

Preserving Negotiation Whilst Promoting Global Order: Should We Bargain with Salt-Water Devils?

Lucas V.M. Bento*

Notable pirate! thou salt-water thief!¹
Should you bargain with the Devil?²
Do or die.³

CONTENTS

I.	Introduction	286
II.	Context	293
	A. "Global Devils": Piracy as an International Problem	293
	B. An International Legal Problem	297

* LLB LLM PGDip. The author is an attorney at Quinn Emanuel Urquhart & Sullivan LLP in New York where he specializes in international disputes and international arbitration. The author is also an executive member of the Intra-American Affairs Committee at the New York City Bar Association. The author would like to thank Professor Robert Mnookin of the Harvard Negotiation Project for his insightful comments on an earlier draft and the editors of the Harvard Negotiation Law Review for their tremendous work, particularly Laurence Hull and Davida Schiff. An earlier draft of this paper was presented at the United Nations on April 29, 2013, and the author would like to thank members of several delegations to the United Nations for their comments and support, with particular thanks to Ms. Yvonne Lodico. The author would also like to thank the Hon. G.E. Brown and P.J. Murphy, Esq. for their encouragement in writing this Article. Many thanks also go to an anonymous referee based in London who provided comments on an earlier draft. As this Article was written using stolen family time, I would like to thank Lauren for her patience and comments, as well as my brother Thiago and my parents for their support. It is more important to emphasize that none of the above should be taken to agree with any of the views herein. Accordingly, the views expressed in this Article are the author's personal views and do not reflect the opinions of Quinn Emanuel Urquhart & Sullivan LLP. Any mistakes remain my own.

1. Duke Orsino in WILLIAM SHAKESPEARE, *TWELFTH NIGHT OR WHAT YOU WILL*, act 5, sc. 1.

2. ROBERT MNOOKIN, *BARGAINING WITH THE DEVIL: WHEN TO NEGOTIATE, WHEN TO FIGHT* 1 (2010).

3. A pirate's motto for piracy-related activities off the coast of Somalia. See Mohamed Ahmed, *Somali Sea Gangs Lure Investors at Pirate Lair*, REUTERS, (Dec. 1, 2009), <http://www.reuters.com/article/2009/12/01/us-somalia-piracy-investors-idUSTRE5B01Z920091201?sp=true>.

C. Ransom Payment Trends	299
D. Piracy or Terrorism: Does It Matter?	301
III. Preserving Negotiation, Promoting Global Order: Towards A New Policy on Ransom Payments	305
A. A Policy-Based Approach to Piratical Ransom Negotiations	305
B. Should We Negotiate with Pirates?	307
1. The Negotiation Process	307
2. The Ransom Debate	310
a). Pro-Ransom Payment	311
b). Anti-Ransom Payments	313
3. Case Studies: U.S. and U.K. Policies on Ransom Payments	317
a). U.S: "Don't Feed the Bears"	317
b). U.K.	318
E. Bargaining with Salt-Water Devils: Negotiation Theory and Analysis	319
Spock's Five Questions	320
1. What are the interests at stake?	320
a). The pirates' interests	321
b). The other side's interests	322
2. What are the alternatives to negotiation?	325
3. What are the potential negotiated outcomes?	327
4. What are the costs to a State of choosing to enable negotiations?	327
5. Could a negotiated agreement be implemented?	327
6. What about recognition, legitimacy and morality?	328
7. Policy recommendations	329
a). No ban but criminalize extraction, tax ransom	330
b). No ban but criminalize extraction, and a tax on ransom if failure to comply with health and safety legislation	333
IV. Conclusion	334

I. INTRODUCTION

This Article utilizes theories of negotiation to assess whether negotiating with pirates is sound policy, and argues for a solution that

maximizes the interests of all stakeholders without compromising important policy-based considerations.

Although piracy incidents off the coast of Somalia have dropped since their peak in 2009, piracy is still a global threat to commerce and human life, with a new wave of attacks unfolding in oil rich regions in West Africa.⁴ Accordingly, governments around the world are taking the issue seriously.⁵ Although there is broad agreement that piracy is a global issue, there has been little academic scholarship about whether negotiating⁶ ransom payments with pirates is sound policy. This Article seeks to fill this void.

The *modus operandi* of the modern pirate is well-known. Pirates typically hijack a ship with a view to extracting ransom payments from the ship-owners or other interested parties.⁷ Negotiating ransom payments with pirates is a dangerous and delicate task. When negotiations go wrong, casualties often result. For instance, in 2011, Somali pirates executed four Americans when rescue talks broke

4. *Pirates Abduct Greek, Ukrainian from Ship off Nigeria*, REUTERS (Dec. 17, 2013), <http://www.reuters.com/article/2013/12/17/us-nigeria-piracy-idUSBRE9BG0T520131217>; *Nigeria Pirate Attack: US Sailors Seized*, BBC NEWS (Oct. 24, 2013), <http://www.bbc.co.uk/news/world-africa-24657515> (noting that “[p]irates have seized two US sailors from an oil supply ship off the coast of Nigeria”); *Nigeria: Pirates Kidnap 3 Sailors off Coast*, N.Y. TIMES (Feb. 8, 2013), <http://www.nytimes.com/2013/02/09/world/africa/nigeria-pirates-kidnap-3-sailors-off-coast.html> (“Piracy in the Gulf of Guinea has escalated from low-level armed robberies to hijackings and cargo thefts.”); Reuters, *Nigerian Offshore Attacks Surge as Pirates Advance*, VOICE OF AMERICA (Feb. 21, 2013), <http://www.voanews.com/content/nigeria-offshore-attacks-surge-as-pirate-advance-reuters/1608174.html> (noting “[p]irates demanded a 200 million naira, or \$1.3 million, ransom for the release of six foreigners kidnapped”).

5. The British government has recently opened a regional anti-piracy body in the Seychelles to help tackle piratical organized crime and its financiers. See, e.g., Press Release, UK Foreign & Commonwealth Office, *Anti-Piracy Centre Open for Business*, (Feb. 25, 2013), available at <https://www.gov.uk/government/news/anti-piracy-centre-open-for-business>; *Somalia: What Is It Like to Be Kidnapped?* BBC NEWS (Jun. 29, 2011), <http://www.bbc.co.uk/news/magazine-13955995> (“The growing menace of hijacking and kidnapping by Somali pirates has governments around the world desperate for a solution . . .”).

6. The term negotiation is appropriate in this context. See *Masefield AG v. Am-lin Corporate Member Ltd*, 1 C.L.C. 318, 323 (2010) (providing a descriptive account of the negotiation process between ship-owner and pirates, and noting that “[n]egotiations are ongoing to secure the safe release of the crew members”) (emphasis added).

7. *Id.* at 326 (“It is clear that they take vessels in order to ransom them and invariably negotiate with the shipowner or other interested party for the release of the vessel, cargo and crew, in exchange for a payment which represents an economic proportion of the value of the property at stake.”); INT’L PIRACY RANSOMS TASK FORCE, FINAL REPORT 1 (2012) [hereinafter UK Task Force Report] (“Piracy off the coast of Somalia is a crime based around the business model of kidnapping crews and hijacking ships and cargo for the purpose of extorting ransoms.”)

down with the U.S. Navy.⁸ In 2012, Somali pirates executed a hostage because of a delayed ransom payment.⁹ In the same year, the Contact Group on Piracy off the Coast of Somalia ("CGPCS"), an international forum consisting of over sixty countries and organizations, succinctly noted the "continuing violence employed by pirates against seafarers" and called for greater efforts by stakeholders¹⁰ to facilitate the liberation of seafarers.¹¹

Some states, like the U.S., Britain,¹² France,¹³ Italy,¹⁴ Colombia,¹⁵ and Somalia¹⁶ officially oppose ransom payments to free hostages,¹⁷ because they argue that such payments legitimize piratical

8. *Jury Recommends Life for 'S/V Quest' Somali Pirates*, BBC NEWS (Aug. 2, 2013), <http://www.bbc.co.uk/news/world-us-canada-23556256> (noting that a United States federal jury recommended a life sentence to each pirate involved in the killing).

9. Abdi Guled, *Somali Pirates Kill Hostage over Delayed Ransom*, HUFFINGTON POST (Sep. 1, 2012), http://www.huffingtonpost.com/2012/09/01/somali-pirates-hostage-killed_n_1848937.html.

10. As noted, *infra* Part III.B.2, there are five major interested parties in any ransom negotiation: pirates, private parties, States, the international community, and ancillary service providers.

11. Communiqué, U.S. Dep't of State, Thirteenth Plenary Session of the Contact Group on Piracy off the Coast of Somalia, (Dec. 11, 2012) [hereinafter Thirteenth Plenary Session of the CGPCS], available at <http://www.state.gov/t/pm/rls/othr/misc/202270.htm>.

12. The British Government refuses to pay ransoms to pirates. It is legal, however, for private parties in Britain to pay for ransoms. The latter, however, was at one time prohibited under law under the Ransom Act 1782 but has since been repealed. See *British Hostages Say Pirates Will Kill Them*, CNN (Nov. 22, 2009), <http://edition.cnn.com/2009/WORLD/europe/11/20/uk.pirates.chandlers/index.html?ref=topnews> (noting that the British "government will not make substantive concessions for hostage takers, including the payments of ransom").

13. See *Cameroon Hostages: French Moulin-Fournier Family Freed*, BBC NEWS (Apr. 19, 2013), <http://www.bbc.co.uk/news/world-africa-22213125> ("France has not changed its position, which is not to pay ransoms."); Alexandria Sage & Sophie Louet, *France Plays Down Report of Ransom Paid from Niger Hostages*, REUTERS (Feb. 8, 2013), <http://www.reuters.com/article/2013/02/08/us-france-hostages-idUSBRE9170YJ20130208> (noting that France has a no-negotiation policy with respect to paying ransom to pirates to free hostages).

14. Walter Block and Patrick Tinsley, *Should the Law Prohibit Paying Ransom to Kidnappers?*, AM. REV. OF POL. ECON., Dec. 2008, at 41.

15. *Id.*

16. *Somalia: Six Jailed for 'Pirate Ransom' Cash*, BBC NEWS (Jun. 20, 2011), <http://www.bbc.co.uk/news/world-africa-13826050>.

17. See also Lu Hui, *New Batch of Filipino Seafarers Seized by Somali Pirates*, XINHUA NEWS (May 14, 2010), http://news.xinhuanet.com/english2010/world/2010-05/14/c_13295229.htm ("As a policy, the Philippine government does not negotiate nor pay ransom to kidnappers, but gives ship owners the free hand in negotiating for the release of abducted Filipino sailors.").

groups, their goals and their means.¹⁸ The expected linkage effect, or the “fact that some negotiations affect other negotiations,”¹⁹ of such a policy is clear: pirates will be discouraged from hijacking ships if they know governments will not negotiate with them. For instance, in 2012, the U.K. began considering whether ransom payments should be criminalized,²⁰ and concluded that policies must be crafted so as to “reach a position whereby pirates are no longer able to receive or profit from ransom payments.”²¹ It noted that although ransom payments are considered “the safest and most effective means of securing the release of hostages and ships”, such payments “reward pirates for their crime” and “also provide the main source of funds to support further piracy activity.”²² Further, ransom payments “strengthen the criminal elements that benefit from them, fuel corruption, and undermine the rule of law.”²³

But the criminalization of ransom payments could make matters worse for seafarers and ship-owners alike, as pirates may become more violent with hostages in order to place greater pressure on ship-owners and families to meet ransom demands.²⁴ Indeed, the CGPCS underscored the “concern expressed by the maritime industry that any sanction measures leading to the prevention of ransom payments

18. *See Africa Leaders Want Payment of Ransom Made Illegal*, REUTERS (Jul. 4, 2009), <http://www.reuters.com/article/2009/07/04/us-au-kidnapping-ransoms-sb-idUSTRE5631PY20090704>.

19. LEIGH L. THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 31 (Pearson International Edition 2009) (“Linkage effects refer to the fact that some negotiations affect other negotiations . . . Resolutions in one situation have implications for other situations.”).

20. Press Release, Intertanko, UK-led Piracy Ransom Task Force Debates Ransom Ban (Jun. 22, 2012), *available at* <http://www.intertanko.com/News-Desk/Home-Page-Article/UK-led-piracy-Ransom-Task-Force-debates-ransom-ban/>.

21. UK Task Force Report, *supra* note 7, at 1.

22. *Id.* For more information, see also then-U.K. Foreign Secretary David Miliband’s views on ransom payments expressed in *Somalia ‘to Become a Pirate Magnet,’* BBC News (Nov. 20, 2008), <http://news.bbc.co.uk/2/hi/world/africa/7739153.stm> (“There is strong view of the British Government, and actually the international community, that payments for hostage-taking are only an encouragement to further hostage-taking.”).

23. UK Task Force Report, *supra* note 7, at 1; *see also Africa Leaders Want Payment of Ransom Made Illegal*, *supra* note 18 (noting that the practice of paying ransom “should be made illegal because the cash is being used by militants to fund violence”).

24. ADJOA ANYIMADU, CHATHAM HOUSE, *COORDINATING AN INTERNATIONAL APPROACH TO THE PAYMENT OF RANSOMS: POLICY OPTIONS FOR PREVENTING PAYMENT OF RANSOMS* 3, 7 (2012) (“[a] reduction in ransom payments could result in systematic violence against hostages in order to place increased pressure on their families and employers to meet the ransom demand.”)

could adversely affect the welfare, security and release of seafarers who are held hostage.”²⁵

There is also a wider problem with respect to the ultimate beneficiaries of ransom payments. Some reports suggest that “[r]ansoms paid to Somali pirates to free merchant vessels are ending up in the hands of Islamist militants, exposing shipping groups to accusations of breaching international [anti-terrorism] sanctions.”²⁶ As pirates and terrorists may sometimes work hand-in-hand, it is important to re-examine whether piracy should be treated in the same way as terrorism for purposes of negotiating ransoms. For example, U.K. and U.S. laws criminalize the funding of terrorist groups, thus putting shipping companies (who often pay ransoms) in a delicate legal situation. In April 2010, U.S. President Barack Obama issued an executive order prohibiting financial dealings with eleven Somali individuals and organizations; two of these organizations have been reported as linked to pirate gangs.²⁷ Thus, enabling negotiation with pirates may have political and security costs beyond the piracy realm. In addition to going to terrorist groups, profits from ransom payments also sometimes benefit investors in “the world’s first pirate stock exchange” that has been established by Somali pirates and their organizational leaders, which allows “investors to profit from ransoms collected on the high seas.”²⁸

Negotiating with pirates has a significant financial cost.²⁹ As of February 2013, over \$300 million has been paid in ransom to pirates

25. Thirteenth Plenary Session of the CGPCS, *supra* note 11; see also Andreas S. Kolb, Time Rene Salomon, and Julian Udich, *Paying Danegeld to Pirates — Humanitarian Necessity or Financing Jihadists*, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, Vol. 15, 2011, at 162 (“As a matter of policy, states should be encouraged to tread different paths . . . [as] [t]he payment of ransom is the most promising and least risk-laden way to free hostages . . .”).

26. *Piracy Ransom Cash Ends Up with Somali Militants*, REUTERS (Jul. 6, 2011), <http://www.reuters.com/article/2011/07/06/somalia-piracy-idUSLDE7650U320110706> (“Under the terms of the arms embargo on Somalia, financial support to armed groups in the Horn of Africa country is banned. Both the United States and Britain regard al Shabaab as a terrorist organisation.”).

27. *Id.*

28. Avi Jorisch, *Today’s Pirates Have Their Own Stock Exchange*, WALL ST. J. (June 16, 2011), <http://online.wsj.com/news/articles/SB10001424052702304520804576341223910765818> (noting that “sources suggest that over 70 entities are listed on the . . . exchange.”).

