ever-present need to service ports in the Arabian Sea, make the idea of reduced service extremely speculative. It is more likely that the increased costs required to provide service will be passed through to customers, and other shippers may step in to fill gaps left by those who withdraw from operation in the area.<sup>84</sup>

In addition, a ship owner may not be able to incur the losses of delay as pirates wait for an indefinite period to pressure payment despite the prohibition. Ship owners might have no other option than to wait and hope pirates will release a ship, extending the duration of

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<sup>76</sup> David Osler, *High Court Rules Hijacked Ships Remain on Charter*, LLOYD’S LIST, June 11, 2010, <http://www.lloydslist.com/ll/sector/regulation/article171069.ece>; see also Gavin van Marle, *Unfair Ruling*, LLOYD’S LIST, June 14, 2010, <http://www.lloydslist.com/ll/sector/regulation/article171132.ece> (noting that once a vessel is hijacked the financial penalties ought to be the responsibility of the insurer).

<sup>77</sup> Jerry Frank, *Cargo Insurers Urge P&I Contribution to Piracy Bills*, LLOYD’S LIST, Sept. 17, 2009, <http://www.lloydslist.com/ll/sector/piracy-and-security/article24826.ece>.

<sup>78</sup> Telephone Interview with Stephen Carmel, *supra* note 27.

<sup>79</sup> Patrick Hagen, *German Owners Swap Flags to Protect Against Pirates*, LLOYD’S LIST, June 14, 2010, <http://www.lloydslist.com/ll/sector/ship-operations/article171179.ece>.

<sup>80</sup> Telephone Interview with Stephen Carmel, *supra* note 27.

<sup>81</sup> *Ib.*; see also David Osler, *We Made a Decision Here Collectively*, LLOYD’S LIST, Oct. 2, 2008, <http://www.lloydslist.com/ll/sector/piracy-and-security/article46666.ece?src=Search>, (noting comments of Commander Winstanley of the CTF 150, who states that “Companies have a duty of care . . . to their people. If the only way to get them released is bowing to the ransom, then part of me says, OK, that’s for them to carry on and do”).

<sup>82</sup> Int’l Mar. Org., *Piracy and Armed Robbery Against Ships*, at 13 ¶ 61, IMO Doc. MSC.1/Circ.1334 (June 23, 2009), [http://www.imo.org/includes/blastDataOnly.asp/data\\_id%3D25885/1334.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25885/1334.pdf).

<sup>83</sup> Andrew Wander, *The Spreading Somali Pirate Threat*, AL JAZEERA, Mar. 25, 2010, <http://english.aljazeera.net/focus/2010/03/2010323132216997663.html>, (noting that with an average income of \$600 a year, young Somalis desperate to escape poverty are easily tempted by payments of up to \$10,000 for each successful pirate raid).

<sup>84</sup> E-mail from Jai Sharma, Head of the Casualty & GA Dep’t, Dolphin Maritime & Aviation Services, to author (June 11, 2010, 05:38 CST).



capture.<sup>85</sup> Head of Dolphin Maritime & Aviation Services' casualty and general average department, Jai Sharma, notes that, "[t]his could go on for a very long time since the pirates do not seem to lack patience and we expect they would be prepared to wait for ages to see whether a ransom can in fact be paid, or whether any suggestion of illegality is simply a negotiating ploy."<sup>86</sup>

A prohibition on the payment of ransoms could be seen as an obstacle to hiring crews for vessels transiting high-risk zones.<sup>87</sup> If crews are not assured they will be reasonably looked after in the event of a hijack, many mariners will be deterred from going to sea. This view would seem to motivate some ship owners to re-route ships until threats from piracy are reduced.<sup>88</sup> However, because the diffuse pool of merchant mariners hails from countries across the globe, it is unlikely that they will effectively organize their unwillingness to sail in these waters.<sup>89</sup> Therefore pressure from merchant mariners is unlikely to affect the maritime industry. Burdening merchant seamen with the task would only result in a massive displacement of mariners who are unwilling or unable to contend with the risks of piracy, only to be replaced with more hardened and perhaps less trained crews.<sup>90</sup>

Finally, if the rules on ransoms are not internationally uniform, States that are permissive of ransom payments will find increased registrations from ship owners whose vessels spend a significant amount of time in high-risk waters. Those States that are prohibitive would likely experience a decline.<sup>91</sup> Evidence of the willingness of ship owners to re-register their vessels' flags has already been seen due to rules permitting the use of armed security.<sup>92</sup>

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<sup>85</sup> E-mail from Jai Sharma, Head of the Casualty & GA Dep't, Dolphin Maritime & Aviation Services, to author (May 17, 2010, 06:02 CST).

<sup>86</sup> *Ib.*

<sup>87</sup> Associated Press, *Are Pirate Ransoms Legal? Confusion Over US Order*, MONITOR, Apr. 20, 2010, <http://www.themonitor.com/articles/pirate-37675-ransom-legal.html>, (interviewing Marie-Louise Moller, spokeswoman for A.P. Moller-Maersk Group who stated that, "[t]aking away our ability to secure the safe release of our crew members and vessels could put us as an employer and ship owner in a very difficult position").

<sup>88</sup> Keith Wallis, *Hong Kong Owners Warn Over Ransom Ban*, LLOYD'S LIST, Feb. 19, 2010, <http://www.lloydslist.com/ll/sector/piracy-and-security/article4549.ece>, (interviewing Arthur Bowring, Managing director of the Hong Kong Shipowners' Association, who points out the consequences of a ban would be an avoidance of the Gulf of Aden, Suez Canal, and North West Indian Ocean).

<sup>89</sup> Michael Grey, *Money-making Solutions to the Puntland Problem*, LLOYD'S LIST, Jan. 18, 2010, <http://www.lloydslist.com/ll/sector/piracy-and-security/article8344.ece?src=Search> (noting that on a recently seized ship the crew hailed from nine different nations which would make even a normally routine fire drill difficult).

<sup>90</sup> Roel R. Landingin, *Every 6 Hours, Pirates Seize a Filipino Seaman*, PHILIPPINE CENTER FOR INVESTIGATIVE JOURNALISM, Nov. 26, 2008, <http://pcij.org/stories/every-6-hours-pirates-seize-a-filipino-seaman/> (discussing a proposal to disallow deployment of Filipino mariners in high-risk zones, which was eventually rejected due to concerns it would reduce recruitment of Filipinos).

<sup>91</sup> E-mail from Jai Sharma, Head of the Casualty & GA Dep't, Dolphin Maritime & Aviation Services, to author (June 11, 2010, 05:38 CST).

<sup>92</sup> Patrick Hagen, *German Owners Swap Flags to Protect Against Pirates*, LLOYD'S LIST, June 14, 2010, <http://www.lloydslist.com/ll/sector/ship-operations/article171179.ece>.

A prohibition on ransoms will unnaturally distort the economic considerations that shipping stakeholders now consider. Non-uniform international laws on ransoms will increase the complexity and decrease the predictability of resolving hostage outcomes.

#### IV. Environmental Reasoning

To date there have not been any significant incidents involving a pirate-caused ecological disaster.<sup>93</sup> However, it is not difficult to imagine the extensive damage that might be caused in the aftermath of a pirate attack. Abhyankar (2002) states “The IMB is convinced that, because there will be no second chance with an oil-spill, a pro-active attitude to the possibility is essential and it would be fool-hardy to the point of irresponsibility not to take all possible measures to prevent the first one.”<sup>94</sup>

Pirates have increased pressure on ransom negotiations by purposefully opening cargo hatches aboard a captured vessel laden with coal—an act that threatened to overheat the cargo.<sup>95</sup> This type of overheating can lead to fire, which might destroy the vessel and cause extensive pollution.<sup>96</sup> Additionally, the difficulty of safely navigating a vessel to an anchorage along the Somali shore could result in accidental grounding and a catastrophic spill.<sup>97</sup>

An ecological disaster is likely to cause immediate and lasting problems as waters and coasts are damaged without easy, effective, or safe means of restoration. Also, the risk of an accidental disaster is likely to increase in accordance with the time a vessel is held in captivity. A prohibition on ransoms removes the possibility of a relatively quick and minimally violent resolution to detainment and increases the threat of ecological disaster caused by dangerous cargo.

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<sup>93</sup> It is not for lack of considering this threat. See Abdi Guled & Abdi Shei, *Somali Pirates Haul in Record Ransom for Oil Tanker*, NATIONAL POST, Jan. 17, 2010, <http://www.nationalpost.com/news/Somali+pirates+haul+record+ransom+tanker/2455939/story.html> (noting that a rival pirate faction threatened to set fire to a tanker unless they received a share of the captors ransom).

<sup>94</sup> JAYANT ABHYANKAR, INT’L CHAMBER OF COMMERCE, INT’L MARITIME BUREAU, PIRACY AND MARITIME VIOLENCE: A CONTINUING THREAT TO MARITIME INDUSTRY 10 (2002), available at [http://www.itopf.com/\\_assets/documents/Abhyankar.pdf](http://www.itopf.com/_assets/documents/Abhyankar.pdf).

