PAYMENT OF PIRACY RANSOMS

Legal Memorandum

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Treaties, Conventions, Resolutions etc…
It is when the pirates count their booty that they become mere thieves.¹

1. SUMMARY OF CONCLUSIONS
   
   A. Scope

   Piracy, a seemingly modern problem currently gracing the face of the legal world, in reality comes with over two millennia worth of legal baggage. This memorandum seeks to probe into the uncharted legal waters of piracy to provide answers as to whether it is currently possible to prohibit the payment of piracy ransoms under preexisting law and policy.² This will be done in four steps. First, the memorandum will explore the history of piracy, kidnap, ransom and insurance in order to provide context to the issues; second, the memorandum will delve into the current debate on the relationship between piracy and terrorism; third, the memorandum will analyze the existing customary law, treaties, and case law on an international level in order to discern whether any of these preexisting legal mechanisms are capable of prosecuting those involved in the payment of ransoms; fourth, the memorandum will analyze the doctrines, legislation, case law, and other government orders on the domestic level in order to determine whether any of these preexisting domestic legal mechanisms are capable of prosecuting those involved in the payment of ransoms; finally, this memorandum will conclude with suggestions for other avenues for the prosecution of piracy ransoms.

   B. Conclusions
   
   i. Under international law, the payment of ransoms to pirates is legal except in very narrow circumstances.

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¹ William Bolitho, Twelve Against the Gods: The Story of Adventure 8 (Simon and Schuster 1929).

² Prohibition of Paying Piracy Ransoms: Analyze the issue of prohibiting payment of piracy ransoms. Examine the analogous cases of plane hijackings and hostage taking. Can the anti-terrorist financing prohibitions be applied to payment of piracy ransoms?
Under international law there is no explicit ban on the payment of ransom within international law; however, there are several laws which would ban the payment of ransom in narrow circumstances. Particularly, there are international instruments that would ban a very narrow category of ransom payments which, indirectly or directly, were used to fund acts of terrorism. Nevertheless, due to a dearth of evidence proving an operational nexus between pirates and those committing terrorist acts, it would be difficult to prosecute ransoms payments in the majority of cases.

ii. Under certain domestic statutory regimes, ransom payments are illegal; however, the majority of domestic regimes allows for the payment of ransoms.

Within the statutory regimes of individual States, there are currently three approaches to banning ransom payments: virtual prohibition, partial prohibition, and targeted prohibition. Italy, the sole state enforcing a virtual ban on ransom payments, places a temporary freeze on all domestically located assets of all relatives of an Italian hostage. Many states including the UK, the United States, and Germany have enacted a vast number of blanket laws prohibiting the financing of terrorists; however, these laws only apply to piracy ransoms when there is a nexus between the ransom payment and terrorists. Finally, the United States has adopted the first targeted prohibition by banning the transfer of assets to specifically named pirate lords and their associates.

iii. If international law were to adopt the notion that piracy and terrorism are comparable crimes, many of the international and domestic laws could allow for the prosecution of ransom payments; however, such an approach is impracticable.

Currently, and traditionally, piracy and terrorism have been bifurcated into two distinct criminal acts. Nonetheless, if international law were to adopt the notion that piracy and terrorism are comparable acts, then the number of laws and conventions which could be used to effectively
prosecute the payment of ransoms would skyrocket. In particular, any convention or law which bans the financing or transferring of assets to a terrorist organization could be expanded to include the payment of ransom to pirates. This particular strategy could be attempted through a United Nations Security Council Resolution or an international convention or treaty. But, the entire strategy assumes that piracy and terrorism can be reconciled and that such an approach is would ever be in the interest of States.

2. FACTUAL CONTEXT

   A. Brief History of Piracy

   Before partaking in any legal analysis, it is pertinent that anyone who truly wants to understand the ancient crime of piracy have at least a cursory understanding of piracy’s long and thrilling past. All of the piratical eras and events found below were chosen to highlight particular features of piracy that will be useful in understanding and framing many legal issues raised later on in the memorandum. In addition, for those unfamiliar with the basic history of kidnapping, ransoms, and the insurance industry’s involvement in these particular issues, this section of the memorandum offers a very brief explanation, below.

   i. Ancient Piracy

   Piracy and particularly kidnapping for ransom “is a centuries old crime; a crime historically prolific during times of great social and economic transition.” The earliest pirate attack on record dates to 1190 BCE. Even the Greek poet Homer mentions pirates operating in

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4 James W. Carbin, Pirates: Hostis Humanis Generis, 56 FED. LAW. 50, 51 (2009). [Electronic copy provided in accompanying USB flash drive at Source # 60]
the eighth century BCE. The ancient Mediterranean civilizations took to actually patrolling the seas. In particular, Cretan ruler Minos attempted to rid the Aegean waters around his city-state in order to allow revenue to come to him. Records exist from 470 BCE that Pericles policed the Aegean Sea. In response to the threat of two major pirate tribes, the Dolopes of Scyros and the Thracian Chersonese, Pericles reportedly convened a meeting of delegates from around the Greek world to formulate an international strategy to fight the pirates; according to Thucydides, Pericles plan successfully eliminated the piracy problem. However, as ebb and tide of war and destabilization in the Greek world shifted over time, so did the threat of piracy.

In Rome, piracy was also an issue. Marcus Antonius, the grandfather of Mark Antony, was commissioned by the Senate in 102 BCE to stamp out the Cilician pirates. After a decisive naval victory, Rome regained naval dominance; however, the Cilician pirates remained a nuisance. A young Julius Caesar was one of the most notable captives of the Cilicians; some accounts tell of Julius Caesar’s 38 day captivity being filled with the young Julius playing games with the pirates and reciting poetry he had written. Additionally, records indicate that Caesar demanded that his captors increase their original ransom demand to 50 talents of gold because that was the amount Caesar thought he was worth. Eventually, the ransom was paid to the

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5 *Id.* at 51.


7 *Id.*

8 *Id.* at 36.

9 *Id.* at 36-37.

10 *Id.* at 37.
pirates; although, upon Caesar’s release the Cilician pirates were captured, crucified and had their throats slit.\textsuperscript{11} Cicero, inspired by this tale, went on to provide us with the foundation for the namesake of piracy as a crime: \textit{hostis humani generi}.\textsuperscript{12}

\section*{ii. The Middle Ages}

Although many scholars of piracy have mysteriously neglected them, the Vikings of the 8\textsuperscript{th} century were quite possibly the most successful pirates as well as the most brutal pirates; in fact, the term “Viking” translates as “sea warrior.”\textsuperscript{13} The Vikings “attacked indiscriminately, canvassing a much wider area than any pirate in history.”\textsuperscript{14} It was also at this time that piracy began to incorporate terror. The brutality of the Vikings reached such a point that “entire populations were hanged in rows, within sight of their burning homes. Soon, as local resistance crumbled before the invaders.”\textsuperscript{15} According to one historian, “it was for this reason—the deliberate use of terror to achieve private ends—that some have termed the Vikings ‘the first terrorists.’”\textsuperscript{16}

\section*{iii. The Golden Age of Piracy and Beyond}

The 16\textsuperscript{th} century signaled the height of interaction between the Barbary states and Europe. It had become the European model to pay tribute to the Barbary states rather than go to

\begin{footnotesize}
\begin{enumerate}
\item Id. at 38.
\item Id. at 41.
\item Id. at 44.
\item Id.
\item Id. at 45.
\item Id.
\end{enumerate}
\end{footnotesize}
Article 22(9) of Hamburg’s *falliten-ordnung* of 1753 imposed a legal obligation on insolvent ship owners to pay ransoms in order to free their ship’s crew from slavery; moreover, it was around this time that the United Kingdom enacted a law specifically authorizing the practice of paying of ransoms.  

In 1784, Barbary pirates hijacked the *Betsy*, a merchant vessel flying under the flag of a very young United States of America, and brought it to Morocco; subsequently, the United States paid a ransom of US$ 80,000 to release the surviving crew. Over the next two decades the United States faced a surge in attacks led by Barbary pirates, these attacks were followed by a peace treaty with the Bashaw of Barbary, and subsequently a declaration of war by the Bashaw of Barbary in 1801. Nearly the entire time, Thomas Jefferson, the third president of the United States and one of the first major proponents of a no-concessions strategy, moved to cease any and all payments of ransom or tribute to the Barbary pirates and to militarily quash the Barbary states. In a letter from Thomas Jefferson to John Jay of 23 August 1785, Jefferson wrote, “an insult unpunished becomes the parent of many other;” making good on these words, Jefferson

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18 *Id.* at 108.

19 *Id.*

20 *Id.*

21 *Id.* at 108-109.

22 Letter from Thomas Jefferson to John Jay of 23 August 1785, *available at* http://avalon.law.yale.edu/18th_century/let32.asp. [Electronic copy provided in accompanying USB flash drive at Source #52]
waged war against the Barbary pirates.\textsuperscript{23} What was started by Jefferson was finished by his successor as president, James Madison; in one of the first descriptions of the current American policy on ransoms, Madison quipped, “It is settled policy of America, that as peace is better than war, war is better than tribute. The United States, while they wish for war with no nation, will buy peace with none.”\textsuperscript{24}

iv. 21\textsuperscript{st} Century Piracy

With the advent of this century, we have seen the rebirth of piracy once more. As we move farther and farther into this new era of piracy we face many new challenges; however, in reality, these challenges aren’t particularly new and neither are the available solutions. As Dr. Martin N. Murphy, a research fellow in the field of Political Science at Dalhousie University and visiting fellow at the Corbett Centre for Maritime Policy Studies at King’s College, London, as well as a noted expert in the field of piracy and maritime terrorism, aptly stated:

\begin{quote}
The nature and purpose of piracy have not changed. The causal factors remain the same: the largely lawless space of the sea, favourable geography, weak or compliant states that provide sanctuary, corrupt officialdom that can benefit from and protect piracy, economic disruption that opens markets for stolen goods, and the promise of reward from the proceeds extracted either from the sale of rich cargoes or from seafarers and coastal communities too weak or isolated to defend themselves. These are little different from the factors that drove past Chinese, Mediterranean or Atlantic piracy; what occurs today cannot be decoupled from the piracy of the past. It is not a deracinated phenomenon.\textsuperscript{25}

Although piracy’s nature and purpose may not have changed, we are no longer living in the days of the Cilicians or the Vikings or the Barbary pirates. We are no longer living in the
\end{quote}

\begin{flushleft}\textsuperscript{23} Kolb, Salomon, and Udich, \textit{supra} note 17, at 109.\end{flushleft}

\begin{flushleft}\textsuperscript{24} \textit{Id}.\end{flushleft}

\begin{flushleft}\textsuperscript{25} \textsc{Martin N. Murphy, Small Boats, Weak States, Dirty Money: The Challenge of Piracy} 21 (2009). [Electronic copy provided in accompanying USB flash drive at Source # 3]\end{flushleft}
days of hegemonic civilizations, such as the Romans or the Greeks, battling the scourge of the seas. Instead, there is now an unparalleled diversity of actors and nationalities involved in the fight against piracy. The turn of the 21st century marks the dawn of an era of pirates who are truly deserving of the title of *hostes humani generis*.

The first major hotbed for piracy in our modern era erupted in the early 1990s in Southeast Asia. Particularly, pirates focused their attention to the strategic shipping lane located in the Strait of Malacca. Taking the first steps to combat the Malacca pirates, Malaysia, Singapore and Indonesia initiated talks in 2004, and in 2006 eventually signed an agreement, creating a unified naval and air patrol system under the name of MALSINDO. Additionally, in 2006, sixteen governments formed the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (“ReCAAP”). ReCAAP famously established the ReCAAP Information Sharing Centre in Singapore as a means to connect the member country’s piracy intelligence networks and disperse their collective knowledge.