29. There are also economic costs to not negotiating, such as the cost of the ship and cargo, which are highly unlikely to be returned without a negotiated payment.

since Somali piracy peaked in 2008.³⁰ A report by One Earth Foundation concluded that piracy cost the world economy almost \$7 billion in 2011.³¹ In 2013, the World Bank released a report quantifying piracy costs at \$18 billion.³² Every ransom payment incurs transaction costs, including legal and payment delivery fees.³³ Consequential costs also accumulate, such as the cost of keeping a vessel off-line during the hijacking period, damage to the cargo and hull cleaning. Accordingly, "the costs additional to the ransom payment . . . could be as high as \$7 million."³⁴ Piracy also has an important human cost that is a central concern to most ransom negotiations. At the outset, a ransom negotiation will typically seek the protection of one of three interests: *non-pecuniary*, *pecuniary*, or *hybrid* interests. Non-pecuniary interests include the well-being of hostages during captivity, their safe release and post-incident care. Pecuniary interests include rescuing or salvaging stolen property, including the vessel, cargo, and equipment on-board. Hybrid interests include a mixture of both non-pecuniary and pecuniary interests. Most negotiations are hybrid-oriented as they seek the release of hostages *as well as* property. But it is often the human cost that is most alarming. Over 1200 individuals were held captive by pirate gangs in 2011 alone. Thirty-five hostages

30. Paul Redfern, *Over \$300m Paid in Ransom to Pirates Since 2008*, THE E. AFR. (Feb. 9, 2013), <http://www.theeastafrican.co.ke/news/Over-USD300m-paid-in-ransom-to-pirates-since-2008/-/2558/1689648/-/eqxo8m/-/index.html>; see also WORLD BANK, *PIRATE TRAILS: TRACKING THE ILLICIT FINANCIAL FLOWS FROM PIRATE ACTIVITIES OFF THE HORN OF AFRICA* 42 (2013), available at <https://openknowledge.worldbank.org/handle/10986/16196> (noting that between 2005 and 2012, approximately \$400 million were claimed as ransom for piratical acts off the Horn of Africa).

31. Anna Bowden & Shikha Basnet, *The Economic Cost of Somali Piracy* 2011 (One Earth Future, Working Paper, 2011), available at http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011.pdf.

32. *Ending Somali Piracy: Go After the System, Not Just the Pirates*, THE WORLD BANK (Apr. 11, 2013), <http://www.worldbank.org/en/news/feature/2013/04/11/ending-somali-piracy-go-after-the-system-not-just-the-pirates>.

33. Willem Marx, *Ransom Payments Give Wing to More Somali Piracy*, AOL NEWS (Nov. 19, 2009), <http://www.aolnews.com/2009/11/19/ransom-payments-giving-to-more-somali-piracy/> ("Ransom payers frequently have to bankroll specialist advice on ransom negotiations, legal fees for the families of crew and premiums for the quick transfer of cash through international financial systems. Then there's the actual cost of ransom delivery — sometimes using light aircraft or parachute.").

34. James Kraska, *Freakonomics of Maritime Piracy*, BROWN J. WORLD. AFF., Spring/Summer 2010, at 114; see also Olaf J. de Groot, Matthew D. Rablen, Anja Shortland, *Baargh-gaining with Somali Pirates*, 11 (Economics of Security Working Paper Series, Working Paper 74, 2012), available at http://www.diw.de/documents/publikationen/73/diw_01.c.408689.de/diw_econsec0074.pdf

and 111 pirates died as a result of attacks, captivity, disease, or rescue operations.³⁵ As one report put it, “[a]ll hostages face[] the risk of violence day upon day and a range of inhumane treatment in violation of their basic human rights, including the right to life, liberty, and security of person.”³⁶ There are still eleven vessels and at least 188 crew members being held in Somalia.³⁷ Interestingly, some pirates have released hostages without any payment of ransom³⁸ and were pardoned by regional authorities, though it is not clear what the pirates obtained in return.³⁹

Given the unique circumstances presented in each hijacking,⁴⁰ blanket rules governing the legality of ransom payments must be replaced with a policy-based approach opposing the *extraction* of ransom without prohibiting payments altogether, as payments may sometimes be the only way to safely rescue crew and property. A complete ban on ransom payments would have devastating effects on seafarers, marine assets, and the environment. Conversely, complete acquiescence to these payments undermines international policy goals of regulating and deterring criminal activity as well as promoting global order. This Article argues for a policy-oriented approach to the development of rules governing negotiations with pirates and submits that a narrow approach that categorically opposes ransom payments is undesirable because it does not acknowledge the context-specific balance between, state and international interests on the one hand, and private party interests on the other hand. Put differently, although private parties should be allowed to negotiate with pirates, negotiation should not lead pirates to enjoy impunity.

Accordingly, this Article is divided in four parts, including this introduction. Part II, provides a backdrop of recent developments, including the international scope of piracy, ransom payment trends, and conceptual differences between piracy and other international

35. THE HUMAN COST OF SOMALI PIRACY 2011, INT’L MAR. BUREAU AND OCEANS BEYOND PIRACY 4, available at http://www.icc-ccs.org/images/stories/pdfs/hcop_2011_version1.4.pdf.

36. *Id.* at 5.

37. D.H. *Somali Piracy: Just Taking a Break*, THE ECON. AFR. BLOG (Oct. 22, 2012, 12:40 PM), available at <http://www.economist.com/blogs/baobab/2012/10/somali-piracy>.

38. Feisal Omar & Adbi Sheikh, *Somali Pirates Release Syrian Hostages After 2 Years-Authorities*, REUTERS (Jan. 12, 2013), available at <http://www.reuters.com/article/2013/01/12/somalia-piracy-idUSL6N0AH0PS20130112>.

39. In this instance, one of the state officials involved in the pardoning and negotiations was a former pirate himself.

40. See *Masefield AG v. Amlin Corporate Member Ltd*, [2010] 1 C.L.C. 318 (“The impact and effect of a [piratical] capture is very fact sensitive.”).

crimes. Part III evaluates arguments for and against the criminalization of ransom payments and crafts a policy-oriented approach to managing the issue. Here, negotiation frameworks are utilized to assess whether negotiating with pirates is sound policy. Part IV concludes by recommending that States should not preclude negotiations with pirates. Rather, States should (1) criminalize the *extraction* of ransom payments and (2) impose a tax on ransom payments. This Article argues that these policy-based measures will maximize the interests of all stakeholders without compromising global order.

II. CONTEXT

A. "Global Devils"⁴¹: Piracy as an International Problem⁴²

Piracy is a violent crime. The fact that crewmembers may be released unharmed does not alter its violent nature.⁴³ To use Harvard Law School Professor Robert Mnookin's typology, pirates are "international devils," as piracy involves "matters of life and death."⁴⁴ Pirates are creatures of purpose, motivated by incentives and unregulated. Pirates have been increasingly successful in their attacks, although the number of attacks has reportedly dropped in the last couple of years. This, however, does not mean that the threat has been eradicated, nor does it suggest that it has been successfully managed. Although reported statistics are helpful, they present only a partial picture of piracy's magnitude worldwide. Indeed, some shipowners do not report piracy attacks at all. Maritime lawyer John Knott explains, "[a]mong the reasons for non-reporting are fear that insurance premiums would otherwise be increased; and the belief that an owner's image would be adversely affected if details were made public."⁴⁵

41. MNOOKIN, *supra* note 2, at 51; ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW*, (Oxford University Press, 2008) at 28 ("The pirates were regarded as enemies of humanity (*hostes humani generis*) in that they hampered the freedom of the high seas and threatened private property."); *see also* Lucas Bento, *Toward an International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*, 29 *BERKELEY J. INT'L LAW* 399, 401 (2011) (noting that pirates were considered as the enemy of all mankind in Roman times).

42. UK Task Force Report, *supra* note 7, at 1 ("Piracy off the coast of Somalia is an international problem . . .").

43. *See* THOMAS SCHELLING, *THE STRATEGY OF CONFLICT*, (Harvard University Press, 1980) at 6 ("The fact that a kidnap victim is returned unharmed, against receipt of ample ransom, does not make kidnapping a nonviolent enterprise.").

44. MNOOKIN, *supra* note 2, at 5.

45. JOHN KNOTT, *SAFETY AT SEA — WITH PARTICULAR REFERENCE TO PIRACY*, 6, available at [http://www.hfw.com/downloads/Client%20Brief%20-%20Safety%20at%20Sea%20\[A4%208pp\]%20July%202012.pdf](http://www.hfw.com/downloads/Client%20Brief%20-%20Safety%20at%20Sea%20[A4%208pp]%20July%202012.pdf) ("Points to bear in mind with published

When compared to 2011 figures, statistics show that although the number of attempted and actual piracy attacks dropped in 2012, they still remain higher than 2008 levels, when Somali piracy grabbed the attention of the international community following the hijacking of the MV *Sirius Star*.⁴⁶ In 2008, the world witnessed some 293 attempted and actual attacks, but in 2012 the figure reached almost 300 attacks.⁴⁷ In 2012, however, *Somali* piracy dropped to a six-year low.⁴⁸ Although this is a comforting development, it is no reason for complacency. As the CGPCS noted, “while a welcome and marked reduction has been seen in the number of attacks and hijackings in 2012 . . . the underlying causes of piracy remain in place and pirate action groups remain active, meaning that the current decline in [Somali] piracy attacks is inherently reversible.”⁴⁹ An alternative explanation for a drop in Somali piracy has been advanced by *The Economist*. According to its hypothesis, “pirates are clearing their stock of hostages and hijacked ships while they wait for the weather to change and the international community to tire of an expensive policing operation.”⁵⁰

figures are that not all incidents are uniformly categorized by different organisations and that, for any of a number of reasons, not all attacks are reported. Some estimates put the number of unsuccessful attacks that are not reported as high as 50 per cent globally, rising to perhaps 80 per cent for Nigeria. These estimates includes incidents that under international law would be classed as armed robbery rather than piracy. More moderate estimates put the proportion of unsuccessful attempts at hijacking by Somali pirates that are not reported in the order of 20 to 25 per cent of the total. Among the reasons for non-reporting are fear that insurance premiums would otherwise be increased; and the belief that an owner's image would be adversely affected if details were made public. The main disadvantage of non-reporting is that the full extent of the problem is not recognized, and that consequently insufficient defensive resources are likely to be made available.”).

46. Borzou Daragahi & Edmund Sanders, *Pirates Show Range and Daring*, LA TIMES (Nov. 18, 2008), <http://articles.latimes.com/2008/nov/18/world/fg-piracy18>, (“In their most brazen raid yet, suspected Somali pirates operating deep in open waters have seized an oil tanker as long as an aircraft carrier . . .”).

47. *Piracy and Armed Robbery Against Ships, 1 January — 31 December 2012*, ICC INT'L MAR. BUREAU, (Jan. 2013) at 6.

48. Alaric Nightingale & Michelle Bockmann, *Somalia Piracy Falls to Six-Year Low as Guards Defend Ships*, BLOOMBERG NEWS (Oct. 22, 2012), <http://www.businessweek.com/news/2012-10-22/somalia-piracy-attacks-plunge-as-navies-secure-trade-route>.

49. Thirteenth Plenary Session of the CGPCS, *supra* note 11.

50. *Somali Piracy: Just Taking a Break*, *supra* note 37.

In any event, it is clear that Somali piracy remains lucrative, and the underlying incentives for piracy remain a potent motivator.⁵¹ For example, in October 2012, pirates released a Greek-owned bulk carrier and its twenty-one-person Filipino crew for \$5 million.⁵² Some reports also suggest that piracy appears to have migrated westward across the African continent, springing up off the coast of the oil rich regions of West Africa, such as Nigeria. This suggests that military efforts in the Gulf of Aden, such as the EU NAVFOR mission,⁵³ which patrols the Gulf of Aden, the Red Sea, and the western part of the Indian Ocean, “ha[ve]n’t stymied piracy [but] only shifted it.”⁵⁴

Piracy is not only a crime of international impact, with attacks occurring off the coast of Somalia, Southeast Asia, and even Colombia,⁵⁵ but it is also in some instances an internationally-run operation.⁵⁶ Rodolphe Durand and Jean-Phillippe Vergne note that “pirates are not solitary heroes who challenge authority out of fury or despair. Rather, they organize themselves into groups,”⁵⁷ which may be international in scope. Indeed, “[a] UN document has linked British citizens with Somali piracy [where a] British businessman of Somali origin [has allegedly acted as one] of the key organizers of a

51. See *Pirate Economics: Bargain Like a Somali*, THE ECONOMIST (Nov. 24, 2012), <http://www.economist.com/news/finance-and-economics/21567077-how-negotiate-pirates-horn-africa-bargain-somali> (noting that “although the number of ships taken is down, the pirates have adjusted by charging more per release”).

52. *Somali Pirates Free Greek-Owned Ship, Say Ransom Was \$5.7 Mln*, REUTERS (Oct. 12, 2012), <http://www.reuters.com/article/2012/10/12/somalia-piracy-idUSL5E8LC23020121012>.

53. *Mission*, EU NAVFOR SOMALIA, (<http://www.eunavfor.eu/about-us/mission/>).

54. Jen Alic, *Pirates Want Your Oil and They're Smart Enough to Get It*, OIL PRICE (Feb. 7, 2013), <http://oilprice.com/Energy/Energy-General/Pirates-Want-Your-Oil-and-Theyre-Smart-Enough-to-Get-It.html>; see also UK Task Force Report, *supra* note 7, at 1 (“[T]his positive trend is fragile and reversible, and the international community and industry should not therefore reduce its efforts across the board to drive down the threat to our security, prosperity and people.”).

55. Bento, *supra* note 41, at 404 (“[M]aritime piracy is a growing global issue in today’s world. Pirates interfere with shipping and maritime transport in diverse locations such as the coast of Somalia, the Straits of Malacca, the South China Sea, the Gulf of Nigeria and the Americas.”); *Piracy and Armed Robbery Against Ships*, *supra* note 47, at 8.

56. ANYIMADU, *supra* note 24, at 3 (“The millions of dollars received when ransoms are paid is divided up between various interested parties within a pirate network and diffused via often opaque connections throughout Somalia and into regional states such as Kenya and Ethiopia, the United Arab Emirates and beyond.”) (emphasis added).

57. RODOLPHE DURAND & JEAN-PHILLIPPE VERGNE, *THE PIRATE ORGANIZATION: LESSONS FROM THE FRINGES OF CAPITALISM 2* (Harvard Business Review Press 2013).

pirate-related kidnapping in 2009.”⁵⁸ Other reports suggest that pirates use information,⁵⁹ which may be non-public, about tanker routes and locations.⁶⁰ With members often based in different countries, larger piratical operations are typically organized by international networks.⁶¹

From a negotiation perspective, knowing the composition of a piracy organization is important because, ideally, a party must know as much as possible about how the other party is structured and organized so as to fully understand relevant pressure points and decision-making centers.⁶² However, the diversity of some of these internationally-run pirate networks can prevent a party from fully knowing who the relevant decision-makers are. As such, the dynamics of ransom negotiations may change according to the “hidden table,” or “parties who are not present at the negotiation table,” which can often be the “most important parties.”⁶³ Are all members of the pirate organization monolithic,⁶⁴ or do their interests conflict internally,⁶⁵ between, for example, the operational team (or “foot

58. Jerome Starkey, *Briton Organized Yacht Couple's Kidnap by Somali Pirates, Says UN Report*, THE TIMES (Jan. 26, 2013), <http://www.thetimes.co.uk/tto/news/uk/article3668941.ece> (also noting that UN documents suggest that “the British Government has evidence that other British residents are also involved in aiding the pirates”).

59. *Piracy and Armed Robbery Against Ships in Asia Annual Report: January-December 2012*, ReCAAP Information Sharing Centre, at 31, available at <http://www.recaap.org/Portals/0/docs/Reports/ReCAAP%20ISC%20Annual%20Report%202012.pdf>; see also *Somali Pirates 'helped by intelligence gathered in London'*, THE TELEGRAPH (May 11, 2009), <http://www.telegraph.co.uk/news/worldnews/piracy/5309692/Somali-pirates-helped-by-intelligence-gathered-in-London.html> (reporting that “[p]irate” consultants are in constant satellite telephone contact with pirate commanders on land, who can then pass details of the layout of the vessel, its crew, route and cargo to their colleagues at sea, it states”); see Bento, *supra* note 41, at 406 (noting that there may also be “unreported and illicit market activity by unknown actors providing pirates with vital insider information about cargo value, vessel layout and specific shipping routes”).