<sup>95</sup> INCE & CO, *supra* note 9, at 3.

<sup>96</sup> *The Pitfalls of The Carriage of Coal*, STEAMSHIP MUTUAL, May 2007, <http://www.sims1.com/Coal0407.html>.

<sup>97</sup> *Hijacking of Saudi Supertanker Likely to Affect Gulf Crude Transport Economics*, IHS GLOBAL INSIGHT, Nov. 18, 2008, <http://www.ihsglobalinsight.com/SDA/SDADetail15000.htm>.

## Chapter Two: Anti-Ransom Perspective

### V. *Anti-Ransom Introduction*

Ransoms paid to criminal organizations that kidnap with a hope of securing a financial reward encourage a model of for-profit capture that is both illegal and destabilizing for the victims and perpetrators of the crime. Yet this is exactly what is tacitly allowed in the waters off Somalia and many other parts of the world.

President Obama's Executive Order 13536 and related international legislation sets an important tone for ending this self-perpetuating cycle of for-profit piracy off the Horn of Africa. Anarchy in Somalia is itself a central component that allows Somali pirates to act with impunity. The purpose of this legislation is to restrict payments to individuals who seek to maintain the lawless environment. People engaged in piratical activities hinder efforts to foster the law and order necessary for stability and peace.

Some think that prohibiting ransoms will not deter piracy. However, this view is too narrowly focused on the short term. The prohibition of ransoms may now be a small step in the fight to end piracy, but there is good reason to take each and every step as soon as it becomes politically and diplomatically feasible. Prohibiting ransoms may even act as a catalyst for additional international action precisely because such a prohibition necessitates a greater commitment to resolving acts of piracy in effective alternate ways.

Furthermore, because pirates are seldom penalized for their activities, any discussion of the ability and willingness of pirates to change this behavior is speculative at best. The idea that pirates may alter their strategy by increasing violence lacks evidence. And even if such a drastic change occurred, it would be a problem of a different nature that would probably be addressed more effectively as many of the political concerns regarding prosecution and military intervention would be ameliorated.

Unfortunately, the kidnap and ransom model's success has drawn the attention of would-be pirates in other regions who see potential for successful local implementation. Leaders in the shipping industry have noticed the spread of the Somali model evidenced by similar attacks in other regions.<sup>98</sup> Kidnap and ransom experts recognize that the ability of Somali pirates to successfully obtain these rewards is a key factor behind the rise in attacks elsewhere such as in Nigeria and South America.<sup>99</sup> In West Africa there have been reports as recently as early June of heretofore uncommon acts of piracy as far north as Ghana and Côte d'Ivoire.<sup>100</sup>

It would be fair to conclude that we may already be facing a situation where the military force in its current size and configuration is ineffective at thwarting the large number of pirate attacks, and might reasonably choose to resort to other more drastic measures to reduce them. Therefore a reemphasis on removing the motivations for pirates to go to sea by even such small steps as restricting ransoms is necessary to address the problem at its

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<sup>98</sup> Michelle Wiese Bockman, *Shell Warns of Rising Piracy Threat in Gulf of Guinea*, LLOYD'S LIST, Mar. 19, 2010, <http://www.loydslist.com/ll/sector/regulation/article6062.ece>.

<sup>99</sup> Frank, *supra* note 140.

<sup>100</sup> David Osler, *Pirates Attack Turkish Vessel off Ghana Coast*, LLOYD'S LIST, June 14, 2010, <http://www.loydslist.com/ll/sector/ship-operations/article171157.ece>.

root. While prohibiting ransoms may be a small step in the elimination of piracy, it is a necessary one, and may predicate others.

## VI. Humanitarian Reasons

### *A. Ransoms are Paid Under Threat of Violence, Terror, and Death that Grow with Increased Attacks*

Pirates who capture vessels and crews for the purpose of securing a ransom do so by the power of force and with the implication that a refusal to comply with their demands will be met by violence against the hostages. The simple truth is that as long as this model begins with violence, it will remain violent. The more pirate activities are “allowed,” the more the mariners will be exposed to violence. Ransom revenues are used to upgrade arsenals, making pirates more effective.<sup>101</sup> Automatic weapons and rocket-propelled grenades have been common, but there have also been reports that pirates are acquiring surface to air missiles.<sup>102</sup> Ship owners face increased violence in the course of the hijacking as many are choosing to arm their vessels, prompting a race against pirate armament fueled by ransom payments.<sup>103</sup>

Although pirates aim to keep crew safe in order to receive their ransom, crewmembers are traumatized and often beaten during the attack and in the course of captivity.<sup>104</sup> In one instance a mariner died. The captain of the *MV Faina*, the high profile cargo ship captured carrying Soviet tanks, died from a heart attack shortly after the pirates seized the ship.<sup>105</sup> The emotional trauma experienced by the crew can often lead to post-trauma stress that requires treatment, which is often hard to provide to transient crews.<sup>106</sup>

Kidnap and ransom insurance experts indicate that the average length of captivity is 60 days.<sup>107</sup> Drake (2010) states “A total of 3,342 days were spent in captivity by vessels released in 2009. The average detention period for any one ship was 82 days, with vessels

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<sup>101</sup> U.N. Sec. Council, Monitoring Group on Somalia, *Report of the Monitoring Group on Somalia Pursuant to Sec. Council Resolution 1811 (2008)*, ¶ 266, U.N. Doc. S/2008/769 (Dec. 10, 2008).

<sup>102</sup> *Ib.*

<sup>103</sup> Patrick Hagen, *German Owners Swap Flags to Protect Against Pirates*, LLOYD’S LIST, June 14, 2010, <http://www.lloydlist.com/ll/sector/ship-operations/article171179.ece> (noting that the German Ship owners Association ‘VDR’ has recently switched its stance on armed security and now encourages all ships passing through the Gulf of Aden to carry armed federal police).

<sup>104</sup> Roger Middleton, *Piracy in Somalia: Threatening Global Trade, Feeding Local Wars* 6 (Chatham House Africa Programme, The Horn of Africa Project, Briefing Paper AFP BP 08/02, 2008), available at [http://www.chathamhouse.org.uk/files/12203\\_1008piracysomalia.pdf](http://www.chathamhouse.org.uk/files/12203_1008piracysomalia.pdf).

<sup>105</sup> Gillian Brigham, *MSC Aids Mariners In Need: Catawba Assists MV Faina During 4-Month Pirate Captivity*, SEALIFT, Apr. 2009, <http://www.msc.navy.mil/sealift/2009/April/catawba.htm>.

<sup>106</sup> CHATHAM HOUSE, AFRICA PROGRAMME AND INTERNATIONAL LAW CONFERENCE REPORT: PIRACY AND LEGAL ISSUES: RECONCILING PUBLIC AND PRIVATE INTERESTS 16 (2009), available at [http://www.chathamhouse.org.uk/files/15221\\_011009piracy\\_law.pdf](http://www.chathamhouse.org.uk/files/15221_011009piracy_law.pdf).

<sup>107</sup> Scott Eden, *Pirates’ Toll (Part 3): The Art of the Ransom Deal*, THE STREET, Mar. 18, 2010, <http://www.thestreet.com/story/10704571/1/pirates-toll-part-3-the-art-of-the-ransom-deal.html>.

facing anything from a few hours to many months in the hands of their Somali captors.”<sup>108</sup>

This violence will most likely escalate unless action is taken. Actions should include restricting opportunities for pirates to gain a reward.<sup>109</sup>

*B. Piracy May Now Be Rare, but Will Increase in Scope and Density as Ransoms Fuel Expansion*

Pirate organizations are committed to the continued exploitation of the shipping industry in the waters off Somalia.<sup>110</sup> As more pirates are recruited and funded, their ability to operate with increased scope and intensity will also rise.

An estimated 33,000 vessels pass through the sea-lanes of the Gulf of Aden each year offering no shortage of pirate targets.<sup>111</sup> Somalia’s position along one side of the Gulf of Aden, separated from Yemen by only 170 nautical miles at its widest point, allows pirates highly strategic access to ships transiting these waters between the Indian Ocean and the Mediterranean.<sup>112</sup>

Ransom-fueled pirate activities have extended to targets ever farther from the Somali Coast<sup>113</sup> beyond the Gulf of Aden where international naval patrols have been concentrated.<sup>114</sup> Initially, best practices guided shipmasters to maintain a distance of 50 nautical miles off the Somali Coast, which was increased to 200 nautical miles in 2008.<sup>115</sup> But as Somalis began to operate farther offshore, this buffer has been pushed out to as far as 600 miles in 2009.<sup>116</sup> In the last quarter of 2009, 13 attacks in waters east of 60 degrees (more than 270nm east of the Seychelles) resulted in four hijackings.<sup>117</sup>

Recently, a surge of piracy seemed to swarm the area of patrol.<sup>118</sup> Rear Admiral Peter Hudson, former head of the EU anti-piracy operation NAVFOR, has noted that despite a reduction of piracy in the Gulf of Aden, piracy off the Somali coast was growing at an

<sup>108</sup> John Drake, *Ships Face Greater Attack Risk in Indian Ocean*, LLOYD’S LIST, Feb. 19, 2010, <http://www.lloydslist.com/ll/sector/piracy-and-security/article10199.ece>.