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29 See http://www.recaap.org/index_home.html.
According to one report, Asian countries saw a 26% decrease in attempted and successful pirate hijackings between 2004 and 2008. The report’s authors attribute this drop to the implementation of cooperative arrangements between countries that facilitated the exchange of intelligence, an expansive definition of piracy, and constant reporting of pirate attacks or attempted attacks.

In the last decade, the focus of the world has turned to the pirates operating in the Horn of Africa. This new brand of pirates has also brought new challenges to the table. The pirates of the Horn of Africa are no longer concerned with the traditional armed robbery and theft found in days of yore; rather, they are focused on holding vessels, their contents, and their crew hostage for hefty ransoms.

As for organization, piracy in the Horn of Africa region is generally controlled by secret organizations of pirate lords who control large groups of willing foot soldiers. One such pirate lord is Abshir Abdullahi aka “Boyah.” According to the United States Department of the Treasury’s Office of Foreign Assets Control (“OFAC”):

BOYAH has been described as “a key organizer, recruiter, financier and commander of a maritime militia consisting of approximately 500 operating pirates, with responsibility for hijacking between 25 and 60 shipping vessels since the mid-1990s.”

In an April 2009 article on Somali piracy in the UK’s The Times, “Boyah” calls himself “chairman” of approximately 500 pirates operating as a “loose

30 Paul Apostolis and John Knott, Modern Piracy at Sea: A Global Challenge, 85 SEAVIEW §6, 1 (Spring 2009). [Electronic copy provided in accompanying USB flash drive at Source #65]

31 Id. at 1-2.

confederation” in the Eyl area. BOYAH is described as “a key organizer, recruiter, financier and mission commander” and the article recounts his claim that “all applicants for the position of Pirate (Eyl Division) must come to him.” BOYAH recounted hijackings with which he was involved, including the Japanese chemical tanker Golden Nori, in October 2007, which involved a stand-off with U.S. Navy vessels but eventually yielded a $1.5 million ransom off the coast of Somalia. The BBC News corroborates that the Golden Nori was a Japanese chemical tanker hijacked in late October 2007 that was involved in a stand-off with the U.S. Navy. The reporting states that the pirates demanded a $1 million ransom.\(^{33}\)

In addition, the United States government has identified another notorious pirate lord, Mohamed Abdi Garaad, who was described by OFAC in the following terms:

GARAAD is a principal organizer and financier of pirate activities. GARAAD has acknowledged responsibility for multiple hijackings and attempted hijackings, including the M/V Stella Maris, M/V Maersk Alabama and M/V Liberty Sun. The M/V Maersk Alabama and M/V Liberty Sun were carrying food aid destined for Somalia. The attacks on these vessels represented the obstruction of humanitarian assistance for Somalia.

In an interview in the UK’s *Globe and Mail* newspaper, GARAAD explained that he “exerts direct control over 13 groups of pirates with a total of 800 hijackers…. Each group has a ‘sub- lieutenant’ who reports directly to Garaad, and none of them make a move without his authorization.” The article described GARAAD’s rise from “front-line pirate” to becoming “one of the better known organizers and financiers in Puntland.” The article recounts GARAAD’s discussion of his capture of “about a dozen” fishing ships as well as “an untold number of commercial vessels."\(^{34}\)

Even considering the role that these pirate lords play, some sources have also claimed that some of the pirates operating in the Horn of Africa region have connections to terrorist organizations operating in the region. According to John Steed, the principal military adviser to the U.N. special envoy to Somalia and head of the envoy’s counter-piracy unit, the links between


\(^{34}\) Id. at 3.
the pirate organizations and the *Al-Qaeda* affiliated terrorist group *Al-Shabaab* have been increasingly crystallized.\(^{35}\)

Even with the fearsome pirate lords, ransom demands, and a possible connection to terrorist organizations, piracy in the Horn of Africa constitutes only a small fraction of worldwide piracy. According to one recent study, Somali piracy accounts for only 15 percent of reported piracy and robbery at sea between 2005 and 2010.\(^ {36}\) No matter the scale, it is the effectiveness and net effect of piracy in this region that have garnered it so much attention. According to the International Maritime Organization (“IMO”), more than 100 attacks were reported in 2010, and over 800 individuals were kidnapped and held for ransom.\(^ {37}\) Any way one looks at it, piracy in the Horn of Africa region has become a global threat worthy of a global response.

**B. Kidnapping, Ransom, and Insurance**

Although kidnap and ransom (“K&R”) are crimes predating our current legal systems, the primary protection mechanism for the crime is quite modern. In Hamburg, the *Casse der Stücke von Achten*, a place where seafarers paid money in exchange for an early form of K&R

\(^{35}\) Richard Lough, *Piracy Ransom Cash Ends Up With Somali Militants*, REUTERS, July 6, 2011, http://uk.reuters.com/article/2011/07/06/uk-somalia-piracy-idUKTRE7652AW20110706 (However, Mr. Steed “acknowledged he had no proof of an operational relationship between the pirates and the al-Qaida linked al Shabaab rebels…”). [Electronic copy provided in accompanying USB flash drive at Source #85]

\(^{36}\) One Earth World, ‘Maritime Piracy Around the World’ (Fact Sheet No. 5, Oceans Beyond Piracy Project Report, 2010). [Electronic copy provided in accompanying USB flash drive at Source #89]

insurance, was established in 1622.\textsuperscript{38} Additionally, European churches would collect money for seafarers taken as slaves by the Barbary states.\textsuperscript{39} The first modern K&R insurance policy was issued by the powerhouse insurance market Lloyd’s of London in 1932 shortly after the kidnapping of the Lindbergh’s baby son.\textsuperscript{40} However, K&R policies did not become prominent until a series of bank executives’ wives were kidnapped in the 1960s.\textsuperscript{41} After these kidnappings, the K&R insurance market became Lloyd’s single most important growth area from the mid-1970s until the mid-80s.\textsuperscript{42} As of 2005 80\% of Fortune 500 companies had subscriptions to K&R policies;\textsuperscript{43} all the while, this boom was increasing the coffers of insurance markets by an estimated US$250 million in annual premium payments.\textsuperscript{44} Furthermore, it was estimated at that time that Hiscox, a Lloyd’s of London syndicate, held 60-70\% of these policies.\textsuperscript{45} Currently, the market has expanded to include many other K&R insurance providers.\textsuperscript{46}

\textsuperscript{38} Kolb, Salomon, and Udich, \textit{supra} note 17, at 108.

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} Kenney, \textit{supra} note 3, at 560 (Citing Susan Hansen, \textit{High Net Worth Families, Kidnapping Risk}, 4 TRUSTS \& ESTATES 36 (Apr. 2003)).

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} \textit{Id.} at 560 n.26.

\textsuperscript{45} \textit{Id.}

\textsuperscript{46} \textit{Id.} at 561.
K&R policies come in a plethora of flavors. K&R policy coverage can be purchased for a couple of days, a couple of months, and even up to three years.\(^{47}\) According to one scholar:

A standard K & R policy has five main components, four of which encompass reimbursement of money lost from a kidnapping. These four reimbursement components are as follows: (1) reimbursement of any ransom paid; (2) reimbursement for expenses related to securing the release of a kidnap victim or resolution of extortion threat; (3) reimbursement of expenses relating to securing the release of a detained or hijacked victim; and (4) reimbursement of money lost when being delivered as ransom. The first, non-reimbursement component of a K & R policy is access to security consultants for preventative measures as well as access to individuals experienced in hostage negotiation, risk management and crisis response in the event of an abduction.\(^{48}\)

Beyond these five main components, K&R policy providers are capable of tailoring a policy to the particular needs of their clients. Options can include reimbursements for interpreter fees, lawyers expenses, reward money provided to an informant, personal financial losses of the kidnap victim, and even for cosmetic surgery for injuries sustained by the kidnap victim.\(^{49}\)

Although K&R policies are an added expense to the shipping industry, reports have surfaced that K&R premiums have actually slumped since August 2008.\(^{50}\) As Andrew Moulton, a marine underwriter at Lloyd’s of London arm of American International Group Inc., stated, “traditional carriers have been cutting each other so much to get the premium in that price has

\(^{47}\) ASM HISCOX – FAQ, http://www.hiscoxbroker.co.uk/hiscox-asm/41.html. [Electronic copy provided in accompanying USB flash drive at Source #74]

\(^{48}\) Kenney, supra note 3, at 561-562.

\(^{49}\) Id. at 562.

fallen off the end of a cliff.”

No matter the drop in premiums, it is crucial to keep in mind the profitability of the K&R market and its role in paying ransoms to pirates.

3. ANALYSIS

A. International Prosecution Options

This portion of the memorandum will analyze the existing International law which might serve as a basis for the prosecution of the payment of ransoms. Before delving into the law, anyone considering the prosecution of ransoms paid to pirates must keep in the back of their mind that there are three possible ways in which a law could criminalize the payment of ransoms. The first approach would be to prosecute the paying of ransoms as an act of piracy per se. The second option would be to prosecute ransom payments as an act constituting a non-piracy related crime. The final method of prosecuting ransom payments would be to simply criminalize all ransom payments.

Piracy is generally considered one of the oldest and most widely recognized violations of international law; moreover, among the earliest recognized principles of international law was that each country had a duty to take action against piracy. Under Customary International Law (“CIL”) piracy is recognized as a jus gentium, or natural law, crime. Piracy was also the first, and

51 Id.

52 In addition to providing a map of how a law can prosecute ransom payments, this tripartite approach also is helpful in two other ways. First, this approach can help match a party’s specified goals and policies to the most compatible means. In other words, if the party’s goal is to stop all ransoms, no matter the context, then option three is best because of its blanket approach to suppressing all ransom payments. If the party’s goal is to merely stop the flow of ransom payments related to piracy, then option one is a best. Second, this approach serves as a tool to assist in deciphering whether the scope of an existing law could or does require the prosecution of ransom payments.

53 Carbin, supra note 4, at 51.
debatably the only, crime subject to true universal jurisdiction. 54 Outside of international convention and treaty, piracy was generally defined as “(1) unauthorized acts of violence (2) occurring on the high seas (3) against another vessel (4) with an intent to plunder.”55


The United Nations Convention on the Law of the Sea (“UNCLOS”),56 the primary international convention providing a definition for piracy, took effect in November 1994. As of May 15, 2011, 162 countries have ratified the convention.57 UNCLOS codified the customary international law on piracy.58 UNCLOS creates a “duty to cooperate in the repression of piracy” by requiring all states party to the convention to “cooperate to the fullest extent in the repression


58 Nanda, supra note 54, at 181.
of piracy on the high seas or in any other place outside the jurisdiction of any State.” 59 Under
article 101 of UNCLOS, piracy is defined as:

(a) any illegal acts of violence or detention, or any act of depredation, committed
for private ends by the crew or the passengers of a private ship or a private
aircraft, and directed:
   (i) on the high seas, against another ship or aircraft, or against persons or
property on board such ship or aircraft;
   (ii) against a ship, aircraft, persons or property in a place outside the
jurisdiction of any State;
(b) any act of voluntary participation in the operation of a ship or of an aircraft
with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a)
or (b). 60

Although many criticisms exist regarding the UNCLOS codification of piracy, they are
not particularly relevant to the question of whether existing laws can be used to prosecute the
payment of ransoms and therefore will not be addressed in this memorandum. 61 While UNCLOS
provides the standard definition of piracy in terms of international law, it is crucial to realize that
UNCLOS does not specifically mention ransom payments within its four corners.

