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# Uncharted Waters

## THE PRIVATE SECTOR'S FIGHT AGAINST PIRACY ON THE HIGH SEAS

In the early morning of June 27, 2005, Captain Sellathurai Mahalingam was at the helm of the MV *Semlow*, a fifty-eight-meter-long cargo ship owned by the Kenya-based Motaku Shipping Agency.<sup>1</sup> The ship, chartered by the United Nations, was thirty nautical miles off the coast of Somalia and contained 850 tons of rice for the victims of the December 2004 tsunami.<sup>2</sup> Suddenly, three small skiffs appeared, fired at the ship, and forced it to stop.<sup>3</sup> At that point, somewhere between fifteen and twenty emaciated Somalis armed with pistols, AK-47s, and rocket-propelled grenade launchers boarded the ship.<sup>4</sup> The pirates looted the captain's safe and the crewmembers' valuables and forced the ship to sail 100 miles northeast to the Somali capital of Mogadishu.<sup>5</sup> There, Captain Mahalingam was forced to call the ship's owner and demand a ransom of \$500,000.<sup>6</sup> Two months later, the crew, still in captivity, witnessed the hijacking of an Egyptian ship before the crews of both ships were again forced to sail elsewhere.<sup>7</sup> Finally, the pirates were paid \$135,000 ransom, and all the hostages were released unharmed.<sup>8</sup>

This horrific scene of raiding, looting, and hostage-taking has become increasingly common across the globe, but especially in the Gulf of Aden, off the Somali coast.<sup>9</sup> The combination of a failed government in Somalia, a depleted

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<sup>1</sup> Peter Lehr & Hendrick Lehman, *Somalia—Pirates New Paradise*, in *VIOLENCE AT SEA: PIRACY IN THE AGE OF GLOBAL TERRORISM* 1, 1-3 (Peter Lehr ed., Routledge 2007); Edward Harris, *U.S. Navy Muscles In on Old Foe: Pirates; Operations Off Africa Reflect Growing Threat*, WASH. POST, Nov. 11, 2007, at A19.

<sup>2</sup> Lehr & Lehman, *supra* note 1, at 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

<sup>9</sup> Abukar Albadri & Edmund Sanders, *Somalia's Pirate Problem Grows More Rampant*, L.A. TIMES, Oct. 31, 2008, at A1, available at <http://articles.latimes.com/2008/oct/31/world/fg-pirates31>.

regional fishing industry, and a close proximity to significant shipping lanes makes the Somali coast a hotbed for pirate activity.<sup>10</sup> Indeed, in a nation with a per-capita GDP of \$600 and an average male life expectancy of forty-seven, the \$150,000 payout for a single hijacking is a lucrative alternative to poverty.<sup>11</sup> As one hijacker admitted, “[w]hen evil is the only solution[,] you do evil.”<sup>12</sup> The result has been an explosion of pirate raids on commercial vessels.<sup>13</sup> While multinational naval forces in the Gulf of Aden thwarted some pirate attacks, there were a staggering 214 attacks and 74 hijackings in 2009.<sup>14</sup> The number of reported pirate incidents has decreased slightly in 2010.<sup>15</sup> Between January and June of 2010, there were 196 reported incidents, compared to 240 over the same period in 2009.<sup>16</sup> At any rate, those 196 reported incidents included 31 hijackings, and resulted in 16 injuries, 1 death, and 597 crewmembers taken hostage.<sup>17</sup>

In addition to the substantial threat to human life, piracy has cost shipping companies between \$13 billion and \$16 billion.<sup>18</sup> In 2008 alone, insurance costs for shipping companies increased ten-fold.<sup>19</sup> In December 2009, pirates claimed they received a \$4 million ransom payment from the Chinese government.<sup>20</sup> One maritime security firm explained that, if left unaddressed, the costs of piracy to shipping

<sup>10</sup> *Id.*

<sup>11</sup> Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, 13 AM. SOC. INT’L L. INSIGHTS 2 (Feb. 6, 2009), available at <http://www.asil.org/insights090206.cfm>.

<sup>12</sup> James Kraska & Brian Wilson, *Piracy Repression, Partnering and the Law*, 40 J. MAR. L. & COM. 43, 44 (2009).

<sup>13</sup> Albadri & Sanders, *supra* note 9.

<sup>14</sup> Mark McDonald, *Record Number of Somali Pirate Attacks in 2009*, N.Y. TIMES, Dec. 30, 2009, at A9 (quoting statistics from the International Maritime Bureau’s Piracy Reporting Center as of Dec. 29, 2009), available at <http://www.nytimes.com/2009/12/30/world/africa/30piracy.html>.

<sup>15</sup> *Pirates Face New Resistance as Navies Strike Back, Says IMB*, ICC COM. CRIME SERVICES (July 15, 2010), [http://www.icc-ccs.org/index.php?option=com\\_content&view=article&id=418:pirates-face-new-resistance-as-navies-strike-back-says-imb&catid=60:news&Itemid=51](http://www.icc-ccs.org/index.php?option=com_content&view=article&id=418:pirates-face-new-resistance-as-navies-strike-back-says-imb&catid=60:news&Itemid=51) [hereinafter *Pirates Face New Resistance*].

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Kraska & Wilson, *supra* note 12, at 45.

<sup>19</sup> Jerry Seper, *Blackwater Joins Fight Against Sea Piracy*, WASH. TIMES, Dec. 4, 2008, at B1, available at <http://washingtontimes.com/news/2008/dec/04/blackwater-joins-fight-against-sea-piracy>.

<sup>20</sup> Corey Flintoff, *A Record Year for Pirate Attacks*, NAT’L PUB. RADIO (Dec. 30, 2009), <http://www.npr.org/templates/story/story.php?storyId=122066185>. The Chinese government described the return of the ship as a “rescue.” *Id.*

companies will only increase.<sup>21</sup> These costs, including added danger payments for crew members, higher ransom payments, and prolonged negotiations for hijacked ships, will lead to increasing prices for consumers.<sup>22</sup> Although these costs are significant, maritime security commentators warn that pirate attacks remain too rare to generate meaningful attention from the governments of the world.<sup>23</sup> In fact, less than one percent of all ships traveling through the Gulf of Aden is attacked by pirates.<sup>24</sup> As such, at least in the short term, it will be left up to private sector firms to protect their ships, their cargo, their crew, and their bottom line.

This note will examine two distinct contexts in which the private sector will have to combat the threat of piracy and the complex legal framework in which it must operate. Shipping companies should—and can—minimize the threat of piracy to commercial vessels while also taking adequate precautions to prevent both criminal and civil liability. States may also utilize private security companies to hunt down piracy without diverting important military resources.

Part I of this note addresses the shortcomings of state protection against pirates and the need for the private sector to take a more active role in securing the high seas. Part II examines the rights and responsibilities of shipping companies in fighting piracy. Finally, Part III considers the possibility of using private security contractors to hunt down pirates and the potential liabilities for these firms.

## I. PUTTING THE BURDEN ON THE PRIVATE SECTOR

### A. *Ancient Origins*

For centuries, combating piracy was substantially the prerogative of states.<sup>25</sup> Since Ancient Roman times, pirates were deemed “common enemies of mankind” and were subject to universal jurisdiction.<sup>26</sup> Some of the earliest known legal references to pirate raids date back to *Justinian’s Digest* in 529

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<sup>21</sup> Seper, *supra* note 19.

<sup>22</sup> *Id.*

<sup>23</sup> See Dennis M. Zogg, Why the U.S. Navy Should Not Be Fighting Piracy off Somalia (May 1, 2009) (unpublished manuscript) (on file with Joint Military Operations Dep’t, Naval War College).

<sup>24</sup> *Id.*

<sup>25</sup> Max Boot, *Pirates, Then and Now*, FOREIGN AFF., July/Aug. 2009, at 94, 99.

<sup>26</sup> *Id.* at 99.

AD.<sup>27</sup> In 1698, Great Britain became the first nation to specifically criminalize piracy.<sup>28</sup> The rise of global commerce and exploration made piracy as relevant as ever.<sup>29</sup> As the Spanish explored and colonized the New World, they sent naval convoys across the Atlantic twice a year with their acquired treasures.<sup>30</sup> Merchant ships not protected by the fleet sailed at their own risk.<sup>31</sup> One of these ships, seized by Sir Francis Drake, was worth \$18 million in today's currency.<sup>32</sup>

The United States, most notably, dealt with piracy in the late eighteenth and early nineteenth centuries in the North African Barbary States.<sup>33</sup> The pirates, sanctioned by the Barbary States, posed such a threat to American merchant ships that the U.S. government entered into agreements to give ships safe passage in exchange for goods and cash.<sup>34</sup> For example, an agreement made in 1795 transferred \$1 million in goods and cash to the government of Algiers.<sup>35</sup>

By 1801, President Jefferson recognized that “nothing will stop the eternal increase of demands from these pirates but the presence of an armed force.”<sup>36</sup> The U.S. Navy fought the pirates until 1815, when the Barbary States finally agreed to stop attacking American ships—a concession that had been made to the British and French decades earlier.<sup>37</sup>

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<sup>27</sup> Zou Keyuan, *New Developments in International Piracy Law*, 8 CHINESE J. INT'L L. 323, 323 (2009); *see also* 1 THE DIGEST OF JUSTINIAN, Book 13, para. 18 (Alan Watson ed. 1998).

<sup>28</sup> Keyuan, *supra* note 27, at 323.

<sup>29</sup> *See* Douglass C. North, *Sources of Productivity Change in Ocean Shipping, 1600-1850*, 76 J. POL. ECON. 953 (1968).

<sup>30</sup> Keyuan, *supra* note 27, at 323.

<sup>31</sup> Boot, *supra* note 25, at 100.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 102.

<sup>34</sup> *Id.*

<sup>35</sup> Treaty of Peace and Amity, U.S.-Algiers, Sept. 5, 1795, 2 U.S.T. 275. The treaty stated in relevant part:

[I]f war vessels or merchant vessels belonging to our friend the American ruler meet on the open sea with war vessels or merchant vessels belonging to Algiers, and they become known to each other, they shall not be allowed to search or to molest each other, and that none shall hinder the other from wending its own way with honor and respect. Also, that whatever kind of travelers there are on board, and wherever they go with their goods, their valuables, and other properties, they shall not molest each other or take anything from each other, nor take them to a certain place and hold them up, nor injure each other in any way.

*Id.*

<sup>36</sup> Boot, *supra* note 25, at 102.

<sup>37</sup> *Id.*

B. *Lowering the Ship's Guard*

From the sixteenth to late eighteenth century, adequate ship defenses were a necessary cost for shipping companies.<sup>38</sup> Ships would be armed like warships, with extra personnel and weaponry to fend off pirate attacks.<sup>39</sup> In the early nineteenth century, these companies began to rethink arming their ships because of several factors.<sup>40</sup> First, as competition among shipping companies increased during the Industrial Revolution, speed became a premium, and companies could not afford to weigh down their ships with ammunition and extra personnel.<sup>41</sup> Furthermore, busier shipping lanes patrolled by a strong British Navy led to a global decline in piracy.<sup>42</sup> As a result, ships began to disarm, carrying fewer personnel and armaments.<sup>43</sup> As Professor Douglass C. North, formerly of the University of Washington, observed, the increased security of shipping routes led to a steady decrease in maritime insurance rates, labor costs, and ammunition costs.<sup>44</sup> He further noted that, in areas such as the West Indies, lingering piracy threats continued to translate into higher costs to shipping companies.<sup>45</sup>

Shipping companies' decisions to disarm their ships in favor of lower costs and increased efficiency became the norm from the nineteenth century until recently.<sup>46</sup> Except during wartime, few ships carried armed guards or even ammunition.<sup>47</sup> The recent reemergence of pirates as a threat to merchant vessels has forced shipping companies to once again consider arming their ships.<sup>48</sup> While shipping companies were initially hesitant, more and more have armed their ships because of the insufficient

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<sup>38</sup> John W. Miller, *Loaded: Freighters Ready to Shoot Across Pirate Bow*, WALL ST. J., Jan. 6, 2010, at A9, available at <http://online.wsj.com/article/SB126265833983415885.html>.