<sup>109</sup> Middleton, *supra* note 105, at 6.

<sup>110</sup> *Ib.* at 5 (noting that despite the low probability nature of the endeavor, “pirates are not engaged only in one-off attacks but are in the business for the long term”).

<sup>111</sup> William Matthews, *Lawmakers Have Many Ideas, Few Answers to Piracy*, DEFENSE NEWS, Apr. 16, 2009, <http://www.defensenews.com/story.php?i=4043805>.

<sup>112</sup> U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 100, ¶ 126.

<sup>113</sup> Mohammed Ibrahim, *Enriched by Record Ransom, Somali Pirates Free Tanker*, N.Y. TIMES, Jan. 18, 2010, <http://www.nytimes.com/2010/01/18/world/africa/19piracy.html?scp=3&sq=piracy%20ransoms&st=cse>.

<sup>114</sup> John Drake, *Somali Pirates Shift Attacks to ‘Safe’ Regions*, LLOYD’S LIST, July 6, 2009, <http://www.lloydslist.com/ll/sector/piracy-and-security/article21379.ece>.

<sup>115</sup> Middleton, *supra* note 105, at 4.

<sup>116</sup> John Curran, *Mutiny: Crew Blames Richard Phillips, Maersk Alabama Captain, for Ignoring Pirate Warnings*, HUFFINGTON POST, Dec. 2, 2009, [http://www.huffingtonpost.com/2009/12/03/maersk-alabama-richard-phillips\\_n\\_378134.html](http://www.huffingtonpost.com/2009/12/03/maersk-alabama-richard-phillips_n_378134.html).

<sup>117</sup> Drake, *supra* note 104; see also Antonio Maria Costa, *The War on Piracy Must Start on Land*, N.Y. TIMES, June 8, 2010, <http://www.nytimes.com/2010/06/09/opinion/09iht-edcosta.html> (noting that some attacks are now carried out 1,000 miles offshore).

<sup>118</sup> ‘*Piracy on an Almost Industrial Scale*,’ DEFENCEMANAGEMENT.COM, June, 17, 2010, [http://www.defencemanagement.com/feature\\_story.asp?id=14456](http://www.defencemanagement.com/feature_story.asp?id=14456).

“almost industrial scale.”<sup>119</sup> Other commentators have noted the diminishing return to military patrols taking place off the Horn of Africa,<sup>120</sup> and troubling indications that the various pirate gangs are beginning to act with greater cohesion.<sup>121</sup>

### *C. Ransom Payments Attract Individuals Lacking Alternative Legitimate Work*

Without a meaningful and stable government, Somalia is incapable of providing an environment conducive to the support of legitimate business opportunities or employment.<sup>122</sup> Many young men desperate for work are attracted to piracy by the cash, villas, and women that pirates seem to flaunt.<sup>123</sup> Desperation may be the most important factor driving Somalis to piracy. Roger Middleton observes that “in a region where legitimate business is difficult, where drought means agriculture is nothing more than subsistence farming, and instability and violence make death a very real prospect, the dangers of engaging in piracy must be weighed against the potentially massive returns.”<sup>124</sup> Others see piracy as a means, and perhaps the only means, of obtaining sufficient capital and prestige to set them up in a business or seek a new life abroad.<sup>125</sup> The UN notes that the strength of these young men is not their training, which is generally very poor, but their motivation.<sup>126</sup>

In 2008, Andrew Mwangura, Head of the East African Seafarer’s Union and liaison between pirates, ransom payers, and media, noted that in 2005 there were about five pirate gangs with fewer than 100 pirates, but now that many youths who have training as bodyguards and militia have witnessed rewards available at sea, he estimates this number has grown to more than 1,100.<sup>127</sup> Head of the United Nations Office of Drugs and Crime (UNODC), Antonio Maria Costa, estimates that each pirate earns \$10,000 to \$15,000 per successful raid and approximately 20 pirates participate in each attack.<sup>128</sup> Based on these

<sup>119</sup> *Ib.*

<sup>120</sup> See David Isenberg, *Pirates, PSC, and Lawyers*, HUFFINGTON POST, May 27, 2010, [http://www.huffingtonpost.com/david-isenberg/pirates-psc-and-lawyers\\_b\\_592036.html](http://www.huffingtonpost.com/david-isenberg/pirates-psc-and-lawyers_b_592036.html) (noting that military patrols are not a long-term solution because “[s]ending billions of dollars worth of warships to chase a ship worth \$1,000 is a losing proposition”).

<sup>121</sup> J. Peter Pham, *Strategic Interests: Return of the Somali Pirates*, WORLD DEFENSE REVIEW, Nov. 12, 2009, <http://worlddefensereview.com/pham111209.shtml> (noting these developments possibly presage an escalation of the threat off the Horn of Africa); see also Jay Bahadur, *Pirates, Inc.*, FIN. TIMES, June 23, 2010, [http://www.ft.com/cms/s/0/e5f60614-7d23-11df-8845-00144feabdc0,dwp\\_uuid=672232c6-1385-11de-9e32-0000779fd2ac.html](http://www.ft.com/cms/s/0/e5f60614-7d23-11df-8845-00144feabdc0,dwp_uuid=672232c6-1385-11de-9e32-0000779fd2ac.html) (noting that a Turkish warship was within 50 miles of the pirated M/V Victoria, but instead responded to a vessel that was being attacked simultaneously).

<sup>122</sup> Abdinasir Mahamed & Sarah Childress, *Telecom Firms Thrive in Somalia Despite War, Shattered Economy*, WALL ST. J., May 11, 2010, <http://online.wsj.com/article/SB10001424052748704608104575220570113266984.html> (noting that “[f]or now, business leaders seem to have adopted a wait-and-see attitude toward the government”).

<sup>123</sup> Daniel Wallis, *Piracy Ransoms Funding Somalia Insurgency*, REUTERS, Aug. 24, 2008, <http://www.reuters.com/article/idUSLO00572320080824>.

<sup>124</sup> Middleton, *supra* note 105, at 5.

<sup>125</sup> John Knott, *United Kingdom: Somalia, The Gulf of Aden, and Piracy: An Overview, and Recent Developments*, MONDAQ, Apr. 15, 2009, <http://www.mondaq.com/article.asp?articleid=77982>.

<sup>126</sup> U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 100, ¶ 131.

<sup>127</sup> Wallis, *supra* note 128.

<sup>128</sup> Costa, *supra* note 117.

figures, the crew alone makes approximately \$200,000 to \$300,000 per attack. For at least some of these men, piracy “has become a low-risk activity with high returns.”<sup>129</sup>

Many speculate that a large percentage of pirates die at sea before ever seeing a potential target.<sup>130</sup> We can reduce the allure of desperate people to make “easy money” by prohibiting the payment of ransoms.

*D. Ransoms Concentrate Power in a Small Group of Actors Dependent on Keeping Regions of Somalia Lawless*

According to Thomas Countryman, Principal Deputy Assistant Secretary of State for Political-military Affairs, “[t]he people deriving the primary benefit [of piracy] . . . are the capitalists who have financed the acquisition of boats and put these young men into the risky position of endangering their own lives in search of some money.”<sup>131</sup> These entrepreneurs finance and organize the network of individuals required to successfully capture and negotiate the release of the vessels and crews for reward.<sup>132</sup> These men, driven by the low-risk and high-reward opportunities, have elevated the incidents of piracy off the coast of Somalia from (UN Monitoring Group 2008) “rag-tag, ocean-going militias into well-resourced, efficient, and heavily armed syndicates employing hundreds of people in northeastern and central Somalia.”<sup>133</sup>

Leaders of pirate organizations have a vested interest in maintaining the lawlessness of the regions in Somalia from which they can operate with impunity. The relative freedom they enjoy ashore allows them to prepare, recruit, and dispose of their rewards without fear of prosecution by any authority. They are also able to hold their captives on shore or at anchor just off the coast without fear that the vessels or the hostages held will be forcefully released.<sup>134</sup>

Some of these groups are better armed and better funded than regional authorities.<sup>135</sup> Million dollar ransoms combined with a lack of accountability have encouraged this growth.<sup>136</sup> The UN Monitoring Group on Somalia reported that for 2008 the total budget for Puntland (the middle region of Somalia containing most pirate strongholds) was only 20% of the projected 2008 piracy revenues.<sup>137</sup> It noted that Puntland’s security sector was

<sup>129</sup> U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 100, ¶ 127.

<sup>130</sup> Telephone Interview with Stephen Carmel, Senior Vice President of Maritime Services, Maersk Line Limited (June 11, 2010).