60. See also Dave Lee, *Ship Trackers 'Vulnerable to Hacking', Experts Warn*, BBC NEWS (Oct. 18, 2013), <http://www.bbc.co.uk/news/technology-24586394> (reporting that Somali pirates may be hacking the Automatic Identification System (“AIS”) used by the shipping industry to track ships globally).

61. WORLD BANK, *supra* note 30, at 3 (noting that presently, “piracy involve[s] organized networks with members operating in different countries”).

62. THOMPSON, *supra* note 19, at 27 (noting that “[i]t is always important to identify the players in a negotiation”).

63. *Id.*

64. *Id.* at 28 (“Monolithic refers to whether parties on the same side of the table are in agreement with one another concerning their interests in the negotiation.”).

65. See Peter T. Leeson, *An-arrgh-chy: The Law and Economics of Pirate Organization*, 115 J. OF POL. ECON. 1049, 1074 (2007) (“To effectively organize their banditry,

soldiers”) and the leaders of the organization?⁶⁶ Answers to these questions remain unclear, particularly because ransom negotiations generally remain secret.⁶⁷ But doing “as much research and homework as possible to determine the counterparties’ interests in the negotiation”⁶⁸ can give negotiators a key advantage, particularly when negotiating with sophisticated, internationally-run piracy groups.

B. *An International Legal Problem*

Rare occasions aside, the legal environment is a powerful shaper of any negotiation. Law may dictate the *substance* of negotiation, i.e., what may be negotiated.⁶⁹ Law can also govern the *procedure* of how negotiations and dispute resolution writ-large are conducted. Finally, law, and particularly general principles of law, can provide structured reference-points that influence the *spirit* of a negotiation.

Piracy is an international crime and has long been recognized as such under public international law.⁷⁰ Acts of piracy are also

pirates required mechanisms to prevent internal predation, minimize crew conflict, and maximize piratical profit . . . [such as the use of pirate constitutions].”).

66. See Noah Shachtman, *Exclusive Interview: Pirate on When to Negotiate, Kill Hostages*, WIRED (Jul. 28, 2009), <http://www.wired.com/dangerroom/2009/07/exclusive-interview-pirate-on-when-to-negotiate-kill-hostages/> (“Are there internal conflicts within the pirate gangs? No. In piracy, everyone’s life depends on everyone else’s. There is some professional competition between groups, but we cooperate with information and logistics when it’s required. We won’t fight amongst ourselves as long as the money is paid as promised. We have never had any conflicts within my group.”).

67. WORLD BANK, *supra* note 30, at 3 (“Negotiations for ransoms and the payment of the ransoms are usually shrouded in secrecy.”).

68. THOMPSON, *supra* note 19, at 28; see also ADAM DOLNIK & KEITH M. FITZGERALD, *NEGOTIATING HOSTAGE CRISES WITH THE NEW TERRORISTS* 137 (Greenwood Publishing Group 2008) (“One of the most important keys to exercising influence effectively is understanding one’s counterpart.”). For a review of difficulties associated with knowing more about the other party, see DE GROOT ET AL., *supra* note 34, at 8 (“It is frequently difficult for the pirates to trace the ship-owner and establish his ability to raise a specific ransom. Ownership structures are often (deliberately) opaque, with ships registered under flags of convenience and owned by various holding companies. Following these complicated ownership structures back to the ultimate decision maker tends to lead to an anonymous post-box address rather than a name. Similarly, the ship-owner lacks presence on the ground in Somalia to verify the type of the pirates. However ship-owners can get information of the location of their ship either from the ship’s AIS signal or on request from EU NAVFOR.”).

69. See, e.g., THOMPSON, *supra* note 19, at 32 (noting that law may dictate whether it is legal to negotiate a specific subject matter, but that “[s]ometimes, no specific laws govern what can or cannot be negotiated”).

70. Bento, *supra* note 41, at 415.

criminalized under the laws of various jurisdictions.⁷¹ Further, hostage taking is forbidden under international law.⁷² However, although international law criminalizes piracy, there is no uniform and comprehensive international legal regime that governs maritime piracy.⁷³ As such, negotiations with pirates are mostly undertaken by private parties within domestic legal boundaries, with occasional interventions by public parties. For example, negotiations with Somali pirates are typically between private parties, such as a ship-owner (typically represented by a law firm), and a pirate "negotiator"⁷⁴ who represents the pirate group's interest in the negotiation. In some instances, if it falls within their mandate or they are attacked, public actors, such as navy ships patrolling the Gulf of Aden, have intervened when commercial ships were hijacked.⁷⁵

This privately-sponsored dispute resolution system is arguably a result of the atypical nature of the international legal system, which lacks a global police system to enforce international laws. Private parties must thus seek to resolve what is clearly an international legal problem, with limited resources and limited help from their respective States; this is particularly true if the ship is flying the flag of

71. See Bento, *supra* note 41, at 429–31.

72. G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, at 245 (Dec. 17, 1979) [hereinafter International Convention Against the Taking of Hostages] ("Article 1: Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.").

73. Kolb et al., *supra* note 25, at 121 ("To date, no instrument of international law specifically addresses the problem of ransoms paid to pirates.").

74. See *United States v. Ali*, 885 F. Supp. 2d 17 (D.C. Cir. Ct. App. 2013) (holding that a ransom negotiator can also be a "pirate" for legal purposes); see also Eugene Kontorovich, *From Prof. Eugene Kontorovich, About Today's Piracy Decision*, THE VOLKOH CONSPIRACY (BLOG), (July 13, 2012), <http://www.volkoh.com/2012/07/13/from-prof-eugene-kontorovich-about-todays-piracy-decision/> ("Yet the defendant does not seem to be a pirate in the traditional sense at all. Rather, he was an official in the education ministry of the breakaway Somali region where the ship was taken, who worked for the pirates as a ransom negotiator.").

75. See, e.g., *Suspected Pirates Caught in Joint Naval Operation*, BBC NEWS (Oct. 20, 2013), <http://www.bbc.co.uk/news/uk-24600396> ("A counter-piracy task force commanded by a Royal Navy officer has caught a group of Somalis believed responsible for two attacks in the Indian Ocean"); Robert D. McFadden & Scott Shane, *In Rescue of Captain, Navy Kills 3 Pirates*, N.Y. TIMES (Apr. 12, 2009), http://www.ny-times.com/2009/04/13/world/africa/13pirates.html?pagewanted=all&_r=0.

a third state and carrying multinational crew.⁷⁶ Furthermore, the legality of ransom payments is silent under international law, and there is no treaty or customary international law governing the subject.⁷⁷ Indeed, “[t]o date, no instrument of international law specifically addresses the problem of ransoms to pirates,”⁷⁸ and in any event, international law “does not forbid the ransoming of [a] captured vessel, either directly after the capture, or after she has been conducted to port, but before adjudication.”⁷⁹ The same, however, cannot be said of international law’s treatment of terrorist financing.⁸⁰

C. Ransom Payment Trends⁸¹

Ransom negotiations have been conducted for millennia. The Greek philosopher Plutarch recounts Julius Caesar being captured by pirates for thirty-eight days.⁸² The pirates, completely unaware of the celebrity and political status of their hostage, demanded twenty talents as ransom. According to Plutarch’s narrative, this small request insulted Caesar, who laughingly asked the pirates to raise

76. See DE GROOT ET AL., *supra* note 34, at 12. As de Groot et al. note:

Nearly fifty per cent of ships hijacked in Somalia fly well-known “flags of convenience”, usually so as to save money, to avoid certain regulations and possibly to obscure ownership of a vessel. Beyond that, a significant portion of ships fly the flag of a developing country, but where ownership data exists, we observe that this does not necessarily imply that the owner too is located in those countries. Vessels with flags from developed countries, on the other hand, give a clear indication that their owners are also located in a developed country. As such, these ships are likely to have wealthy ship-owners.

Id.

77. The sources of international law can be found in Article 38 of the Statute of the International Court of Justice. One of these sources is the teachings of the most highly qualified publicists. The issue of whether ransom payments are legal under international law has received little attention by scholars, and as such, its legality is at best unexplored and should be examined in further research. See Statute of the International Court of Justice, June 26, 1945, art. 38(d), 59 Stat. 1055, 1060 (1945).

78. Kolb et al., *supra* note 25, at 121.

79. L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE*, VOL. II — WAR 277 § 195 (Longmans, Green & Co, 3d ed. 1921).

80. G.A. Res. 109, U.N. GAOR, 54 Sess., Supp. No 49, U.N. Doc A/54/49, (Dec. 9, 1999).

81. Vivienne Walt, *Why the Somali Pirates Keep Getting Their Ransoms*, TIME (Apr. 20, 2009), available at <http://www.time.com/time/world/article/0,8599,1892366,00.html>.

82. PLUTARCH, *The Life of Julius Caesar*, in *Parallel Lives*, Vol. VII, 443, 445–47 (Loeb Classical Library ed., 1919), available at http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Plutarch/Lives/Caesar*.html.

their demand to fifty talents of gold. Once the ransom was paid, Caesar was freed and engineered an extermination campaign against the pirates.

Unfortunately, hostages nowadays do not share the political clout or financial resources of the Roman Emperor. This is unfortunate because ransom demands have increasingly risen in the past decade⁸³ as pirates successfully prey on larger ships,⁸⁴ from an average of approximately \$500,000 per vessel captured in 2007 to almost \$5 million in 2011.⁸⁵ Some reports estimate that in 2011 alone, pirates took in an estimated \$160 million.⁸⁶ Ransom negotiations are also taking longer to negotiate,⁸⁷ consisting “an average [of] 178 days, or around six months for a ransom to be negotiated, and a ship released.”⁸⁸

Ransom demands are also sensitive to geography. West African pirates are different from their Eastern counterparts. Western African pirates’ inability to “park” a vessel for a prolonged period of time during ransom negotiations calls for alternative strategies. Whereas Somali pirates can easily move in and out the sea with relative impunity, “West African pirates have no place to hold a vessel securely while ransom negotiations take place so they sometimes kidnap crew members, usually more senior or highly skilled technical people who may attract higher ransoms,”⁸⁹ given their seniority. Thus, unable to park the vessel and drag negotiations to increase the ransom payout, West African pirates are more akin to kidnappers, bargaining over the hostages rather than the cargo or ship. Others, however, hijack

83. See S.C. Res. 1897, U.N. Doc. S/RES/1838 (Oct. 7, 2008) (noting with concern the “escalating ransom payments . . . are fuelling [Somali piracy]”).

84. Peter Chalk, *Piracy off the Horn of Somalia: Scope, Dimensions, Causes and Responses*, 16 BROWN J. WORLD AFF. 89, 93 (2010) (noting a positive increasing correlation between the size of the vessel seized and the size of hostage ransom payments); Bowden & Basnet, *supra* note 31, at 11 (“While the success rate of pirate attacks in 2011 has declined from 27% in 2010, to 13% in 2011, there has been an increase in both the number of attempted attacks (from 152 in 2010, to 189 in 2011), as well as the ransom price.”).

85. ANYIMADU, *supra* note 24, at 2.

86. Bowden & Basnet, *supra* note 31, at 11.

87. DE GROOT ET AL., *supra* note 34, at 2–3 (showing that negotiation durations increased since January 2004, and finding that “ransom durations have lengthened as pirates have developed the land-side infrastructure needed to protect and supply ships for long periods of time.”).

88. Bowden & Basnet, *supra* note 31, at 11.

89. AUSTRALIAN STRATEGIC POLICY INSTITUTE, CALMING TROUBLED WATERS: GLOBAL AND REGIONAL STRATEGIES FOR COUNTERING PIRACY (2012), at 26.

vessels to siphon cargo, such as oil, and then dispose of the cargo and crew without asking for ransom.⁹⁰

D. Piracy or Terrorism: Does It Matter?

At first sight, piracy and terrorism share some striking similarities.⁹¹ They both utilize violent means to achieve their goals, and are often ruthless in their methods. Both groups often kidnap individuals to obtain a desired outcome, e.g., prisoner exchange, ransom payment, and operate in diffuse international networks. Some scholars have argued that both activities should be treated as one and the same thing.⁹² However, equating piracy to terrorism is a risky proposition for a number of reasons.

First, it undermines established conceptions of piracy under international law. Indeed, an act must be conducted for *private* ends for it to be considered piracy under international law.⁹³ Terrorism, on the other hand, fundamentally seeks to promote an ideology, rather than satisfy private or purely pecuniary ends.⁹⁴ Although the overwhelming legal consensus is that pirates are *not* terrorists per se, it is

90. *Nigeria: Pirates Kidnap 3 Sailors off Coast*, *supra* note 4 (“The pirates released the ship and its sailors a few days later after most likely stealing the diesel fuel the ship had on board.”); Ejiofor Alike, *IMO: Piracy in Nigeria Differs from That of Somalia*, THIS DAY LIVE, (Feb. 7, 2013), <http://www.thisdaylive.com/articles/imo-piracy-in-nigeria-differs-from-that-of-somalia/138678/> (“[In Nigeria], the target of pirates in the West African coast is to steal crude oil or petroleum products, while in Somalia the target is to seize ships and crewmembers for ransom.”).

91. Eric Shea Nelson, *Maritime Terrorism and Piracy: Existing and Potential Threats*, GLOBAL SEC. STUD., Winter 2012, at 16 (“Although maritime terrorism and piracy are two distinct phenomena that exist for different reasons, many of their characteristics tend to overlap.”).

92. Douglas R. Burgess Jr., *Piracy Is Terrorism*, N.Y. TIMES, (Dec. 5 2008), http://www.nytimes.com/2008/12/05/opinion/05burgess.html?_r=0.

93. See U.N. Convention on the Law of the Sea art. 101(a), Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (“Piracy consists of any of the following acts . . . 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”); MALCOM N. SHAW, *INTERNATIONAL LAW* (5th ed. 2005); ANTONIO CASSESE, *CASSESE’S INTERNATIONAL CRIMINAL LAW* (2nd ed. 2008). *But see* Inst. of Cetacean Research v. Sea Shepherd Conservation Soc., 725 F. 3d 940 (9th Cir. 2013) (holding that “private ends” include “those purported on personal, moral or philosophical grounds, such as . . . environmental [protection] goals”).

94. See Todd Sandler & Walter Enders, *An Economic Perspective on Transnational Terrorism*, in THE ECON. ANALYSIS OF TERRORISM 13, 13–28 (Keith Hartley & Jurgen Brauer eds., 2007) (“Terrorism is the premeditated use, or threat of use, of extranormal violence to obtain a political objective through intimidation or fear directed at a large audience. An essential aspect of this definition concerns the presence of a political objective.”); Kevin Jon Heller, *Why Piracy Is Not Terrorism*, OPINIO JURIS (Dec. 5, 2008), <http://opiniojuris.org/2008/12/05/why-piracy-is-not-terrorism/> (noting

clear that such fine legal distinctions are not always justified in practice. Indeed, some terrorist organizations, such as *al-Shabbab*, use piracy as a fundraising tool.⁹⁵ It is thus unsurprising that the U.S. and U.K. have made it illegal for any U.S. or U.K. entity to make payments to *al-Shabbab*, including ransom payments to pirates working for the organization.⁹⁶

Second, the distinction between piracy and terrorism bears on which legal regime governs the activity in question. Indeed, “there are remarkable differences in the legal regimes of combating terrorism and combating piracy.”⁹⁷ Such distinctions have a number of repercussions, including a state’s authority to board a vessel and the applicability of the doctrine of universal jurisdiction.⁹⁸

Importantly, whether an act falls under the rubric of piracy or terrorism influences the possibility and method of negotiating with the perpetrators at issue. Many countries categorically refuse to negotiate with terrorists⁹⁹ and criminalize such interactions. The same,

that piracy is not terrorism); Lucas Bento, *The ‘Piratization’ of Environmental Activism*, L.M.C.L.Q. (forthcoming May 2014).

95. See Richard Lough, *Piracy Ransom Cash Ends Up with Somali Militants*, REUTERS, July 6, 2011, <http://www.reuters.com/article/2011/07/06/somalia-piracy-idUSLDE7650U320110706> (noting that the Somali-based terrorist organization *al Shabbab* finances some of its operations by using piracy, such as taking a \$200,000 cut from the release of the Japanese-owned MV *Izumi* after pirates received a \$4.5 million ransom).