<sup>39</sup> *Id.*; see also North, *supra* note 29, at 960.

<sup>40</sup> See Miller, *supra* note 38.

<sup>41</sup> *Id.*

<sup>42</sup> Deepak Lal, *Will Terrorism Defeat Globalization?*, in NO MORE STATES? GLOBALIZATION, NATIONAL SELF-DETERMINATION, AND TERRORISM 36 (Richard N. Rosecrance & Arthur A. Stein eds., 2006).

<sup>43</sup> North, *supra* note 29, at 960.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 959-60.

<sup>46</sup> Miller, *supra* note 38.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

international response to piracy and recent reductions in insurance premiums for ships that carry armed guards.<sup>49</sup>

C. *The International Response*

The reemergence of piracy, especially the high-profile taking of the U.S.-flagged MV *Maersk Alabama*, has drawn some response from the international community.<sup>50</sup> The United Nations, for example, has passed resolutions on the matter, and many of the world's navies have devoted resources to the Gulf of Aden.<sup>51</sup> Despite these measures, pirate attacks remain a considerable threat.<sup>52</sup> As such, shipping companies, particularly in the short term, must not rely on governmental entities to keep their ships safe.<sup>53</sup>

In the Gulf of Aden, warships from the United States, United Kingdom, Russia, China, India, South Korea, and several other nations have been deployed to fight piracy.<sup>54</sup> For the most part, these multilateral efforts are controlled by the U.S. Combined Task Force 151 and the European Union's Operation *Atalanta*.<sup>55</sup> The U.S. Navy has established a "Maritime Security Patrol Area," a heavily patrolled area that merchant vessels are encouraged to navigate.<sup>56</sup> In addition to military collaboration, the United Nations has taken a leading role in coordinating global antipiracy policy through the International Maritime Organization (IMO).<sup>57</sup> The IMO is an United Nations entity with 168 member nations whose mission includes global coordination "for legal issues, technical co-operation, and maritime security including anti-piracy efforts."<sup>58</sup>

In 2008, the United Nations Security Council ("Security Council") passed four resolutions that were significant to nations fighting piracy.<sup>59</sup> Most notably, these resolutions allowed states to enter the territorial waters of Somalia and

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<sup>49</sup> *Id.*

<sup>50</sup> See Zogg, *supra* note 23, at 7-8.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 9-12.

<sup>54</sup> *Id.* at 1.

<sup>55</sup> *Id.* at 8.

<sup>56</sup> *Id.* at 10.

<sup>57</sup> LAUREN PLOCH ET AL., CONG. RESEARCH SERV., R40528, PIRACY OFF THE HORN OF AFRICA 18 n.41 (2009).

<sup>58</sup> *Id.*

<sup>59</sup> Zogg, *supra* note 23, at 7.

urged states to commit naval vessels and aircraft to the Somali region.<sup>60</sup> The Security Council's resolutions certainly laid important groundwork for nations to combat piracy.<sup>61</sup> Still, the resolutions only "urged" nations to commit resources to the fight against piracy.<sup>62</sup> As Lieutenant Daniel Zogg of the U.S. Naval War College points out, there is presently little incentive for nations to do more to fight piracy.<sup>63</sup>

Lieutenant Zogg suggests that pirate attacks remain a very rare phenomenon and will not receive the requisite attention necessary to provide optimal security, especially without a connection to terrorist groups.<sup>64</sup> Less than one percent of all ships traveling through the world's hot spot for piracy is attacked, and the \$16 billion lost annually is a drop in the multi-trillion-dollar bucket that is international shipping.<sup>65</sup> The overall effectiveness of naval patrols is a problem in itself.<sup>66</sup> Patrol ships must cover 1.1 million square miles of ocean and must be able to respond to a hijacking within fifteen minutes,

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<sup>60</sup> *Id.* (quoting S.C. Res. 1816, ¶ 7(a), U.N. Doc. S/RES/1838 (June 2, 2008); S.C. Res. 1838, ¶ 2, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1846, ¶ 15, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, ¶ 6, U.N. Doc. S/RES/ 1851 (Dec. 16, 2008)). Zogg summarized the resolutions as such:

UNSCR 1816 (June 2, 2008) authorized . . . [other states] to "enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea."

UNSCR 1838 (October 7, 2008) urged "states interested in the security of maritime activities to take part actively in the fight against piracy on the high seas off the coast of Somalia, in particular by deploying naval vessels and military aircraft."

UNSCR 1846 (December 2, 2008) extended by twelve months the authorization initially established under UNSCR 1816 for foreign countries to pursue pirates into Somalia's territorial waters. It also urged all "parties to the [1988] SUA [Suppression of Unlawful Acts Against the Safety of Maritime Navigation] Convention to fully implement their obligations under said Convention . . . to build judiciary capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia."

UNSCR 1851 (December 16, 2008) authorized for a period of twelve months states to "undertake all necessary measures that are appropriate in Somalia," essentially paving the way for attacks against piracy infrastructure ashore.

*Id.* (footnotes omitted).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2.

<sup>66</sup> *Id.* at 9.

the time it generally takes to hijack a ship.<sup>67</sup> The Navy has projected that it would take sixty-one ships to adequately patrol a small corridor within the pirates' operational space—a dramatic increase from the twelve to sixteen ships that currently patrol the corridor.<sup>68</sup> While the current naval presence in the Gulf of Aden has led to a slight decrease in pirate incidents, pirates have proven to increase their operational capabilities to up to 1000 nautical miles off the Somali coast, and their reach continues to grow.<sup>69</sup> In 2009, the International Maritime Bureau reported twenty-eight attacks off the coast of Nigeria,<sup>70</sup> and in July 2010, pirates attacks were reported north of the naval patrols' reach in the Red Sea.<sup>71</sup>

In addition to encouraging nations to join the fight against piracy, the Security Council resolutions made one mention of shipping companies.<sup>72</sup> Resolution 1846 urges shipping companies, nations, and the International Maritime Organization to advise ships on “best practices” in dealing with pirate attacks.<sup>73</sup> The International Maritime Bureau—a nonprofit organization not affiliated with the IMO—suggests that these practices include:

[R]eview of the ship's security plan (SSP), crew briefing and drills regarding emergency measures, an emergency communication plan, additional security watches, group transits, transits as far from territorial waters as possible, daytime transits through high-risk regions, as well as myriad practices in the event that an attack occurs.<sup>74</sup>

Still, these suggestions are merely guidelines and, like any Security Council resolution, they are not binding on the shipping private sector.<sup>75</sup> In short, absent a dramatic change in international policy, shipping companies will retain great

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<sup>67</sup> *Id.* Zogg's 1.1 million square mile figure refers to the area in which the Somali pirates have displayed operational success. *Id.*

<sup>68</sup> *Id.* at 11.

<sup>69</sup> *Pirates Face New Resistance*, *supra* note 15.

<sup>70</sup> Jon Gambrell, *Nigeria: 12 Foreign Sailors Kidnapped by Pirates*, ASSOCIATED PRESS (July 3, 2010), <http://www.google.com/hostednews/ap/article/ALeqM5jFgtm4PvHOfaFjZnYMcaAmrfvgD9GNJRVG2>.

<sup>71</sup> Adam Schreck, *NATO Fears Somali Pirates Moving to South Red Sea*, ASSOCIATED PRESS (July 21, 2010), <http://www.google.com/hostednews/ap/article/ALeqM5gB7YMEDuCwwY9ncDOtPAkEI4-H2wD9H3I9884>.

<sup>72</sup> Michelle Nakamura, *Piracy off the Horn of Africa: What is the Most Effective Method of Repression?* 9 (May 4, 2009) (unpublished manuscript) (on file with Joint Military Operations Dep't, Naval War College).

<sup>73</sup> *Id.* at 9-10.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

responsibility and broad discretion in securing their ships against pirate attacks.

## II. THE SHIPPING COMPANY

While the international community struggles to craft policies to stabilize Northern Africa and eradicate piracy, it is clear that shipping companies will primarily be responsible for keeping their ships safe. Piracy has cost shipping companies, cargo owners, and ship owners billions of dollars over the last decade.<sup>76</sup> Pointing out the numerous costs and considerations facing shipping companies, practitioner D. Joshua Staub writes in the *Journal of Maritime Law and Commerce*,

If a shipping line must take a route around the Cape of Good Hope instead of through the Suez Canal, it will incur additional annual costs of \$89 million. War risk insurance premiums for vessels transiting the Gulf of Aden could reach as much as \$400 million per annum. A Saudi oil tanker forced to travel to the United States by way of the Cape of Good Hope will reduce its annual delivery capacity by 26% and expend an additional \$3.4 million per year to bring its payload to market. These examples do not include emotional damages to hostages and their families, or special damages from loss of use of impounded vessels, lost cargo, ransom payments, difficulty in retaining mariners or increased cost of goods for consumers.<sup>77</sup>

Shipping companies cannot ignore these observations. As pirates become stronger, bolder, and acquire more resources, shipping corporations will continue to pay a high cost of doing business. The decision to pay ransoms, the hiring of private security, and the adoption of increased safety precautions represent three complex legal issues that shipping companies must face in fighting piracy.

### A. Ransoms

Unlike their predecessors, pirates of the twenty-first century do not have the capability or the desire to plunder the cargo of the hijacked ships.<sup>78</sup> Their true capabilities lie not in

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<sup>76</sup> See *supra* note 12 and accompanying text.

<sup>77</sup> D. Joshua Staub, *Letters of Marque: A Short Term Solution to an Age Old Problem*, 40 J. MAR. L. & COM. 261, 262-63 (2009).

<sup>78</sup> James W. Carbin, *Pirates: Hostis Humanis Generis*, 56 FED. L., Sept. 2009, at 50, 55.

the capture of ships but in the negotiations that follow.<sup>79</sup> In fact, by 2009, ransoms paid for the release of cargo and crew approached \$50 million.<sup>80</sup> These payments have become so commonplace that they are factored into the general calculation of a ship's liability.<sup>81</sup> Like other liabilities, ransom payments are paid from a ship's general average.<sup>82</sup> The recent spike in piracy has required some carriers, cargo owners, and others who contribute to a ship's general average to seek additional protection through insurance.<sup>83</sup> Kidnapping and ransom ("K&R") policies are now being extended to ships and their crew with rates increasing substantially.<sup>84</sup> The payment of ransoms has become not only a general practice for shipping companies, but also a business in itself.<sup>85</sup>

Ransom payments by private parties to pirates remains legal practice in countries such as the United States and Great Britain.<sup>86</sup> The British legal system acknowledged the payment of ransoms as early as 1590.<sup>87</sup> In *Hicks v. Palington Moore's*, the court held that a ransom paid voluntarily by a master to ransom a ship and its cargo can and should be paid from the ship's general average.<sup>88</sup> Similarly, in the American legal tradition, James Carbin, a maritime law practitioner who advises shipping companies on paying pirate ransoms, points out, "The U.S. Supreme Court cited [*Hicks*] with approval in *Ralli v. Troop* . . . , and subsequent authorities have followed the analysis. Indeed, the *Digest of Justinian*, *Rhodian Law*, and *Consolado Del Mare*, which cover the sixth through the [fifteenth] centuries A.D., appear to endorse ransom as a General Average expense."<sup>89</sup>

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 54.

<sup>81</sup> *Id.*

<sup>82</sup> Jonathan Spencer, *Hull Insurance and General Average—Some Current Issues*, 83 TUL. L. REV. 1227, 1261 (2009). The doctrine of General Average is defined as "a rule allowing a carrier to require cargo owners and the shipowner to contribute pro rata to the cost of protecting the ship and its cargo." BLACK'S LAW DICTIONARY 518 (8th ed. 2004).

<sup>83</sup> Spencer, *supra* note 82, at 1260.

<sup>84</sup> *Id.* at 1259.

<sup>85</sup> *Id.* at 1259-60.

<sup>86</sup> See Fred C. Ikle & Stephen G. Rademaker, *Coddling Pirates Aids Terrorists*, WASH. TIMES (Jan. 11, 2009), <http://www.washingtontimes.com/news/2009/jan/11/coddling-pirates-aids-terrorists>.