Even though ransoms are not specifically mentioned, the payment of ransoms may
become an act facilitating piracy under Article 101(c). Some scholars have suggested that “while
including ransom payments as piracy by way of article 101 (c) UNCLOS was quite surely not
within the intent of the drafters, the mere wording opens up this possibility of interpretation.” 62 It

59 UNCLOS, supra note 56.
60 Id.
61 For a further treatment of UNCLOS art. 101’s treatment of piracy see, e.g., Christopher M.
Douse, Combating Risk on the High Sea: An Analysis of the Effects of Modern Piratical Acts on
the Marine Insurance Industry, 35 Tul. Mar. L.J. 267 (2010-2011) [Electronic copy provided in
accompanying USB flash drive at Source #58].
62 Kolb, Salomon, and Udich, supra note 17, at 121 n. 57.
is clear that ransoms facilitate piracy, but does this overcome the subjective element of intentionality that is required? One could argue that “paying of ransom does not entail a voluntary or intentional facilitation” because those paying only intend to free the vessel, its cargo, and its crew. On the other hand, those paying the ransoms at least know the effect of payment therefore theoretically closing the mens rea gap. Note though that if UNCLOS were utilized to prosecute the payment of ransoms, many ship-owners and K&R insurers would find themselves in a legal zugzwang situation where such parties are left only with the choice of going into costly criminal litigation or going out of business.

In addition to the possibility of using UNCLOS to prosecute those paying ransoms as pirates, the UNCLOS factors into the meta-debate, discussed below, of whether piracy and terrorism can be combined together into what one scholar calls “Piraterrorism.”

ii. United Nations Security Council Resolutions

Currently, no United Nations Security Council resolution speaks directly on the legality of paying ransoms to pirates. The South African delegate present at the July 26, 2010 Security

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63 Id.
64 Id.
65 It has been suggested that one could apply the German criminal law concept of notwendige Teilnahme, or “necessary participation” which “excludes from the crime itself the participation of the victim … that is necessary to commit the specific offence.” Id.
66 Burgess, supra note 6, at 24.
Council meeting suggested a resolution to prohibit paying ransoms; however, this proposal currently appears to lack popular support.

Although not explicitly concerned with ransom payments, Security Council Resolution 1373 is the only Security Council resolution which could theoretically apply. Under Resolution 1373, “the Council decided that all States should prevent and suppress the financing of terrorism, as well as criminalize the willful provision or collection of funds for such acts.” Resolution 1373 necessitates all states to implement these goals in their domestic legislation.

According to at least one scholarly article, ransom payments at least appear to fit the prohibitions of Resolution 1373 because of the evidence showing possible collaboration between Somali pirates and al-Shabaab. However, in order to make this case it must be shown (1) that the pirate acts are terrorist acts under 1737 and (2) that ransom payments fall within the scope of Resolution 1373 as payments intended to facilitate such acts of piracy-terrorism.

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68 Id.


71 Resolution 1373, supra note 69, at 2.

72 Kolb, Salomon, and Udich, supra note 17, at 140.

73 Id. at 140-41.
1373 requires that “the pirates receiving ransom have to commit ‘terrorist acts’ and payment of the ransom has to be financing pursuant to subparagraphs (a)-(d).”

The answer to whether the payment of ransoms qualifies as financing under Resolution 1373 appears to be doubtful. As Andreas S. Kolb, Tim René Salomon, and Julian Udich argue, the language of Resolution 1373, subparagraphs (a), (b), and (d), points toward states being required to criminalize ransom payments to terrorists if the payments further terrorist acts. Moreover, the political context of Resolution 1373 may indicate that there is a duty to prohibit ransom payments in the case that, “the ransoms paid to Somali pirates are passed on to terrorist organizations such as *al-Shabaab*;” However, there has been no actual evidence of a nexus existing between the pirates and terrorists organizations.

iii. **African Union Ban on Paying Terrorist Ransoms**

As a part of its overall efforts in the prevention and combating of terrorism, the African Union (“AU”) passed the Decision to Combat the Payment of Ransom to Terrorist Groups. This particular decision “strongly condemns the payment of ransom to terrorist groups for hostages to be freed” and “requests the international community to consider the payment of ransom to terrorist groups a crime.” More specifically, the AU “requests the Security Council

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74 *Id.* at 141.

75 *Id.* at 146.

76 *Id.* at 150.

77 Decision to Combat the Payment of Ransom to Terrorist Groups, Assembly Decision 256, ASSEMBLY OF THE AFRICAN UNION, 13th Ordinary Session, Assembly/AU/Dec.256(XIII). [Electronic copy provided in accompanying USB flash drive at Source #97]

78 *Id.* at ¶ 8.
to adopt a restrictive resolution against the payment of ransom in order to consolidate legal provisions put in place.”

Although this signals a unified policy preference of the AU’s members in favor of prosecuting the payment of ransom, the decision focuses quite intensely on the traditional conception of terrorists instead of pirates.

B. Domestic Options and Strategies to Prosecute

i. United States of America

1. No-Concession Policy

The U.S. Government will make no concessions to individuals or groups holding official or private U.S. citizens hostage…. [I]t is U.S. Government policy to deny hostage takers the benefits of ransom, prisoner releases, policy changes, or other acts of concession.

The United States has famously taken the stance of making absolutely no concessions with those who demand ransoms. The United States State Department justifies this policy on the common sense grounds that the payment of ransoms makes the act of demanding ransom more likely to occur in the future. However, in practice this policy comes with so many exceptions and limitations that it takes on the appearance of Swiss cheese. For example, the policy prohibits making actual concessions to ransoms demands; however, it does not prohibit the mere

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79 Id. at ¶ 9.


81 Meadow Clendenin, “No Concessions” with No Teeth: How Kidnap and Ransom Insurers and Insureds are Undermining U.S. Counterterrorism Policy, 56 EMORY L.J. 741, 762 (2007). [Electronic copy provided in accompanying USB flash drive at Source #64]
negotiation with the captor.\textsuperscript{82} One of the more surprising exceptions to the policy is that the policy is binding solely on the United States government. Any private citizen or company may negotiate and pay ransoms as they please.\textsuperscript{83} Even though the policy only applies to the United States government, the government “strongly urges American companies and private citizens not to accede to hostage-taker demands”\textsuperscript{84} and that as a matter of additional policy:

U.S. private organizations…must understand that if they wish to follow a hostage resolution path different from that of U.S. government policy, they do so without U.S. government approval. In the even a hostage-taking incident is resolved through concessions, U.S. policy remains steadfastly to pursue investigation leading to the apprehension and prosecution of hostage takers who victimize U.S. citizens.\textsuperscript{85}

Besides the presence of \textit{lacunae} in the policy itself, there have even been particular times when the United States government’s adherence to the policy was less than compliant. On November 4, 1979, 500 students seized the American Embassy and captured 66 hostages as a reaction to the United States government’s decision to allow the exiled Shah Reza Pahlavi to receive medical treatment in the United States.\textsuperscript{86} In reaction to this the United States immediately

\textsuperscript{82} \textit{Id.}

\textsuperscript{83} \textit{Id.}


imposed a host of sanctions against Iran including, but certainly not limited to: the severing of diplomatic ties with Iran, the freezing of all Iranian assets in the United States, and settling all financial claims the US had against Iran with those frozen Iranian assets.\textsuperscript{87}

Unfortunately, much to the dismay of the United States President at that time, Jimmy Carter, these strong-handed sanctions proved unsuccessful and their immediate repeal was added to an already large list of demands made by the Iranian captors.\textsuperscript{88} With the United States government under pressure from its citizens, and Iran’s scarcity of resources in the face of an invasion by Iraq, landed the United States and Iranian leadership at the negotiation table with Algeria mediating the talks.\textsuperscript{89} Exactly 444 days from their capture, the remaining hostages were freed in in exchange for the United States making such concessions as: (1) the US adopting a non-intervention policy regarding Iranian internal affairs; (2) The US would return all frozen Iranian assets and remove all trade sanctions against Iran; (3) the US would refer all claims against Iranian assets to a claims tribunal; (4) the US would ensure the assets of the former Shah would be returned to Iran.\textsuperscript{90}

\textsuperscript{87} \textit{Id.} at 22.

\textsuperscript{88} \textit{Id.} at 22-23.

\textsuperscript{89} \textit{Id.} at 23.

Since the Iran hostage crises, the United States government has violated its allegedly strict no-concessions policy on numerous other occasions including the Lebanon hostage crises that took place between 1982 and 1992; American and British Negotiations with the IRA; and many other situations. As Maj. William R. Farrell, Ret., former professor at the U.S. Naval War College, noted, “Reality demands, and actual government action has shown, that the real policy of the U.S. is that it will make no concessions to terrorists which are believed to be inimicable to the fundamental interests and values of the American people.”

It is clear that with the inconsistency and questionable power of the no-concessions policy other sources of American law and policy may be better suited to address the issue of ransom. The remainder of section shall focus on existing law and policy to determine whether there is an option to prosecute the payment of ransoms within the jurisdiction of the United States.

2. The Patriot Act and Material Support of Terrorism

In the aftermath of the terrorist attacks of September 11, the United States Congress was prompted to take legislative action in the form of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (“Patriot Act”).


An important legislative result of the Patriot Act, 18 U.S.C. § 2332b, was the designation of a large number of already existing crimes as acts of terrorism. In 2005, the US Congress extended the life of the Patriot Act; in doing so, the Patriot Act clarified the scope of these newly defined acts of terrorism and bestowed upon them the title of “federal crime[s] of terrorism.” In order for one of the specifically designated crimes to rise to the level of “federal crime of terrorism,” the criminal act must be done in a manner “involving conduct transcending national boundaries” and is “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct.”


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100 See 18 U.S.C. § 2332b(g)(5)(B).
For the remainder of this section, the memorandum will briefly walk through each of the first four of the five crimes listed in the above paragraph, to establish that these crimes do occur during pirate hijackings. This section will conclude by showing that under the fifth crime, 18 U.S.C. § 2339A, persons paying pirate ransoms to anyone committing any of the four “federal crime[s] of terrorism” may be subject to prosecution by the United States for providing material support to terrorists.

It is worth noting that the proposition that terrorism is a crime of politics, while piracy is a crime of personal gain, has been argued.\(^\text{101}\) However, according to at least one scholar, this bifurcation is irrelevant under the Patriot Act because, “several of the piratical acts themselves may be defined as acts of terrorism.”\(^\text{102}\) Additionally, another scholar took this view even further by asserting that participating in a “federal crime of terrorism” is in violation to the U.S. Counterterrorism policy.\(^\text{103}\) Although this debate is unresolved, for the sake of argument it will be assumed for the remainder of this section that the “calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct” requirement of this law can be met in a case of piracy.