<sup>131</sup> Peter S. Green, *Cheaper Piracy Patrols off Somalia Needed, U.S. Official Says*, BUSINESSWEEK, Feb. 18, 2010, <http://www.businessweek.com/news/2010-02-18/cheaper-piracy-patrols-off-somalia-needed-u-s-official-says.html>.

<sup>132</sup> Kim Sengupta & Daniel Howden, *Pirates: The \$80m Gulf Connection*, INDEPENDENT (London), Apr. 21, 2009, <http://www.independent.co.uk/news/world/africa/pirates-the-80m-gulf-connection-1671657.html>.

<sup>133</sup> U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 100, ¶ 122.

<sup>134</sup> Brian Reyes, *This Is a Siege Situation... What Else Is an Owner Going to Do?*, LLOYD’S LIST, Sept. 29, 2008, at 4 (noting that “[r]ecent cases suggest that the Somali coastal town of Eyl has emerged as a modern-day Tortuga, a pirate base where the gangs appear to enjoy logistical support and where most hijacked vessels end up”), available at <http://lettersfromgib.files.wordpress.com/2008/12/piracy-feature.pdf>.

<sup>135</sup> U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 100, ¶ 122.

<sup>136</sup> *Ib.* at ¶ 127.

<sup>137</sup> *Ib.*

weak, and central Somalia had no law enforcement capacity at all.<sup>138</sup> The Security Council Report of April 2010 has called upon these authorities “to increase efforts to combat piracy, consider possible targeted measures against those involved in pirate activities, and prohibit the provision of support to the Puntland security sector in the absence of significant improvement.”<sup>139</sup> This lawlessness makes it easy for pirates to operate.<sup>140</sup>

In addition to the governmental incapacity, the UN also worries that “piracy networks benefit from the complicity and protection of senior officials in the Puntland administration.”<sup>141</sup> The UN has verified the credibility of these allegations, and the investigation into the infiltration of the highest levels of government is ongoing.<sup>142</sup> Despite some reports that this corruption has been resolved, the difficulty of establishing stability and legitimacy in the Somali government is evident.

Any amount of lawlessness fuelled by ransoms will also have a detrimental impact on the people dependent on legitimate government aid and protection.<sup>143</sup> The UN Monitoring Group Report (2008) reports that “Somalia’s maritime militias threaten the delivery of humanitarian assistance at a time when an estimated 2.5 million Somalis require food aid, and are driving up the costs of commercial imports of foodstuffs and other essentials.”<sup>144</sup> One example of this is the U.S. Office of Foreign Asset Control (OFAC) Specially Designated National<sup>145</sup> and noted pirate leader Mohamed Abdi Garaad,<sup>146</sup> who reportedly hijacked a shipment destined for Somalia from the World Food Programme. Garaad’s activities delayed the vessel and the distribution of aid, and the UN views him as a threat to peace and security because of these actions. The 2010 report of the UN Monitoring Group on Somalia notes, “Puntland authorities have yet to take any action to apprehend Garaad or curb his activities.”<sup>147</sup>

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<sup>138</sup> *Ib.*

<sup>139</sup> Update Report No. 3, *Somalia: Piracy*, SECURITY COUNCIL REPORT, Apr. 20, 2010, at 1, 3, available at [http://www.securitycouncilreport.org/atf/cf/%7B65BF99B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Update%20Report%2020%20April%2010\\_Somalia.pdf](http://www.securitycouncilreport.org/atf/cf/%7B65BF99B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Update%20Report%2020%20April%2010_Somalia.pdf).

<sup>140</sup> Jerry Frank, *Ransom for Seafarers Could Rocket to \$50m*, LLOYD’S LIST, Sept. 15, 2008, <http://www.lloydslist.com/ll/sector/Insurance/article44463.ece>.

<sup>141</sup> U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 100, ¶ 264.

<sup>142</sup> *Ib.* ¶ 141, (noting that “[a]llegations of complicity in piracy activities by members of the Puntland administration are commonplace and well substantiated”).

<sup>143</sup> Contact Group on Piracy off the Coast of Somalia, Working Group on Public Diplomacy, *Proposed Communication Strategy*, (noting that “[p]iracy threatens vital humanitarian aid shipments to Somalia and The Horn of Africa”), available at [http://www.marad.dot.gov/documents/WG4\\_-\\_PD\\_Cairo\\_Paper\\_-\\_Communication\\_Strategy.pdf](http://www.marad.dot.gov/documents/WG4_-_PD_Cairo_Paper_-_Communication_Strategy.pdf).

<sup>144</sup> U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 100, ¶ 129.

<sup>145</sup> OFFICE OF FOREIGN ASSETS CONTROL, DEPARTMENT OF THE TREASURY, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS (2010), available at <http://www.ustras.gov/offices/enforcement/ofac/sdn/t11sdn.pdf>.

<sup>146</sup> Monthly Forecast, *Somalia*, SECURITY COUNCIL REPORT, May 2010 (Garaad as the “Pirate King”), available at [http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.5968925/k.9BBB/May\\_2010brSomalia.htm](http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.5968925/k.9BBB/May_2010brSomalia.htm).

<sup>147</sup> U.N. Sec. Council, Monitoring Group on Somalia, *Report of the Monitoring Group on Somalia Pursuant to Sec. Council Resolution 1853 (2008)*, at 42–43, U.N. Doc. S/2010/91 (Mar. 10, 2010).



*E. Links between Pirate Ransoms and Terrorism Cannot be Ignored*

Much debate centers on whether pirates should be considered terrorists and the extent to which their operations overlap with acknowledged terrorist groups. The UN Monitoring Group has recognized that “there is some evidence of linkages between piracy, arms trafficking, and the activities of some armed opposition groups . . .”<sup>148</sup> Pirates were reported to have paid \$1 million to al-Shabaab and their foreign instructors.<sup>149</sup> Likewise, there is evidence that al-Shabaab is providing combat training to pirates and pirates are offering maritime training to members of al-Shabaab.<sup>150</sup> In addition to these more overt links, there also are reports of a tacit agreement among pirates, al-Shabaab, and Somali businessmen that ships transiting in and out of local ports will not be disturbed.<sup>151</sup>

The OFAC list of Specially Designated Nationals (SDN) now includes at least two people who are linked to both piracy and terrorism. Upon issuance of Executive Order 13536, the President issued an accompanying statement to Congress making it clear that the Administration views piracy as a threat to U.S. national interests and seeks to undercut financial support for piratical activities.<sup>152</sup> The UN also has recognized that piracy has spillover effects into Somali destabilization by identifying key pirate leaders who have violated the arms embargo.<sup>153</sup> In addition to Garaad, the UN also notes that numerous reports link Yusuf Mohamed Siyaad to terrorism, piracy, illegal arms imports, and kidnapping foreigners for ransoms.<sup>154</sup>

Despite the fact that only two SDNs named are known to have piracy connections, the SDN listing process and ongoing intelligence gathering will most likely have the effect of increasing the number of individuals linked to piracy.<sup>155</sup> Much of the ambiguity surrounding the Executive Order is the extent to which potential ransom payers will be held responsible if a ransom recipient has links to terrorism. But it does seem clear that at the highest levels, a significant amount of information available to OFAC links piracy and terrorism.<sup>156</sup>

Even if piracy has only tenuous links to terrorism,<sup>157</sup> it is still evident that the indirect effects of piracy on East Africa are devastating: As Costa succinctly concludes, “It

<sup>148</sup> U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 100, ¶ 107.

<sup>149</sup> *Ib.*

<sup>150</sup> Bruno Schiemy, *Piracy’s Rising Tide – Somali Piracy Develops and Diversifies*, JANE’S INTELLIGENCE REVIEW, Jan. 20, 2009, [http://www.janes.com/news/security/jir/jir090120\\_1\\_n.shtml](http://www.janes.com/news/security/jir/jir090120_1_n.shtml).

<sup>151</sup> *Ib.*

<sup>152</sup> MARITIME & ADMIRALTY PRACTICE, WINSTON & STRAWN LLP, BRIEFING: GUIDANCE REGARDING THE APPLICATION OF THE NEW U.S. EXECUTIVE ORDER ON SOMALIA TO PIRATE RANSOM PAYMENTS 1 (2010), available at [http://www.winston.com/siteFiles/Publications/Briefing\\_4\\_23\\_10\\_v1.pdf](http://www.winston.com/siteFiles/Publications/Briefing_4_23_10_v1.pdf).

<sup>153</sup> U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 100, ¶ 123.

<sup>154</sup> *Ib.* ¶ 144.

<sup>155</sup> Telephone Interview with Stephen Carmel, *supra* note 130.

<sup>156</sup> Memorandum from Dewey & LeBoeuf LLP to Lloyd’s of London, Responses to Maritime Community Queries Regarding Recent U.S. Executive Order on Somalia 4 (Apr. 30, 2010), available at <http://www.lmalloyds.com/AM/AMTemplate.cfm?template=/CM/ContentDisplay.cfm&ContentID=24132>.