96. See Exec. Order No. 13536, 75 Fed. Reg. 19,869 (April 12, 2010) (noting that “[a]ll property and interests in property that are in the United States . . . are blocked and may not be transferred, paid [to *al-Shabbab*]); Bruce G. Paulsen & Ellen Lafferty, *Hijacked: The Unlikely Interface Between Somali Piracy and the U.S. Regulatory Regime*, 85 TUL. L. REV. 1241, 1241–56 (2011) (explaining executive order 13,536 and its import for piracy situations); *Impact of President Obama’s April 13, 2010 Executive Order on Somalian Piracy — The UK Insurance Perspective*, CLYDE & Co., April 20, 2010, http://www.clydeco.com/uploads/Files/Publications/2010/UK%20INSURANCE%20PERSPECTIVE_2010.pdf (noting that “[t]here can be no doubt that a ransom payment to an individual or group who has been designated pursuant to the Order is now illegal under US law.”); see also G.A. Res. 54/109, *supra* note 80 (requiring Signatory States to criminalize the financing of terrorism); Kolb et al., *supra* note 25, at 122.

97. Kolb et al., *supra* note 25, at 115.

98. *Id.* at 115–16. The distinction also impacts a insured’s ability to recover ransom payments from his insurer in instances where the payment is contrary to a country’s public policy and illegal for insurance purposes. See also Bento, *supra* note 41, at 418 (noting that “[t]he distinction between piracy and terrorism is particularly important for the purposes of insurance coverage, since protection and indemnity liabilities arising from acts of piracy are not excluded risk whereas terrorism is concerned; rather, these would fall under a war risk”).

99. Harmonie Toros, *‘We Don’t Negotiate with Terrorists!’: Legitimacy and Complexity in Terrorist Conflicts*, 39 SEC. DIALOGUE 407 (“Government after government has pledged never to talk to terrorists.”); Press Release, The White House, President

however, cannot be said with respect to piracy. Arguably, States, as engines of political ideologies, feel directly threatened by terrorists who, unlike pirates, seek to target the political infrastructure of a State. Accordingly, negotiations with pirates are relatively less arduous than negotiations with terrorists. In negotiation theory, “the two major types of conflict are consensus conflict and scarce resource competition.”¹⁰⁰ Whereas consensus conflict, such as those involving terrorism, involves the incompatibility between parties’ “opinions, ideas, or beliefs”,¹⁰¹ scarce resource competition exists when parties vie for limited resources such as in piracy. The distinction is important because conflicts over scarce resources are easier to resolve than consensus conflicts. Indeed, “when negotiations involve “sacred issues” such as religion or politics, “more impasses, lower joint profits, and more negative perceptions of the counterparty result.”¹⁰² Furthermore, labelling piracy as terrorism will limit a State’s ability to respond to piracy threats appropriately, “as [the State’s] assessment of the characteristics of [its] enemies is frequently based simply on the projection of [the State’s] own fears and biases, as opposed to an actual understanding of their motivations and strategic mind-sets.”¹⁰³

Finally, conflating terrorism with piracy may confuse policy-makers and private parties, such as ship-owners,¹⁰⁴ by ignoring critical differences between the two activities.¹⁰⁵ Terrorism is a form of

Bush, Philippine President Arroyo Hold Joint Press Conference (May 19, 2003) <http://2001-2009.state.gov/p/eap/rls/rm/2003/20732.htm> (“You’ve got to be strong, not weak . . . [T]he only way to deal with these people is to bring them to justice. You can’t talk to them, you can’t negotiate with them.”).

100. THOMPSON, *supra* note 19, at 30; see also Vilhelm Aubert, *Competition and Dissensus: Two Types of Conflict and of Conflict Resolution*, 7 J. OF CONFLICT RESOL. 26, 26–42 (1963).

101. THOMPSON, *supra* note 19, at 30.

102. See *id.*

103. DOLNIK & FITZGERALD, *supra* note 69, at 137 (further noting that “[t]he widespread use of the term ‘terrorist’ alone, expresses an understandable revulsion and disagreement with the other party’s beliefs and methods, but all too often leads to the refusal even to attempt to understand the terrorists’ motives; driven by the fear that such a process in itself constitutes a violation of our core values and allegiances”).

104. Kolb et al., *supra* note 25, at 162 (“It hardly seems a tolerable situation that ship-owners are confronted with an uncertain set of legal norms, most of which are associated with severe punishment, and cannot assess beyond any doubt whether they are acting in a manner consistent with the law or not. As such, clear statements by states and the United Nations as to the applicability of norms to ransom payments to pirates are needed”).

105. See *Nigeria Pirate Attack: US Sailors Seized*, BBC, Oct. 24, 2013 (noting that the U.S. State Department Deputy Spokeswoman characterized the kidnapping of two U.S. sailors from an oil supply ship as “an act of piracy rather than terrorism”).

political and/or religious activism that uses violence in seeking to promote ideological or religious beliefs and/or to obtain desired outcomes that are fundamentally based on or motivated by such beliefs.¹⁰⁶ Piracy, on the other hand, is a crime of opportunity that uses the *threat* of violence, or in some cases violence per se, for private ends.¹⁰⁷ Modern pirates are not trying to make a political statement; they are mere products of capitalism that seek financial gain.¹⁰⁸ Accordingly, piratical ransom negotiations are negotiations over crimes of “opportunity” and not, unlike the case of many terrorists operating under religious “commands,” crimes of “necessity.”¹⁰⁹ Piracy, then, remains “a criminal act driven by commercial interests.”¹¹⁰ Although both terrorists and pirates utilize similar *methods* to reach their goals, such as hostage-taking and the use of weapons, and carry out activities in *organized* form,¹¹¹ they occupy different strands of the criminal enterprise. Thus, if policy-makers treat both activities as one and the same, prophylactic and corrective measures may not yield effective results.¹¹²

106. See Terrorism Act, 2000, c. 11, § 1 (U.K.) (defining terrorism as “the use of threat [that] is designed to influence the government 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 or ideological cause”).

107. See KARINE HAMILTON, AUSTRALIAN COUNTER TERRORISM CONFERENCE, THE PIRACY AND TERRORISM NEXUS: REAL OR IMAGINED? (2010) (concluding that terrorists and pirates “appear more in competition with each other over access to ports and money” and that “the weight of current evidence strongly suggests that piracy off the East African coast is strictly an economic crime”).

108. See generally DURAND & VERGNE, *supra* note 57 (arguing that piracy drives capitalism’s evolution and foreshadows the direction of the economy); see also BENTO, *supra* note 94 (explaining that the term ‘private ends’ includes, but is not limited to, a desire for financial gain, with as an example revenge, which can amount to a private end).

109. THOMPSON, *supra* note 19, at 30 (contrasting opportunistic negotiations with negotiations of necessity).

110. ANYIMADU, *supra* note 24, at 3.

111. See Leeson, *supra* note 65 (examining the internal governance institutions of violent criminal enterprise by examining the law, economics, and organization of pirates); see also Jay Bahadur, *Somali Pirate: ‘We’re Not Murderers . . . We Just Attack Ships’*, THE GUARDIAN (May 24, 2011), <http://www.theguardian.com/world/2011/may/24/a-pioneer-of-somali-piracy> (“‘There are about 500 pirates operating around Eyl. I am their chairman,’ he said, claiming to head up a ‘central committee’ composed of the bosses of 35 other groups. The position of chairman, however, did not imbue Boyah with the autocratic powers of a traditional gang leader. Rather, Eyl’s pirate groups functioned as a kind of loose confederation, in which Boyah was a key organiser, recruiter, financier and mission commander.”).

112. See Nelson, *supra* note 91, at 15 (“Policymakers must be able to clearly distinguish these two phenomena in order to develop effective countermeasures.”).

III. PRESERVING NEGOTIATION, PROMOTING GLOBAL ORDER: TOWARDS A NEW POLICY ON RANSOM PAYMENTS

One of the key tenets of the Harvard Negotiation Law Review is that “[n]egotiation, not adjudication, resolves most legal conflicts.”¹¹³ This is particularly true of piracy negotiations because purely legal and adjudicatory solutions are incapable of yielding satisfactory results. Piracy operates on the outskirts of domestic legal systems, and international legal instruments remain inadequate to combat the scale of maritime piracy.¹¹⁴ This Article argues for a policy-based solution to the issue of whether States should allow private parties to make ransom payments to maritime pirates. This Part provides a summary of the policy-based school of addressing international legal problems (an approach underlying the recommendations made later in the article) before delving into the analysis of whether negotiating with pirates is sound policy.

A. *A Policy-Based Approach to Piratical Ransom Negotiations*

Piracy is an international problem. Although ransom negotiations are usually conducted by private parties, such negotiations are effectively topically treating an international, or public, ailment. As such, rules that purport to prohibit ransom payments to pirates must be analyzed under international legal lenses.

Given the indeterminate status of ransom payments under international law, this Article adopts a policy-oriented approach to developing a solution to the international legal problem of ransom payments to pirates.¹¹⁵ The policy-oriented approach to examining and developing international legal rules is particularly fitting in this context, since the interests at stake in ransom negotiations transcend public and private dichotomies. The policy-oriented school, also known as the New Haven School of International Law, seeks to “make policy recommendations to stabilize international relations, to promote minimum order and human dignity.”¹¹⁶ Indeed, there needs to be a “policy calculus” in shaping international law when [other

113. *About Us*, HARV. NEGOT. L. REV. (2014), <http://www.hnlr.org/about-us-2/>.

114. See Bento, *supra* note 41, at 399–400 (noting that “[c]urrent domestic, regional, and international legal frameworks fail to adequately combat the nature and scale of maritime piracy”).

115. See TAI-HENG CHENG, WHEN INTERNATIONAL LAW WORKS: REALISTIC IDEALISM AFTER 9/11 AND THE GLOBAL RECESSION 49 (2012) (noting that the New Haven School acknowledged the indeterminacy of international law and sought to resolve it via policy recommendations).

116. See *id.*

rules] are not synchronous"¹¹⁷ Although necessary, formalistic rules are incapable of fully satisfying the evolving nature of international problems. As former Dame Rosalynn Higgins, former President of the International Court of Justice, noted, "law is not an abstract application of rules: it is a process directed towards the implementation of policy goals for the common good."¹¹⁸

Thus, instead of solely basing a solution to ransom payments on existing legal instruments, precedents and principles, this Article's recommendations are grounded on shared expectations of appropriate conduct¹¹⁹ that seek to promote the "common good."¹²⁰ As "[p]olicy analysis is a social and political activity,"¹²¹ any solution dealing with ransom payments to pirates must consider a myriad of considerations that cannot be formalistically and exclusively confined to legal analysis. Though intended in a broader context, Jeremy Waldron put it thus, "[u]nless the legal scholar understands the relation between legal doctrines and institutions, on the one hand, and the wider political context on the other, his understanding of law and of the way in which particular legal doctrines work will be inconclusive or impoverished, in a *formalistic sort of way*."¹²²

In effect, solutions to legal problems must address both the law and context of the issue at hand. As Professor Richard Falk remarked, "one role of law is to help a social system move toward the attainment of its [policy] goals."¹²³ Policy-makers, lawyers, and scholars must thus look for tools and frameworks beyond the legal field

117. *Id.* at 52.

118. ROSALYNN HIGGINS, 1 THEMES AND THEORIES: SELECTED ESSAYS, SPEECHES AND WRITINGS IN INTERNATIONAL LAW 3 (2009).

119. CHENG, *supra* note 115, at 8. Cheng notes,

One way to think about the international legal system is as a process to address international problems. In international problems, government officials, international and domestic judges, corporate officers, and other decision-makers make decisions about what to do. One consideration in their decision-making is whether there are relevant prescriptions, including international laws, guidelines, principles, or even shared expectations of appropriate conduct.

Id.

120. HIGGINS, *supra* note 118, at 3.

121. EUGENE BARDACH, A PRACTICAL GUIDE FOR POLICY ANALYSIS, THE EIGHTFOLD PATH TO MORE EFFECTIVE PROBLEM SOLVING xv (CQPress, 1st edition, 2000).

122. Jeremy Waldron, *Legal and Political Philosophy*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, (Jules Coleman & Scott Shapiro ed., 2002).

123. Richard Falk, *New Approaches to the Study of International Law*, AM. J. INT'L L. 477, 477-95 (1967).

when devising ways to tackle international problems.¹²⁴ To this end, negotiation theory may shed light into this delicate area of policy and law by unveiling the multiplicity of interests, risks and expectations associated with ransom payments.¹²⁵

B. *Should We Negotiate with Pirates?*

1. *The Negotiation Process*

Ransom negotiations bifurcate into two strands. The first and less common strand encompasses *publicly*-negotiated ransoms, where a State government is actively involved in the negotiation and payment of the ransom. However, direct government involvement in the negotiation phase is often limited, “whether owing to national policies towards ransoms or because those acting on behalf of kidnapped crew actively discourage engaging with national or international authorities,”¹²⁶ since reaching out to authorities may escalate the conflict. The second strand involves *privately*-negotiated ransoms, where private parties are in charge of negotiations, and where governments provide limited assistance such as advice on crisis management.

Although every piracy negotiation differs in duration, scope, and structure, the negotiation process tends to follow a uniform sequence.¹²⁷ Indeed, in the context of Somali piracy, the sophistication

124. For an overview of other analytical approaches of international law, see SHAW, *supra* note 93, at 49–65.

125. Cheng, *supra* note 115, at 37–59 (surveying alternative theories of international law); see also SHAW, *supra* note 93, at 49–58 (discussing modern theories of international law).

126. UK Task Force Report, *supra* note 7, at 10.

127. When negotiating a party can typically choose among three strategies for reaching agreement: contending (or competing, engaging in distributive bargaining), problem solving, and yielding. When contending, a party tries to maximize its objectives by seeking to obtain concessions from the other party. When in problem-solving mode, also known as collaboration, a party seeks to “identify options that satisfy both parties’ goals.” When yielding, a party diminishes one’s own goals, accommodating the other party’s demands. Parties usually default to problem-solving when it is difficult to yield, when delays are costly, or when contentious tactics seem unwise. For example, a State cannot simply yield to the pirates’ business model. Delays are also costly for all parties involved, including crewmembers and their families, the shipowner and the pirates themselves. Contentious tactics are not really effective in this context, unless military action is taken, though, as noted below, this option carries significant risks. Thus, problem-solving is the best strategy that should inform a State’s policy on ransom payments. See Dean Pruitt, *Strategy in Negotiation*, in *INTERNATIONAL NEGOTIATION: ANALYSIS, APPROACHES, ISSUES* 92 (Victor A. Kremenyuk, ed.) (Wiley, 2nd ed., 2002).

and professionalization of Somali pirates have “formalized” the bargaining over ransoms.¹²⁸ Negotiations follow a predictable pattern of offers and counter-offers: “Bargaining is conducted with the ship-owner according to a sequence of alternating offers, with the pirates making the initial offer, and the ship-owner making the final offer.”¹²⁹ As one pirate put it, “[w]e know that we won’t get our initial demands, but we use it as a starting point and negotiate downwards to our eventual target.”¹³⁰ As rational subjects, pirates identify their target and reservation points and seek to maximize their returns once the parties establish their Zone of Potential Agreement (“ZOPA”).¹³¹

Piratical negotiations are complex. The use of sophisticated negotiation techniques by pirates is unsurprising in light of evidence that pirate organizations tend to consult and utilize experienced negotiators,¹³² who act as brokers between ship-owners and organizational leaders of piracy groups.¹³³ Negotiations also tend to be conducted in an environment of informational asymmetry in that the ship-owners have more information about the ship’s assets.¹³⁴ Thus, ship-owners pretend to be poorer so that they can contain the pirates’ expectations

128. For an insightful narrative of a negotiation with Somali pirates, see Geeta Anand & John W. Miller, *Hijacked on the High Seas*, WALL ST. J., Jan. 31, 2009, <http://online.wsj.com/article/SB123335651246634995.html?mod=djemITP>.

129. DE GROOT ET AL., *supra* note 34, at 6.

130. SHACHTMAN, *supra* note 66, at 51 (“We begin asking a high price and then go down until we agree on a price.”).

131. See generally Roger Fisher & William Ury, *GETTING TO YES* (2011).

132. Pirate negotiators need not be members of gangs. These individuals can be hired on a need-based basis, as was the case in *United States v. Ali*, 885 F.Supp.2d 17 (D.D.C. July 13, 2012), where the ransom negotiator was also Director General of the Ministry of Education for the Republic of Somaliland, a self-declared sovereign state within Somalia.