**Conspiracy to Kill, Kidnap, Maim, or injure Persons or Damage Property in a Foreign Country** - In early 2011, four US citizens aboard a yacht in the Indian Ocean had their


\(^{103}\) Clendenin, *supra* note 81, at 762.
vessel hijacked by Somali pirates.\textsuperscript{104} The US naval forces, in an attempt to rescue the four
Americans held hostage by the pirates, arrived only to find that all four had been shot dead by
the pirates. Although this was the first time US citizens had been killed in pirate attacks, it
certainly was not the first time someone has fallen victim to the violence of the pirates.\textsuperscript{105} 18
U.S.C. § 956 (“Conspiracy Statute”) reads as follows:

\begin{quote}
Whoever, within the jurisdiction of the United States, conspires with one or more
other persons, regardless of where such other person or persons are located, to
commit at any place outside the United States an act that would constitute the
offense of murder, kidnapping, or maiming if committed in the special maritime
and territorial jurisdiction of the United States shall, if any of the conspirators
commits an act within the jurisdiction of the United States to effect any object of
the conspiracy, be punished as provided in subsection (a)(2).\textsuperscript{106}
\end{quote}

The language of the Conspiracy Act is clear that the aforementioned crimes of murder,
kidnapping, and maiming are treated as though they were committed within the jurisdiction of
the United States if a single member of the conspiracy were within the jurisdiction of the United
States and commits one of the listed crimes abroad. Additionally, those acts must be deemed
criminal within the “special maritime and territorial jurisdiction of the United States” (“SMTJ”).
SMTJ constitutes a very specific, although expansive, set of temporal-spatial jurisdictions. For
the purposes of piracy the most pertinent portion of the SMTJ includes:

\begin{quote}
(1) The high seas, any other waters within the admiralty and maritime jurisdiction
of the United States and out of the jurisdiction of any particular State, and any
\end{quote}

\textsuperscript{104} Ewen MacAskill, \textit{Somali Pirates Kill Four Americans}, \textit{THE GUARDIAN}, Feb. 22, 2011
[Electronic copy provided in accompanying USB flash drive at Source #81]

\textsuperscript{105} See David Osler, \textit{Somali Pirates Kill Tanker Master}, \textit{LLOYD’S LIST}, Oct. 06, 2010 available
at http://www.lloydslist.com/ll/sector/ship-operations/article346561.ece. [Electronic copy
provided in accompanying USB flash drive at Source #80]

vessel belonging in whole or in part to the United States or any citizen thereof, or
to any corporation created by or under the laws of the United States, or of any
State, Territory, District, or possession thereof, when such vessel is within the
admiralty and maritime jurisdiction of the United States and out of the jurisdiction
of any particular State.

…

(7) any place outside the jurisdiction of any nation with respect to an offense by
or against a national of the United States.

(8) to the extent permitted by international law, any foreign vessel during a
voyage having a scheduled departure from or arrival in the United States with
respect to an offense committed by or against a national of the United States. 107

Additionally, it is worth noting that the crimes of murder, kidnapping and maiming are all
considered to be crimes any time they are committed within the SMTJ; therefore, in reality, the
Conspiracy Act merely requires that the crimes occur as they are defined under their respective
code sections.

One scholar, relying on the United States Supreme Court, highlights that because pirates
are hostes humanii generis the United States has universal jurisdiction over pirates. 108

Furthermore, this scholar, relying on reports of the International Maritime Bureau (“IMB”)
indicating that pirates have kidnapped and even killed their hostages, argues that these acts of
murder and kidnapping by the pirates will be subject to the universal jurisdiction the United
States has over pirates. 109 Finally, this scholar concludes that if any of the crimes listed within
the Conspiracy Act are committed by pirates, these acts would be considered “federal crime[s] of


108 Lennox-Gentle, supra note 102, at 212 (Citing United States v. Smith, 18 US 153, 156 (1820)
[Electronic copy provided in accompanying USB flash drive at Source #15]).

109 Id. (Citing Int'l Chamber of Commerce, Int'l Maritime Bureau [IMB], Piracy and Armed
Robbery Against Ships: Annual Report 12 (2009) [Electronic copy provided in accompanying
USB flash drive at Source #55]).
terror” under 18 U.S.C. 2332b. However, this all turns on whether or not the individuals meet the definition of pirate that the United States Supreme Court envisions as *hostes humani generis*.

**Hostage Taking** - It is impossible to deny that the piracy endemic to the Horn of Africa is founded on the concept of hostage taking. 18 U.S.C. § 1203 (“Hostage Taking Act”) became effective on January 6, 1985 as part of the Act for the Prevention and Punishment of the Crime of Hostage-Taking. Additionally, the Hostage Act was passed in response to the United States becoming a party to the International Convention Against the Taking of Hostages. The relevant language of the statute reads as follows:

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

The Hostage Act only applies to three particular cases: (1) the offender or the person seized or detained is a national of the United States; (2) the offender is found in the United States; or (3) the governmental organization compelled is the Government of the United States. As one scholar has pointed out, this seemingly narrow jurisdiction is expanded when hostages are taken in a maritime setting:

[I]f a U.S. ship and its crew is held hostage by pirates who are aboard the U.S. vessel, according to maritime law and convention, they would be found within the

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110 *Id.*


jurisdiction of the United States. This scenario, and proper use of the [Hostage Act], would not require the ship’s crew to be U.S. nationals, because the offenders (the pirates) are found in U.S. territory (aboard the ship). Conversely, if pirates hijacked another country’s vessel, but took a U.S. national as hostage, they too would fall under a successful application of this law. In any of these instances, the United States would find the acts of piracy to commensurate with a federal act of terrorism.\textsuperscript{113}

Under the jurisprudence of United States Federal Courts, the demand of ransom has been consistently seen as proof of the perpetrator compelling a third party or the United States Government to do or abstain from doing something.\textsuperscript{114} Additionally, it should be noted that demand for ransom payment as a condition of hostage release is sufficient to support a conviction even if the ransom demand was for the payment of a pre-existing debt.\textsuperscript{115} This line of logic could, theoretically, be applied to those pirates who claim that they are taking ransoms as retribution for the alleged acts of overfishing and polluting by foreign countries and their citizens.

The federal courts of the United States have also held that for the Hostage Act to apply there must be some “international element,” a nexus between the United States and a foreign country or nexus between the perpetrators and the United States government.\textsuperscript{116} Again, Lennox-

\textsuperscript{113} Lennox-Gentle, \textit{supra} note 102, at 213 (2010).

\textsuperscript{114} U.S. v. Rodriguez, 286 Fed. Appx. 760 (2d Cir. 2008). [Electronic copy provided in accompanying USB flash drive at Source #14]

\textsuperscript{115} U.S. v. Lin, 101 F.3d 760 (D.C. Cir. 1996). [Electronic copy provided in accompanying USB flash drive at Source #13]

Gentle argues that piratical acts violating the Hostage Taking Act are commensurate with “Federal crimes of terrorism” under 18 U.S.C. § 2332b.\textsuperscript{117}

Finally, it is worth noting that the United States Department of State has taken the position that “[a]ctions by private persons or entities that have the effect of aiding or abetting the hostage taking, concealing knowledge of it from the authorities, or obstructing its investigation may themselves be in violation of U.S. law.”\textsuperscript{118} The State Department’s position could very well be used to justify including aiding or abetting any step of the ransom payment process, as a “federal crime of terrorism.”

**Violence Against Maritime Navigation** - In addition to hostage taking and conspiring to kill, the Patriot Act also includes many types of violent crime in maritime settings as “federal crime[s] of terrorism.” The specific violent crimes are found in 18 U.S.C. § 2280 (“Violence Against Maritime Navigation Act”) as listed below:

(1) In general. A person who unlawfully and intentionally--
(A) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation;
(B) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship;
(C) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship;
(D) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship;

\textsuperscript{117} Lennox-Gentle, *supra* note 102, at 213.

(E) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if such act is likely to endanger the safe navigation of a ship;
(F) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safe navigation of a ship;
(G) injures or kills any person in connection with the commission or the attempted commission of any of the offenses set forth in subparagraphs (A) through (F); or
(H) attempts or conspires to do any act prohibited under subparagraphs (A) through (G).119

The Violence Against Maritime Navigation Act is plainly drafted with the safe navigation of ships in mind.120 Because every instance of piracy at sea endangers a vessel’s ability to navigate safely, the hijacking of a ship could qualify as a “federal crime of terrorism.”121 Lennox-Gentle particularly points to situations in which pirates hijack ships which contain hazardous cargo such as chemicals or weapons where protection of that ships ability to safely navigate to its destination is paramount to prevent disaster.122 Therefore, because of the threat piracy has against the safe navigation of vessels the act of hijacking a ship would qualify as a “federal crime of terrorism” under 18 U.S.C. 2332b.123

Torture - In an exclusive interview with both the master and the captain of the shipping vessel Renuar, Lloyd’s List reported that the pirates had treated the crew of the Renuar with an

120 Lennox-Gentle, supra note 102, at 214.
121 Id.
122 Id.
123 Id.
unprecedented amount of aggression and cruelty. According to the interview, “the crew was corralled on to the ship’s bridge, beaten and told to sail towards the Somali coastline.”

According to the captain, “when [the pirates] got fed up with the company over the long ransom negotiations they said they would kill [the crew]…They were aggressive and there was no indication they were joking.” 18 U.S.C. § 2332b also allows for the crime of torture to rise to the level of a “federal crime of terrorism” under 18 U.S.C. § 2340A (“Torture Act”). The Torture Act provides:

(a) Offense. Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.

(c) Conspiracy. A person who conspires to commit an offense under this section shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense, the commission of which was the object of the conspiracy.

Additionally, 18 U.S.C. § 2340 provides the following definitions:

(1) “torture” means an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other

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125 Id.

126 Id.


than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control;

(2) “severe mental pain or suffering” means the prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another person will imminently be subject to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the sense or personality;

Although the facts available are limited, the acts committed by the Somali pirates holding the Renaur’s crew hostage do appear as though they are acts of torture. However, the biggest hurdle for the application of the Torture Act is that the pirates committing these acts must be “acting under the color of law.” Currently, no jurisprudence or scholarly work exists on the point of whether pirates can act under the color of law. It would seem that common sense dictates the argument that pirates cannot act under color of law because pirates are innately lawless.

Furthermore, it could be argued as well that pirates who act under the color of law aren’t really pirates; instead, these individuals would be more like privateers empowered by letters of marque. On the other hand, it could be argued that this complete lack of respect for the law is the piratical version of color of law.

**Providing Material Support to Terrorists** - 18 U.S.C. § 2339A (“Material Support Act”) is concerned with those who provide material support to terrorists, the types of crimes that constitute terrorism, and the extent of the punishments. The relevant portion of the Material Support Act provides as follows:
(a) Offense. Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section...956,...1203,...2280,..., or any offense listed in section 2332b (g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.129

The Material Support Act supports the prosecution of any person who provides material support to acts of terrorism including 18 U.S.C. §§ 956, 1203, 2280, and 2340A, discussed above. The Material Support Act defines material support as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities.”130 In the case of piracy ransoms, pirates have traditionally demanded that the ransoms be paid in US currency.131 Therefore, it is possible to prosecute any person, especially K&R insurance providers, who pay ransom demands to pirates when the payor knows that the pirates will use the money to commit further “federal crime[s] of terrorism.”

Assuming that the United States government had decided to use the Material Support Act to prosecute those individuals or insurance companies who paid ransoms to pirates, the act would have two effects. First, the act would be “a deterrent to those who may otherwise pay pirate

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ransoms.”\textsuperscript{132} Second, the act would essentially outlaw the purchase of K&R insurance policies by those having the proper nexus with the jurisdiction of the United States.