<sup>157</sup> Reyes, *supra* note 134 (noting that “there is scant public information about the practicalities of how this nefarious [pirate] activity actually works”).

endangers lives, curbs trade, kills tourism, steals food aid, enriches criminals, funds insurgents and perverts the regional economy.”<sup>158</sup>

## VII. Economic Reasoning

### *A. Ransoms are Rising without Sign of Plateau*

Ransom payments have been rising steadily since pirate attacks off the coast of Somalia first captured the world’s attention.<sup>159</sup> Where the average ransom was only a few thousand dollars,<sup>160</sup> it is estimated that the average will rise to \$3 million in 2010.<sup>161</sup> Some payments have already reached as much as \$7 million.<sup>162</sup> In 2008, Hiscox Insurance accurately estimated that ransom payments for the year could be between \$25-\$50 million dollars.<sup>163</sup> This number grew in 2009 to \$100 million and is estimated to be as high for 2010 despite continued military patrols.<sup>164</sup> Furthermore, the complex legal and logistical obstacles that must be overcome to facilitate payment may double the cost of the final ransom demand.<sup>165</sup>

There is no reason to believe that there will be a ceiling above which ransom payments will not rise. Increasing ransom demands may soon make it impossible for smaller shipping companies and local maritime trades to function. A vessel and its cargo have a finite value, but the value of crew lives is priceless. In addition, a corporation that declines to pay a ransom or makes a counter-offer that then causes its employees to be tortured or killed will suffer unquantifiable public relations damage.<sup>166</sup> Costa explains that “given ransom payments of a few million dollars per ship, the . . . criminal groups [are] the big winners. In other words, piracy has become an increasingly profitable business — insurance companies do not mind paying a few million dollars for the ransom of a tanker whose temporary disability in the hands of pirates would cost as much per week.”<sup>167</sup>

Longer detention periods for vessels cause a loss of business, as well as an increase in other costs of shipping firms.<sup>168</sup> To protect against this financial risk, commercial shipping insurance premiums for vessels in the Gulf of Aden increased tenfold in 2008.<sup>169</sup>

<sup>158</sup> Costa, *supra* note 117.

<sup>159</sup> ‘*Piracy on an Almost Industrial Scale*,’ *supra* note 118 (noting that piracy became problematic towards the end of 2008).

<sup>160</sup> Costa, *supra* note 117.

<sup>161</sup> Drake, *supra* note 108.

<sup>162</sup> Abdi Guled & Abdi Shei, *Somali Pirates Haul in Record Ransom for Oil Tanker*, NAT’L POST (Ontario), Jan. 17, 2010, <http://www.nationalpost.com/news/Somali+pirates+haul+record+ransom+tanker/2455939/story.html#ixzz0r2gmJWz5>.

<sup>163</sup> Frank, *supra* note 140.

<sup>164</sup> Costa, *supra* note 117.

<sup>165</sup> *Piracy Payday For Hijackers and Lawyers*, LLOYD’S LIST, Jan. 30, 2009, <http://www.lloydlist.com/ll/sector/Insurance/article12623.ece?src=Search>.

<sup>166</sup> E-mail from Jai Sharma, Head of the Casualty & GA Dep’t, Dolphin Maritime & Aviation Services, to author (May 17, 2010, 05:59 CST).

<sup>167</sup> Costa, *supra* note 117.

<sup>168</sup> Drake, *supra* note 108.

<sup>169</sup> U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 101, ¶ 128.

This cost is often defrayed among the clients of the shipping company.<sup>170</sup> Where some smaller vessels are unable to pay ransoms, they are sometimes commandeered as “mother ships” used by pirates to service the skiffs while far out at sea.<sup>171</sup>

If ransoms continue to rise, the difficulties already encountered at all levels within the shipping and maritime industry will only grow, ultimately making it impossible for smaller companies to operate within the region.

### *B. Ransom Fuelled Piracy Requires Expensive and Ineffective Naval Patrols*

Until Somali motivations to piracy are ameliorated on land, there seems to be no check on exorbitant ransom demands other than expensive military intervention. This intervention now comes in the form of increased piracy patrols and convoys. The Executive Director of the UNODC has noted the absurdity of spending many millions of dollars to patrol and secure waters against pirates whose vessels cost next to nothing to operate.<sup>172</sup> He is not alone in his view. Military leaders responsible for patrolling the Gulf of Aden and convoys along the Somali Coast state that destroyers and frigates chasing skiffs is not an answer.<sup>173</sup> Defense Management (2008) in a report on piracy makes the case that, “They are expensive assets and they are not designed for that sort of business, but we deliver maritime security whilst the land problem . . . is [addressed] by international bodies such as the UN, the European Union, the United States, the African Union, and so on because it is ashore that the solution rests.”<sup>174</sup>

In addition to the inordinate expense, the international military efforts to intervene and apprehend pirates have been plagued with other problems. Foremost is the issue of prosecution. Somalia currently has neither an effective naval enforcement nor a domestic legal infrastructure capable of meting out justice to apprehended pirates.<sup>175</sup> Also, the confidence of foreign navies patrolling in the region wavers due to doubts regarding legal authority to apprehend and prosecute (regardless of whether that prosecution is done by the apprehending country or a third-party state).<sup>176</sup> Finally, third-party states, concerned about the ramifications of prosecuting citizens of a foreign country apprehended by another foreign country, offer some resistance.<sup>177</sup> These third-party prosecutions may

<sup>170</sup> Andrew Spurrier, *CMA CGM Increases Gulf of Aden Surcharge*, LLOYD’S LIST, Nov. 25, 2009, <http://www.lloydlist.com/ll/sector/containers/article28645.ece> (noting that French owned CMA CGM’s container piracy surcharge increased almost 100% (\$23 to \$41) due to the prevailing risk of piracy in the area).

<sup>171</sup> U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 101 (noting that the *M/T Yenegro Ocean* was hijacked on August 4, 2008 and used in this manner).

<sup>172</sup> Costa, *supra* note 117.

<sup>173</sup> ‘Piracy on an Almost Industrial Scale,’ *supra* note 118

<sup>174</sup> *Ib.*

<sup>175</sup> Eugene Kontorovich, *International Legal Responses to Piracy Off the Coast of Somalia*, ASIL INSIGHTS, Feb. 6, 2009, [http://www.asil.org/insights090206.cfm#\\_edn1](http://www.asil.org/insights090206.cfm#_edn1).

<sup>176</sup> *Ib.*

<sup>177</sup> Elizabeth Andersen et al., *Suppressing Maritime Piracy: Exploring the Options in International Law 9* (One Earth Future Foundation, Workshop Report, 2010), available at <http://www.oneearthfuture.org/images/imagefiles/OEF%20-%20PIRACY%20-%20LAW%20WORKSHOP%20BOOKLET%20-%20FINAL%20VERSION.pdf>.

burden host countries' legislative and punitive resources and are often seen as damaging to their cultural and diplomatic agendas.<sup>178</sup>

Military intervention faces the additional difficulty of being dangerous to the crew held hostage on a captured vessel.<sup>179</sup> In most instances military force is used to recover a vessel only when the unit can be assured that the entire crew has securely locked itself in a "safe room" out of harm's way from pirates who would use them as leverage against attack, and where they will be safe from collateral damage.<sup>180</sup> There is also a political reluctance to use military force to reclaim ships when the hijackers are in Somali territorial waters.<sup>181</sup>

Spyros Polemis, chairman of The International Chamber of Shipping, which represents 75% of the global shipping industry, noted the "deepening frustration at the impotence of the international community in combating the growing piracy in the Indian Ocean."<sup>182</sup> "It is extraordinary," he stated, "that governments today seem less able to protect shipping than they were almost 200 years ago."<sup>183</sup>

Ransoms should not be allowed to fuel the types of activity that the military now finds impossibly difficult to overcome. If we arrive at the point at which military intervention becomes the only available option, we will have no reason to believe that it will be successful.

### *C. Legitimizing Ransoms Gives Negotiating Leverage to the Captor Who May Threaten Unlawful Action*

Pirates work from a position of unhindered domestic support and have the ability to out-wait those who balk at the payment of ransoms.<sup>184</sup> If ransom payments are legitimized, there is little to keep pirates from raising threats of violence and terror, or other harassments such as lying in wait to recapture a recently released ship,<sup>185</sup> to seek greater rewards. To keep these ransom negotiations from growing out of control, the process must be internationally condemned.

<sup>178</sup> Walter Menya, *Deal on Piracy Trials Skewed, Say Ministers*, DAILY NATION (Kenya), June 26, 2010, <http://www.nation.co.ke/News/-/1056/947196/-/w9h9nu/-/index.html>.

<sup>179</sup> E-mail from Jai Sharma, Head of the Casualty & GA Dep't, Dolphin Maritime & Aviation Services, to author (May 17, 2010, 05:59 CST).