<sup>87</sup> *Hicks v. Palington*, (1590) 72 Eng. Rep. 590 (K.B.).

<sup>88</sup> *Id.*

<sup>89</sup> Carbin, *supra* note 78, at 54 (citation omitted).

While paying ransoms has become common practice, commentators have indicated that refraining from doing so could actually deter piracy.<sup>90</sup> Following the capture of a Saudi supertanker in November 2008, British Foreign Secretary David Miliband stated,

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 and we will be approaching this issue in a very delicate way, in a way that puts the security and safety of the hostages to the fore.<sup>91</sup>

Former American policymakers Fred C. Ikle and Stephen G. Rademaker suggest an international regime to prevent payment of pirate ransoms.<sup>92</sup> They point to United Nations Security Council Resolution 1373, which outlaws any financial support to terrorists and terrorist organizations.<sup>93</sup> Of course, this ban, along with the American policy of not negotiating with terrorists, applies only to state actors.<sup>94</sup> As the U.S. Department of State makes clear, “U.S. Government policy is to make no concessions to terrorist demands. However, such a decision on the part of private individuals or companies is a personal one and in some special circumstances may be made by the family or company of the victim.”<sup>95</sup> Thus, companies, as private actors, can choose whether to pay the ransoms.<sup>96</sup>

On its face, an international ban on paying pirate ransoms seems to be an important step in combating piracy.<sup>97</sup> Still, there are several problems with such a policy. Most strikingly, the payment of ransoms often makes good business

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<sup>90</sup> See, e.g., Ikle & Rademaker, *supra* note 86; Michelle Caruso-Cabrera, *A Sure-Fire Cure for Pirate Hijackings*, CNBC NEWS (Apr. 8, 2009), <http://www.cnbc.com/id/30109142>.

<sup>91</sup> Xan Rice & Matthew Weaver, *Sirius Star Pirates Demand \$25m Ransom*, GUARDIAN (Nov. 20, 2008), <http://www.guardian.co.uk/world/2008/nov/20/piracy-somalia>; see also Brent Lang, *Gates: Stop Paying Ransom to Pirates*, CBS NEWS (Apr. 17, 2009), <http://www.cbsnews.com/blogs/2009/04/17/politics/politicalhotsheet/entry4952864.shtml> (reporting on United States Secretary of Defense Robert Gates’ speech to the United States Naval War College in which he referred to corporations paying pirate ransoms as “part of the problem”).

<sup>92</sup> Ikle & Rademaker, *supra* note 86.

<sup>93</sup> S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

<sup>94</sup> The United States Department of State re-affirmed this posture in a report by its Overseas Security Advisory Council. U.S. DEP’T OF STATE OVERSEAS SEC. ADVISORY COUNCIL, SECURITY AWARENESS OVERSEAS: AN OVERVIEW (1991), available at <http://www.state.gov/documents/organization/19792.pdf>.

<sup>95</sup> *Id.* at 13-14.

<sup>96</sup> *Id.* at 14.

<sup>97</sup> See PLOCH ET AL., *supra* note 57, at 10-11.

sense for a corporation.<sup>98</sup> As the Congressional Research Service points out, shipping corporations today will often secure insurance policies that will cover ransom payments in the event of a hijacking.<sup>99</sup> As such, these costs may be considerably lower than the cost of securing a vessel against pirate attacks.<sup>100</sup> Such costs could include rerouting ships, arming the vessel, and hiring private security.<sup>101</sup> Defending the ship or counting on naval assistance also greatly increases the risk to the cargo and to human life.<sup>102</sup> However, to date, few pirate attacks in the Gulf of Aden have turned deadly.<sup>103</sup> Among the most notable casualties was the owner of a French sailboat who was killed in a gunfight between pirates and the French Navy.<sup>104</sup> Furthermore, the negotiated ransom is often minute compared to the substantial value of a ship's cargo.<sup>105</sup> The owners of the aforementioned supertanker, MV *Sirius Star* (carrying oil valued at \$100 million), agreed to pay a ransom of \$3 million to the pirates.<sup>106</sup>

As such, in the short term, many shipping companies will continue to consider paying pirate ransoms.<sup>107</sup> However, as the *Wall Street Journal* points out, increases in pirate attacks, ransom amounts, and insurance costs have forced many companies to reconsider defending their ships.<sup>108</sup> More and more, companies are looking to private security and additional safety measures instead of acquiescing to the pirates.<sup>109</sup>

## B. *Hiring Private Security*

### 1. A Growing Industry

Though the threat of piracy is a danger, it has not escalated to a point that would dramatically increase naval

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<sup>98</sup> *Id.* at 11.

<sup>99</sup> *Id.* at 10-11.

<sup>100</sup> *Id.* at 11.

<sup>101</sup> *Id.* at 10-11.

<sup>102</sup> *Id.* at 11.

<sup>103</sup> *Id.* at 8.

<sup>104</sup> *Id.* at 9.

<sup>105</sup> *Id.* at 11; Miller, *supra* note 38.

<sup>106</sup> See *supra* note 78 and accompanying text; *Saudi Tanker 'Freed Off Somali'*, BBC NEWS (Jan. 9, 2009), <http://news.bbc.co.uk/2/hi/africa/7820311.stm>.

<sup>107</sup> Miller, *supra* note 38.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

presence in the Gulf of Aden.<sup>110</sup> As such, shipping companies have increasingly relied on private contractors to provide security for their ships and cargo.<sup>111</sup> The U.S. State Department observed that “[i]n appropriate circumstances, onboard armed security, private or military, can provide an effective deterrent to pirates in the Horn of Africa region for certain vessels deemed to be at high risk.”<sup>112</sup> Professor Claude Berube of the U.S. Naval Academy theorizes that private contractors may be used in two distinct contexts.<sup>113</sup> First, private contractors can be hired by shipping companies to provide security on board their ships.<sup>114</sup> Second, private contractors can be commissioned by the government to hunt down pirates.<sup>115</sup> The former is quickly becoming a common practice for pirate-plagued shipping companies.<sup>116</sup>

While some states have resorted to placing naval personnel on private ships, most shipping companies have turned to private security contractors.<sup>117</sup> This practice is far from new.<sup>118</sup> In the days of the British Empire, the British East India Company regularly subcontracted the protection and transport of goods to armed merchant ships.<sup>119</sup> In the twenty-first century, an entire industry is devoted to maritime security.<sup>120</sup> Among the companies in this growing industry is

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<sup>110</sup> See *supra* notes 23-24 and accompanying text.

<sup>111</sup> *Splashing, and Clashing, in Murky Waters: Piracy and Private Enterprise*, ECONOMIST, Aug. 22, 2009, at 53. [hereinafter *Splashing, and Clashing*].

<sup>112</sup> *Id.*

<sup>113</sup> Claude Berube, *Blackwaters for the Blue Waters: The Promise of Private Naval Companies*, 51 ORBIS 601, 607, 609 (2007).

<sup>114</sup> *Id.* at 609.

<sup>115</sup> *Id.* at 608. See *infra* Part III for a discussion of private pirate hunters.

<sup>116</sup> Miller, *supra* note 38. Many shipping companies have been advocating the use of private contractors only if the United States Government is unable to provide armed military escorts for its ships. Currently, the Department of Defense has declined to provide individual escorts for American-flagged ships. See *Piracy Against United States-Flag Vessels: Lessons Learned: Hearing Before the Subcomm. on Coast Guard & Mar. Transp. of the H. Comm. on Transp. & Infrastructure*, 111th Cong. 2 (2009) (statement of the American Maritime Officers; International Organization of Masters, Mates, & Pilots; Marine Engineers' Beneficial Association; and Seafarers International Union), available at <http://transportation.house.gov/Media/file/Coast%20Guard/20090520/industry%20testimony.pdf>; *Id.* (statement of Arthur J. Volkle, Jr., Vice President of American Cargo Transport, Inc.), available at [http://www.marad.dot.gov/documents/Testimony-Arthur\\_Volkle,Jr-American\\_Cargo\\_Transport.pdf](http://www.marad.dot.gov/documents/Testimony-Arthur_Volkle,Jr-American_Cargo_Transport.pdf) [hereinafter Volkle Statement] (“Historically, the primary mission of the Navy has been the protection of U.S. merchant shipping, and we believe that that mission is as important today as it was when the Navy responded to the last major threat of piracy against our ships 200 years ago.”).

<sup>117</sup> See *Splashing, and Clashing, supra* note 111.

<sup>118</sup> Berube, *supra* note 113, at 611.

<sup>119</sup> *Id.*

<sup>120</sup> *Splashing, and Clashing, supra* note 111.

British-based Eos Risk Management, which claims to have fended off fifteen attacks between January and August of 2009.<sup>121</sup> Eos, like most private contractors, employs ex-military personnel, often with strong naval experience.<sup>122</sup> Their personnel is instructed to use non-lethal defenses, such as ear-piercing acoustic weaponry and high-pressured water hoses, to repel pirate attackers.<sup>123</sup> Security companies are hesitant to use lethal force, because it could cause pirates to better arm themselves and thus escalate hostilities.<sup>124</sup> Moreover, as the United Kingdom-based Olive Group explained, pirate contacts in African ports can warn their comrades of which ships have security and should be avoided.<sup>125</sup> Many firms share the view of Virginia-based Securewest International that the mere presence of contractors can scare away pirates.<sup>126</sup> While this view has been the norm, more companies are considering the presence of armed guards.<sup>127</sup>

Following its high-jacking in April 2009, the MV *Maersk Alabama* turned to an armed security team.<sup>128</sup> Only seven months later, the ship was again attacked 300 miles off the Somali coast.<sup>129</sup> This time, the contractors were able to successfully repel the attack.<sup>130</sup> Slow, bulky ships, like the MV *Maersk Alabama*, are coming to realize that armed guards are an effective option.<sup>131</sup> Insurance companies are providing further incentive.<sup>132</sup> Companies such as Hiscox, Ltd. are offering fifty-percent reductions in shipping-company insurance rates to those that contract for armed security.<sup>133</sup> In fact, these trends have led to new strategic partnerships between insurance brokers and maritime security firms. One of the world's largest

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.* France-based Secoplex and California-based RSB International are also providing security on ships in East Africa and Southeast Asia. *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> Miller, *supra* note 38.

<sup>125</sup> *Case Study #3: Dealing with Piracy at Sea*, SECUREWEST INT'L, [http://www.securewest.com/pg/case\\_study\\_3.ikml](http://www.securewest.com/pg/case_study_3.ikml) (last visited Oct. 3, 2010); *Private Security Firms Join Battle Against Somali Pirates*, FOX NEWS (Oct. 26, 2008), <http://www.foxnews.com/story/0,2933,444103,00.html>.

<sup>126</sup> See sources cited *supra* note 125.

<sup>127</sup> Miller, *supra* note 38.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

insurance brokers, Marsh, has partnered with maritime security firm, REDfour, offering clients discounts in both insurance coverage and security services, when purchased together.<sup>134</sup>

Blackwater Worldwide,<sup>135</sup> which came to prominence for its controversial role in providing security services for the United States in Iraq, has also found opportunity in armed security.<sup>136</sup> Rather than provide armed guards on merchant vessels, the company purchased and retro-fitted an 183-foot research vessel with “state-of-the-art navigation systems,” advanced communication systems, helicopters, a hospital, and a highly trained crew of forty-five.<sup>137</sup> The ship, named the *MacArthur*, will offer patrols and security for its clients in lieu of armed guards aboard the merchant vessel.<sup>138</sup>

The U.S. Maritime Administration, within the Department of Transportation, recently released an advisory that makes several recommendations when considering the use of private security forces.<sup>139</sup> Most significantly, shipping companies must consider the legality of having armed security forces aboard and bringing them into foreign ports.<sup>140</sup> Under American law, shipping companies are permitted to employ armed guards on ships. Section 383 of title 33 of the United States Code, titled “Resistance of Pirates by Merchant Vessels,” states,

The commander and crew of any merchant vessel of the United States, owned wholly, or in part, by a citizen thereof, may oppose

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<sup>134</sup> Press Release, Marsh and REDfour Team to Help Shipowners Address Risks Associated With Piracy Attacks in Gulf of Aden (Oct. 9, 2009), *available at* <http://global.marsh.com/news/press/pr20091009.php>. Eos Risk Management has also partnered with kidnap and ransom insurance firms and has launched a “High Risk Premium Discount Programme.” The program similarly purports to give shipping companies a 50% discount on insurance premiums. Press Release, Leading Insurer Reduces High Risk Transit Premiums for Eos Clients (Jan. 10, 2009), *available at* [http://www.eosrisk.com/news.php?Leading-Insurer-Reduces-High-Risk-Transit-Premiums-for-Eos-Clients&news\\_id=1254348236](http://www.eosrisk.com/news.php?Leading-Insurer-Reduces-High-Risk-Transit-Premiums-for-Eos-Clients&news_id=1254348236).