3. \textbf{Foreign Corrupt Practices Act}

The Foreign Corrupt Practices Act (“FCPA”) criminal provisions are defined within 15 U.S.C. § 78dd-1 to -3. The FCPA’s primary concern is to, “prevent U.S. entities and public companies trading on the U.S. markets from engaging in acts intended to influence the acts or decisions of foreign officials, political parties, or government entities.”\textsuperscript{133} The primary hurdle of the FCPA is that it must be proven that any money paid was paid to a political entity or person who can be expected to “affect or influence any act or decision of such government or instrumentality, in order to assist such issuer in obtaining or retaining business for or with, or directing business to, any person.”\textsuperscript{134}

There is some evidence of ransom money reaching government officials in Somalia;\textsuperscript{135} nevertheless, the ransom payments are paid to pirates for the purpose of freeing vessels and their crews rather than influencing those officials. At least one scholar has posited that, “the fact is that the rule of law in Somalia, to the extent there is any, is not impacted by ransom

\textsuperscript{132} Lennox-Gentle, \textit{supra} note 102, at 215.

\textsuperscript{133} Lawrence Rutkowski, Bruce G. Paulson, and Jonathan D. Stoian, \textit{Mugged Twice?: Payment of Ransom on the High Seas}, 59 Am. U. L. Rev. 1425, 1433 (2009-2010). [Electronic copy provided in accompanying USB flash drive at Source #63]

\textsuperscript{134} 15 U.S.C. § 78dd-1(a)(1)(B). [Electronic copy provided in accompanying USB flash drive at Source #23]

payments."\(^{136}\) If it is the case that ransom payments do not go towards influencing Somali officials, then the payment of ransoms to pirates would not, under the circumstances, violate the the FCPA.

4. **Bank Secrecy Act of 1970**

The Bank Secrecy Act of 1970 ("BSA") imposes special requirements to report certain categories of financial transfers on individuals, banks, and financial institutions operating in the United States. The BSA by no means outlaws the payment of ransoms to pirates; however, it could be used as an additional tool to enforce other bans against the payment of ransoms. Because the BSA lacks a direct effect on the payment on ransoms, this memorandum will only briefly touch on the BSA as an additional tool. For our purposes the most relevant requirements imposed by the BSA are found in 31 U.S.C. § 5316. 31 U.S.C. §5316 requires that any "person or an agent or bailee of the person...[who knowingly transfers] monetary instruments of more than $10,000 at one time from a place in the United States to or through a place outside the United States"\(^{137}\) The BSA’s regulations are important tools in reducing the number of unreported ransom payments as well as stopping those unreported ransom payments that were made in contravention to US law.\(^{138}\)


\(^{138}\) For a more comprehensive treatment of the BSA see Rutkowski, Paulson, and Stoian, *supra* note 133, at 1443-1446.
As a brief aside before looking into the most recent legal development in the United States regarding ransom payments, it is worth mentioning one of the more recent United States Supreme Court cases addressing ransom payments. In the *Peters* case, the Supreme Court famously declared that ransoms are a “necessary means of deliverance from a peril.”\(^ {139}\) In terms of the Patriot Act and its provisions discussed above, the *Peters* language seems out of line with the current statutes, especially with regards to terrorism whether it be a traditional terrorist group such as Al-Qaeda or one accepts the argument that piracy is terrorism. Additionally, the *Peters* case will appear out of sync with the current policy of the executive branch in light of Executive Order 13,536, discussed, below.

### 6. Executive Order 13,536

On April 12, 2010, Barack Obama, the President of the United States of America, issued Executive Order 13,536 titled “Blocking Property of Certain Persons Contributing to the Conflict in Somalia”.\(^ {140}\) According to the Office of Foreign Assets Control (“OFAC”), EO 13,536 should be seen as:

> [D]eclaring a national emergency to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States posed by the deterioration of the security situation and the persistence of violence in Somali, acts of piracy and armed robbery at sea off the coast of Somalia, and violations of the Somalia arms embargo imposed by the United Nations Security Council.\(^ {141}\)


\(^ {141}\) *EO 13,536*, *supra* note 140, Pmbl.
On May 5, 2010, OFAC issued abbreviated regulations to carry out EO 13,536; subsequently, these regulations were codified in the United States Code of Federal Regulations.\textsuperscript{142}

Executive Orders and the question of inherent presidential powers is a very old and very lengthy discourse reaching back as far as commentators such as Alexander Hamilton\textsuperscript{143} and James Madison\textsuperscript{144}; however, for those not familiar with the legal status of an Executive Order, it is pertinent to spend a moment briefly reflecting on the weight of Executive Orders. According to the second edition of the legal encyclopedia American Jurisprudence, “in the exercise of the executive power under the Constitution, the President may make various proclamations and executive orders.”\textsuperscript{145} These Executive Orders are “public acts that all courts of the United States must recognize.”\textsuperscript{146} The authority on which the President relies upon when issuing an Executive Order is premised on whether or not the President has been authorized to act in a particular issue. In this particular case, President Obama asserts that his authority to issue EO 13,536 is found

\textsuperscript{142} See 75 Fed. Reg. 24,394 (May 5, 2010) [Electronic copy provided in accompanying USB flash drive at Source #19]; SOMALIA SANCTIONS REGULATIONS, 31 CFR §551 (2011) [Electronic copy provided in accompanying USB flash drive at Source #16].

\textsuperscript{143} See Alexander Hamilton, First Letter of Pacificus (June 29, 1793) available at http://www.humanitiesweb.org/human.php?s=h&p=c&a=p&ID=27786. [Electronic copy provided in accompanying USB flash drive at Source #50]


\textsuperscript{145} 77 Am Jur 2d United States §22 (citing Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S. Ct. 241, 79 L. Ed. 446 (1935) [Electronic copy provided in accompanying USB flash drive at Source #7]). [Electronic copy provided in accompanying USB flash drive at Source #90]

\textsuperscript{146} Id. (citing The Three Friends, 166 U.S. 1, 17 S. Ct. 495, 41 L. Ed. 897 (1897) [Electronic copy provided in accompanying USB flash drive at Source #12]).
within the following sources: (1) The Constitution of the United States,\textsuperscript{147} (2) The International Emergency Economics Powers Act ("IEEA"),\textsuperscript{148} (3) the National Emergencies Act ("NEA"),\textsuperscript{149} (4) the United Nations Participation Act ("UNPA"),\textsuperscript{150} and (5) the general authorization of the president to delegate functions and to publish these delegations.\textsuperscript{151} For the purposes of this memorandum EO 13,536 should be assumed to be binding authority.\textsuperscript{152}

To grasp the extent of EO 13,536’s prohibitions four particular issues must be addressed; specifically: (1) What type of activity is prohibited, (2) Do ransom payments fall within the type of activity prohibited by EO 13,536, (3) if the payment of ransom is a prohibited activity under EO 13,536, who is prohibited from receiving ransom payments, and (4) who exactly is prohibited from paying ransoms?

According to 31 CFR § 551.201, “all transactions prohibited pursuant to Executive Order 13536 are also prohibited pursuant to this part.”\textsuperscript{153} EO 13,536 prohibits, “any transaction by a

\begin{itemize}
\item \textsuperscript{147} U.S. CONST. (U.S. 1776). [Electronic copy provided in accompanying USB flash drive at Source #34]
\item \textsuperscript{148} 50 U.S.C. § 1701 et seq. (2011). [Electronic copy provided in accompanying USB flash drive at Source #33]
\item \textsuperscript{149} 50 U.S.C. § 1601 et seq. (2011). [Electronic copy provided in accompanying USB flash drive at Source #32]
\item \textsuperscript{150} 22 U.S.C. § 287c et seq. (2011). [Electronic copy provided in accompanying USB flash drive at Source #30]
\item \textsuperscript{151} 3 U.S.C. § 301 et seq. (2011). [Electronic copy provided in accompanying USB flash drive at Source #22]
\item \textsuperscript{152} SOMALIA SANCTIONS REGULATIONS, 31 CFR § 551 (2011). [Electronic copy provided in accompanying USB flash drive at Source #16]
\item \textsuperscript{153} SOMALIA SANCTIONS REGULATIONS, 31 CFR § 551.201 (2011). [Electronic copy provided in accompanying USB flash drive at Source #16]
\end{itemize}
United States person or within the United States that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this order….”\(^{154}\) Specifically, this prohibition prohibits “the making of any contribution or provision of funds, goods, or services by, to, or for the benefit of any person whose property and interests in property are blocked pursuant to this order” and “the receipt of any contribution or provision of funds, goods, or services from any such person.”\(^{155}\) Additionally, EO 13,536 prohibits “Any conspiracy formed to violate any of the prohibitions….”\(^{156}\)

Whether ransom is specifically covered by EO 13,536 is a somewhat contentious issue especially because the word ransom is never explicitly mentioned. EO 13,536 makes it clear that the prohibitions are intended to apply to acts of piracy and armed robbery at sea off the coast of Somalia.\(^{157}\) When broken down into its most essential parts, a ransom payment is merely a provision of funds between the ship-owner and the pirates. Therefore, it is reasonable to assume President Obama considered at least some ransom payments as a violation of EO 13,536. Moreover, it is worth noting that some law firms and insurance brokers have strongly

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\(^{154}\) *EO 13,536, supra* note 140, at § 2(a) (*Id.* § 3(a) defines “person” as “[…]an individual or entity;” *Id.* § 3(b) defines “entity” as “[…]a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization,” and; *Id.* § 3(c) defines “United States person” as, “[…]any United States Citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States”).

\(^{155}\) *Id.* § 1(d)(i)-(ii).

\(^{156}\) *Id.* § 2(b).

\(^{157}\) *Id.* § 1(b) (“I hereby determine that, among other threats to the peace, security, or stability of Somalia, acts of piracy or armed robbery at sea off the coast of Somalia threaten the peace, security, or stability of Somalia.”).
encouraged their clients to inquire with OFAC as to whether their ransom payment is in violation of EO 13,536.\footnote{\textmd{See JARDINE LLOYD THOMPSON SPECIALTY LIMITED, ENERGY & MARINE, EXECUTIVE ORDER 13536 (Jan. 2011) [Electronic copy provided in accompanying USB flash drive at Source #75]; WINSTON & STRAWN LLP, MARITIME & ADMIRALTY PRACTICE, GUIDANCE REGARDING THE APPLICATION OF THE NEW U.S. EXECUTIVE ORDER ON SOMALIA TO PIRATE RANSOM PAYMENTS (Apr. 2010). [Electronic copy provided in accompanying USB flash drive at Source #76]}}

Although ransom payments in general may or may not fall within the prohibitions of EO 13,536, the more pertinent question is who is “blocked” from receiving property or interests in property. According to EO 13,536, the following persons are “blocked” from being the recipient of any transfer of assets from a person under the jurisdiction of EO 13,536:

(i) the persons listed in the Annex to this order; and
(ii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:
   (A) to have engaged in acts that directly or indirectly threaten the peace, security, or stability of Somalia, including but not limited to:
      (1) acts that threaten the Djibouti Agreement of August 18, 2008, or the political process; or
      (2) acts that threaten the Transitional Federal Institutions, the African Union Mission in Somalia (AMISOM), or other international peacekeeping operations related to Somalia;
   (B) to have obstructed the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia;
   (C) to have directly or indirectly supplied, sold, or transferred to Somalia, or to have been the recipient in the territory of Somalia of, arms or any related materiel, or any technical advice, training, or assistance, including financing and financial assistance, related to military activities;
   (D) to have materially assisted, sponsored, or provided financial, material, logistical, or technical support for, or goods or services in support of, the activities described in subsections (a)(ii)(A), (a)(ii)(B), or (a)(ii)(C) of this section or any person whose property and interests in property are blocked pursuant to this order; or
   (E) to be owned or controlled by, or to have acted or purported to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to this order.\footnote{\textmd{EO 13,536, supra note 140, at § 1(a)(i)-(ii).}}
According to Note 1 to 31 CFR § 551.201 (2011):

The names of persons listed in or designated pursuant to Executive Order 13536, whose property and interests in property therefore are blocked pursuant to this section, are published in the Federal Register and incorporated into the Office of Foreign Assets Control's Specially Designated Nationals and Blocked Persons List ("SDN List") with the identifier "[SOMALIA]."\(^\text{160}\)

As of the date of this memorandum, there are 11 individuals and one entity on the SDN List with the identifier of "[SOMALIA]."\(^\text{161}\) As previously noted above, two of these individuals, Abshir Abdullahi aka “Boyah” and Mohamed Abdi Garaad, are well documented leaders in the pirate organizations.