<sup>180</sup> Tom Morgan, *Hopes Raised for Hostage Couple Held by Somali Pirates*, INDEPENDENT (London), Mar. 5, 2010, <http://www.independent.co.uk/news/world/africa/hopes-raised-for-hostage-couple-held-by-somali-pirates-1916722.html> (noting that a Royal Navy vessel watched the kidnapping of the Chandlers, a yachting couple taken hostage by pirates, because they could not have acted without endangering their lives); see also Xan Rice & Lizzy Davies, *Hostage Killed As French Storm Yacht Held By Somali Pirates*, GUARDIAN (London), Apr. 11, 2009, <http://www.guardian.co.uk/world/2009/apr/10/hostage-killed-as-french-storm-pirate-yacht> (noting that military force used by French Special Forces to free the crew of the yacht *Tanit* resulted in the inadvertent death of one of the hostages).

<sup>181</sup> E-mail from Jai Sharma, Head of the Casualty & GA Dep't, Dolphin Maritime & Aviation Services, to author (May 17, 2010, 05:59 CST).

<sup>182</sup> Guled & Shei, *supra* note 162.

<sup>183</sup> *Ib.*

<sup>184</sup> John Drake, *supra* note 108 (according to John Chase, head of Crisis Response at AKE, the main reason for rising detention periods is financial because "[p]irates are in less of a hurry to settle ransom negotiations when they have a lot of money in the bank already").

<sup>185</sup> Laura Morrison, *Ship Owners Face Insurance Nightmare as Piracy Soars*, LLOYD'S LIST, Sept. 3, 2007, <http://www.lloydlist.com/ll/sector/piracy-and-security/article63268.ece>.

The demonstrated lack of ability to secure the release of hostages through either military or diplomatic means<sup>186</sup> adds to the security of the position from which pirates make their demands. Threats against the lives of those captured are enough to disrupt the process firmly in their favor. As one of the Somali pirates holding hostages Paul and Rachel Chandler averred, “[i]f anyone interrupts our negotiations to get the payment of a ransom, it will be a risk for them . . .”<sup>187</sup>

Most ransom payment statistics are imprecise estimates that indicates the fear ship owners have of “tipping their negotiating hand.” To slow the escalation of payments and to discourage further piratical attacks, information about the amount of ransoms paid is often shielded from public awareness.<sup>188</sup> State Guled and Shei (January 2010), “There is a general reluctance to comment in any detail on the mechanics of paying a ransom, reflecting the extensive reach of the Somali pirates and the fear that the information might prejudice future negotiations.”<sup>189</sup>

Even seasoned negotiators for ship owners acknowledge that their position is subject to the vagaries of their rivals’ sensibilities.<sup>190</sup> James Wilkes, Managing Director of Gray Page, which consults on maritime security, (qtd in Reyes 2008) states that “[t]he aim [of negotiations] is to reach an agreement which we believe the pirates will stick to”<sup>191</sup> “However,” he adds, there are no guarantees and you’re dealing with pirates who, by virtue of what they do, are unpredictable.”<sup>192</sup>

Gustavo de Arístegui, foreign spokesman for the Partido Popular of Spain, has said that (qtd in Reyes 2008) “[n]obody should confuse the figure of a negotiator in a heist involving hostages with one negotiating with the criminal groups. The first is used to buy time and save lives, while the second finances and legitimizes the criminal.”<sup>193</sup>

If we legitimize the ransom process by failing to legislate against it on a global level, we perpetuate this unbalanced and potentially limitless grant of power to a criminal enterprise. In addition, a failure to condemn ransoms is “tantamount to recognizing [governmental] impotence. It would also represent a complete victory for the criminal and his activity.”<sup>194</sup>

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<sup>186</sup> *Masefield AG v. Amlin Corporate Member Ltd.*, [2010] EWHC (Comm) 280, [22] (noting that in Somalia “any attempt to intervene by diplomatic means is fraught with difficulty. Equally any concept of military intervention involves legal and technical difficulties, leaving aside the risk to captured crews”), available at <http://www.scribd.com/doc/28789566/MasefieldAG-v-Amlin-2010>.

<sup>187</sup> Marle Colvin, *Somali Pirates Will Die Before Releasing Paul and Rachel Chandler*, *TIMES* (London), Jan. 24, 2010, <http://www.timesonline.co.uk/tol/news/world/africa/article6999897.ece>.

<sup>188</sup> Guled & Shei, *supra* note 162 (noting that Maran Tankers, owner of the recently released *M/T Maran Centaurus* will not be releasing details of negotiations).

<sup>189</sup> Reyes, *supra* note 134.

<sup>190</sup> *Ib.* (noting that the tone of negotiations fluctuates between co-operative and threatening).

<sup>191</sup> *Ib.*

<sup>192</sup> *Ib.*

<sup>193</sup> *Ib.*

<sup>194</sup> *Ib.*

## Chapter Three: Analysis of Various National Positions

### VIII. Introduction

A brief survey of the policies surrounding the payment of ransoms shows that the positions and practicalities are far from clear. The trend seems to be that publicly forbidding payments to pirates is important, yet most nations are cognizant of the difficulty this places on the industry's current practices, as well as the large group of current captives.

The storm of controversy surrounding the United States' Executive Order 13536 is interesting because it is not the first such prohibition internationally, though it may be the first such proclamation issued by any nation. The intense reactions from the maritime industry and shipping associations may be due to the greater likelihood of prosecution by the US, and the pervasiveness of US-related shipping interests that would seem to be directly affected. In essence the only real difference between the US Executive Order and the others may be that the industry fears the US government may actually enforce their prohibition.

Another twist in the debate is the recent move by the UK to place a *technical hold* on the UN's proposed sanctions against two pirate leaders. This seems to place the UK at direct odds with the policies of the United Nations and the United States.

What follows is a brief analysis of some of these national and international positions. The order is based on the recentness of developments.

### IX. Analysis of International Positions

#### A. United Nations—Historically Prohibitive of Aiding Instability

The UN Security Council has long advocated restrictions to aid that would increase instability in Somalia. The 1992 UN Security Council Resolution (UNSCR) 733 “[c]alls on all states to refrain from any action which might contribute to increasing tension and to impeding or delaying a peaceful and negotiated outcome to the conflict in Somalia . . . .”<sup>195</sup> The UN has reemphasized this position many times since 1992.<sup>196</sup>

UNSCR 1844 (2008) is one of the most important of these resolutions regarding financial support, including ransoms, provided to individuals or entities that would seek to disrupt stability in Somalia.<sup>197</sup> It reemphasizes UNSCR 733, and also introduces additional restrictive measures. Acknowledging the effects of piracy on the region, it expresses “concern at all acts intended to prevent or block a peaceful political process.”<sup>198</sup> This

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<sup>195</sup> S.C. Res. 733, ¶ 6, U.N. Doc. S/RES/733 (Jan. 23, 1992).

<sup>196</sup> S.C. Res. 1916, U.N. Doc. S/RES/1916 (Mar. 19, 2010).

<sup>197</sup> S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008).

<sup>198</sup> *Ib.*

would seem to include corruption of government officials with links to piracy.<sup>199</sup> It also notes “the role piracy may play in financing embargo violations by armed groups. . . .”<sup>200</sup>

Based on these issues, the Resolution forbids payment of funds, financial assets, or economic resources to certain individuals or entities.<sup>201</sup> The individuals or entities are those “engaging in or providing support for acts that threaten the peace, security or stability of Somalia . . . .”<sup>202</sup> It further encourages member states to submit to the UN information about individuals or entities in violation so that a list may be developed.<sup>203</sup>

UNSCR 1844 therefore is a very early indicator that the UN position is anti-ransom. At the end of 2008, the UN Monitoring Group on Somalia’s report noted the negative impact of piracy on Somalia: “Somalia’s maritime militias threaten the delivery of humanitarian assistance at a time when an estimated 2.5 million Somalis require food aid, and are driving up the costs of commercial imports of foodstuffs and other essentials.”<sup>204</sup>

Resolution 1844 was followed a few months later by UN Security Council Resolution 1846. UNSCR 1846 acknowledged and expressed concern over escalating ransom payments fuelling the growth of Somali piracy.<sup>205</sup> This concern was reiterated in Resolution 1897.<sup>206</sup>

The UN has proposed that two suspected pirate leaders said to be involved with nearly all ransoms, Abshir Abdillahi and Mohamed Abdi Garaad, be added to a sanctions list.<sup>207</sup> This would prohibit ransom payments to either of them.<sup>208</sup> However, this effort has been blocked by the United Kingdom in contrast to the UN and US positions.<sup>209</sup>

### *B. The Philippines – Supportive of Industry Needs*

Approximately one-third of seafarers working in the global merchant mariner fleet are Filipinos.<sup>210</sup> This large proportion puts Filipino sailors at greater risk simply because of their higher probability of exposure to pirate threats. As a result, in 2008 the Foreign Affairs Secretary of the Philippines suggested prohibiting Filipino mariners from work

<sup>199</sup> U.N. Sec. Council, Monitoring Group on Somalia, *Report of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1811 (2008)*, ¶ 141, U.N. Doc. S/2008/769 (Dec. 10, 2008) (noting that “[a]llegations of complicity in piracy activities by members of the Puntland administration are commonplace and well substantiated”).