<sup>135</sup> In 2009, Blackwater Worldwide changed its name to “Xe” in an effort to shift its business focus. Dana Hedgpeth, *Blackwater Sheds Name, Shifts Focus*, WASH. POST (Feb. 14, 2009), [http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021303149\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021303149_pf.html). For ease of reference, the company and its subsidiaries will be referred to as “Blackwater” henceforth.

<sup>136</sup> Seper, *supra* note 19.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Advisory, U.S. Maritime Admin., Maritime Advisory 2009-07 (Sept. 9, 2009), *available at* [http://www.marad.dot.gov/new\\_room\\_landing\\_page/maritime\\_advisories/advisory/advisory2009-07.htm](http://www.marad.dot.gov/new_room_landing_page/maritime_advisories/advisory/advisory2009-07.htm).

<sup>140</sup> *Id.* In the United States, there is no express ban on armed personnel aboard a ship. In fact, the advisory suggests that ship owners consider using armed and unarmed guards. *Id.* ¶ 7(d).

and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel so owned, by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States, and may subdue and capture the same; and may also retake any vessel so owned which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States.<sup>141</sup>

The U.S. Supreme Court examined this statute in the classic piracy case, *The Marianna Flora*.<sup>142</sup> Writing for the Court, Justice Story held that “[p]irates may, without doubt, be lawfully captured on the ocean by the *public or private* ships of every nation; for they are, in truth, the common enemies of all mankind, and, as such, are liable to the extreme rights of war.”<sup>143</sup> Other nations, including Spain, have also passed laws that explicitly allow ships to carry armed guards.<sup>144</sup> Meanwhile, nations such as Malaysia and Indonesia have outlawed the use of armed guards and have stated that these guards would be subject to arrest if found in territorial waters.<sup>145</sup> Armed guards traveling through the territorial waters of Singapore are required to disassemble and lock their weapons.<sup>146</sup> While hiring armed guards is becoming a more accepted practice, shipping companies face three legal hurdles in employing armed guards—weapons exportation laws, command and control issues, and potential liability for defending the ship.

## 2. Regulation of Armed Guards

### a. “Weapons Trafficking”

While their cargo might not be weaponry, ships carrying armed guards are subject to both international and domestic weapons-trafficking laws.<sup>147</sup> Because shipping companies have increasingly turned toward private contractors, the U.S. Coast

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<sup>141</sup> 33 U.S.C. § 383 (2006).

<sup>142</sup> 24 U.S. (11 Wheat.) 1 (1826).

<sup>143</sup> *Id.* at 19 (emphasis added).

<sup>144</sup> Martin Roberts, *Spain Allows Armed Guards on Ships in Danger Zones*, REUTERS (Oct. 30, 2009), <http://www.reuters.com/article/idUSLU707043>.

<sup>145</sup> Carolin Liss, *Private Security Companies in the Fights Against Piracy in Asia* 6-7 (Asia Research Ctr., Working Paper No. 120, 2005), available at <http://www.warc.murdoch.edu.au/wp/wp120.pdf>.

<sup>146</sup> *Id.* at 7.

<sup>147</sup> Port Security Advisory (4-09)(rev 2), United States Coast Guard, Restrictions for U.S.-Flagged Vessels (Nov. 4, 2009), available at <http://www.simsl.com/Loss-Prevention/USCGPSA409Rev2.pdf> [hereinafter Nov. 4, 2009 Port Security Advisory].

Guard (“Coast Guard”) has issued an advisory about compliance with American firearms laws.<sup>148</sup> While armed guards are not “importing” and “exporting” their firearms to be sold in port, American flagged vessels must comply with American domestic law, including the Gun Control Act of 1968<sup>149</sup> and the National Firearms Act,<sup>150</sup> as well as the International Traffic in Arms Regulations (ITAR) set forth by the Departments of State and Justice.<sup>151</sup> Shipping companies can comply by applying for a temporary export license, which allows the ship to import and export approved weapons for a four-year period and does not permit the transfer of weapons to other individuals.<sup>152</sup> Armed guards could also carry their weapons under a personal-use exception of ITAR; however, this alternative severely limits the quantity of guns and ammunition that could be carried, and the exception would need to be reissued upon each entry.<sup>153</sup>

Still, as the Coast Guard admits, this is far from the only obstacle to importing weapons.<sup>154</sup> In addition to American law, shipping companies must comply with state and local laws as well as the laws of foreign ports.<sup>155</sup> In testifying before the House Subcommittee on the Coast Guard and Maritime Transportation, Arthur J. Volkle, Jr., Vice President of America Cargo Transport, Inc.,<sup>156</sup> explained that varying restrictions and prohibitions in domestic and foreign ports creates a significant burden on shipping companies.<sup>157</sup> Domestically, Volkle points out that temporary export permits are “impossible” to get, as they require authorization from all of the ports to which the ship will be traveling.<sup>158</sup> As a result, vessels have the burden of constantly applying for personal effects exemptions for each of their armed guards.<sup>159</sup> Internationally, the lack of uniformity in the rules and

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<sup>148</sup> *Id.*

<sup>149</sup> 18 U.S.C. §§ 921-931 (2006).

<sup>150</sup> 26 U.S.C. §§ 5801-5822 (2006).

<sup>151</sup> Nov. 4, 2009 Port Security Advisory, *supra* note 147.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*; *see also* 22 C.F.R. § 123.17 (2009) (the ITAR personal use exception).

<sup>154</sup> Nov. 4, 2009 Port Security Advisory, *supra* note 147.

<sup>155</sup> *Id.*

<sup>156</sup> America Cargo Transport Corp. is a United States-based shipping company.

<sup>157</sup> Volkle Statement, *supra* note 116, at 2-5.

<sup>158</sup> *Id.* at 3.

<sup>159</sup> *Id.*

regulations of foreign ports overburdens the companies, and regulatory violations can delay the unloading of a vessel.<sup>160</sup>

To address these problems, Volkle advocates several policy recommendations. Most notably, the United States, according to Volkle, should broker agreements with foreign governments that set forth uniform rules for the entry of ships with armed guards.<sup>161</sup> In the interim, the United States should provide a clear list of the various requirements of foreign states for the entry of arms.<sup>162</sup> Finally, Volkle asserts that there should be new regulations and procedures for licensing private security contractors and allowing them to carry firearms on board.<sup>163</sup> These are worthwhile recommendations that would better equip the private sector to combat piracy while not requiring further commitment of military assets.

*b. Command and Control*

Once the private contractors are on the vessel, for whom do they work? As most advocates for arming merchant ships would agree, shipping companies do not want to arm their own crews, but instead hire a private, third party to defend their ships.<sup>164</sup> As such, there is currently some ambiguity in exactly who is in control of the private contractors once the vessel is at sea.<sup>165</sup> In choosing to deploy their weapons, contracts with private security firms often only require the security force to consult the ship's captain "if there is time."<sup>166</sup> Otherwise, the decision when to deploy and use weapons lies with the contractors.<sup>167</sup> This outcome directly conflicts with the longstanding tradition of the supremacy of the captain while a ship is at sea.<sup>168</sup> The International Convention for the Safety of Life at Sea (SOLAS), Regulation 34-1 states,

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<sup>160</sup> *Id.* at 2-5.

<sup>161</sup> *Id.* at 2-3.

<sup>162</sup> *Id.* at 3.

<sup>163</sup> *Id.* at 4.

<sup>164</sup> *Id.* at 2-3; see also *Confronting Piracy off the Coast of Somalia: Hearing Before S. Comm. on Foreign Relations*, 111th Cong. 5-6 (2009) (statement of Richard Phillips, Captain of the MV *Maersk Alabama*).

<sup>165</sup> *Piracy: Issues Arising from the Use of Armed Guards*, INCELAW.COM (Sept. 2009), <http://www.incelaw.com/documents/pdf/Strands/Shipping/Article/Piracy-issues-arising-from-the-use-of-armed-guards>.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

The owner, the charterer, the company operating the ship as defined in Regulation 1X/1, or any other person shall not prevent or restrict the master of the ship from taking or executing any decision which, in the master's professional judgment, is necessary for the safety of life at sea and protection of the marine environment.<sup>169</sup>

Testifying before the Senate Foreign Relations Committee, Richard Phillips, captain of the hijacked MV *Maersk Alabama* expressed concern with this conflict. He observed,

[V]ery clear protocols would have to be established and followed. For example, as a captain, I am responsible for the vessel, cargo and crew at all times, but I am not comfortable giving up command authority to others, including the commander of a protection force. In the heat of an attack, there can be only one final decisionmaker.<sup>170</sup>

Indeed, issues of command and control are crucial and without Congressional regulations, shipping companies must be careful in contractually ceding control from their captains to security contractors.

*c. Limiting Liability for Defending the Ship*

Related to command and control, shipping companies and individual private contractors' liability can stem from defending a ship. The U.S. House of Representatives is currently considering a bill that would limit liability for owners, captains, and mariners for their actions during a pirate attack. Introduced by Representative Lobiondo in July 2009, the bill currently states,

An owner, operator, time charterer, master, or mariner who uses force, or authorizes the use of force, to defend a vessel of the United States against an act of piracy shall not be liable for any injury or death caused by such force to any person participating in the act of piracy.<sup>171</sup>

While it is perhaps unlikely for pirates to sue ships for the injuries, this bill is clear evidence that Congress recognizes that it can be good policy for ships to employ private security. Indeed, the deterrent provided by private contractors not only lessens the burden on the U.S. Navy, but it also keeps insurance costs down, protects mariners, and decreases the

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<sup>169</sup> M.S.C. Res. 153(78), Annex 3, Rep. of the Int'l Mar. Org., May 20, 2004, available at <http://www.unhcr.org/refworld/pdfid/432aca724.pdf>.

<sup>170</sup> *Confronting Piracy off the Coast of Somalia: Hearing Before S. Comm. on Foreign Relations*, 111th Cong. 5-6 (2009).

<sup>171</sup> United States Mariner and Vessel Protection Act of 2009, H.R. Res. 3376, 111th Cong. § 2 (2009).

likelihood of paying ransoms. Of course, this bill does not relate to injuries sustained by shipping company employees as a result of pirate attacks.<sup>172</sup>

### C. *Potential Civil Liability for Shipping Companies*

Traveling through pirate-infested waters can also mean substantial civil liability for a corporation. Following the hijacking of the MV *Maersk Alabama*, the ship's cook, Richard E. Hicks, brought suit against the ship's owner, Maersk Line Ltd., and his employer, Waterman Steamship Corporation.<sup>173</sup> Claiming that the defendants failed to take adequate precautions when sending the ship through the Gulf of Aden, Hicks sought \$75,000 for his injuries and his apprehension about returning to work.<sup>174</sup> Hicks sued for negligence under the Maritime Transportation Security Act of 2002,<sup>175</sup> the Jones Act,<sup>176</sup> as well as general maritime and common law.<sup>177</sup> Hicks' broad spectrum of claims is clear evidence that shipping companies must be aware that potential liability—and limits in liability—for a pirate attack can come from several sources of law. Three notable statutes of which shipping companies should be aware are (1) the Maritime Transportation Security Act of 2002 and (2) the Jones Act—both of which were pleaded in the Hicks case—and (3) the Shipowner's Limited Liability Act.