Additionally, the scope of EO 13,536 is extended beyond just the named persons. As noted by Bruce G. Paulsen and Ellen Lafferty, litigation experts with the New York law firm Seward & Kissel LLP:

\[E\]ntities related to Blocked Persons may also be considered blocked even if those entities are not listed on the Annex or the SDN List and have not otherwise been identified in connection with the Order. An entity in which a Blocked Person owns a fifty percent or greater interest, whether directly or indirectly, will be considered by OFAC to be a Blocked Person. Moreover, a party must still use caution if a potential transaction concerns an entity in which a Blocked Person has

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\(^{160}\) 31 CFR § 551.201, n.1, (2011) (SDN List is available at http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx) [Electronic copy provided in accompanying USB flash drive at Source #49]; see OFFICE OF FOREIGN ASSETS CONTROL, DEP’T OF THE TREASURY, SOMALIA, WHAT YOU NEED TO KNOW ABOUT SANCTIONS AGAINST PERSONS CONTRIBUTING TO THE CONFLICT IN SOMALIA (Sept. 30, 2010), available at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/Somalia.pdf [Electronic copy provided in accompanying USB flash drive at Source #45]. [Electronic copy provided in accompanying USB flash drive at Source #16]

\(^{161}\) See OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, SOMALIA SANCTIONS: INFORMATION ON PERSONS LISTED IN THE ANNEX TO E.O. 13536 OF APRIL 12, 2010 (Sept. 22, 2010). [Electronic copy provided in accompanying USB flash drive at Source #46]
a less than fifty percent interest or exerts any control. Any interest by a Blocked Person is a red flag that the entity may later be subject to designation. 162

The final question that must be considered regarding EO 13,536 is who can be prosecuted. EO 13,536 allows for the prosecution of anyone so long as the transfer of property or an interest in property has a nexus to a “United States person” (“US Person”). EO 13,536 defines US Person as, “any United States Citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.” 163 However, Paulsen and Lafferty have noted that in their own practice of the law those who are not US Persons could also be subject to EO 13,536. 164 According to Paulsen and Lafferty:

The government has informally taken the position that the Order is applicable, and that there is potential exposure, wherever there is a U.S. nexus with a ransom payment or a U.S. connection anywhere in the continuum of transactions that occur in connection with a ransom payment. This is a much broader applicability

162 Bruce G. Paulsen and Ellen Lafferty, Hijacked: The Unlikely Interface Between Somali Piracy and the U.S. Regulatory Regime, 85 TUL. L. REV. 1241, 1247-1248 (2010-2011) (citing 31 CFR. § 551.406 (“A person whose property and interests in property are blocked pursuant to § 551.201 has an interest in all property and interests in property of an entity in which it owns, directly or indirectly, a 50 percent or greater interest. The property and interests in property of such an entity, therefore are blocked, and such an entity is a person whose property and interests in property are blocked pursuant to § 551.201, regardless of whether the entity itself is listed in the Annex or designated pursuant to Executive Order 13,536.”)); id. § 551.304 (“[T]he term interest, when used with respect to property (e.g., ‘an interest in property’), means an interest of any nature whatsoever, direct or indirect.”) [Electronic copy provided in accompanying USB flash drive at Source #57]; OFFICE OF FOREIGN ASSETS CONTROL, DEP’T OF THE TREASURY, GUIDANCE ON ENTITIES OWNED BY PERSONS WHOSE PROPERTY AND INTERESTS IN PROPERTY ARE BLOCKED (2008) available at http://www.treasury.gov/resource-center/sanctions/Documents/licensing_guidance.pdf. [Electronic copy provided in accompanying USB flash drive at Source #47]

163 EO 13,536, supra note 140; (13,536 goes on to further clarify that “person” is defined as “[…]an individual or entity[…]”and that an “entity” is defined as “[…] a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization[…].”

164 Paulsen and Lafferty, supra note 162, at 1250.
than was suggested in the Order and in the Regulations by the definition of "U.S. person." The requisite U.S. nexus is present in almost every ransom-related transaction. This can occur, for example, where the vessel owner has U.S. insurers, reinsurers, or perhaps merely where the ransom payment involves a currency conversion into U.S. dollars (and therefore currency passes through U.S. money center banks). Either way, it is safe to assume that at a minimum EO 13,536.\(^\text{165}\)

On a brief aside, it is worth noting that EO 13,536 allows anyone who feels there may be a nexus to a US Person to submit to an application process. This process essentially seeks guidance from OFAC, by way of an application, with respect to the ransom payment. Such application can be received even if the owner does not believe that the pirates are listed on the SDN List.\(^\text{166}\)

There has been some worry within the shipping industry regarding the overall effect that EO 13,536 could have. The preeminent maritime shipping intelligence journal, Lloyd’s List, reported that one expert in the insurance field felt that EO 13,536 could exacerbate the situation by dividing the shipping industry into those who are legally precluded from paying ransoms and those who are able to freely pay ransom demands.\(^\text{167}\) However, this effect could very well serve as a catalyst for other countries to adopt laws similar to those of the United States.

In conclusion, EO 13,536 is currently the best and most viable option to prosecute individuals for paying ransoms to pirates under the laws of the United States. EO 13,536 directly goes after payments to known pirates on the basis that such ransoms will continue to destabilize

\(^\text{165}\) Id. at 1253.

\(^\text{166}\) For a more detailed treatment of the application and licensure process see Id.

the Somali region; however, it does come with several limiting factors. First, it can only be used to prosecute those individuals or entities sharing a nexus with the United States; and, second, even if that nexus exists the ransom money is required to go to either (1) an individual or entity on the SDN List or (2) an entity of which an individual or entity on the SDN List owns a majority interest.

ii. United Kingdom

1. Legislative Attitude

The laws of the United Kingdom of Great Britain and Northern Ireland (“UK”) have, with one small exception, allowed for the payment of ransoms. Prior to the Ransom Act of 1782, the payment of ransoms was allowed under the laws of Great Britain. The Ransom Act of 1782’s ban on the payment of ransoms was later repealed by the Naval Prize Act 1864, later modified by The Senior Courts Act 1981.

2. Ministerial Attitude

Although the current statutory regime of the United Kingdom allows for the payment of ransoms, the 1980s witnessed the kidnapping of a member of the “famed Guinness brewing family” which sparked a parliamentary debate and further investigation into the legality of K&R

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168 An Act to Prohibit the Ransoming of Ships or Vessels Captured From His Majesty’s Subjects, and of the Merchandise or Goods on Board Such Ships or Vessels (Act 22 Geo III c.25). [Electronic copy provided in accompanying USB flash drive at Source #35]

169 Naval Prize Act, 1864, Chapter 25, 27, and 28, Vict. [Electronic copy provided in accompanying USB flash drive at Source #36]

170 Senior Courts Act, 1981, Chapter 54; (The Senior Courts Act is also referred to as The Supreme Court Act by virtue of the Constitutional Reform Act, 2005, Chapter 4). [Electronic copy provided in accompanying USB flash drive at Source #37]
policies. The particular victim of the kidnapping was under the coverage of a K&R policy. When the Guiness kidnappers were arrested they admitted that they didn’t expect the family to “pay the ransom-it was understood that [the money] would come from an insurance policy.”

Arguing that the words of the perpetrators were indicative of the encouraging effect K&R policies have on Kidnappers, Labour Party representatives in the British Parliament requested the British Attorney General to investigate the legality of K&R policies and to prosecute the insurer involved in the kidnapping for “breaching prevention of [British] terrorism legislation.” After an investigation, the British Attorney General declared that as a matter of law, K&R insurance was legal and that the insurance providers involved had not violated the law.

3. Judicial Attitude

The British ministerial and legislative position of allowing ransom payments was recently crystallized into case law in Masefield v. Amlin. In Masefield v. Amlin, a case examining whether the payments of piracy ransoms were contrary to public policy, Admiralty Judge David Steel, sitting on the Commercial Court of the Queen’s Bench Division in the High Court of Justice, declared that the payment of ransoms payments were not only legal but were in line with

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172 Clendenin, supra note 81, at 764.

173 Id. (quoting Guinness Kidnap Brothers Are Jailed, TIMES (London), June 24, 1986, at 3 [Electronic copy provided in accompanying USB flash drive at Source #82]).

174 Id.; Richard Evans, Call to Prosecute Kidnap Advisers, TIMES (London), Apr. 15, 1986, at 2. [Electronic copy provided in accompanying USB flash drive at Source #86]

175 Id. at 764-5.

public policy for three reasons: (1) neither English, Somali, Malaysian or Swiss law had made paying ransoms illegal; (2) All laws in the United Kingdom outlawing ransom had been repealed; and (3) paying ransoms to pirates is the only viable option to remove a ship’s crew from harm’s way if military and diplomatic efforts had failed.\(^\text{177}\)

Additionally, Judge Steel presented two other wider justifications for the payment of ransoms: first, “kidnap and ransom cover (whether for personnel or property) is a long standing and important feature of the insurance market” which should not be rendered unenforceable;\(^\text{178}\) second, relying on a *Royal Boskalis Westminster NV v. Mountain*,\(^\text{179}\) Judge Steel found that because ransom payments are recoverable as a sue and labour expense, ransom payments could not, therefore, be against public policy.\(^\text{180}\) It is also worth noting that Judge Steel states, albeit in dicta, that, “as a matter of English criminal law a demand for ransom against return of property may well constitute a theft.”\(^\text{181}\)

\(^{177}\) Masefield AG v. Amlin Corporate Member Ltd, [2010] EWHC 280 [60].


\(^{179}\) Royal Boskalis Westminster NV v. Mountain [1999] QB 674. [Electronic copy provided in accompanying USB flash drive at Source #9]

\(^{180}\) Masefield AG v. Amlin Corporate Member Ltd, [2010] EWHC 280 [63-64].