133. See, e.g., *United States v. Ali*, 885 F.Supp.2d 17 (D.D.C. July 13, 2012) (upholding piracy charge against ransom negotiator; but the jury verdict acquitted negotiator from piracy charges); see also Attila Ambrus, Eric Chaney, and Igor Salitskiy, *Pirates of the Mediterranean: An Empirical Investigation of Bargaining with Transaction Costs*, ECONOMIC RESEARCH INITIATIVES, DUKE UNIVERSITY, ERID Work Paper No. 115, Dec. 22, 2011 at 37 (noting that the “historical preference for centralized ransoming organizations suggests that such institutions might aid negotiations with pirates today by both enabling negotiations for multiple cargoes at once and by reducing transaction costs”).

134. Sandler & Enders, *supra* note 82, at 20 (“Hostage-taking incidents involve asymmetric information and uncertainty on the part of both [hostage-takers] and governments.”).

of a larger payout, and pirates portray themselves as more sophisticated so that they are not taken advantage of during negotiations.¹³⁵ Negotiations can also be complicated by aggravating factors, such as whether the hijacked vessel was involved in fishing, “because the pirates’ main grievance is that their waters have been severely overfished.”¹³⁶ Finally, prior payouts “educate pirates about the ‘value’ of European sailors and ships — raising both ransoms and ransom durations for subsequent victims.”¹³⁷

Ransom negotiations are time-sensitive. Although “‘wait and see’ is an essential ingredient in a ransom situation,”¹³⁸ research suggests that delaying payment can lower payouts.¹³⁹ Indeed, “ransom amounts correlate positively with duration for short negotiations, but correlate negatively with duration for longer negotiations.”¹⁴⁰ Much depends, however, on the level of sophistication of the pirate, as “sophisticated” pirates (akin to organized criminal gangs) extract higher ransoms than “opportunists”, who lack the infrastructure to sustain long negotiations.”¹⁴¹ Once a deal is struck, the payment is usually dropped by parachute by a special security firm¹⁴² or sent via local brokers, known as *hawaladars*,¹⁴³ based in Somalia.¹⁴⁴ The average

135. *Pirate Economics: Bargain Like a Somali*, *supra* note 51; DE GROOT ET AL., *supra* note 68, at 9 (noting that “ship-owners . . . have an incentive to claim to be poor, while pirates . . . have an incentive to masquerade as sophisticated.”).

136. AFRICA PROGRAMME AND INTERNATIONAL LAW CONFERENCE REPORT, CHATHAM HOUSE, PIRACY AND LEGAL ISSUES: RECONCILING PUBLIC AND PRIVATE INTERESTS 15 [hereinafter PIRACY AND LEGAL ISSUES] (Oct. 1, 2009), available at http://www.chathamhouse.org/sites/default/files/public/Research/Africa/011009piracy_law.pdf.

137. DE GROOT ET AL., *supra* note 34, at 22.

138. *Masefield AG v. Amlin Corporate Member Ltd*, [2010], 1 C.L.C. 318, 317, xxxv.

139. DE GROOT ET AL., *supra* note 34, at 28.

140. *Id.* at 2.

141. *Id.*; see also Email from U.S. Dep’t of State, Bureau of Counterterrorism, to author (Mar. 5, 2013) (on file with author) (“When [pirates] see that holding and negotiating for hostages is slow, risky and less likely to produce benefits, hostage-takers will think twice.”).

142. See James Kraska, *Freakonomics of Maritime Piracy*, BROWN J. WORLD. AFF., Spring/Summer 2010, at 113.

143. U.S. Immigration and Customs Enforcement, *Hawalas*, 7 THE CORNER STONE REPORT No. 2 (2010), available at <http://www.ice.gov/doclib/news/library/reports/cornerstone/cornerstone7-2.pdf> (noting that hawala is “an ancient, international method of transferring money that is based upon the personal relationship between the operators, rather than the international transmission of actual currency” and that “[t]he hawala system can be utilized by criminal organizations to transfer funds in or out of a country with little or no detection by law enforcement.”).

144. There are other ways payment can be routed. For example, it can be routed via a nearby military ship, or to international associates.

ransom negotiation lasts between 70 to 178 days, but some have been reported to last years.¹⁴⁵

2. *The Ransom Debate*

Although typically conceived in bipolar fashion, with pirates on one side and ship-owners on the other, there are five interested parties in any ransom negotiation: (1) pirates, (2) private parties, (3) States, (4) ancillary service providers, and (5) the international community. Each party has its own perspective about ransom payments. First, *pirates and their parent organizations* seek no restrictions on ransom payments.¹⁴⁶ Second, *private parties*, such as the ship-owner or family members of the hostages, are also strong opponents of placing constraints on their abilities to rescue their crew or relatives unharmed. Third, the interests of the *State* in which the private party is a citizen (natural or corporate) can be either pro- or anti-ransom payment.¹⁴⁷ States may also be directly involved in ransom negotiations by providing assistance to private parties in negotiations. However, as their involvement may implicitly suggest a pro-ransom payment policy, the world's major naval powers oppose ransom payments and often take military action to prevent pirates benefiting from their attacks.¹⁴⁸ Fourth, *ancillary service providers*, such as insurance companies, law firms, and other commercial parties, have an interest in a pro-ransom payment policy since they benefit commercially from these negotiations. Finally, members of the *international community* and respective world organizations, being joint

145. See Bowden & Basnet, *supra* note 31, at 12.

146. Here I assume that the act of piracy was committed for ransom. As noted above, different pirates may want different things. See *supra* note 91 (noting that some Western African pirates have hijacked vessels to siphon oil, and asked for no ransom).

147. Of course, the respective States of crewmembers may also have an interest in their citizens' safe release.

148. See *France: Pirates Captured, Hostages Freed*, CBSNEWS.COM, Apr. 11, 2008, available at http://www.cbsnews.com/2100-202_162-4009248.html ("Helicopter-borne French troops swooped in on Somali pirates Friday after they freed 30 hostages from a yacht, seizing six of the hijackers and recovering sacks of money — apparently ransom paid by the ship's owners.").

authors and subjects of international law, generally condemn the taking of hostages¹⁴⁹ and use of unjustified violence, which are the primary methods of extracting ransom.¹⁵⁰

a). *Pro-Ransom Payment*

The main proponents of permitting ransom payments are: private actors in the maritime industry, including shipowners, crewmembers and their families; ancillary service providers; and the pirates. There are 4 grounds that are commonly employed to support a pro-ransom policy. These are: (1) humanitarian grounds, (2) property protection grounds, (3) environmental grounds, and (4) commercial grounds.

The humanitarian and property protection arguments are the most compelling: absent the payment of a ransom, crewmembers and property may be held hostage indefinitely. A total ban on ransom payments would punish the victim, not the kidnapper.¹⁵¹ Thus, payment is the only way to safely secure the release of hostages and the return of vessel, cargo and other property onboard. As one leading practitioner has put it, "it would be unconscionable for lawmakers to take away a shipowner's only prospect of rescuing its personnel and assets."¹⁵² Indeed, the inability to diffuse the situation via negotiation further exposes crewmembers to torture and inhumane treatment, illness, disease, and death.¹⁵³ A complete ban would arguably

149. See International Convention Against the Taking of Hostages *supra* note 72. Although the Hostage Convention requires states to criminalize the taking of hostages, which arguably encompasses some of piracy's *modus operandi*, it does not cover the request for ransom from the taking of property as security. See *id.*, art. 1 (forbidding the taking of "another person", thus excluding property from its application.). As such, when pirates take a valuable ship and cargo as their 'bargaining chip', the Hostage Convention is inapplicable.

150. U.N. Charter preamble, available at <https://www.un.org/en/documents/charter/preamble.shtml> (noting that the objective of the Charter is "to practice tolerance and live together with one another as good neighbours," "to unite our strength to maintain international peace and security" and "to ensure . . . that armed forces shall not be used, save in the common interest.").

151. Thirteenth Plenary Session of the CGPCS, *supra* note 11, at ¶ 35 ("[A]ny sanction measures leading to the prevention of ransom payments could adversely affect the welfare, security and release of seafarers who are held hostage.").

152. Richard Neylon & James Gosling, *Banning Ransom Payments to Somali Pirates Would Outlaw the Only Method a Shipowner Has to Remove His Crew from Harm's Way and Rescue His Vessel and Cargo*, LLOYD'S LIST.COM, Nov. 1, 2011.

153. Katharine Houreld, *AP Interview: Somali Pirates Torturing Hostages*, THE GUARDIAN (Feb. 1, 2011), available at <http://www.guardian.co.uk/world/feedarticle/9479830> (quoting Maj. Gen Buster); Abdiqani Hassan, *Somali Pirates Release Longest-Held Hostage After 33 Months*, REUTERS, Dec. 23, 2012, available at <http://www>

violate Articles 3¹⁵⁴ and 5¹⁵⁵ of the Universal Declaration of Human Rights, as well as sister documents, such as Articles 2¹⁵⁶ and 3¹⁵⁷ of the European Convention on Human Rights, which protect the right to life and freedom from torture and inhumane treatment. These humanitarian and property protection grounds carry significant moral weight, and place proponents of a total ban in an uncomfortable moral position.

Ransom payments are also capable of aborting potential environmental catastrophes,¹⁵⁸ as they prevent the abandonment of unransomed vessels and cargo and their disposal at sea. Given the importance of developing domestic and international policies that seek to protect and preserve the natural environment,¹⁵⁹ including

.reuters.com/article/2012/12/23/us-somalia-piracy-idUSBRE8BM08D20121223 (noting that 2 crewmembers died).

154. Universal Declaration on Human Rights, G.A. Res. 217A, U.N. Doc. A/RES/217A (Dec. 10 1948) [hereinafter UDHR] ("Everyone has the right to life, liberty and security of person.").

155. *Id.* at art. 5 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.").

156. European Convention for the Protection of Human Rights, arts. 2(1), 14, Nov. 4, 1950, 213 U.N.T.S. 222. [hereinafter ECHR] ("Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.").

157. *Id.* at art. 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

158. Neylon and Gosling, *supra* note 152 ("If a ship is lost, its cargo is lost. The last very large crude carrier that was captured carried approximately two million barrels of crude oil. That is about eight times the amount of crude oil that is estimated to have been lost from the Exxon Valdez, which devastated the Alaskan coast in 1989. That is about 40% of the crude oil that is estimated to have been lost from the Deepwater Horizon incident in 2010 — reportedly one of the worst pollution incidents in history. If a tanker is lost and crude oil pollutes the East African coast there is unlikely to be an oil major on hand to spend billions of dollars on clean-up costs, and there will be no ability to mobilise the world's fleet of antipollution and salvage vessels. The impact to the coastline of Somalia is likely to be catastrophic.").

159. Stockholm Declaration on the Human Environment, princ. 2, Jun. 6 1972, 11 I.L.M. 1416 (1972) ("The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate."); Rio Declaration on Environment and Development, Jun. 16, 1972, 31 I.L.M. 874 (1992), princ. 7 ("States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem"); Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Jun. 11, 1974., 1046 U.N.T.S. 120, 1996 Protocol to the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 36 I.L.M. 1 (2006) ("Recognizing that the marine environment and the living organisms which it supports are of vital importance to humanity, and all people have an interest in assuring that it is so managed that its quality and resources are not impaired.").

marine biodiversity, ransom payments ensure that cargo and vessels are safely returned without damage to the environment. Of course, the proper perpetrators are the pirates, who improperly dispose of the vessel, and not States criminalizing ransom payments. But States should be cautious in crafting policies that may indirectly *enable* damage to the environment.

In a commercial context, banning ransom payments could negatively affect the maritime industry's ability to recruit personnel. It may in turn drive wages up, as crewmembers request increased compensation for increased risk.¹⁶⁰ Less obvious parties may also be impacted commercially from a complete ban, such as ancillary providers (maritime solicitors, private security firms, insurance companies, and ransom and kidnap service providers), who incidentally derive some commercial benefit from the ransom activity. Further, the global economy may suffer from increased transportation costs as certain shipowners reroute to avoid risky trading routes.¹⁶¹

b). *Anti-Ransom Payments*

The main proponents of a complete ban on ransom payments are States and the international community. This non-concession policy hinges on four assumptions: (1) ransom payments incentivize piracy, (2) ransom payments legitimize piracy, (3) ransom payments are derived from threats to human life, and (4) ransom payments enable consequential risks such as funding to terrorist groups.

First, ransom payments provide pirates with remunerative incentives to further piracy operations.¹⁶² As the U.S. Department of State has noted, "every ransom paid . . . further institutionalizes the practice of hostage-taking for profit and funds its expansion as a

160. *POEA Clarifies Hazard Pay for Seafarers*, MANILA BULL., (Oct. 26, 2012), available at <http://ph.news.yahoo.com/poea-clarifies-hazard-pay-seafarers-113444467.html> ("The Philippine Overseas Employment Administration (POEA) said Filipino seafarers on board ships that pass through pirate-infested areas are entitled to overtime and leave pays.").

161. *International Task Force on Ransom Payments*, ICS Briefing Note, ECSA, at 4 <http://www.hksoa.org/contents/attachments/2012/ICS%2812%2936%20-%20Annex%202%20-%20ICS%20Briefing%20Note%20-%20Ransom%20Payments-%20GWS%20TCFinal.pdf>.

162. See Chris Green, *Miliband: Don't Negotiate with Pirates*, THE INDEPENDENT, (Nov. 21, 2008), available at <http://www.independent.co.uk/news/world/africa/miliband-dont-negotiate-with-pirates-1028228.html> ("There is a strong view of the British Government, and actually the international community, that payments for hostage-taking are only an encouragement to further hostage-taking."); see also S.C Res. 1897, U.N. Doc. S/RES/1838 (Oct. 7, 2008), ¶ 2 (noting with concern the "escalating ransom payments . . . are fuelling [Somali piracy]"); AIR FORCE ONE (Columbia Pictures 1997) ("If you give a mouse a cookie, it will want a glass of milk.").

criminal enterprise.”¹⁶³ Knowing that the crime will pay, pirates will likely continue turning to piracy for income, rather than pursuing other avenues, such as legal employment or non-violent entrepreneurship. Indeed, economic analysis of criminal behavior suggests that “if the expected rewards from criminal behavior exceed the net benefits of alternative pursuits, the individual will choose to engage in crime.”¹⁶⁴ In other words, “[i]ncentives matter.”¹⁶⁵ Thus, “the logic here is to eliminate the fundamental motivations of the crime by removing the economic incentive to commit piracy.”¹⁶⁶

Surely, however, the counter-argument to this position is that although criminalizing ransom payments *may* have an impact in the long-run, in the short-run, however, it places those already in jeopardy in greater danger. In any event, pirates may defy any ban on ransom payments, as the *Iceberg 1* incident demonstrates. The *Iceberg 1* was hijacked in 2010 and the vessel, and its twenty-four crewmembers, remained in captivity even though the ship-owners were clear about their inability to satisfy ransom demands for lack of kidnap and ransom insurance.¹⁶⁷ As the ship-owners could not meet

163. Andrew J. Shapiro, Assistant Secretary, Bureau of Political-Military Affairs, U.S. Approaches to Counter-Piracy, Remarks to International Institute for Strategic Studies (Mar. 30, 2011), available at <http://www.state.gov/t/pm/rls/rm/159419.htm>.

164. W. Kip Viscusi, *Market Incentives for Criminal Behavior*, in THE BLACK YOUTH EMPLOYMENT CRISIS 301 (Richard B. Freeman & Harry J. Holzer eds., 1986); see also Gary S. Becker, *Crime and Punishment: An Economic Approach*, in ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 44 (G. Becker and W. Landes eds., 1974) (“[O]ffenders are ‘risk preferrers.’ . . . The conclusion that ‘crime would not pay’ is an optimality condition and not an implication about the efficiency of the police or courts . . .”). But see Sandler & Enders, *supra* note 94 at 20 (noting that “[although] [t]he conventional wisdom states that if terrorists know ahead of time that they have nothing to gain that they will never abduct hostages,” “[this] assumption[] may not hold in practice”).