<sup>200</sup> S.C. Res. 1844, 1, U.N. Doc. S/RES/1844 (Nov. 20, 2008).

<sup>201</sup> *Ib.* ¶ 3.

<sup>202</sup> *Ib.* ¶ 8(a).

<sup>203</sup> *Ib.* ¶ 11–12.

<sup>204</sup> U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 199, ¶ 129.

<sup>205</sup> S.C. Res. 1846, ¶ 2, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

<sup>206</sup> S.C. Res. 1897, ¶ 2, U.N. Doc. S/RES/1897 (Nov. 30, 2009).

<sup>207</sup> Paul Reynolds, *UK Blocks Sanctions Against Suspected Somali Pirates*, BBC NEWS, Aug. 9, 2010, <http://www.bbc.co.uk/news/world-africa-10917961>.

<sup>208</sup> *Ib.*

<sup>209</sup> *Ib.*

<sup>210</sup> Alastair McIndoe, *Filipino Seamen Learn to Fight Pirates*, ASIA NEWS NETWORK, Jan. 22, 2010, <http://www.asianewsnet.net/news.php?id=9722&sec=1>.

board vessels sailing through high-risk waters.<sup>211</sup> This was ultimately rejected over concerns that it would limit the employability of Filipino merchant mariners.

Instead the Philippine Overseas Employment Administration (POEA), responsible for regulating the mariner recruitment industry, instituted Board Resolution No. 4, which specified that Filipino mariners would receive double pay in the designated high-risk zones. This was intended to compensate Filipino mariners for the increased risk.<sup>212</sup> POEA administrator, Attorney Jennifer Jardin-Manalaili, (qtd in *The Daily PCIJ* 2008) has said that the policy was “not meant to solve the security problem . . . [as] much as it wants to, it is something way beyond the agency’s control.”<sup>213</sup> Ultimately, the resolution effectively provided a greater incentive for Filipino sailors to work aboard vessels transiting high-risk zones with the attraction of higher wages.<sup>214</sup>

Increased captures of Filipino crew further prompted the POEA, as of January 15, 2010, to now require all mariners to attend anti-piracy training.<sup>215</sup> The training teaches techniques to avoid and repel pirate attacks.<sup>216</sup>

These mandates represent a reasonable effort of the Philippine government to curb incidents of piracy. Perhaps because the Philippine government is aware of the limited effectiveness of these defensive strategies, it remains permissive of ransom payments to release hostages. According to the report in *Xinhuanet* (2010), “As a policy, the Philippine government does not negotiate nor pay ransom to kidnappers, but gives ship owners the free hand in negotiating for the release of abducted Filipino sailors.”<sup>217</sup> This policy is notable for recognizing the importance of commercial shipping to the crewmembers’ lives, and the ability of the maritime industry to rectify the problem.

### C. UK—Ransom Payments are not Contrary to Public Policy

On February 18, 2010, the English High Court held in *Masefield AG v. Amlin Corporate Member Ltd.* that the payment of ransoms to Somali pirates is not contrary to public policy.<sup>218</sup> Such a clear assertion that ransoms are permissible is unique when compared against other international law, but an examination of how this fits with other UK positions shows the policy may be just as restrictive in some situations.

<sup>211</sup> Roel R. Landingin, *Every 6 Hours, Pirates Seize a Filipino Seaman*, PHILIPPINE CENTER FOR INVESTIGATIVE JOURNALISM, Nov. 26, 2008, <http://pcij.org/stories/every-6-hours-pirates-seize-a-filipino-seaman/>.

<sup>212</sup> The Daily PCIJ, POEA on Seafarers’ Plight: Piracy a Security Issue Beyond Our Control, <http://www.pcij.org/blog/?p=3302> (Dec. 7, 2008, 1:10 pm)

<sup>213</sup> *Ib.*

<sup>214</sup> Roel R. Landingin, *supra* note 211.

<sup>215</sup> Teresa Cerojano, *Philippines Orders Anti-Piracy Training for Its Sailors to Help Curb Somali Ship Attacks*, WASH. EXAMINER, Jan. 4, 2010, <http://www.washingtonexaminer.com/world/philippines-orders-anti-piracy-training-for-its-sailors-to-help-curb-somali-ship-attacks-80571692.html>.

<sup>216</sup> *Ib.*

<sup>217</sup> *New Batch of Filipino Seafarers Seized by Somali Pirates*, XINHUANET, May 14, 2010, [http://news.xinhuanet.com/english2010/world/2010-05/14/c\\_13295229.htm](http://news.xinhuanet.com/english2010/world/2010-05/14/c_13295229.htm); *see also* David Osler, *Pirates Demand \$2.8m for Irene and Its 22 Crew*, LLOYD’S LIST, Aug. 27, 2009, <http://www.lloydlist.com/ll/sector/piracy-and-security/article24191.ece> (noting that the onus to respond is on the vessel’s owners).

<sup>218</sup> *Masefield AG*, [2010] EWHC (Comm) 280, [61].



The court provided reasons why ransom payments do not violate public policy. First, there is no prohibition against payment of ransom in English law.<sup>219</sup> Second, making such payments illegal should be a matter for legislative and not judicial discretion.<sup>220</sup> Third, neither diplomatic nor military intervention can reliably recover captives.<sup>221</sup> Finally, a failure to pay may lead to further peril for other crews.<sup>222</sup> The court further noted that kidnap and ransom policies are a long-standing feature of the insurance market, and implied that the court should not render them unenforceable.<sup>223</sup>

While the court decision in *Masefield v. Amlin* seems a straightforward statement of the law, the reaction of the British Foreign Office to the kidnapping and ransom demand for the Chandlers, a yachting couple seized by pirates on October 23, 2009, implied that sources of ransom payments must be private and may not be linked to terrorism.<sup>224</sup> However, efforts to facilitate a ransom agreement for release of the Chandlers, which would have used private funds paid to pirates with no known links to terrorism, were nevertheless blocked by the UK government.<sup>225</sup>

The British Foreign Office (BBC News 2010) stated that “[a]lthough there is no UK law against third parties paying ransoms, we counsel against them doing so because we believe that making concessions only encourages future kidnaps. This is why the government does not make or facilitate substantive concessions to hostage takers.”<sup>226</sup> Despite this apparent government unwillingness, former Foreign Secretary David Miliband assured the BBC that political and diplomatic efforts are ongoing.<sup>227</sup>

At the time of writing, Somali pirates are still holding the Chandlers.<sup>228</sup> A date set by the pirates for the execution of the couple has passed, and it remains to be seen how the situation will be resolved.<sup>229</sup>

In a similarly disjointed move, the UK has recently placed an indefinite *technical hold* on the proposal by the United Nations to add pirate leaders Abshir Abdillahi and Mohamed Abdi Garaad to a sanctions list, which would limit the shipping industry’s ability to pay

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<sup>219</sup> *Ib.* [60].

<sup>220</sup> *Ib.*

<sup>221</sup> *Ib.*

<sup>222</sup> *Ib.*

<sup>223</sup> *Ib.* [62].

<sup>224</sup> Roger Middleton, *Piracy in Somalia: Threatening Global Trade, Feeding Local Wars* 15 (Chatham House Africa Programme, The Horn of Africa Project, Briefing Paper AFP BP 08/02, 2008) (“If a link is established between the pirates and Al Shabab, for example, there will be very real doubt as to whether ransoms can be paid, which will condemn the crews presently being held to an uncertain future.”), available at [http://www.chathamhouse.org.uk/files/12203\\_1008piracysomalia.pdf](http://www.chathamhouse.org.uk/files/12203_1008piracysomalia.pdf).

<sup>225</sup> Tristan McConnell, *Government ‘Is Blocking Deal for Paul and Rachel Chandler,’* TIMES (London), Feb. 1, 2010, <http://www.timesonline.co.uk/tol/news/world/africa/article7011104.ece>.

<sup>226</sup> *UK Defends Not Paying Pirates Ransom for Kidnapped Pair*, BBC NEWS, Feb. 1, 2010, [http://news.bbc.co.uk/2/hi/uk\\_news/england/kent/8491301.stm](http://news.bbc.co.uk/2/hi/uk_news/england/kent/8491301.stm).

<sup>227</sup> *Ib.*

<sup>228</sup> Save the Chandlers, *Piracy – Enough is Enough!*, <http://www.savethechangers.com/2010/07/22/piracy-enough-is-enough/> (July 22, 2010, 8:53 am).