\(^{181}\) Masefield AG v. Amlin Corporate Member Ltd, [2010] EWHC 280 [65] (Also known as a rescue clause, a sue and labor clause is defined as “a provision in property- and marine-insurance policies requiring the insured to protect damaged property against further loss. The clause generally requires the insured to ‘sue and labor’ to protect the insured party’s interests.” Black’s Law Dictionary 1570 (9th ed. 2009); “Some insurance today is written against ‘all risks’…. Besides the perils clause…recovery under the policy can be had on the entirely separate ‘sue and labor’ clause….Under this clause, the underwriter may become liable for certain charges incurred by the assured in caring for the insured property, whether or not there is any actual loss or damage. Where sue-and-labor charges are incurred and loss also occurs, the underwriter may become liable for more than the policy amount, which limits only a claim for loss of or damage to the goods or vessel.” Id. (citing Grant Gilmore & Charles L. Black Jr.,
4. Terrorism Act 2000

Although the current jurisprudence encourages the payment of piracy ransoms, The Terrorism Act 2000\textsuperscript{182} may prevent any piracy ransoms which end up in the coffers of terrorists. According to The Terrorism Act 2000, “a person commits an offence if he (a) provides money or other property, and (b) knows or has reasonable cause to suspect that it will or may be used for purposes of terrorism.”\textsuperscript{183} Under The Terrorism Act 2000 terrorism is defined as the:

use or threat of action where … (b) the use or threat of action is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause.”\textsuperscript{184}

Scholars have noted that, “Payment of ransom to terrorists seems to fit;” however, a complete dearth of enforcement of The Terrorism Act 2000 against those paying ransoms has created a great deal of legal uncertainty.\textsuperscript{185}

In an attempt to better determine The Terrorism Act 2000’s scope it is important to consider the past legislative, ministerial, and judicial positions; particularly, it is worth looking back to the actions of the British Attorney General’s opinion in the Guinness kidnapping investigation, discussed above. Sir Michael Havers, the British Attorney General at the time of the Guinness investigation, declared that no evidence had ever been placed before him of “either

\begin{itemize}
  \item \textsuperscript{182} The Law of Admiralty § 2-10 75 (2d ed. 1975) [Electronic copy provided in accompanying USB flash drive at Source #91]).
  \item \textsuperscript{183} The Terrorism Act, 2000, Chapter 11. [Electronic copy provided in accompanying USB flash drive at Source #38]
  \item \textsuperscript{184} The Terrorism Act, 2000, Chapter 11, § 15(3).
  \item \textsuperscript{185} Kolb, Salomon, and Udich, supra note 17, at 160.
\end{itemize}
substantive offences under Sections 10 or 11 of the 1984 Act or conspiracy to contravene those provisions.”

The act which Sir Havers refers to is the Prevention of Terrorism Act 1984. The “1984 Act” originally intended to target the Irish Republican Army was later expanded in scope to include all other acts of terrorism. This “1984 Act” was eventually replaced by none other than The Terrorism Act 2000.

If one were to examine the language of the sections which Sir Haver spoke upon, sections 10 and 11 of the Prevention of Terrorism Act 1984, one would find that the language is similar or nearly identical to that of The Terrorism Act 2000. Section 10 made it a criminal offense to make “contributions to resources of proscribed organisations” and Section 11 criminalized the act of “assisting in retention or control of terrorist funds.” Considering the strong similarities between the “1984 Act” and The Terrorism Act 2000 and taking into consideration the overall pro-ransom payment attitude discussed earlier, it would seem unlikely that The Terrorism Act 2000 would ever be applied to the payment of ransoms. However, the question of whether The Terrorism Act 2000 can or should be used against those paying ransoms to pirates is in the hands of the government of the UK.

iii. Germany

186 Richard Evans, *Minister Reviews Ransom Insurance*, TiMES (London), Apr. 15, 1986, at 2. [Electronic copy provided in accompanying USB flash drive at Source #87]

187 Prevention of Terrorism (Temporary Provisions), 1984, Chapter 4. [Electronic copy provided in accompanying USB flash drive at Source #40]

188 See Prevention of Terrorism (Temporary Provisions) Act, 1989, Chapter 4, Part 3, Section 10. [Electronic copy provided in accompanying USB flash drive at Source #40]

Like the UK, Germany has several similar statutes which make the funding of criminal organizations\(^{190}\) and funding terrorist organizations\(^{191}\) unlawful acts. Yet, just like the UK, the government has yet to prosecute any payment of ransom under either of these laws.\(^{192}\) As several scholars have noted, the same policy argument found in *Masefield v. Amlin* could very well apply in Germany due to the existence of German statutes paralleling those on which the *Masefield* case was decided.\(^{193}\)

iv. Italy, Columbia and the No-Pay Experiment

In response to an explosion in kidnapping, the Italian legislature voted on a law which effectively froze the assets of anyone taken hostage and the assets of their families in order to deter criminals.\(^{194}\) Under the reign of the virtual ban on ransoms, the average number of kidnappings per year dropped from 29 to 5; however, no correlation was ever proven.\(^{195}\) In 1993, Columbia adopted legislation similar to that of Italy’s 1991 ransom ban; however, Columbia’s law was far more expansive.\(^{196}\) Columbia’s law not only froze the assets of family members of

\(^{190}\) Strafgesetzbuch [StGB] [Penal Code] Jul. 1, 2005, Reichsgesetzblatt [RGBl] 739, as amended, § 129. [Electronic copy provided in accompanying USB flash drive at Source #41a, 41b]

\(^{191}\) Strafgesetzbuch [StGB] [Penal Code] Jul. 5, 2005, Reichsgesetzblatt [RGBl], § 129a. [Electronic copy provided in accompanying USB flash drive at Source #42a, 42b]

\(^{192}\) Kolb, Salomon, Udich, *supra* note 17, at 160.

\(^{193}\) *Id.* at 161.


\(^{195}\) *Id.*

\(^{196}\) Ley 40 de 1993, enero 19, Diario Oficial No. 40726, de 20 de enero de 1993. [Electronic copy provided in accompanying USB flash drive at Source #43]
those held hostage, it outlawed the sale of ransom insurance and prohibited professional kidnap
negotiators.\textsuperscript{197}

The notion of a no-pay ransom system seems contrary to common sense. According to
Professor Walter Block, the Harold E. Wirth Eminent Scholar Endowed Chair and Professor of
Economics at Loyola University New Orleans, and Patrick Tinsley, a practicing attorney, “the
intent of these laws was to discourage kidnappings by eliminating a kidnapper’s expectation of
financial gain.”\textsuperscript{198} However, when one applies this same no-pay logic to similar crimes, such as
mugging, the result is outlandish.\textsuperscript{199} It is a difficult pill to swallow that a law could exist which
denies an individual the right to give their wallet to a mugger. In fact, the Columbian law was so
difficult to swallow that the Columbian Constitutional Court struck down parts of the law,
holding that it was a constitutional right for families to try to save a relative’s life and that
“Rights to life and freedom cannot be sacrificed in pursuit of the general interest”.\textsuperscript{200}
Nonetheless the Columbian law was struck down in 2002.\textsuperscript{201}

In additional to legal scrutiny, the manner in which the laws are executed has created
questionable results. According to a report from The New York Times, an Italian man was held

\textsuperscript{197} Elster, \textit{supra} note 194, at 23.

\textsuperscript{198} Walter Block and Patrick Tinsley, \textit{Should the Law Prohibit Paying Ransom to Kidnappers?},
6(2) AM. REV. POL. ECON. 40, 41-42 (Dec. 2008). [Electronic copy provided in accompanying USB flash drive at Source #72]

\textsuperscript{199} \textit{Id.} at 41.

\textsuperscript{200} Elster, \textit{supra} note 194, at 23.

\textsuperscript{201} \textit{Id.}
captive while his family begged the Italian government to allow them to pay the ransom.\textsuperscript{202} After
8 months of captivity, the Italian government gave up on enforcing their own law and issued a
special order to allow the payment of that particular ransom.\textsuperscript{203}

These particular no-pay regimes clearly provide a very strong lesson, an absolute ban on
all ransoms subjects individuals to a great deal of unnecessary harm. In the case of piracy, it is
easy to imagine that pirates, frustrated from not having their demands met, could escalate
hostilities and begin harming both their captives and others.

\textbf{C. Future Approaches and Suggestions}

Although there is a complete dearth of legislation effectively targeting the payment of
ransoms, it does not mean that such will be the case in the near future. This final portion of the
memorandum aims to describe several approaches which could be used to effectuate the
prosecution of individuals or organizations that pay ransoms. These approaches range from the
practical to the unapologetically theoretical and from the tried-and-true to the purely novel.

\textit{i. Piracy is Terrorism}

As evidenced by the discussions above, it is clear that many of the existing laws, both
international and domestic, could be utilized to prosecute the payment of ransoms; however, the
scope of these laws are severely narrowed because of the currently held belief that terrorism and
piracy are separate crimes. If customary international law, as well as domestic law, were

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\textsuperscript{203} Id.
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amenable to the notion that terrorism and piracy were one in the same, the currently existing laws could be used as effective tools to prosecute the payment of ransoms to pirates.

In the last two decades, the dialogue on the merging of piracy and terrorism, either completely or partially, has gained traction in the scholarly world. On one hand, you have the traditionalists fighting for the preservation of the status quo. Alfred Rubin, a luminary in the field of piracy, a staunch traditionalist, and author of the pivotal text *The Law of Piracy*, has consistently held the position that “‘terrorism’ cannot, by traditional forms of argument, be shown to be ‘criminal’ as a matter of international law whatever its quality might be in the municipal law of the state or group of states the ‘terrorists’ are trying to destabilize.”204 On the other hand, you have the progressives who are of the mind that piracy’s definition, as well as terrorisms, ought to be modernized to represent the current era and current practice. Rüdiger Wolfrum, the current Director of the Max Planck Institute for Comparative Public Law and International Law as well as a current justice, and past-president, in the International Tribunal for the Law of the Sea, took a stand against traditionalists in 2008 by arguing that “new developments seem to indicate that these mechanisms do not embrace modern threats…. The existing rules for the suppression of piracy are inadequate. They do not even provide an efficient regime against piracy narrowly defined.”205

In his book entitled, *The World for Ransom*, Professor Douglas R. Burgess, an assistant professor of history at Yeshiva University and of legal history at its Benjamin N. Cardozo School of Law, puts forth an unprecedented challenge to the traditional notion that terrorism and piracy

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205 *Id.* at 156 (citing Rüdiger Wolfrum, Fighting Terrorism at Sea: Options and Limitations under International Law, in *LEGAL CHALLENGES IN MARITIME SECURITY* at 32 (Myron H. Nordquist, Rüdiger Wolfrum, John Norton Moore and Ronán Long eds., 2008)).
are discrete crimes. Burgess, in his attempt to construct a seaworthy vessel on which both pirates and terrorists can co-exist, traces his blueprints around the tautology that if piracy and terrorism share the same *mens rea, actus reus, and locus in quo*, then they are the same crime.\(^{206}\) With his blueprints in hand, Burgess approaches the construction of his ship in three steps.

Burgess begins constructing his vessel’s hull out of the historical similarities between pirates and terrorists. Burgess addresses four of these historical links. First, Burgess argues that since the beginning of piracy “the directed use of terror has been an integral part of piracy,”\(^{207}\) and that “piracy represents the first use of terror as a means of coercion by a non-state actor against the flag and trade of a nation-state.”\(^{208}\) Burgess’s second point shines a spotlight on the long history of government-sponsored piracy and its similarity with modern state-sponsored terrorism.\(^{209}\) Burgess argues that in both state-sponsored acts “the pirate/terrorist is a private individual (or organization) acting beyond the nominal purview of the sponsor state, yet whose actions are directed toward a coercive political aim of that state.”\(^{210}\)

In addition to the two historical linkages offered above, Burgess also argues that when terrorists wage war against governments they are really waging a piratical war against the world; in an offer of proof, Burgess argues that this piratical war is the same type of war, both in substance and purpose, that organizations like *al-Qaeda* are currently waging. In addition to

\(^{206}\) *Id.* at 24.

\(^{207}\) *Id.* at 76.