#### 1. Maritime Transportation Security Act of 2002

The Maritime Transportation Security Act (MTSA) is a comprehensive piece of legislation that sets forth a host of responsibilities not only for ship owners and mariners, but also for the Coast Guard and U.S. Department of Homeland

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<sup>172</sup> *Id.*

<sup>173</sup> *Sailor Sues Owner of Pirated U.S. Ship*, MSNBC.COM (Apr. 27, 2009), <http://www.msnbc.msn.com/id/30438990/wid/17621070>. Waterman is a contracting company which provides crewmembers for shipping companies. *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> 46 U.S.C. §§ 70101-70121 (2006).

<sup>176</sup> 46 U.S.C. §§ 12101-12152 (2006) (formerly cited as 46 U.S.C. § 688; also referred to as The Merchant Marine Act of 1920).

<sup>177</sup> Plaintiff's Original Petition and Jury Demand at 1-2, *Hicks v. Waterman Steamship Corp.* (Dist. Harris Cnty. Tex., Apr. 27, 2009), No. 2009-26129. Hicks originally brought suit in this court, but the case was removed to the United States District Court for the Southern District of Texas by defense motion. Hicks moved for remand back to Harris County, which was granted on September 16, 2009. Notice of Removal, *Hicks v. Waterman Steamship Corp.* (S.D. Tex. Sept. 16, 2009), No. H-09-1601.

Security.<sup>178</sup> Ship owners are required to take certain measures, including: designating security officers for the vessel and company; overseeing proper personnel training; and ensuring vessel records are kept.<sup>179</sup> They must also conduct a Vessel Security Assessment (VSA) and make a Vessel Security Plan (VSP) that must be approved by the Coast Guard.<sup>180</sup> Approved vessels are certified with an International Ship Security Certificate.<sup>181</sup> Finally, the MTSA holds owners responsible for compliance with Coast Guard directives relating to incident reporting as well as safety and security checks.<sup>182</sup>

Noncompliance with these regulations can carry a \$25,000 per day civil penalty and can also leave a corporation vulnerable to negligence claims, as seen in *Hicks*.<sup>183</sup> Maritime negligence claims are similar to those on land. A plaintiff has the burden of showing four elements: (1) “[t]he existence of a duty” that imposes a legal obligation on a person “to protect others from unreasonable risks”; (2) a “breach of that duty by engaging in conduct that falls below the applicable standard or norm”; (3) a “reasonably close causal connection between the offending conduct and the resulting injury,” i.e., proximate causation; and (4) injury to the plaintiff.<sup>184</sup>

Antonio J. Rodriguez, a former U.S. Naval captain and a current maritime law practitioner, observed that violations of the MTSA could be considered a breach of the standard to “protect others from unreasonable risks” and lead to liability.<sup>185</sup> Judge Learned Hand’s opinion in *The TJ Hooper* is a seminal case in maritime negligence law and is the leading authority on the widely accepted negligence rules relating to industry safety practices.<sup>186</sup> In *The TJ Hooper*, two tug boats were deemed

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<sup>178</sup> Antonio J. Rodriguez, *When Your Ship Is in The Bull’s Eye: The Maritime Transportation Security Act and Potential Vessel Owner Liability to Third Parties Resulting from a Terrorist Attack*, 17 U.S.F. MAR. L.J. 241, 251-52 (2005). From the corporate perspective, the act incorporates a number of principles already set forth by the International Maritime Organization in its International Ship and Port Facility Security Code. *Id.*

<sup>179</sup> *Id.* (citing 33 C.F.R. § 104 (2003) (implementing regulations for the Maritime Transportation and Safety Act of 2002, 46 U.S.C. §§ 70101-70121)).

<sup>180</sup> *Id.* at 252.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Hicks v. Waterman Steamship Corp.* (Dist. Harris Cnty. Tex., Apr. 27, 2009), No. 2009-26129; 46 U.S.C. § 70103(a).

<sup>184</sup> See Rodriguez, *supra* note 178, at 256.

<sup>185</sup> *Id.*

<sup>186</sup> JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 184 (2d ed. 2008).

negligent and responsible for the loss of two barges when the tugs traveled into a storm without radios, which would have warned them of the storm.<sup>187</sup> While having radios on board was not an accepted industry custom at the time, Judge Hand held that “proper diligence” would have led the tugs to equip their ships with the proper safety precautions (i.e., radios).<sup>188</sup> He noted further that regardless of how persuasive an industry usage, an industry may not establish its own tests for proper diligence.<sup>189</sup> Instead, courts are required to make an objective determination of reasonable diligence.<sup>190</sup>

In addition to negligence claims, Rodriguez also notes that violations of MTSA regulations could create grounds for negligence per se claims.<sup>191</sup> As explained by the Third Restatement of Torts, a defendant is negligent per se when he “violates a statute that is designed to protect against the type of accident [his] conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.”<sup>192</sup> As such, a seaman’s injury that stems from a shipping company’s violation of the MTSA would likely meet this definition, and the company could be deemed negligent even if it was acting reasonably.<sup>193</sup> Conversely, full compliance with MTSA regulations and possession of a valid International Ship Security Certificate could be considered prima facie evidence that the vessel fulfilled its duty of care.<sup>194</sup>

In the context of claims arising from pirate attacks, as seen in the *Hicks* case, the MTSA regulations in question will focus on shipping companies’ adequate safety precautions.<sup>195</sup> As the MTSA includes several provisions for ship security, a plaintiff—likely a shipping company employee—could make a substantial case for per se negligence.<sup>196</sup> Even if the ship has a valid International Ship Certificate, a plaintiff can look for a

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<sup>187</sup> 60 F.2d 737, 740 (2d Cir. 1932).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*; see also RESTATEMENT (THIRD) OF TORTS § 14 (Proposed Final Draft No. 1, 2005) (defining per se negligence, “An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.”).

<sup>192</sup> RESTATEMENT (THIRD) OF TORTS § 14.

<sup>193</sup> See Rodriguez, *supra* note 178, at 261.

<sup>194</sup> *Id.* at 256.

<sup>195</sup> *Id.* at 261.

<sup>196</sup> *Id.*

shipping company's noncompliance with Coast Guard directives relating specifically to ships traveling in high-risk waters.<sup>197</sup> As mentioned above, violations of Coast Guard directives are deemed violations of the MTSA.<sup>198</sup> Among these directives is MARSEC<sup>199</sup> Directive 104-6 (Rev. 2), which was issued following the capture of the MV *Maersk Alabama*. This directive requires ship owners that travel in high-risk waters to undertake specific planning to deter and repel pirate attacks.<sup>200</sup> A shipowner's plan must include:

- a. Hardening the vessel against intrusions.
- b. Non-lethal methods of repulsing intruders.
- c. Ship operations & maneuvers to evade attack.
- d. Communications procedures: Internal protocol for internal shipboard communications & external communications before, during and after the incident.
- e. Protection of the crew.
- f. Procedures to take if the ship's security is compromised.
- g. Procedures for crew in hostage situations.
- h. Company policy/procedures for confronting intruders.
- i. Training program establishing frequency for drills and exercises.<sup>201</sup>

Ships must also travel within certain protected corridors of the Gulf of Aden and provide voyage plans to regional Coast Guard liaisons.<sup>202</sup> While not required, ships are also advised to establish "safe havens" in which the crew can take refuge during an attack.<sup>203</sup> Also, a ship may rig its hull with nets, soap, or barbed wire to make it difficult to scale.<sup>204</sup>

In the case of the MV *Maersk Alabama*, a Vessel Safety Plan was submitted by Maersk to the Coast Guard that included many antipiracy procedures and was ultimately approved.<sup>205</sup> While *Hicks* has yet to be decided, this certainly

<sup>197</sup> *Id.*

<sup>198</sup> See *supra* note 179.

<sup>199</sup> "MARSEC" refers to the Coast Guard's Maritime Security Levels and relate to pre-planning based on increased threat levels. *U.S. Coast Guard Maritime Security (MARSEC) Levels*, U.S. COAST GUARD, <http://www.uscg.mil/safetylevels/whatismarsec.asp> (last visited Oct. 3, 2010).

<sup>200</sup> Port Security Advisory (2-09), United States Coast Guard (May 22, 2009) [hereinafter May 22, 2009 Port Security Advisory]. The text of MARSEC Directive 104-6 (Rev. 2) is not readily available to the public. Port Security Advisory (2-09) was released to the public to supplement the directive and gives an overview of the more detailed document.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> Memorandum and Order, *Hicks v. Waterman Steamship Corp.* (S.D. Tex. Sept. 16, 2009), No. H-09-1601.

would make a showing of per se negligence based on a violation of the MTSA less likely. Still, Hicks can prevail under a “standard” negligence formulation, as Judge Hand applied in *The TJ Hooper*.<sup>206</sup> This requires the plaintiff to convince a jury that the ship owner knew or should have known that the security measures, approved by the Coast Guard, were insufficient to prevent his injury.<sup>207</sup>

## 2. The Jones Act

While the MTSA provides a host of rules and regulations intended to protect the ship, crew, and cargo, the Jones Act was intended specifically to ensure shipping companies provide safe working conditions for seamen.<sup>208</sup> Under the Act, “a seaman injured in the course of employment” can bring a civil claim against his employer. Specifically,

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.<sup>209</sup>

The Fifth Circuit in *Myles v. Quinn Menhaden Fisheries, Inc.* held that an action under the Jones Act requires “a finding both of negligent breach of duty and proximate cause.”<sup>210</sup> While this ruling might sound like a standard common law formulation of negligence, the Supreme Court has made clear that, in passing the Jones Act, “Congress did not mean that the standards of legal duty must be the same by land and sea.”<sup>211</sup> In fact, the employer’s duty will be construed liberally under the Jones Act.<sup>212</sup>

In the context of piracy, the Jones Act puts a heavy burden on the seaman’s employer to provide a safe working environment.<sup>213</sup> The adequacy of the safety precautions in place

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<sup>206</sup> See *The TJ Hooper*, 60 F.2d 737, 739 (2d Cir. 1932).

<sup>207</sup> *Id.* at 740.

<sup>208</sup> *Bertrand v. Int’l Mooring & Marine*, 700 F.2d 240, 245 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984).

<sup>209</sup> 46 U.S.C. § 30104 (2006).

<sup>210</sup> 302 F.2d 146, 150 (5th Cir. 1962).

<sup>211</sup> *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 377-78 (1932).

<sup>212</sup> *Koehler v. Presque-Isle Transp. Co.*, 141 F.2d 490, 491 (2d Cir. 1944).

<sup>213</sup> It is important to point out that the Jones Act provides a cause of action against the seaman’s employer and not necessarily the ship owner. In the *Hicks* case,

will likely determine whether the burden is met. It is likely that the satisfaction of MTSAs standards will provide at least a framework for the reasonableness of the precautions. Beyond protecting the physical well-being of the crew, the Jones Act also opens the door for lawsuits relating to emotional distress. As the complaint in *Hicks* stated, “[p]laintiff sustained and suffered physical pain, *mental anguish*.”<sup>214</sup>

Emotional distress stemming from raids on the high seas is a fairly unexplored area of the law.<sup>215</sup> In 1975, when the SS *Mayaguez* was hijacked by the Khmer Rouge off the coast of Cambodia, members of the crew sued their employer, the ship’s owner, for negligent infliction of emotional distress.<sup>216</sup> The crew claimed that the ship was negligently piloted too close to the Cambodian coast.<sup>217</sup> The ship’s insurance carrier agreed to pay the crew without litigating.<sup>218</sup> While the case of the SS *Mayaguez* was never litigated, recent developments in negligence law would likely have given the crew a cause of action. In *Consolidated Rail Corp. v. Gottshall*, the Supreme Court determined the standard for evaluating claims for negligent infliction of emotional distress under the Federal Employer’s Liability Act (FELA).<sup>219</sup> The court rejected the “physical impact” test, which only allowed collection of emotional damages for negligence when it was accompanied by bodily injury.<sup>220</sup> Instead, the court adopted the “zone of danger” test, which imposes liability not only if there is bodily injury, but also when the defendant’s conduct puts the plaintiff in “immediate risk of physical harm.”<sup>221</sup>

The Ninth Circuit, in *Chan v. Society Expeditions, Inc.*, addressed claims of negligent infliction of emotional distress in

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the Jones Act claim was only against employer Watermen Steamship Corp. and not against ship owner Maersk Lines Ltd. See Memorandum and Order, *supra* note 205, at 5 (“The Jones Act provides for negligence remedies in cases where an employer-employee relationship exists, while other maritime causes of action, such as seaworthiness, create alternative and additional theories of liability.”).