165. Russell Roberts, *Incentives Matter*, Library of Economics and Liberty, Jun. 5, 2006, available at <http://www.econlib.org/library/Columns/y2006/Robertsincentives.html>; Kraska, *supra* note 142, at 109 (“People respond to incentives, which are the cornerstone of modern life”).

166. Bento, *supra* note 41, at 443; James Kraska, *Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea*, 28 COMP. STRATEGY 197, 208–09 (2009) (noting that “although [a total ban] would not stop all payment of ransom, it would make it easier for ship owners to decline payment for hostages, reducing the benefits that pirates expect for their crimes.”).

167. Colin Freeman, *Why David Cameron Will Not Stop Somali Pirates Getting Their Pieces of Eight*, THE TELEGRAPH (Sep. 6, 2012), <http://blogs.telegraph.co.uk/news/colinfreeman/100179584/why-david-cameron-will-not-stop-somali-pirates-getting-their-pieces-of-eight/>.

the ransom demands, the pirates, in a sign of despair and revolt, tortured the crew and even considered selling the crewmembers' kidneys to make a profit from the operation.¹⁶⁸ The situation was only diffused when Puntland security forces intervened to rescue the vessel and crewmembers.¹⁶⁹ Thus, a ship-owners' inability to satisfy a ransom demand, whether because of illegality or financial incapacity, may place those in captivity in greater danger.

Second, States and the international community may wish to communicate their resolve against piracy *qua* crime, as they do with terrorism. In enabling, or acquiescing to, ransom payments, States may be perceived as indirectly legitimizing,¹⁷⁰ condoning, or rewarding, piratical behavior.¹⁷¹ Thus, States, as *legislators* and *political actors*, may want to publically oppose acts that have the potential of enabling piracy. In giving in, or conceding, to a pirates' demand, the State, and political actors within it, may also incur reputational costs. In their research on negotiating with terrorists, Lapan and Sandler argue that making "[c]oncessions result in a loss in reputation that is costly in terms of more hostage taking in the future."¹⁷² In the same vein, it has been noted that "[t]he key objective for any government contemplating negotiations with terrorists is not simply to end violence but to do so in a way that minimizes the risk of setting dangerous precedents and destabilizing its political system."¹⁷³ In a similar context, it has been argued that "[d]emocracies must never give in to violence, and [hostage-takers] must never be rewarded for using it."¹⁷⁴ States, as *negotiators*, can also suffer financially from negotiating directly with pirates. In addition to the direct economic

168. Nick Meo, *Longest Somali Pirate Ordeal Ends for Iceberg-1 Crew*, THE TELEGRAPH (Dec. 29, 2012), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/9770677/Longest-Somali-pirate-ordeal-ends-for-Iceberg-1-crew.html>.

169. *Id.*

170. Peter R. Neumann, *Negotiating with Terrorists*, FOREIGN AFF., Jan./Feb. 2007, <http://www.foreignaffairs.com/articles/62276/peter-r-neumann/negotiating-with-terrorists>.

171. ANYIMADU, *supra* note 24, at 2 ("The payment of large sums to individuals clearly acting outside of the law is seen as rewarding criminality.").

172. Sandler & Enders, *supra* note 94, at 20.

173. Neumann, *supra* note 170.

174. *Id.* ("The argument against negotiating with terrorists is simple: Democracies must never give in to violence, and terrorists must never be rewarded for using it. Negotiations give legitimacy to terrorists and their methods and undermine actors who have pursued political change through peaceful means. Talks can destabilize the negotiating governments' political systems, undercut international efforts to outlaw terrorism, and set a dangerous precedent. Yet in practice, democratic governments often negotiate with terrorists. . . . But the rigidity of the "no negotiations" stance has prevented any systematic exploration of how best to conduct such negotiations. How can a democratic government talk to terrorists without jeopardizing the integrity of

costs of negotiating, States may also fail to obtain “value” from the negotiations. For example, in 2008, Spain paid \$1.2 million to recover hostages of a fishing vessel, “more than twice the previous record amount for a fishing vessel.”¹⁷⁵ The risk of overpaying may thus lead some States to wanting to communicate their resolve against piratical negotiations.

Third, and related to the previous point, in turning a blind eye to ransom payments, the State arguably acquiesces to the pirates’ use of human life as a means to obtain payment. This has significant moral¹⁷⁶ and political implications, which for spatial reasons are beyond the scope of this paper.

Finally, there are a number of independent consequential risks to ransom payments. For example, the act of delivering a payment may put more lives and freedom into jeopardy. Indeed, six individuals were imprisoned in Somalia for attempting to deliver a ransom payment.¹⁷⁷ As noted earlier, piracy may also be used as a method to fund terrorist organizations.¹⁷⁸ Ransom payments also fund future piracy operations.¹⁷⁹ Payments risk setting new precedents that influence subsequent ransom demands. As one study has shown, “higher past ransoms are positively associated with subsequent ransom amounts”¹⁸⁰ thus imparting “a negative externality on future victims.”¹⁸¹ Last, ransom payments sustain criminal enterprises on

its political system? . . . The key objective for any government contemplating negotiations with terrorists is not simply to end violence but to do so in a way that minimizes the risk of setting dangerous precedents and destabilizing its political system.”); *Negotiating with Terrorists: A Mediator’s Guide*, INT’L INST. FOR APPLIED SYS. ANALYSIS, 1, 2 (Mar. 2009), <http://webarchive.iiasa.ac.at/Research/PIN/docs/pb06-web.pdf> (“The main objection to negotiation with terrorists is that it encourages them to repeat their tactics. But it is not negotiation per se that encourages terrorism but rather the degree to which they are able to achieve their demands by negotiation.”).

175. DE GROOT ET AL., *supra* note 34, at 2–3.

176. See, e.g., Immanuel Kant’s theory of morality, which states that it is immoral to use another person merely as a means to an end. James Rachels, *The Elements of Moral Philosophy*, 114–15 (Random House, 1986) (According to Kant, humans may never be “used” as means to an end. He even went so far as to suggest that this is the ultimate law of morality.”).

177. *Somalia: Six Jailed for ‘Pirate Ransom’ Cash*, *supra* note 16.

178. See Nelson, *supra* note 91, at 17 (explaining how “terrorists may conduct maritime [piratical] attacks to fund their onshore operations”).

179. ANYIMADU, *supra* note 24, at 3 (“[I]t is the reinvestment of ransom money into equipment useful for further hijacks which has led some policymakers to argue that paying ransoms endangers the lives of other seafarers.”).

180. See DE GROOT ET AL., *supra* note 34, at 2.

181. *Id.*

Somali soil which undermines national and regional authorities' efforts at promoting law and order.¹⁸² Although independent of one another, these consequential risks are significant by-products of ransom payments that must be highlighted so as to obtain a comprehensive picture of the issue at hand.

3. Case Studies: U.S. and U.K. Policies on Ransom Payments

a). U.S.: "Don't Feed the Bears"¹⁸³

Although ransom payments do not generally violate U.S. federal law,¹⁸⁴ the U.S. has articulated a no-concession policy with respect to hostage-takers.¹⁸⁵ The U.S. Department of State's "overarching policy is [to] do whatever possible to safely recover hostages, but to avoid concessions (ransom, prisoner release, etc.)."¹⁸⁶ In other words, the U.S. Government's belief is that "if you 'feed the bears' they will keep coming into camp."¹⁸⁷ Accordingly, private parties are advised to "pursue a no-concession policy."¹⁸⁸

However, in some cases, the U.S. Government may make assistance available to private parties. Assistance includes providing "advice on crisis management or information that could contribute to hostage survival (i.e., ways to encourage good treatment during captivity) or safe recovery."¹⁸⁹ It also encourages such parties to "share information [with the U.S. Government] that may lead to apprehension of the [hostage-takers]."¹⁹⁰

182. ANYIMADU, *supra* note 24, at 3 ("The concurrent growth of a criminal industry such as piracy, particularly if the international community appears passive on the issue, poses serious threats to these efforts [to build stability and peace in Somalia].").

183. Email from U.S. Dep't of State, Bureau of Counterterrorism, *supra* note 141.

184. See Lawrence Rutkowski, Bruce G. Paulsen & Jonathan D. Stoian, *Mugged Twice?: Payment of Ransom on the High Seas*, 59 AM. U. L. REV. 1425, 1430 (noting when federal law may be violated, but explaining that "[i]n most instances, federal law cannot be construed to prohibit an entity, be it a vessel owner or its insurers, from making a ransom payment to pirates to secure the release of a hijacked vessel and its crew").

185. Email from U.S. Dep't of State, Bureau of Counterterrorism, *supra* note 141 ("[The U.S. Department of State's] policy is to make no concessions to hostage-takers; to deny them the benefits of any concessions made; to bring them to justice and thereby prevent future hostage-takings."); see also Shapiro, *supra* note 163 ("We continue to discourage ransom payments and to actively seek to deny the benefits of concessions to hostage takers.").

186. Email from U.S. Dep't of State, Bureau of Counterterrorism, *supra* note 141.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

The U.S. Government recognizes the “tension between the [U.S.]’s promotion of a [n]on [c]oncessions policy and the provision of assistance to a company that is proceeding with a ransom.”¹⁹¹ But the Government notes that “[i]f payment of a ransom to a particular party is prohibited by U.S. law or regulation, [the Government] will advise private parties of those restrictions”¹⁹² Indeed, Executive Order 13,536 concerning Somalia issued by U.S. President Barack Obama in 2010¹⁹³ could potentially apply to ransom payments made to entities or individuals named under the Order, including terrorist organizations known to have used maritime piracy for funding purposes, such as *al-Shabbab*. Although the Order does not specify penalties for contravening it, it gives the Secretary of the Treasury, as well as officers and agencies of the U.S. Government powers to “take such actions . . . as may be necessary to carry out the purposes of this order.”¹⁹⁴ The Secretary of the Treasury clarified that penalties may include criminal fines of up to \$1 million, as well as imprisonment up to twenty years.¹⁹⁵

b). *U.K.*

Like the U.S., the U.K. Government has an official policy of no-concession. However, it also recognizes that the policy “should [not]make it more difficult for companies to secure the safe release of their crew by criminalizing the payment of ransoms”.¹⁹⁶ This position seems to be in line with English case law. Indeed, “the payment of ransom is not illegal as a matter of English law.”¹⁹⁷ English courts are extremely sensitive to the “tension” between encouraging piracy and the need to rescue hostages. As the High Court of Justice of England and Wales noted in *Masefield AG v. Amlin Corporate Member Ltd.*:

So far as harm is concerned it is true that payments of ransom encourage a repetition, the more so if there is insurance cover: the history of Somali piracy is an eloquent demonstration of that. But if the crews of the vessels are to be taken out of harm’s

191. *Id.*

192. *Id.*

193. Exec. Order No. 13,536, 75 Fed. Reg. 19,869 (Apr. 12, 2010).

194. *Id.* at § 5.

195. U.S. DEP’T OF THE TREASURY, AN OVERVIEW OF SANCTIONS AGAINST PERSONS CONTRIBUTING TO THE CONFLICT IN SOMALIA (Sep. 30, 2010), available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/somalia.txt>.

196. House of Commons, Foreign Affairs Committee, *Piracy off the Coast of Somalia*, Tenth Report of Session 2010-12, HC 1318, at 9: 27.

197. *Masefield AG v. Amlin Corporate Member Ltd.*, [2010] 1 C.L.C. 318, 340.

way, the only option is to pay the ransom. Diplomatic or military intervention cannot usually be relied upon and failure to pay may put in jeopardy other crews.¹⁹⁸

Ransom payments may nonetheless fall foul of U.K. anti-terrorism legislation which prohibits the payment or transfer of funds to a terrorist organization.¹⁹⁹ Thus, “[i]f a link is established between the pirates and Al Shabaab [a terrorist organization] . . . there will be very real doubt as to whether ransoms can be paid, which will condemn the crews presently being held to an uncertain future.”²⁰⁰

In 2012, Prime Minister David Cameron commissioned a special Task Force to discuss “the issue of piracy ransom in detail.”²⁰¹ Although the report did not categorically recommend a complete ban on ransom payments, it recognized that “[t]he ultimate goal must be to reach a position whereby pirates are no longer able to receive or profit from ransom payments.”²⁰² At the time of writing, it is not yet known whether the U.K. Government will criminalize ransom payments to pirates.

E. *Bargaining with Salt-Water Devils: Negotiation Theory and Analysis*

Should a State ban ransom payments, effectively precluding negotiations with pirates? Should current legislation criminalizing ransom payments to pirates if the latter are associated with known terrorist groups be revised? In *Bargaining with the Devil*, Professor Mnookin asks a related question: “Should you bargain with the Devil? . . . What about terrorist groups holding hostages?”²⁰³ Professor Mnookin develops an analytical framework, known as “Spock’s Five Questions,”²⁰⁴ to guide decision-makers of “when to negotiate, [or] when to fight.”²⁰⁵ The Spock’s Five Questions framework seeks to explore the interests, alternatives, costs, and implementation of the negotiation at issue. Although the cost-benefit analysis undertaken in Part III.B.2 is useful to understand the wider debate, “bargaining

198. *Id.*

199. Proceeds of Crime Act, 2002, c. 29 (U.K.); see INCE & CO, PIRACY OFF ADEN AND SOMALIA: AN OVERVIEW OF LEGAL ISSUES FOR THE INSURANCE INDUSTRY 2, available at <http://incelaw.com/documents/pdf/legal-updates/piracy-off-aden-and-somalia-an-overview-of-legal-issues-for-the-insurance-industry.pdf>.

200. PIRACY AND LEGAL ISSUES, *supra* note 136, at 15.

201. UK Task Force Report, *supra* note 7, at 1.

202. *Id.*

203. MNOOKIN, *supra* note 2, at 1.

204. *Id.* at 6–7, 27–32.

205. *Id.*

with a devil may raise issues that go beyond simply comparing costs and benefits,"²⁰⁶ such as understanding the underlying interests of stakeholders in a given negotiation. Thus, this Part of the Article applies each step of Mnookin's framework to assess whether States should permit negotiations (whether public or private) with pirates or "fight" them by enacting a total ban on such negotiations.²⁰⁷

SPOCK'S FIVE QUESTIONS

1. *What are the interests at stake?*

As noted above in Part III.B.2, there are five major interested parties in any ransom negotiation: pirates, private parties, States, the international community, and ancillary service providers. In negotiations, interests matter. Indeed, one of the central tenets of modern negotiation theory is to argue over interests, not positions.²⁰⁸ In this respect, and in keeping with another fundamental principle of negotiation,²⁰⁹ it is particularly important to view the pirate as a "rational human being who, for some set of reasons, has chosen — or felt forced into — an extreme, violent course of action."²¹⁰ Indeed, Mnookin warns of the potential traps that may arise in negotiations of this type. In particular, the demonization of a party is a negative trap that "stoke[s] our anger and tempt[s] us to refuse to negotiate when we probably should."²¹¹ Thus, a State's constructions of the other party, such as "dehumanizing"²¹² the party and labelling it as a *terrorist* or *pirate*,²¹³ and the policies that flow from these constructions, may lead to positions that are ineffective and adverse to a State's interests in the long-run. It may distort the State's ability to

206. MNOOKIN, *supra* note 2, at 33.

207. States can, of course, fight literally, via military interventions, as they already have. The interpretation of 'fight' here, however, is to be understood as fighting with the force of the law rather than the gun.

208. ROGER FISHER ET AL., *GETTING TO YES* 41 (2nd ed. 1991); MNOOKIN, *supra* note 2, at 3 (noting that "one should always try to negotiate based on the interests of the parties.").

209. *Id.* at 17 ("separate the people from the problem").