\(^{208}\) *Id.*

\(^{209}\) *Id.* at 77

\(^{210}\) *Id.*
fighting a similar type of war, Burgess adds that the methods of attack are identical.\footnote{211} Finally, Burgess argues that pirates and international terrorist organizations are identical in that they both are merely “a band of private individuals divorced from the state, existing in enclaves outside its jurisdiction, whose actions threaten the safety and the sovereignty of the community as a whole.”\footnote{212}

With his ship’s hull complete, Burgess moves on to construct his vessel’s mast. Burgess highlights a number of traditional arguments which most scholars rely on to support the view that terrorism and piracy are discrete concepts. The traditional arguments are as follows: (1) piracy must involve some act of theft; (2) piracy must occur between two vessels; and, (3) acts of piracy must be for private ends while terrorism is for political ends.

Burgess addresses these three traditional arguments by looking at them through the lens of American Jurisprudence.\footnote{213} In regards to the argument that theft is a necessary element of piracy, Burgess turns our attention to the United States Supreme Court case \textit{United States v. The Brig Malek Adhel};\footnote{214} in particular, Burgess directs our attention to the words of Justice Story in the majority opinion. According to Justice Story, the only thing required for piracy is a “lawless appetite for mischief.”\footnote{215} In addition, Burgess also argues that according to the jurisprudence of

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 78.
\item See D. R. Burgess, \textit{The World for Ransom: Piracy is Terrorism, Terrorism is Piracy} (2010).
\item U.S. v. The Brig Malek Adhel, 43 US (2 Howard) 209 (1844). [Electronic copy provided in accompanying USB flash drive at Source #11]
\item Burgess, \textit{supra} note 6, at 113.
\end{enumerate}
\end{footnotesize}
the United States Supreme Court, piracy’s universal jurisdiction could be extended to other international criminal acts which are crimes within the law of nations.\textsuperscript{216}

In regards to the second traditional objection to the bifurcation of piracy and terrorism, Burgess argues that the two ship rule of piracy was never intended to prove it separate from terrorism; rather, it was merely used to distinguish internal conflicts on a vessel, such as mutiny, from the crime of piracy.\textsuperscript{217} Burgess also argues both American and British Jurisprudence, particularly in the American Civil War era, made it quite clear that in cases of pirates who appear to be legitimate passengers only to seize the ship internally, were still pirates because of their piratical intent.\textsuperscript{218} Burgess concludes his discussion on the second traditionally argument by concluding that piracy therefore, isn’t so much about the conditions of the act, but the intent that is created within the mind of the pirate.\textsuperscript{219}

Finally, in addressing the third traditional argument, Burgess argues that the political/private ends language currently relied upon is a misconstruction of its actual meaning. Burgess argues that, “it does not refer to defendants with a political motive, but rather to defendants who act as agents of their country.”\textsuperscript{220} Additionally, Burgess relies on President Ronald Reagan’s characterization of the hijacking of the Achille Lauro, by Palestinian political

\textsuperscript{216} Id. at 114 (citing The Antelope, 23 US (10 Wheaton) 66 (1825) [Electronic copy provided in accompanying USB flash drive at Source #10]).

\textsuperscript{217} Id.

\textsuperscript{218} Id.

\textsuperscript{219} Id. at 114-115.

\textsuperscript{220} Id. at 116.
militants, as an act of piracy.\textsuperscript{221} Finally, Burgess argues that American jurisprudence is currently on a trajectory towards recognizing piracy as maritime terrorists who engage “in the same acts of violence at sea that their confreres do on land” and that “it remains the policy of the United States to extend its jurisdiction to all persons whose crimes constitute an offense to the law of nations.”\textsuperscript{222} Burgess concludes by arguing that if one looks at the totality of his three repartees to the traditional line of thinking, persons committing acts which constitute an offense to the law of nations could, “under American law, be prosecuted \textit{as if they were} pirates.”\textsuperscript{223}

In his final move, Burgess throws his sails to the wind by providing a proposal for a model law for terrorism based on piracy. Before presenting his proposal, Burgess goes to great length to emphasize that the greatest difficulty he faces is that “there is no universal definition of terrorism to draw from;” instead, there is only “a list of proscribed offenses.” After a lengthy meditation on this list of offenses, Burgess provides us with the following proposal:

1) The crime of terrorism is defined as:
   a) any illegal acts of violence or detention, or any act of depre
dation, destruction of property, or homicide;
   b) as well conspiracy to commit such acts, membership in an organization that conspires to commit these acts, and any form of active sponsorship including financial support, refuge, or withholding knowledge of such activities from the authorities;
   c) committed by persons not acting under the color of a state, government, or revolutionary organization engaged in the replacement of an established regime within the borders of its own state;
   d) against the citizens or property of another state;
   e) with the purpose of inflicting terror on the citizens or government of that state or achieving international recognition for a private cause;

\textsuperscript{221} \textit{Id.}

\textsuperscript{222} \textit{Id.} at 116-117.

\textsuperscript{223} \textit{Id.} at 117.
f) none of these provisions is meant to contradict or negate the existing terrorist offenses currently proscribed by convention, covenant, treaty, agreement, or customary international law.

2) Terrorists do not lose their definition under the law if they are sponsored by a state, government, or revolutionary organization acting in accordance with clause (1)(b):
   a) political exemption is only to be inferred if the terrorists act as de facto agents of that state, government, etc. by committing their acts by its direct order and in furtherance of its policy;
   b) in that event, criminal liability transfers from the terrorists as agents to the state as agency; and
   c) the state is then inferred to have committed an act of war;
   d) states that sponsor terrorist activities as outlined in clause (1)(b) are not inferred to have committed acts of war but share criminal liability with the terrorists for any acts undertaken during their sponsorship.

3) The crime of piracy is defined as sharing the definition given in sections (1) and (2), specifically for crimes committed:
   a) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   b) against a ship, aircraft, persons, or property in a place outside the jurisdiction of any state;
   c) against persons or property within the jurisdiction of the state, where the pirates have:
      i) descended by sea to a coastal port;
      ii) descended by air to any city or township;
   d) the crime of piracy also includes acts committed for pecuniary gain.

4) Terrorists and pirates are defined as hostis humani generi under the law of nations and therefore they are subject to universal jurisdiction, meaning:
   a) as enemies of all nations, any state may effect the capture of a suspected offender;
   b) such capture must be made in accordance with international law;
   c) the capturing state must then either prosecute the offender under its own laws and in good faith, or;
   d) extradite the suspect to the jurisdiction of a requesting state, or to a requesting competent international tribunal.\textsuperscript{224}

Even the most cursory glance at this proposal would reveal that it is legally, politically and even morally controversial; however, in the same breath used to criticize this proposal one ought recognize the courage and innovation behind this attempt to fill the lacunae of domestic and international law. Focusing back to the particular topic of this memorandum, it is clear that Burgess’s proposal would certainly be the most effective way to ensure that nearly every form or method of ransom payment to pirates would be banned. Section 1(c) defines the crime of

\textsuperscript{224} \textit{Id.} at 243-245.
terrorism to include anyone who finances the pirates; additionally, the overall paradigm of the proposal, that piracy is terrorism, authoritatively determines that the anti-piracy laws discussed above apply without question.

ii. United Nations Security Council Resolution

One of the most effective methods of encouraging a global crackdown on the payment of ransoms would be a Security Council Resolution. This resolution could come in four different flavors: (1) a prohibition on all ransom payments; (2) a prohibition on only ransom payments made to pirates; (3) a resolution which categorizes pirates as terrorists; or, (4) a prohibition targeting particular individuals or organizations.

As discussed above, a prohibition against the payment of all ransom payments is ineffective. As we have seen from the Italian and Columbian experiments, a prohibition of this nature harms the victims of the crime rather than the perpetrators. It would be highly improbable that the Security Council would ever accept such a proposal. In that same vein, it would also seem highly unlikely that the Security Council would accept a prohibition restricted to ransoms paid to pirates. Blanket prohibitions of this nature generally cause more harm in the long run and are ineffective in deterring the crime at which it is aimed. If in the off chance that these two prohibitions reached the Security Council for a vote, one could count on at least one veto from the United Kingdom considering its domestic policy on piracy ransoms discussed above. Additionally, combining piracy and terrorism into a single notion would also be a difficult sell. A shift in legal thinking of this gravity could not, and should not, be done by way of a simple Security Council Resolution; instead, it should be done through treaty or convention.

If one hopes to have a Security Council Resolution passed, the best strategy would be to propose a targeted prohibition inspired by EO 13,536. The resolution would empower one of the
United Nations’ organizations such as UNODC, or a committee, to determine the targets of the prohibition while placing the burden of enforcement on each individual UN member by requiring domestic legislation banning the payment of ransoms to the designated individuals or organizations. What makes this approach extremely viable is the fact that the Security Council already has an existing sanctions regime for Somalia which is very similar to EO 13,536.\textsuperscript{225}

The Security Council’s current sanctions regime is led by the Security Council Committee pursuant to resolutions 751 and 1907 concerning Somalia and Eritrea.\textsuperscript{226} This committee oversees Security Council Resolutions which include the freezing of particular assets, an arms embargo, as well as a travel ban.\textsuperscript{227} In essence, this committee fulfills the same role that OFAC does under EO 13,536.

In addition to an already existing regime to handle a Security Council Resolution on piracy ransoms for at least the Somalia region, a Security Council resolution targeting particular individuals or organizations would have strong support from the voting members of the Security Council. The only questionable vote would be that of Columbia. Starting January 1, 2011, Columbia will assume the position of non-permanent member to the Security Council. Although non-permanent members lack the veto power that permanent members wield, they still have a vote. Nevertheless, it is highly unlikely that a country which adopted legislation virtually banning the payment of ransoms would vote against a resolution for targeted prohibition.

\textsuperscript{225} For a complete list of resolutions establishing the sanctions regime against Somalia see http://www.un.org/sc/committees/751/resolutions.shtml.


D. Conclusions

As shown, under international law there is no explicit ban on the payment of ransoms within international law; however, there are several laws which would ban the payment of ransom in narrow circumstances. Particularly, there are international instruments that would ban a very narrow category of ransom payments which, indirectly or directly, were used to fund acts of terrorism. Nevertheless, due to a dearth of evidence proving an operational nexus between pirates and those committing terrorist acts, it would be difficult to prosecute ransom payments in the majority of cases.

Under domestic statutory regimes, there are currently three approaches to banning ransom payments: virtual prohibition, partial prohibition, and targeted prohibition. Italy, the sole state enforcing a virtual ban on ransom payments, places a temporary freeze on all domestically located assets of all relatives of an Italian hostage. Many states including the UK, the United States, and Germany have enacted a vast number of blanket laws prohibiting the financing of terrorists; however, these laws only apply to piracy ransoms when there is a nexus between the ransom payment and terrorists. Finally, the United States has adopted the first targeted prohibition by banning the transfer of assets to specifically named pirate lords and their associates.

If international law were to adopt the notion that piracy and terrorism are comparable crimes, many of the international and domestic laws could allow for the prosecution of ransom payments; however, such an approach is impracticable. Currently, and traditionally, piracy and terrorism have been bifurcated into two distinct criminal acts. Nonetheless, if international law were to adopt the notion that piracy and terrorism are comparable acts, then the number of laws and conventions which could be used to effectively prosecute the payment of ransoms would
skyrocket. In particular, any convention or law which bans the financing or transferring of assets to a terrorist organization could be expanded to include the payment of ransom to pirates. This particular strategy could be attempted through a United Nations Security Council Resolution or an international convention or treaty. But, the entire strategy assumes that piracy and terrorism can be reconciled and that such an approach is would ever be in the interest of States.