<sup>214</sup> Plaintiff’s Original Petition and Jury Demand, *supra* note 177, at 3-4 (emphasis added).

<sup>215</sup> Eric Danoff, *Marine Insurance for Loss or Damage Caused by Terrorism or Political Violence*, 16 U.S.F. MAR. L.J. 61, 73 (2004).

<sup>216</sup> *Id.* at 73, 80.

<sup>217</sup> *Id.* at 80.

<sup>218</sup> *Id.*

<sup>219</sup> 45 U.S.C. §§ 51-60 (2006). “FELA” imposes liability to railroads when their workers are injured on the job. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 541-42 (1994).

<sup>220</sup> *Gottshall*, 512 U.S. at 547.

<sup>221</sup> *Id.*

general maritime law.<sup>222</sup> In *Chan*, a young girl, the daughter of an employee of the defendant, was on an inflatable raft that capsized after leaving a cruise ship. She was swept off the raft but watched two employees perish.<sup>223</sup> The court first observed that, since the Jones Act incorporates FELA, the same common-law principles that endorse the “zone of danger” test should apply.<sup>224</sup> The court then used the principles of the Jones Act to determine that the general maritime law also supports actions for negligent infliction of emotional distress.<sup>225</sup> While the court declined to identify the precise test it used,<sup>226</sup> two important principles were established in *Chan*. First, the girl’s witnessing of the two crewmembers dying after being swept off the raft was sufficient to put her in a zone of danger.<sup>227</sup> Second, the court made particularly clear that the “zone of danger” test established in *Gottshall* should also apply to Jones Act cases.<sup>228</sup>

While the law of emotional damages for hijackings on the high seas is unclear, emotional damages have been litigated in the context of airline hijackings.<sup>229</sup> These cases followed a different liability scheme that departed from the *Gottshall* standards and might be considered an alternate framework for ship hijackings by pirates.<sup>230</sup> Following the hijacking of Transworld Airlines Flight 741 in 1970, passengers brought suit for emotional damages against the airline.<sup>231</sup> The court allowed plaintiffs whose emotional damages stemmed from bodily injury to collect damages.<sup>232</sup> The court’s holding was not solely based on common law torts; it was also based on the Warsaw Convention, which regulates liability for the international carriage of passengers and cargo by commercial airlines.<sup>233</sup> The court observed that the Warsaw Convention provides a presumption of liability for commercial carriers while also imposing a cap on damages.<sup>234</sup> In a case related to the

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<sup>222</sup> 39 F.3d 1398 (9th Cir. 1994).

<sup>223</sup> *Id.* at 1402.

<sup>224</sup> *Id.* at 1408.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.* at 1409.

<sup>227</sup> *Id.* at 1410.

<sup>228</sup> *Id.* at 1408.

<sup>229</sup> *See Burnett v. Transworld Airlines Corp.*, 368 F. Supp. 1152 (D.N.M. 1973).

<sup>230</sup> *See* LAWRENCE B. GOLDBIRSCHE, *THE WARSAW CONVENTION: A LEGAL HANDBOOK* (2000).

<sup>231</sup> *See Burnett*, 368 F. Supp. at 1153.

<sup>232</sup> *Id.* at 1158.

<sup>233</sup> *See* GOLDBIRSCHE, *supra* note 230.

<sup>234</sup> *Burnett*, 368 F. Supp. at 1158.

same 1970 hijackings, the court pointed out that the liability regulations set forth by the Convention, originally in 1920, were to “nurture” the newly developing airline industry by capping damages to prevent devastating liability.<sup>235</sup> To avoid prejudicing the travelers, who were also taking a risk, the airline companies were given the presumption of liability.<sup>236</sup> The court noted that, while this scheme may be obsolete, it is still considered good law.<sup>237</sup>

There are three key differences between the Jones Act and the Warsaw Convention’s imposition of liability for negligent infliction of emotional distress. First, the Jones Act requires a more liberal “zone of danger” test, while the Warsaw Convention, as interpreted by American courts, requires bodily injury.<sup>238</sup> Second, the Warsaw Convention imposes a presumption of liability on the carrier, while the Jones Act still requires a showing of negligence.<sup>239</sup> Finally, the Warsaw Convention, and not the Jones Act, greatly caps damages.<sup>240</sup> These differences expose shipping companies to greater potential liability for emotional damages following a hijacking. Unlike the airlines, shipping companies do not have the benefit of a liability regime designed to foster growth and decrease risk to fledgling companies.<sup>241</sup> Instead, shipping companies must rely on careful compliance with federal safety regulations to avoid negligence and therefore minimize their exposure to emotional damages.<sup>242</sup> Compliance can translate into a presumption against liability. Still, like the airlines, there were legal principles established in shipping’s infancy that shipping companies can use to further limit liability.

### 3. The Shipowner’s Limited Liability Act

Limiting a ship owner’s liability for acts of the crew beyond the owner’s contemplation is a longstanding tradition of

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<sup>235</sup> *Husserl v. Swiss Air Transp. Co.*, 388 F. Supp. 1238, 1244 (S.D.N.Y. 1975).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> Israeli, German, and Argentinean courts have allowed for liability under the Convention for non-bodily injuries. However, Germany requires a showing of willful misconduct. GOLDHIRSCH, *supra* note 230, at 79 (citations omitted).

<sup>239</sup> *Burnett*, 368 F. Supp. at 1158.

<sup>240</sup> *Id.*

<sup>241</sup> *Burnett*, 368 F. Supp. at 1154; Andreas F. Lowenfeld & Allan I. Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 499-500 (1967).

<sup>242</sup> See *supra* notes 222-28 and accompanying text.

common law.<sup>243</sup> Following a decision holding a shipping company liable for smuggling by the ship's master, several London merchants petitioned the House of Commons.<sup>244</sup> In response, the House of Commons, in 1734, passed legislation that aimed "to promote the increase of the number of ships and vessels" and to prevent "the prejudice of the trade and navigation of [Great Britain]." The statute required the "knowledge or privity of the owner" to bring a claim.<sup>245</sup>

These very same principles were accepted by the U.S. Congress in the Shipowner's Limited Liability Act of 1851.<sup>246</sup> The Act limits ship owners' liability for losses arising from "embezzlement, loss, or destruction of any property, goods, or merchandise shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred" without the knowledge or privity of the owner.<sup>247</sup> As the House of Commons and the American judiciary have observed, this statute is crucial to maintaining and encouraging investment in the shipping industry by limiting an owner's risk.<sup>248</sup>

Most notably, the provisions of the Shipowner's Limited Liability Act prevent the owner from assuming liability for the negligent actions of the crew.<sup>249</sup> In *Northern Fishing & Trading Co., Inc. v. Grabowski*, the captain of a vessel, which was seaworthy at the commencement of its voyage, unreasonably

<sup>243</sup> *Liability Limited*, N.Y. TIMES, Oct. 13, 1912, at XXII. This article examined English common law as well as The Shipowner's Limited Liability Act of 1851 for potential liability for owners of the Titanic, which had sunk six months earlier.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.* The act stated in relevant part:

Whereas it is of the greatest consequence and importance to this kingdom to promote the increase of the number of ships and vessels and to prevent any discouragement to merchants and others from being interested and concerned therein: and it has been held that in many cases owners of ships or vessels are answerable for goods and merchandise shipped or put on board the same, although the said goods and merchandise, after the same have been on board, should be made away with by the maters or mariners of the said ships or vessels without the knowledge or privity of the owner or owners, by means whereof merchants and others are greatly discouraged from adventuring their fortunes as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this kingdom.

*Id.* (quoting Responsibility of Shipowners Act, 7 Geo. 2, c. 15 (1734)).

<sup>246</sup> 46 U.S.C. § 30505 (2006).

<sup>247</sup> *Id.*

<sup>248</sup> *Liability Limited*, *supra* note 243; *Petition of Tracy*, 92 F. Supp. 706, 711 (S.D.N.Y. 1950).

<sup>249</sup> *See N. Fishing & Trading Co. v. Grabowski*, 477 F.2d 1267, 1272 (9th Cir. 1973).

decided not to take shelter from extreme weather conditions.<sup>250</sup> The Ninth Circuit held that a ship owner could limit its liability because the injury resulted from unreasonable conduct by the captain, and the injury was not proximately caused by the vessel's unseaworthiness.<sup>251</sup> Relying on the Second Circuit's opinion in *The 84-H*,<sup>252</sup> the court reasoned that if no liability is traceable to the owner and the ship seemed seaworthy at embarkment,<sup>253</sup> then the owner should be completely exonerated.<sup>254</sup> If liability is found but the damage was incurred without the "privity or knowledge" of the owner, liability should at least be limited. While it is the plaintiff's burden to show the owner's negligence, if the defendant can show "seaworthiness at commencement of the voyage," he is prima facie entitled to limited liability.<sup>255</sup>

Similarly, in *United States v. MV Big Sam*, the pilot of the tanker *MV Big Sam* negligently collided with another tanker.<sup>256</sup> Noting that the negligent conduct was beyond the knowledge and privity of the ship owner, the court released the owners of the *MV Big Sam* of any liability.<sup>257</sup> Inherent in these cases is the important limitation that an owner's failure to inspect the safety of the vessel and ensure its seaworthiness will prevent him from limiting liability. In the case of *The Republic*, the Second Circuit, drawing on English common law, held that a ship owner could not invoke the Shipowner's Limited Liability Act when he had failed to discover a safety defect that later caused the accident.<sup>258</sup>

In addition to the Shipowner's Limited Liability Act, ship owners can use maritime security regulations and Coast Guard antipiracy directives as guidance of how to limit their liability. Even if a shipping company cannot completely immunize itself against legal accountability, it can use the certifications and safety plans required by the MTSA to at least

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> 296 F. 427, 431 (2d Cir. 1923), *cert. denied sub nom.*, Randolph v. Bouker Contracting Co., 264 U.S. 596 (1924). The *Grabowski* court referred to *The 84-H* as the "leading" case for this proposition. 477 F.2d at 1272.

<sup>253</sup> "Seaworthy" is defined as a vessel that is "properly equipped and sufficiently strong and tight to resist the perils reasonably incident to the voyage for which the vessel is insured." BLACK'S LAW DICTIONARY 1380 (8th ed. 2004).

<sup>254</sup> *Grabowski*, 477 F.2d at 1272.

<sup>255</sup> *The Suduffco*, 33 F.2d 775, 776 (S.D.N.Y. 1929).

<sup>256</sup> 681 F.2d 432, 434 (5th Cir. 1982).

<sup>257</sup> *Id.* at 443-44.

<sup>258</sup> 61 F. 109, 113 (2d Cir. 1894).

limit its liability. A shipping company that properly files a VSA and VSP<sup>259</sup> and is granted an International Shipping Security Certificate likely has a strong argument that the ship was safe and seaworthy at the commencement of its voyage. Similarly, a shipping company that follows Coast Guard directives and has implemented safety precautions in the event of pirate attack would be able to argue that an employee's deviation from these plans would be beyond its "privity and knowledge."<sup>260</sup> For example, if a pilot negligently veers from the protected passageways and encounters a pirate attack, ship owners would likely be able to limit liability. Also, if a crewmember departs from the ship's procedure of meeting in its established safe haven, a shipping company might also be able to limit liability.

Generally, the current liability regime for shipping companies sets forth an effective "carrot-and-stick" approach. If shipping companies follow the provisions of the MTSA and the directives of the Coast Guard, they are given substantial presumptions against liability that would exonerate them under the MTSA, the Jones Act, and maritime negligence—or at least limit their liability. If shipping companies do not follow these provisions, however, they are subject not only to substantial presumptions of liability, but also to civil penalties.