<sup>229</sup> David Sanderson, *Pirates Will Kill Us in Days Say Hostages Rachel and Paul Chandler*, TIMES (London), Jan. 22, 2010, <http://www.timesonline.co.uk/tol/news/world/africa/article6997606.ece>.

them ransoms.<sup>230</sup> While reiterating its belief that ransoms only fuel the growth of piracy, the UK Foreign and Commonwealth Office (qtd. In *Fairplay* 2010) has stated that the reason for the hold is to allow the government to examine the legal implications of a ban: “It is by no means a veto. . . . It’s being considered at the moment.”<sup>231</sup> It appears that Britain’s dilemma is due to pressure from the large number of shipping industry interests in London who have relied on ransoms to expedite the release of captured crews.<sup>232</sup> Most industry officials think that ransom payments are “often the only practical way to ensure the return of a ship.”<sup>233</sup> London is now the center of the industry specialists in conducting ransom negotiations and a ban such as this would severely limit its ability to operate.<sup>234</sup>

#### *D. US—Executive Order 13536: Ambiguous Prohibition of Ransoms*

With ambiguous language, President Obama issued Executive Order 13536 on April 13, 2010. The Order appears to make criminally punishable any act of providing financial aid directly or indirectly to any person or entity classified as a ‘Specially Designated National’ (SDN) by the Office of Foreign Asset Control (OFAC), or to any person or entity that is determined by the Treasury and State departments “to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Somalia.”<sup>235</sup>

The Order does not mention the word ‘ransom’ in the text, and some read it as having very little effect on ransom payments to pirates other than the two listed in the 11-person SDN group enumerated in the annex. In a memorandum to The Maritime Law Association of the United States, Joseph Grasso writes: “The EO does not specifically block payments to or assets of “pirates” or persons engaged in armed robbery at sea off the coast of Somalia, and only two of the individuals listed on the Annex are suspected to have engaged in acts of piracy or attempted piracy.”<sup>236</sup> “Thus, while there may have been an inference that the EO is meant to block payments to and assets of all Somali pirates, to the extent they can be deemed ‘to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Somalia,’ that is not the case.”<sup>237</sup> Others disagree, pointing to language within the EO which states that “acts of piracy and armed robbery at sea off the coast of Somalia . . . constitute an unusual and extraordinary threat to the national security and foreign policy of the United States . . . .”<sup>238</sup>

<sup>230</sup> David Osler, *Failure to Arrest Tanker Attackers Angers Intertanko*, LLOYD’S LIST, Aug. 9, 2010, <http://www.lloydslist.com/ll/sector/ship-operations/article342220.ece>.

<sup>231</sup> UK, *US at Odds Over Ransoms*, FAIRPLAY, Aug. 9, 2010, [http://www.fairplay.co.uk/secure/DailyNewsEmail.aspx?path\\_info=/secure/DailyNewsEmail.aspx&articlename=dn0020100809000007](http://www.fairplay.co.uk/secure/DailyNewsEmail.aspx?path_info=/secure/DailyNewsEmail.aspx&articlename=dn0020100809000007) (on file with author).

<sup>232</sup> Michael Peel, *UK Blocks UN Move to End Pirate Funding*, FIN. TIMES, Aug. 8, 2010, <http://www.ft.com/cms/s/0/633a2eca-a30d-11df-8cf4-00144feabdc0.html>.

<sup>233</sup> David Osler, *Failure to Arrest Tanker Attackers Angers Intertanko*, LLOYD’S LIST, Aug. 9, 2010, <http://www.lloydslist.com/ll/sector/ship-operations/article342220.ece>.

<sup>234</sup> *Ib.*

<sup>235</sup> Jason Straziuso, *Obama Memo Triggers Confusion Over Legality Of Pirate Ransoms*, INS. J., Apr. 22, 2010, <http://www.insurancejournal.com/news/international/2010/04/22/109187.htm>.

<sup>236</sup> Memorandum from Joseph G. Grasso, Wiggin & Dana LLP, to Am. Inst. of Marine Underwriters, Executive Order Concerning Somalia (Apr. 27, 2010), available at <http://www.mlaus.org/mboard/discussion.cfm?t=1> (last visited Jul. 22, 2010) (on file with author).

<sup>237</sup> *Ib.*

<sup>238</sup> Exec. Order No. 13,536, 31 C.F.R. 551 (2010).

This would seem true given that many of the pirate organizations operating in the Puntland region are better funded and better armed than regional authorities.<sup>239</sup> Any amount of lawlessness fuelled by ransoms would also have a detrimental impact on the people dependent on legitimate government aid and protection.<sup>240</sup>

Implying that OFAC will use discretion in carefully choosing which cases to prosecute, Adam Szubin, OFAC's director, (in *Monitor* 2010) has said that they will target "only those individuals and entities that freely choose to support acts of piracy or armed robbery at sea off the coast of Somalia, including through the supply of weapons, financing, communication devices, or small boats and other equipment."<sup>241</sup> This discretion is emphasized in the comments of Jon Waldron, a partner at Blank Rome LLP specializing in maritime law, who states that the government has offered to work proactively with ship owners involved in ransom incidents.<sup>242</sup> He notes that OFAC may even guide a US entity involved in a ransom dispute and advise them on payment of a ransom, while avoiding liability by not involving a US nexus.<sup>243</sup>

Despite this somewhat rosy interpretation of EO 13536, Mr. Waldron (qtd in Joshi 2010) admits "there are no assurances that the US government will agree prior to the payment of ransom that it will not pursue civil or criminal action against those making the payment."<sup>244</sup>

At minimum, the Executive Order will slow the process of paying ransoms, and may serve to prohibit them altogether due to fears of prosecution. Popular sentiment seems to be that the essential purpose of the ambiguous EO is to chill the willingness of the maritime industry to enter the ransom negotiation process.<sup>245</sup> It is also believed that this may prompt some shipping companies to cease operation in the high risk waters off Somalia.<sup>246</sup> If some do cease operations there, the US government and OFAC would likely see it as a positive signal that incidents of piracy in the region are being alleviated.

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<sup>239</sup> U.N. Sec. Council, Monitoring Group on Somalia, *supra* note 199, ¶ 122.

<sup>240</sup> Contact Group on Piracy off the Coast of Somalia, Working Group on Public Diplomacy, *Proposed Communication Strategy*, [http://www.marad.dot.gov/documents/WG4\\_-\\_PD\\_Cairo\\_Paper\\_-\\_Communication\\_Strategy.pdf](http://www.marad.dot.gov/documents/WG4_-_PD_Cairo_Paper_-_Communication_Strategy.pdf) (noting that "[p]iracy threatens vital humanitarian aid shipments to Somalia and The Horn of Africa").

<sup>241</sup> Associated Press, *Are Pirate Ransoms Legal? Confusion Over US Order*, *MONITOR*, Apr. 20, 2010, <http://www.themonitor.com/articles/pirate-37675-ransom-legal.html>.

<sup>242</sup> Rajesh Joshi, *Washington Offers to Work With Owners on Ransoms*, *LLOYD'S LIST*, April, 20, 2010, at 2, available at

<http://www.blankrome.com/siteFiles/News/766B25FBE80AAFDD9C6B52E92F3B5039.pdf>.

<sup>243</sup> *Ib.*

<sup>244</sup> *Ib.*

<sup>245</sup> Keith Wallis, *Obama Ransom Order Raises Fears Over Crew Safety*, *LLOYD'S LIST*, Apr. 27, 2010, <http://www.lloydlist.com/ll/sector/ship-operations/article7567.ece>.

<sup>246</sup> Justin Stares, *Owners to Shun Gulf of Aden Over Ransom Ban*, *LLOYD'S LIST*, Mar. 4, 2010, <http://www.lloydlist.com/ll/sector/regulation/article5124.ece>.

*E. EU—Council Regulation 356/2010: Echoes US Executive Order 13536*

The European Union Council passed Regulation 356/2010 on April 26, 2010, which essentially implements the principles UNSCR 1844<sup>247</sup>, and is similar to US Executive Order 13536.

The regulation imposes specific restrictive measures directed against certain natural or legal persons, entities, or bodies in view of the situation in Somalia.<sup>248</sup> The restrictive measures permit the freezing of assets and prohibit transfer of assets in any form to restricted parties.

According to the EU Council, the purpose of this regulation is to ensure “uniform application by economic operators in all member states”.<sup>249</sup> The restricted entities and individuals are provided in Annex I to the Regulation, and are developed by the UN Security Council pursuant to Resolution 1844.<sup>250</sup> It is also interesting (and distinct from the US Executive Order) that the EU Council leaves it to each of the member states to determine the penalty for infraction, and urges that it be “proportionate, effective, and dissuasive.”<sup>251</sup>

There has been little public outcry against Regulation 356/2010, which may be due to the relatively mild language as compared to US Executive Order 13536. In addition, the international scope of the regulation, coupled with the explicit assigning of penalty determination to the EU member states, is simply not as threatening to the maritime industry. The industry may recognize the enormity of political and bureaucratic difficulties that must be overcome before they would face prosecution for violation.

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<sup>247</sup> Council Regulation 356/2010, ¶ 1, 2010 O.J. (L 105) 1, 1 (EU), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:105:0001:0009:EN:PDF>.

<sup>248</sup> *Ib.* ¶ 2.

<sup>249</sup> *Ib.* ¶ 8, at 2.

<sup>250</sup> *Ib.* art. 2, ¶ 3 at 3.

<sup>251</sup> *Ib.* ¶ 16 at 2.