210. DOLNIK AND FITZGERALD, *supra* note 69, at 162.

211. MNOOKIN, *supra* note 2, at 6.

212. *Id.*

213. *But see* VADIM VOLKOV, *VIOLENT ENTREPRENEURS x* (Cornell University Press, 2002) ("Defining and labeling are instrumental for any institutionalized practice. Legal terminology . . . is part of the same tool kit as handcuffs. . . . It also serves to alert society of certain dangers.").

fully explore the range of interests at stake, and craft policies that seek to fully maximize them.²¹⁴

a). *The pirates' interests*

The pirates' primary interest is to maximize their financial returns.²¹⁵ This is, after all, what differentiates a pirate from a terrorist. Profit, however, comes in many shapes and colors. For instance, we noted earlier how Somali pirates derive financial benefit from ransom payments, whereas some Western African pirates prefer to siphon cargo for resale.²¹⁶ Accordingly, different pirates may want different things, in different places and at different times. It is not clear who defines the pirates' interests, and it is also unclear whether there are "subgroups that have competing interests" in piracy organizations.²¹⁷ It has been reported that there are a number of stakeholders (perhaps shareholders is a better word)²¹⁸ in piracy organizations, such as organizational leaders, pirate negotiators, "pirate capitalists,"²¹⁹ the men that carry out the attacks (or "foot soldiers"²²⁰) and government officials.²²¹ As noted earlier, the existence of a "pirate stock exchange" in the village of Haradheere in Somalia also widens the pool of parties that hold vested interests in

214. See Pruitt, *supra* note 127, at 90 ("Hostility toward the other party tends to constrain yielding and makes it more difficult to reach agreement.").

215. FISHER ET AL., *supra* note 208, at 50 (noting that the most powerful interests are basic human needs, including economic well-being).

216. *Nigeria: Pirates Kidnap 3 Sailors off Coast*, *supra* note 4 ("The pirates released the ship and its sailors a few days later after most likely stealing the diesel fuel the ship had on board.").

217. MNOOKIN, *supra* note 2, at 29.

218. WORLD BANK, *supra* note 30, at 30 ("Over time, the Somali piracy business model has become more sophisticated and has come to involve a number of investors, financiers, and other shareholders within Somalia, across the region, and even internationally.").

219. Kyra Maya Phillips & Alexa Clay, *A Buccaneering Spirit Is Not Piracy's Only Gift to Business*, WIRED MAGAZINE (Aug. 17, 2012), available at <http://www.wired.co.uk/magazine/archive/2012/09/ideas-bank/a-buccaneering-spirit-is-not-piracy%E2%80%99s-only-gift-to-business> ("Like startups, a piracy mission begins with a search for venture capital. 'Pirate capitalists' court investors who will, according to J Peter Pham of the Atlantic Council, offer \$250,000 or more in seed money.").

220. WORLD BANK, *supra* note 218, at 38, 45 (defining "foot soldiers" in the piracy context as low level pirates that "are sent out to sea to hijack the concerned vessel").

221. PIRACY AND LEGAL ISSUES, *supra* note 136, at 19–20 ("[I]t has been speculated that 20% goes to the bosses of the organization, 20% is re-invested in future missions, 30% goes to the gunmen that executed the operation, and 30% goes to government officials.").

piracy attacks.²²² "Investors"²²³ in piratical "projects", share the pirates' appetite for profit. It is unclear, however, how much control these shareholders have on piratical enterprises. Pirates also have other, secondary interests, such as their own safety and well-being.²²⁴

b). *The other side's interests*

For lack of a better term, the "other side" includes private parties, States, the international community and ancillary service providers. *Private parties* include commercial parties, such as shipowners, and family members of those in captivity. Their interests include the well-being and safety of crewmembers and the preservation of property such as the vessel and cargo.²²⁵ In terms of financial interests, private parties seek to minimize the ransom payout. There are also other commercial interests, such as the need to pursue an uninterrupted voyage to satisfy customer demands and contractual requirements, the reputation of the shipowner, and the need to minimize ancillary costs such insurance and legal fees.

States, as creature of politics, are interested in the regulation and deterrence of criminal behaviour, the protection of human rights,²²⁶ and private property. As Merges et al note, "[t]he concept of

222. Jorisch, *supra* note 28 (noting that "sources suggest that over 70 entities are listed on . . . exchange").

223. Phillips & Clay, *supra* note 219.

224. FISHER ET AL., *supra* note 208, at 50 (noting that "security" is a powerful interest).

225. See Thirteenth Plenary Session of the CGPCS, *supra* note 11 (expressing "serious concern at the inhuman conditions hostages face in captivity, the adverse impact on their families"); PIRACY AND LEGAL ISSUES, *supra* note 136, at 16 ("Some 1400 crew members have been taken hostage. They remain the central victims. Some have died during the hijacking; others have been wounded.").

226. T.M. SCANLON, THE DIFFICULTY OF TOLERANCE: ESSAYS IN POLITICAL PHILOSOPHY 113 (2003). Scanlon notes:

Human rights, it is held, are a particularly important class of moral considerations. Their gross and systematic violation represents not just the failure to meet some ideal but rather a case of falling below *minimum* standards required of political institutions. False [and noting that] This normal acceptance, and the fact that violations of human rights are not confined to governments of any particular ideological stripe but occur both on the left and on the right, lend support to the idea that concern for human rights is a ground for action that is neutral with respect to the main political and economic divisions in the world.

Id.

property is well understood in Western society.”²²⁷ It is therefore unsurprising that “the criminal law protect private property from interference by others.”²²⁸ States are also concerned with domestic and international audience costs, or how the international community and the State’s electorate evaluate the State’s behaviour in complex circumstances. For example, there may be “[n]egative repercussions for failing to follow through on a threat or to honor a commitment,”²²⁹ such as permitting ransom negotiations whilst publically opposing them. Indeed, some States firmly adopt a public policy of non-concession with hostage-takers, even if they privately support parties to diffuse the situation by facilitating ransom payments.²³⁰ This is a classic technique that has been used by States, and involves “taking a contentious public stance coupled with covert (secret) problem solving”²³¹, as noted above in the U.S. and U.K. case studies.

That States cannot publically “yield” to pirates’ demands (i.e. by whole-heartedly promoting a policy that ransom payments are acceptable) is understandable.²³² As Pruitt notes:

Resistance to yielding tends to be high on important issues, where needs are strong and feelings run deep . . . It is especially hard to yield when the underlying concerns involve such emotional touchstones as life itself, basic rights (security), self-esteem (honor or public image), or ethical principles (*dishonesty should not be rewarded; one does not do business with murderers.*)²³³

227. ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 1 (5th ed. 2010) (noting further that “[t]he philosophical bases for protection of private property are well entrenched in [Western] culture”).

228. *Id.*

229. JEFFREY A. FRIEDEN, DAVID A. LAKE & KENNETH A. SCHULTZ, *WORLD POLITICS* 103 (W.W. Norton & Co. 2010).

230. *See also id.* at 104 (“In the process of tying their hands, of course, state leaders also send a powerful message to their opponents: ‘I cannot back down; hence, my threat is completely credible.’”).

231. Pruitt, *supra* note 127, at 87 (also noting examples such as the “Oslo negotiations that led to establishment of the Palestinian Authority and the Northern Ireland peace process”).

232. *See* Toros, *supra* note 99, at 408 (“Traditionally, the main argument used to reject negotiations with terrorists is that such a course of action would legitimize the terrorists and terrorism more broadly; Legitimizing terrorist groups and their actions would weaken the democratic quality of states and likely only serve to incite more violence.”). *But see* Neumann, *supra* note 170 (“When it comes to negotiating with terrorists, there is a clear disconnect between what governments profess and what they actually do.”).

233. Pruitt *supra* note 127, at 89 (emphasis added).

Negotiation theory recognizes that these “intangible issues”²³⁴ are difficult to manage, particularly when a State’s reputation and ideological positioning can be adversely affected.

As promoters of law and order, States seek to regulate and deter criminal behaviour. By enabling ransom payments to flow freely from private parties to pirates, States tacitly support the *hijack-for-ransom* business model of piracy. For States that fund navy patrols in piracy prone areas, e.g., EU NAVFOR in the Gulf of Aden, it could be argued that enabling ransom payments makes little financial sense. It is counterproductive for a State, on the one hand, to tacitly enable the financing of piracy’s expansion, and on the other hand, expend considerable funds in military operations that seek to prevent and correct piracy operations.

Like States, the *international community* is interested in maintaining global order, geopolitical stability²³⁵ and the smooth operation of international commerce. In the long-run, the international community may wish to dismantle the funding sources of piracy organizations. In recognizing a bias for global order, the doctrine of universal jurisdiction authorizes any State to “capture on the high seas and bring to trial pirates in order to safeguard their joint interest to fight a common danger and a consequent (real or potential) damage.”²³⁶ The international community is also interested in the protection of human rights²³⁷ and environment preservation.²³⁸

On balance, whether the international community supports or opposes ransom payments ultimately depends on which value system and temporal perspective is adopted. Does respect for global order trump environmental preservation and human rights? Can these values work hand-in-hand? Do potential long-term interests take priority over short-term concerns? Answers to these questions are far from clear, and in any event are beyond the scope of this Article.

234. *Id.*

235. Worryingly, “[u]nless the rewards for piracy are significantly curtailed, the danger is that the Somali piracy model could spread.” Andrew Murdoch, *Recent Legal Issues and Problems Relating to Acts of Piracy off Somalia*, in *Selected Contemporary Issues in the Law of the Sea*, 139, 168 (Clive R. Symmons ed. 2011).

236. ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 12 (Oxford University Press 2d ed. 2008).

237. Neylon & Gosling, *supra* note 152 (“[L]et us say the US or the European Union passes a law which bans ransom payments, what would happen in practice? Pausing here, I question whether such a law would violate the European Convention on Human Rights. Would outlawing the only viable method of removing a seafarer from harm’s way not be in breach of Article 2 (the right to life) and Article 3 (the right to freedom from torture, inhumane and degrading treatment)?”).

238. *See id.*

Lastly, *ancillary service providers* have a pecuniary interest in providing services in hostage-taking situations. Although interested in the situation, they are not actively encouraging the behavior, but rather are incidental beneficiaries that facilitate the resolution of the conflict.²³⁹

2. *What are the alternatives to negotiation?*

If a party is unable to negotiate with pirates because of concerns that the ransom payment would be illegal, what are the party's alternatives? In a nutshell, the alternatives carry significant risk.

One way to examine the risks of alternatives to negotiations is through game theory, such as the "chick game." The advantage of game theory in this context is that "it permits the evaluation of policies while accounting for uncertainty and strategic interactions of opposing interests, so that easy fixes may not be so straightforward."²⁴⁰ Harvard Business School Professor Deepak Malhotra explained that in the "chicken" game, two drivers on a bridge speed toward each other. "Whoever swerves first and avoids collision loses, and whoever is brave enough to stay the course wins. Of course, when both drivers stay the course, they collide and die."²⁴¹

As the payoff matrix in Figure 1 illustrates, only full cooperation (P-R), secures a complete *win* for all parties.²⁴² State policy should therefore promote cooperation and shy away from no-concession. In a couple of rare instances, crew and property have been released without payment (NP-R).²⁴³ Military intervention may also achieve a similar result,²⁴⁴ although such analysis omits military expenses, legal difficulties, and the possibility of conflict escalation which may jeopardise hostage safety.²⁴⁵ There have also been a couple of rare instances where military intervention immediately recovered ransom deliveries as part of hostage rescue operations.²⁴⁶

239. PIRACY AND LEGAL ISSUES, *supra* note 136, at 15 ("The time taken to negotiate a ransom is becoming longer. There is a question as to whether the interests of all stakeholders are taken into account. . . . The crews are being asked to endure whilst the negotiations continue . . .").

240. Sandler & Enders, *supra* note 94, at 20.

241. Deepak Malhotra, *Six Steps for Making Your Threat Credible*, HARVARD BUSINESS SCHOOL WORKING KNOWLEDGE (May 30, 2005), <http://hbswk.hbs.edu/item/4823.html>.

242. See *Masefield AG v. Amlin Corporate Member Ltd*, [2010] 1 C.L.C. 318, 323.

243. See Hassan, *supra* note 153.

244. See MNOOKIN, *supra* note 2, at 29 ("In the international arena, a naval blockade or an air strike may be an alternative to diplomatic negotiations.").

245. See *Masefield AG v. Amlin Corporate Member Ltd*, [2010] 1 C.L.C. 318, 323.

246. *France: Pirates Captured, Hostages Freed*, *supra* note 148.

It is not clear what would happen in the hypothetical situation where pirates are paid but do not release crew or property (P-NR),²⁴⁷ though military intervention may be a possibility.²⁴⁸ Where both parties decide not to negotiate (NP-NR),²⁴⁹ either voluntarily or because of legal impediments, it is clear that both parties lose, although it has been argued that in the long-run pirates will be discouraged from resorting to piracy for income.²⁵⁰ Pirates are unlikely to release crew and property without payment, and some have been reported to keep hostage crew and vessel years after the ship-owner went bankrupt.²⁵¹ Thus, pirates may never “chicken out” or “accept failure.”²⁵² In conclusion, the payoff matrix in Figure 1 suggests that a State should avoid pre-committing itself to a no-negotiation policy that precludes private parties (or the State if acting as a negotiator) from making ransom payments to pirates.

		Pirates	
		Release Crew / Property (R)	Do Not Release Crew / Property (NR)
Private Party	Pay Ransom (P)	Win, Win (P-R)	Lose, Win (P-NR)
	Do Not Pay Ransom (NP)	Win, Lose (NP-R)	Lose ²⁵³ , Lose ²⁵⁴ (NP-NR)

FIGURE 1. THE PAYOFF MATRIX OF RANSOM PAYMENTS

247. See *Masefield AG*, 1 C.L.C., at 341.

248. But see Neylon & Gosling, *supra* note 237 (noting that “there seems no appetite for a risky military solution once a vessel has reached the Somali coast and a private military solution is impractical and probably illegal”).

249. MNOOKIN, *supra* note 2, at 29 (“One alternative might be to do nothing: walk away from the deal and ignore the conflict.”).

250. *Supra* Part III.B.2.

251. See Meo, *supra* note 168.

252. See Megan McArdle, *Kidnapped by Pirates at Sea? Here’s How Economics Can Save You*, THE ATLANTIC (May 8, 2012, 8:31 AM), <http://www.theatlantic.com/business/archive/2012/05/kidnapped-by-pirates-at-sea-heres-how-economics-can-save-you/256828/> (“The first is, as always in a game of chicken, the willingness to accept failure. The more willing you appear to walk away, the more bargaining power you have.”).

253. But note that in purely financial terms, the private party may still partially “win” by avoiding the monetary expense of a ransom payout, though this is likely to be dwarfed in terms of reputational costs and compensation to crewmembers’ families.

254. But note that pirates may be able to resell cargo and vessel and thus still profit from the attack.

3. *What are the potential negotiated outcomes?*

In this context, it is difficult to identify potential negotiated outcomes that would fully meet the interests of all parties. There is clearly no way for a State to ban ransom payments and yet expect hostages to be freed without risk. By the same token, private parties cannot expect to freely fund piracy and at the same time enjoy greater safety at sea. And pirates cannot expect to continue perpetrating their crimes without legal consequences. A balanced approach, advocated below, seeks to preserve negotiation whilst promoting global order.

4. *What are the costs to a State of choosing to enable negotiations?*

As noted above, there are a number of transactional²⁵⁵ and spillover²⁵⁶ costs associated with a pro-ransom policy, including incentivizing further criminal behaviour, the potential funding of terrorist groups, and risks associated with the delivery of payments.

Fundamentally, in choosing to enable negotiations, a State may be perceived as yielding to the pirates' demands, and thus "condoning [the pirates'] past behaviour and thereby encouraging more wrongful acts in the future."²⁵⁷ It could also "signal to other[] [pirates] that [their] claims are legitimate,"²⁵⁸ which would further incentivize attacks. Accordingly, any solution must address these reputational and precedent-setting costs²⁵⁹ head on.

5. *Could a negotiated agreement be implemented?*

This step is strategic and practical.²⁶⁰ It seeks to answer the question "[i]f we do reach a deal, is there a reasonable prospect that it will be carried out?"²⁶¹ In other words, if a deal with a pirate is made, is there "a risk that it may not be honoured?"²⁶² As the analysis of Figure 1 showed, pirates, as repetitive players, customarily stick to

255. See MNOOKIN, *supra* note 2, at 31 (noting that transactional costs include "time, money, manpower, and other resources").

256. *Id.* at 31 ("Negotiating with one party may adversely affect you in future dealings with other parties. One such costs may involve reputation . . . A related spillover cost concerns precedent.").