As a matter of policy, this approach will have three important benefits in combating Somali piracy. First, the refusal to pay ransoms combined with increased security on ships could help deter acts of piracy without any further support from states. Second, it promotes stability in shipping markets. While implementing defensive measures on ships can be costly up front, shipping companies will be less likely to have to sporadically pay large ransom payments. Furthermore, the successful deterrence of pirate attacks could lead to a long-term decrease in costs for shipping companies due to lower insurance premiums and decreased need to reroute ships. Third, the current approach emphasizes the safety of the captain and the crew. Without a strict regime that regulates the payment and ransoms and ship security measures, the safety of those aboard would be left to the business judgment of the ship owner. By imposing substantial penalties and a

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<sup>259</sup> "VSA" stands for Vessel Security Assessment, and "VSP" stands for Vessel Security Plan. See *supra* text accompanying note 180 for further discussion of those terms.

<sup>260</sup> See *supra* notes 252-54 and accompanying text.

considerable liability regime, ship owners effectively must chose safety.

While this is perhaps an economically inefficient rationale, the risk of death, injury, and psychological suffering that comes from a ship's hijacking is too substantial to justify this approach. While shipping companies are increasingly doing their share to combat piracy, another industry stands ready to profit in eradicating pirates from the Gulf of Aden.

### III. PIRATE HUNTERS

Shipping companies are not the only players in the fight against piracy. The reemergence of piracy in the Gulf of Aden has sparked an industry of private contractors who stand ready to not only protect ships from pirate raids, but also to hunt down pirates.<sup>261</sup> As the United States is caught fighting wars against terrorism and drugs, the military does not have the assets to adequately protect commercial shipping from pirates. Commentators suggest the U.S. government should turn to the private security industry.<sup>262</sup> In doing so, however, these private companies face a host of legal challenges.<sup>263</sup> Among the most notable are the legal authorization to hunt pirates and the potential criminal and civil liability that these companies could face.

#### A. *Historical Context*

Reliance on the private sector to hunt down pirates is not a new concept. Prior to the development of large-scale navies, countries would commission merchant vessels using instruments known as "letters of marque and reprisal" to attack enemy ships.<sup>264</sup> These private sailors would come to be known as "privateers" and the practice of "privateering" became increasingly commonplace.<sup>265</sup> At that time, Algiers alone had over one hundred ships and thousands of sailors engaged in privateering.<sup>266</sup> Of course, as privateering became more

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<sup>261</sup> Berube, *supra* note 113.

<sup>262</sup> *See id.*

<sup>263</sup> *See, e.g., id.* at 612.

<sup>264</sup> Boot, *supra* note 25, at 98. "Privateering" is "[t]he practice of arming privately owned merchant ships for the purpose of attacking enemy trading ships." BLACK'S LAW DICTIONARY 1233 (8th ed. 2004).

<sup>265</sup> Boot, *supra* note 25, at 96.

<sup>266</sup> *Id.*

commonplace, government attitudes changed toward the practice, and rather than attack enemy ships, privateers were hired by countries including Great Britain and the United States to hunt down pirates.<sup>267</sup> Among these privateers was Captain William Kidd, who, in 1696, received a royal commission to apprehend specific pirates wanted by King William III, as well as “all other Pirates, Free-booters, and Sea Rovers of what Nature soever.”<sup>268</sup>

### B. *Legal Basis for the Letter of Marque*

The practice of privateering continued until it was outlawed by many nations through the 1856 Treaty of Paris and the 1907 Hague Convention.<sup>269</sup> The United States was not among the signatories of either, and thus has not foreclosed the possibility of using privateers.<sup>270</sup> Still, over the last century, the letter of marque has fallen out of use, largely due to the modernization and centralization of war efforts in the industrialized world.<sup>271</sup> This, of course, does not mean that Congress has lost its power to grant them. As former naval officer David Douglas Winters observed, “Much like our Revolutionary War forefathers, we do not have the assets we need to protect ourselves. They found an answer, and fortunately they preserved it for us: privateers.”<sup>272</sup>

Indeed, letters of marque were an important part of American life at the founding.<sup>273</sup> During the Constitutional Convention, the inclusion of a Congressional power to grant letters of marque was among the few powers on which the federalists and antifederalists could agree.<sup>274</sup> Article I, Section 8 states in relevant part that “[t]he Congress shall have power . . . [t]o declare War, *grant Letters of Marque and Reprisal*, and make Rules concerning Captures on Land and Water.”<sup>275</sup> Exercising this power, Congress passed 33 U.S.C. § 386:

<sup>267</sup> *Id.* at 98.

<sup>268</sup> Philip Goose, *Captain William Kidd*, in *THE PIRATES' WHO'S WHO* 153-54, (2007); *see also* Boot, *supra* note 25, at 99.

<sup>269</sup> David Douglas Winters, *Bring Back the Privateer*, 128 U.S. NAVAL INST. PROC. 112, 112 (2002).

<sup>270</sup> *Id.*

<sup>271</sup> Theodore M. Cooperstein, *Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering*, 40 J. MAR. L. & COM. 221, 251 (2009).

<sup>272</sup> Winters, *supra* note 269, at 112.

<sup>273</sup> *Id.*

<sup>274</sup> Cooperstein, *supra* note 271, at 231.

<sup>275</sup> U.S. CONST. art. I, § 8 (emphasis added).

The President is authorized to instruct the commanders of the public-armed vessels of the United States, and to authorize the commanders of any other armed vessels sailing under the authority of any letters of marque and reprisal granted by Congress, or the commanders of any other suitable vessels, to subdue, seize, take, and, if on the high seas, to send into any port of the United States, any vessel or boat built, purchased, fitted out, or held as mentioned in section 385 of this title (pirate vessels).<sup>276</sup>

As such, the President is authorized to enlist private citizens granted letters of marque to seize pirate vessels on the high seas.<sup>277</sup> Individuals granted letters of marque are given significant authority to engage in hostilities against pirates.<sup>278</sup> The letter of marque would allow the ship to bear arms, and upon the capture of pirates, the ship's master would be permitted to arrest the pirates and seize the pirates' vessel.<sup>279</sup> To preserve this authority, the ship must have received a completed letter of marque that identifies the vessel and its master.<sup>280</sup> In addition, the master would be liable for the actions of his crew and responsible both for keeping detailed records and for complying with American and international humanitarian law.<sup>281</sup> Ships that exceed the bounds of their commission would lose these privileges and be punished as pirates.<sup>282</sup>

Commentators suggest that the modern privateer would be able to work within these limitations while taking advantage of cutting-edge technology, a faster procurement process, and a more flexible organizational structure, as compared to the government.<sup>283</sup> In 2005, the Department of Defense spent one third of its total budget on private contractors, and therefore it has the infrastructure and expertise to properly manage privateers.<sup>284</sup> Much like military contractors in Iraq, privateers would be connected by a command/intelligence fusion center that could be operated by

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<sup>276</sup> 33 U.S.C. § 386 (2006).

<sup>277</sup> Staub, *supra* note 77, at 268-69.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 269. Article 105 of UNCLOS authorizes states to seize and arrest pirates. *Id.* at 269 n.57 (citing United Nations Convention on the Law of the Sea art. 105, Dec. 10, 1982, 1833 U.N.T.S. 397). Commissioned privateers would be exercising this power on behalf of the commissioning state.

<sup>280</sup> *Id.* at 268-69.

<sup>281</sup> *Id.*

<sup>282</sup> The Palmyra, 25 U.S. (12 Wheat.) 1, 4 (1827).

<sup>283</sup> Berube, *supra* note 113; Winters, *supra* note 269, at 112.

<sup>284</sup> Berube, *supra* note 113.

the Coast Guard.<sup>285</sup> Drawing further parallels to Iraq, Professor Berube suggests that letters of marque may not even be necessary to employ private contractors.<sup>286</sup> Instead, he suggests, private contractors could be used to fill gaps in the United States' overly stretched naval deployment, in tandem with an embedded Coast Guard Officer aboard to ensure compliance with international law.<sup>287</sup>

The employment of modern day privateers in the Gulf of Aden could lead to substantial improvement in the security of the region and represents a lucrative new niche for the private security establishment. Companies have already invested heavily in this prospect; for example, Blackwater Worldwide recently developed its antipiracy ship, the *MacArthur*.<sup>288</sup> Still, the risks to these companies are great.<sup>289</sup> The law of privateering has been consistent, and privateers who exceed the bounds of their commissions risk being arrested and subjected to severe penalties for piracy.<sup>290</sup> This risk would likely be even greater for contractors that are not commissioned. Unlike private contractors on land, private contractors on the high seas can be deemed pirates by any nation, and arrested and prosecuted.<sup>291</sup> As such, it would be in the best interests of both private contractors and the U.S. government to grant letters of marque to private contractors before partnering with them in fighting piracy.

### C. *Limitations on the Letter of Marque and Criminal Sanctions*

Letters of marque can and have placed strict limitations on the actions of privateers, and the American legal system has several mechanisms to deal with those that go beyond the bounds of a letter of marque.<sup>292</sup> Many of these limitations were noted by Justice Story in *The Amiable Isabella*, one of the most

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<sup>285</sup> Winters, *supra* note 269, at 112.

<sup>286</sup> Berube, *supra* note 113, at 609-10.

<sup>287</sup> *Id.* at 613.

<sup>288</sup> See *supra* note 113 and accompanying text.

<sup>289</sup> See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 3-4 (1827); see also *The Bello Corrunes*, 19 U.S. (6 Wheat.) 152 (1821); *United States v. Klintock*, 18 U.S. (5 Wheat.) 144 (1820).

<sup>290</sup> *The Palmyra*, 25 U.S. at 4; see also *The Bello Corrunes*, 19 U.S. at 152; *Klintock*, 18 U.S. at 144.

<sup>291</sup> United Nations Convention on the Law of the Sea, art. 105, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>292</sup> See *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 2 (1821).

well-known cases in the realm of letters of marque.<sup>293</sup> Story laid out several statutory restrictions that come with an issuance of a letter of marque. Notably, the Prize Act of 1812, as cited by Justice Story, states, “[A ship’s master is] to give bond, and is made responsible for his own misconduct and that of the crew; is to receive and execute the President’s instructions; [and] is to keep a journal of the ship’s transactions.”<sup>294</sup> Failure to abide by these instructions would result in forfeiture of the commission and the rights to any prize.<sup>295</sup> The Prize Act of 1812 further required ships to abide by the laws and treaties of the United States and to be responsible for any injuries beyond the purposes of the vessel.<sup>296</sup> As mentioned above, violation of these

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<sup>293</sup> In his opinion, Justice Story reproduces the entire letter of marque:

*James Madison, President of the United States of America, to all who shall see these presents, greeting:* Be it known, that in pursuance of an act of Congress, passed on the 26th day of June, one thousand eight hundred and twelve, I have commissioned, and by these presents do commission, the private armed schooner called the Roger, of the burthen of 184 tons, or thereabouts, owned by Thomas E. Gary, Hy. Gary, James B. Cogbill & Co., Brogg & Jones, Hannon & High, Robert Ritchie, Robert Birchett, John Wright, Wm. C. Boswell, Samuel Turner, John G. Heslop, Wm. & Charles Carling, Thomas Shoe, Richard B. Butte, Richard Drummond, Littlebury Estambuck, John Davis, Spencer Drummond, Peter Nestell, and Roger Quarles, mounting fourteen carriage guns, and navigated by ninety men, hereby authorizing Captain—, and John Davis, Lieutenant of the said Schooner Roger, and the other officers and crew thereof, to subdue, seize, and take any armed or unarmed British vessel, public or private, which shall be found in the jurisdictional limits of the United States, or elsewhere, on the high seas, or within the waters of the British dominions, and such captured vessel, with her apparel, guns and appurtenances, and the goods or effects which shall be found on board the same, together with all the British persons and others, who shall be found acting on board, to bring within some port of the United States; and also to retake any vessels, goods, and effects, of the people of the United States, which may have been captured by any British armed vessels, in order that proceedings may be had concerning such capture or recapture, in due form of law, and as to right and justice shall appertain. The said \_\_\_\_\_ is further authorized to detain, seize, and take all vessels and effects, to whomsoever belonging, which shall be liable thereto, according to the law of nations, and the rights of the United States, as a power at war, and to bring the same within some port of the United States, in order that due proceedings may be had thereon—this commission to continue in force during the pleasure of the President of the United States, for the time being. Given under my hand, and the seal of the United States of America, at the City of Washington, the 24th day of April, in the year of our Lord one thousand eight hundred and thirteen, and of the Independence of the said States the thirty-seventh. (Signed) JAMES MADISON. By the President, (Signed) JAMES MONROE, Secretary of State.