257. MNOOKIN, *supra* note 2, at 34.

258. *Id.*

259. See *id.* ("Are you worried about the impact on your reputation with others? Or about setting a bad precedent?").

260. See *id.* at 32.

261. *Id.* at 28.

262. *Id.* at 32.

their end of the bargain. The risk of non-implementation is therefore very low.

6. *What about recognition, legitimacy and morality?*

Professor Mnookin acknowledges that Spock's framework may not fully grasp the moral dimension of negotiations and recognizes that it is "difficult to avoid a sixth question: What issues of recognition and legitimacy are implicated in [a negotiator's] decision?"²⁶³ In other words, what if a party feels that continuing doing business, or negotiating with an adversary is "simply wrong — against [the party's] . . . values"?²⁶⁴ This is clearly an issue in the context of piracy, as a State may feel that, for the reasons noted earlier, permitting ransom payments is a concession to the pirates' demands and feels "wrong." Accordingly, States have, in other contexts, "rejected engagement for reasons of principle, morality, and pragmatism . . . [and so] it may make greater strategic sense for [S]tates to balance, contain, marginalize, isolate, or even try to defeat enemies than to engage with them."²⁶⁵ Thus, as a matter of "principle,"²⁶⁶ a State may feel that it should not acquiesce to negotiations with pirates. In not banning ransom payments, a democratic State may feel "complicit in [the pirates'] behaviour"²⁶⁷ Further, in legitimizing ransom payments, a State may find its legitimacy and authority as a regulator of criminal behaviour undermined.²⁶⁸

Although "moral values should, and in some cases must, be factored into decision-making,"²⁶⁹ it is difficult to fully canvas a full analysis of the moral implications of negotiating with pirates here. As a matter of natural legal theory, a purely non-concession approach is not "the right thing to do here and now."²⁷⁰ This is because by encouraging "doing nothing," i.e., not negotiating with pirates,²⁷¹ the State is effectively damaging or impeding the realization of the "basic good" of "life,"²⁷² namely the life of hostages. Other theories, such as utilitarianism, would also discourage a non-concession strategy. Based on

263. *Id.* at 34.

264. *Id.*

265. MITCHELL B. REISS, *NEGOTIATING WITH EVIL: WHEN TO TALK TO TERRORISTS* 15–16 (2010).

266. MNOOKIN, *supra* note 2, at 34.

267. *Id.* at 35.

268. *See* REISS, *supra* note 265, at 16 (noting that negotiating with evil regimes may "also diminish the reputation and moral authority of democratic states").

269. MNOOKIN, *supra* note 2, at 36.

270. JOHN FINNIS, *FUNDAMENTALS OF ETHICS* 70 (1983).

271. Promoting position NP-NR in Figure 1, *see supra* notes 253–54.

272. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 100–26 (2d ed. 2011).

the utilitarian tenet of “saving as many lives as possible, instead of giving up on negotiations, [a State] must . . . continue to look for ways to exercise influence and de-escalate the situation,”²⁷³ which should involve negotiating (or permitting the negotiation) with pirates so as to minimize the suffering of hostages, family members, and other interested parties.

In the final analysis, the open-textured nature of morality precludes any absolute moral conclusions to be drawn, though the scales of morality arguably tip in favour of permitting negotiations with pirates if human life is at risk. Of course, in the absence of a single set of values or operative sense of moral self in any given country, issues of legitimacy and morality are likely to be subjected to debate and interpretation by lawyers, policy-makers, and other stakeholders.

7. Policy recommendations

Having applied Spock’s analytical framework to the issue of whether we should bargain with pirates, this Part seeks to draw conclusions from the exercise and develop policy recommendations that fit, in practice, the theoretical models considered above.

The immediate conclusion that can be drawn is that it is “unwise”²⁷⁴ for a State to either ban (read: fight) or permit (read: negotiate) ransom payments. Given the multiplicity of interests at stake, the best solution would be a policy that strikes a balance between negotiation and legal confrontation. Indeed, the rigidity of a no-negotiation approach undermines the context-specific balance between, on the one hand, the interests of a State and the international community, and private parties, such as ship-owners and crewmembers, on the other. Accordingly, the overarching policy expectations must be to (1) reach a position where pirates are unable to profit from piracy without (2) jeopardizing the interests of the various stakeholders in piracy hijacking situations.

In seeking to ban ransom payments, a State falls into the zero-sum trap: “what one side wins, the other side must lose . . . anything that benefits your enemy is necessarily bad for you.”²⁷⁵ But the payment of the ransom is not entirely “bad,” for it is freeing human life and property. In fact, it is the only realistic safe way to obtain the release of crew, vessel, and cargo.

273. DOLNIK & FITZGERALD, *supra* note 68, at 147.

274. See MNOOKIN, *supra* note 2, at 49.

275. *Id.* at 19.

As the interests at stake are difficult to fully align, negotiation is the *only* way in which the most interests can be maximized.²⁷⁶ This perspective is supported by “the categorical notion — prevalent in the field of dispute resolution — that you should always be willing to negotiate.”²⁷⁷ But negotiation should not lead to the impunity of pirates. Thus, an approach that combines both negotiating *and* fighting is recommended here. Expanding on Professor Mnookin’s framework of “when to negotiate, when to fight,” this Article argues that a middle-ground can be identified where negotiation *and* fighting can be suitable in certain circumstances. Accordingly, this Article proposes that a State or a group of States²⁷⁸ should implement one of the following policies in order to maximize both the State’s and other stakeholders’ interests.

a). *No ban but criminalize extraction, tax ransom*

This policy option opposes a complete ban on ransom payments. Thus, ship-owners and other private parties are free to negotiate with pirates to seek release of cargo and crew in exchange for payment. It also provides ancillary service providers with a continued market for commercial gain. The pirates’ demands will also be satisfied, thus diffusing the immediate conflict. In order to satisfy the State’s and the international community’s interests, the State should criminalize the *extraction* of ransom.²⁷⁹ This shifts criminal responsibility to the pirate and resolves the policy need of allowing payments of ransom, whilst meeting the legal need of criminalizing the overall effect of ransoms writ-large. It also helps a State to manage reputational risks and sends a clear message that the State does not condone hijacking for ransom. By extracting ransom payments, pirates are therefore committing a further crime under law, which can be used as an additional basis for prosecution when captured and brought to trial. This proposal does not, however, endanger crew or property in the short-run, and it keeps all negotiation channels open

276. See Neylon & Gosling, *supra* note 237 (noting that the payment of a ransom is the “only hope of securing the release of your crew and your vessel”).

277. MNOOKIN, *supra* note 2, at 3.

278. For example, through a Treaty or Regional Agreement, or in the alternative, in the form of international guidelines issued by influential organizations, such as the International Maritime Organization; see UK Task Force Report, *supra* note 7, at 1 (“Unilateral initiatives may also contribute to the goal of breaking the pirate business model, but to be properly effective any regime to stop ransoms would need to operate and be applied consistently and multilaterally.”).

279. See *Masefield AG v. Amlin Corporate Member Ltd*, [2010] 1 C.L.C. 318, 341 (noting that under English law, “a demand for ransom against return of property may well constitute a theft”) (emphasis added).

so that crew and property can be safely released. A State's reputation as a coercive agent is maintained, and potential audience costs averted.

Furthermore, the State should consider imposing a proportionate tax²⁸⁰ on ransom payments in order to fund socio-economic, logistical and military anti-piracy operations in piracy-prone regions. Although some may feel that it is unfair to tax the victims of piracy, the tax would also operate as a warning to ship-owners that they also share some responsibilities in combatting piracy. This will work as an additional reminder to ship-owners that they must continue to take the protection of their ships seriously, and consider implementing relatively inexpensive methods to protect their ships in piracy-prone waters, such as installing barbed wire and training its personnel.²⁸¹ The law already recognizes that ship-owners owe duties to its employees and crewmembers. For example, under U.S. law, ship-owners can be held liable to an injured seaman's claim under negligence and the Jones Act for failing to implement safety measures.²⁸² More sophisticated protective methods may also be required. Recognizing the shipping industry's shared responsibility to combat piracy, in May 2009, the U.S. Coast Guard mandated the use of guards on vessels transiting around the Horn of Africa.²⁸³ Further, in 2009 and 2012, the crewmembers of the MV Maersk Alabama sued their employers (the ship-owners) for "knowingly, intentionally and wilfully sen[ding] their employees . . . into an area where pirates were attacking

280. An alternative to taxation would be to impose a fine. However, fines carry a level of stigma that are not typically associated with taxation. Since the imposition of a fine implies wrongdoing and a ship-owner may not have done anything wrong, a tax is a better method to extract a financial contribution from the shipping industry.

281. The broader question of shipowner liability broader issue was raised as early as 1885 in the April edition of *The Steamship*. See *The Lading Bill Agitation*, *THE STEAMSHIP*, Apr. 1885 at 109 ("Should shipowners be held liable, or rather doubly liable, for that which they cannot prevent? . . . [Shipowners] insured their vessels, and perhaps the value of the profits the journey should yield, and indulged in the belief that they were freed from further responsibility.").

282. Erin Fuchs, *This Lawsuit Supposedly Tells the 'True Story' of Captain Richard Phillip's Pirated Ship*, *BUSINESS INSIDER* (Oct. 11, 2013, 5:18 PM), http://www.businessinsider.com/lawsuit-against-maersk-line-over-captain-phillips-ship-201310?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+businessinsider+%28Business+Insider%29 ("Crew members of the Maersk Alabama filed the lawsuit against the company that owned the ship, claiming they were steered into pirate-infested waters near the Somali coast without any real protection.").

283. See Susan Gvozdas, *Coast Guard Releases Anti-Piracy Rules*, *NAVY TIMES* (May 12, 2009, 5:12 PM), <http://www.navytimes.com/article/20090512/NEWS/905120315/Coast-Guard-releases-anti-piracy-rules>.

merchant vessels” and “failed to take adequate steps to provide appropriate levels of security and safety for their employees . . .”²⁸⁴ Though the cases are still pending, these lawsuits highlight potential areas of improvement by some actors in the industry. Thus, there is some evidence that more can be done by the shipping industry to protect ships from piratical attacks, and a ransom tax would achieve the goal of clearly communicating that message.

The tax recommendation advanced in this Article would also signal to pirates that in extracting a ransom they will effectively contribute towards the funding of their own extinction both on land and at sea. Since pirates operate as members of larger criminal organizations, this signalling effect would quickly become disseminated within the organization and, depending on the level of inter-organizational communications, to other groups too.

This policy proposal acknowledges the difference between *promoting* negotiation in the wrong context i.e. instances where it is not right to negotiate, versus *preserving* negotiation in difficult contexts. It aims to disrupt piracy’s business model through the power of law without undermining negotiations for the safe release of human life and property. Whereas the payment of ransom is currently not criminal in the U.S. and U.K., this proposal corrects the current legal lacunae, without imposing an absolute ban on the only way to reach a peaceful settlement of a dispute.

This recommendation is not free from challenges. Indeed, States may find it difficult to tax payments since ship-owners may underreport piracy hijackings. But similar criticisms may be levied against banking and commercial regulations sanctioning transactions with prohibited entities or States.²⁸⁵ Although some activity may go unnoticed by law enforcement, the majority will be uncovered since financial transactions are typically recorded in some form and can be thus can be traced forensically. Further, legislation may penalize any entity that aids or abets an entity from avoiding the tax. This is already

284. See Complaint at ¶ 12, Miguel Ruiz et al. v. Waterman Steamship Corp. and Maersk Line, Ltd., No. CL12-1617 (Cir. Ct. Mob. Cnty., Alabama April 9, 2012); see also Waterman Steamship Corp. v. Ruiz, 355 S.W.3d 387, 395 (Tex. App., 2011) (noting that “Miguel Ruiz, John Cronan, and Richard Hicks, sued Waterman and Maersk for negligence under the Jones Act and general maritime law for injuries allegedly suffered during the hijacking of the M/V MAERSK ALABAMA by pirates off the coast of Somalia.”).

285. For example, the Iranian sanctions programs under the Iranian Transactions Regulations, 31 C.F.R. § 560 (2014), and the Iranian Assets Control Regulations, 31 C.F.R. § 535 (2011), as administered by the U.S. Treasury Department’s Office of Foreign Assets Control (“OFAC”); see also Exec. Order No. 13,536, 75, Fed. Reg. 72, 19,869 (Apr. 15, 2010) (prohibiting transactions with certain Somali groups).

embodied in most tax codes, as aiding and abetting tax evasion is illegal. Thus, law firms and financial institutions that assist the evasion of the ransom tax may expose themselves to legal action by the State. In order to lighten the financial burden on ship-owners, the State may also impose the tax as a 'deferred tax liability'. Alternatively, or in addition to payment deferral, a State may give the ship-owner the option to pay the tax in instalments, or to structure the tax as a donation to State-approved charities that focus on combating the fundamental causes of piracy, e.g., charities that run educational programs in piracy prone regions in Somalia or West Africa.²⁸⁶

- b). *No ban but criminalize extraction, and a tax on ransom if failure to comply with health and safety legislation*

This is a more palatable alternative to the blanket ransom tax policy explored above. Here, instead of levying a tax on all ransom payments, the tax should be conditioned on the private party's failure to comply with health and safety legislation.²⁸⁷ The health and safety legislation could impose minimum obligations on ship-owners, such as basic safety training of crewmembers (so that they know to retreat to an inaccessible locked safe room when attacked), and the installation of relatively inexpensive equipment, such as barbed wire and high-pressure hoses.²⁸⁸ Since pirates tend to attack ships of bigger tonnage, such health and safety legislation could be imposed on ships of a certain tonnage. Alternatively, such legislation could impose obligations on ship-owners to comply with safety guidelines or explain, in a public report, its failure to do so.²⁸⁹

286. Importantly, charity donations also have tax benefits, which may lighten the stigmatization effect of the tax.

287. See Bento, *supra* note 41, at 54 (proposing international measures and health and safety legislation requiring shipowners to adopt best management practices or explain failures to do so).

288. See E.U. Naval Force, Maritime Security Centre Horn of Africa (MSCHOA), *BMP3: Best Management Practices to Deter Piracy off the Coast of Somalia and the Arabian Sea* 27 (Version 3, June 2010).

289. A similar approach is undertaken by the United Kingdom Corporate Governance Code. See Financial Reporting Council, *What Constitutes an Explanation Under 'Comply or Explain'?: Report of Discussions Between Companies and Investors* (Feb. 2012), available at <http://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/What-constitutes-an-explanation-under-comply-or-ex.aspx> ("[T]hrough the concept of 'comply or explain' the U.K. has successfully promoted high standards of corporate governance over many years. This has led to widespread improvements in practice.").

IV. CONCLUSION

The objective of this Article was to consider whether a State should preclude negotiations with pirates by criminalizing ransom payments. In doing so, it has sought to bridge the chasm that separates *pro-ransom* and *anti-ransom* advocates by devising a solution that incorporates all stakeholder interests. Accordingly, it recommended that only the *extraction* of ransom be criminalized and that ransom payments be subject to a proportional tax.

Piracy for ransom transcends public and private negotiation contexts. In the private context, it involves the competition for resources between private parties and pirates. In the public context, it implicates important questions of policy and creates a tension between what is necessary and what is legitimate. This tension, however, "can be managed."²⁹⁰ Indeed, there needs to be no choice between the *necessity* to protect human life, property and the environment, and the *legitimacy* of acts which the State seeks to regulate. Negotiation, as a tool for communication and dispute resolution, can exist alongside fighting tools', such as the criminalization of unwanted behaviour. To this end, the "Faustian tensions between pragmatism and principle"²⁹¹ inherent in some international legal problems can best be "managed" through a policy-oriented approach to law that addresses the underlying political, social, and commercial interests, risks, and expectations of the situation in question.

Negotiation, as a powerful tool for dialogue, should be promoted even if the underlying effect is to reward a criminal and immoral act. Dialogue does not mean endorsement, or legitimization, of the unwanted act; it merely seeks to resolve the dispute at hand. The full force of the law should not be directed at the problem-solvers, but at the problem-makers. Accordingly, the policy of the law should reflect the need to preserve negotiation of ransom payments, whilst recognizing the need for States to promote order both on land and at sea.

290. MNOOKIN, *supra* note 2, at 35.

291. *Id.*