*Id.* at 2-3.

<sup>294</sup> *Id.* at 13.

<sup>295</sup> *Id.*

<sup>296</sup> An Act Concerning Letters of Marque, Prizes, and Prize Goods, ch. 107 (1812) (“The Prize Act of 1812”).

requirements would leave the privateer vulnerable to arrest and prosecution for piracy.<sup>297</sup>

### 1. Military Extraterritorial Jurisdiction Act of 2000

In addition to these longstanding consequences, Congress has passed legislation relating to the conduct of private contractors in response to the use of private contractors during the war in Iraq. The key piece of legislation relating to criminal liability for private contractors is the Military Extraterritorial Jurisdiction Act of 2000.<sup>298</sup> In relevant part, the Act states that anyone who “engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than one year if the conduct had been engaged in within the . . . jurisdiction of the United States” while employed or accompanying the Armed Forces or as a member of the armed forces “shall be punished for the offense.”<sup>299</sup>

Recently, the actions of private contractors in Iraq have greatly broadened the scope of the Military Extraterritorial Jurisdiction Act of 2000. The most notable cases relate to the shootings in Nissour Square, Baghdad, Iraq, in September 2007.<sup>300</sup> While providing security for U.S. Embassy personnel, Blackwater contractors improperly opened fire in the open square, leaving fourteen Iraqis dead.<sup>301</sup> One of the contractors, Jeremy Ridgeway, has pled guilty to voluntary manslaughter in a federal district court in the District of Columbia<sup>302</sup> based on allegations that he “was employed by the Armed Forces outside the United States, as defined in 18 U.S.C. § 3267(1) (Military Extraterritorial Jurisdiction Act).”<sup>303</sup> This determination made Ridgeway subject to the laws of the United States.<sup>304</sup> Five of Ridgeway’s colleagues were also indicted for voluntary manslaughter and charged under 18 U.S.C. § 3267(1).<sup>305</sup>

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<sup>297</sup> The Palmyra, 25 U.S. (12 Wheat.) 1, 4 (1827).

<sup>298</sup> 18 U.S.C. §§ 3261-3267 (2006).

<sup>299</sup> 18 U.S.C. § 3261.

<sup>300</sup> See *Guard’s Plea Led to Blackwater Indictments*, CBS NEWS (Dec. 9, 2008), <http://www.cbsnews.com/stories/2008/12/09/national/main4657323.shtml>.

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> Information at 1, *United States v. Ridgeway* (D.D.C. Dec. 4, 2008), Criminal No. 08-341-01, available at <http://www.justice.gov/opa/documents/us-v-ridgeway2.pdf>.

<sup>304</sup> 18 U.S.C. §§ 3261-3267.

<sup>305</sup> *Guard’s Plea Led to Blackwater Indictments*, *supra* note 300. Charges were dropped against the five guards on December 31, 2009. See Charlie Savage, *Judge Drops Charges from Blackwater Deaths in Iraq*, N.Y. TIMES (Dec. 31, 2009),

The precedent established in the *Ridgeway* case could have strong ramifications for potential criminal liability for individual private contractors in the Gulf of Aden. In addition to risking potential prosecution for piracy, these contractors can be convicted for violating American law under the Military Extraterritorial Jurisdiction Act of 2000.<sup>306</sup> As seen in the case of the Blackwater guards, there is an additional risk of severe penalties if the guards are armed with automatic weapons—a circumstance that could expose them to aggravating sentencing factors.<sup>307</sup> As such, it is crucial for private security companies to properly stay within the bounds of their commissions and have clear mechanisms for command and control, both of which ensure compliance with American law. Failure to do so could lead to not only criminal penalties for their employees, but also civil liability for their organizations.

## 2. Civil Liability

Like the imposition of criminal liability using the Military Extraterritorial Jurisdiction Act, the United States' use of private contractors in Iraq has also led to new developments in civil liability for private contractors.<sup>308</sup> The current framework for civil liability was born out of the Abu Ghraib prison scandal.<sup>309</sup> Following the scandal, a class of Iraqi prisoners brought private actions against two contractors who provided translation and interrogation support—Titan Corp. and CACI International, Inc. (“CACI”)—for their roles in the scandal.<sup>310</sup> The Iraqis brought suit in the U.S. District Court for the District of Columbia under the Alien Tort Statute, the Racketeer Influenced and Corrupt Organizations Act (RICO),

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<http://www.nytimes.com/2010/01/01/us/01blackwater.html>. Not addressing the merits of the charges, District Judge Urbina held that statements taken from the defendants by the government violated their rights against self-incrimination. *Id.*

<sup>306</sup> 18 U.S.C. §§ 3261-3267.

<sup>307</sup> *Guard's Plea Led to Blackwater Indictments*, *supra* note 300. Since the guards committed their crimes using machine guns, they were subject to thirty year mandatory minimums. *Id.*

<sup>308</sup> *See Saleh v. Titan Corp.*, 580 F.3d 1, 2 (D.C. Cir. 2009).

<sup>309</sup> *See id.* at 1. The Abu Ghraib prison scandal refers to allegations of torture and mistreatment of prisoners perpetrated by United States Army interrogators in an Iraqi prison beginning in 2004. The United States Military investigated the private contracting firms Titan Corp. and CACI International, Inc. Julian Borger, *U.S. Military in Torture Scandal*, *GUARDIAN* (Apr. 30, 2004), <http://www.guardian.co.uk/media/2004/apr/30/television.internationalnews>.

<sup>310</sup> *Saleh*, 580 F.3d at 2.

and state tort law claims under the Federal Tort Claims Act.<sup>311</sup> The district court dismissed the federal claims, and the Court of Appeals for the District of Columbia affirmed.<sup>312</sup> Dismissing the liability claim under the Alien Tort Statute, the court held that the actions of the defendants, while under the color of state authority, were still done by private actors (not official actors) and therefore were not actionable.<sup>313</sup> Dismissing the RICO claim, the court held that the plaintiffs lacked standing to seek civil remedies under the Act because they could not allege damage to business or property.<sup>314</sup>

Turning to the merits of the state tort law claims, the district court had to determine whether the defendants were exempt from liability under the Federal Tort Claims Act.<sup>315</sup> The district court granted summary judgment for Titan Corp., holding that, since its command structure was fully integrated with that of the military, its employees were “soldiers in all but name,” and therefore it fell under the “combatant activities” exception of the Federal Tort Claims Act.<sup>316</sup> This exception provides tort immunity for defendants “under the direct command and exclusive operational control of the military chain of command” who are “engaged in ‘activities both necessary to and in direct connection with actual hostiles.’”<sup>317</sup> By contrast, the district court held that CACI was not entitled to summary judgment, since it granted its managers additional discretion and supervision over their employees, thus creating dual chains of command.<sup>318</sup>

On appeal, the D.C. Circuit, reversed the District Court’s denial of summary judgment as to CACI and affirmed

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<sup>311</sup> *Id.* at 3; see also *D.C. Circuit Rules that Preemption Requires Dismissal of Tort Claims Against Battlefield Contractors*, 51 GOV’T CONTRACTOR 35, Sept. 23, 2009, at ¶ 324. The Federal Tort Claims Act is codified at 28 U.S.C. §§ 2671-2680 (2006). The Act regulates tort liability and immunity for employees of the federal government. See GOLDBERG ET AL., *supra* note 186, at 440-41.

<sup>312</sup> *Saleh*, 580 F.3d at 2.

<sup>313</sup> *Saleh v. Titan Corp.*, 436 F. Supp. 2d 55, 57 (D.D.C. 2006) (citing *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10 (D.D.C. 2005)). *Saleh* and *Ibrahim* were both prisoners and both brought suit against Titan and CACI. Since their cases followed the same facts, the cases were consolidated for discovery purposes. As such, various case citations will refer to *Saleh* or *Ibrahim* as the named plaintiff. Both citations refer to the same litigation. See *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1, 1 (D.D.C. 2007).

<sup>314</sup> 18 U.S.C. § 1964(c) (2006); *Saleh*, 436 F. Supp. 2d at 57 (citing *Ibrahim*, 391 F. Supp. 2d at 10).

<sup>315</sup> *Ibrahim*, 556 F. Supp. 2d at 3-4.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 4 (citing *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948)).

<sup>318</sup> *Id.* at 10-11.

summary judgment as to Titan Corp.<sup>319</sup> The court rejected the District Court's use of a narrow "direct command and exclusive operational control" test as inconsistent with Supreme Court precedent and bad policy.<sup>320</sup> The D.C. panel noted that the court's decision in *Boyle v. United Technologies Corp.* stood for broader protection of the federal interests inherent in the exceptions to the Federal Torts Claims Act.<sup>321</sup> In *Boyle*, the Court struck down the Eleventh Circuit's decision that a contractor who was minimally involved in the design of a military helicopter did not fall within the "discretionary function" exemption of the Federal Tort Claims Act.<sup>322</sup> The *Boyle* court made clear that government officials were still involved in making judgments about the design and therefore the tort claims were barred.<sup>323</sup>

The D.C. Circuit in *Saleh* made similar findings. The court noted that freeing military commanders from worrying about potential tort claims when planning operations is a significant federal interest inherent in the "combatant activities" exception.<sup>324</sup> Drawing on *Boyle*, the court agreed that even "limited influence on an operation" supports the interest in barring claims.<sup>325</sup> The court further noted, as a matter of policy, that contractors would be less inclined to report abuses to their superiors and the government.<sup>326</sup> The panel referred to the District Court's recognition that contractors had to report abuses up both the corporate and military chains as evidence of a dual chain of command.<sup>327</sup> Instead, the court set forth a broader test for preemption under "combatant activities" exception:

During wartime, where a private service contractor is integrated into combatant activities over which the military retains command authority, a tort claim arising out of the contractor's engagement in such activities shall be preempted. We recognize that a service contractor might be supplying services in such a discrete manner—perhaps even in a battlefield context—that those services could be judged separate and apart from combat activities of the U.S. military.<sup>328</sup>

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<sup>319</sup> *Saleh v. Titan Corp.*, 580 F.3d 1, 17 (D.C. Cir. 2009).

<sup>320</sup> *Id.* at 8-9.

<sup>321</sup> *Id.* (citing *Boyle v. United Techs. Corp.*, 487 U.S. 500, 513 (1988)).

<sup>322</sup> *Id.* (citing *Boyle*, 487 U.S. at 513).

<sup>323</sup> *Id.* (citing *Boyle*, 487 U.S. at 513).

<sup>324</sup> *Id.* at 7.

<sup>325</sup> *Id.* at 8-9.

<sup>326</sup> *Id.* at 9.

<sup>327</sup> *Id.* at 4-5.

<sup>328</sup> *Id.* at 9.

Applying this test, the panel reversed and held that both Titan and CACI were exempt from the state tort claims.<sup>329</sup>

Working under the color of American authority enables both criminal and civil sanctions to be brought against private contractors in the Gulf of Aden. To avoid civil liability, private contractors must heed the test established in *Saleh*. Beyond a commission, private security companies must insist on being integrated into the military's antipiracy operations. Integration into the command structure not only helps to limit civil liability, but as Professor Berube points out, it allows private contractors to share intelligence and the military to effectively coordinate operations.<sup>330</sup> Even with full integration, there is no guarantee that courts will consider combating piracy a "wartime" activity, and therefore leave private security firms open to liability.<sup>331</sup> As such, just as Congress is attempting to pass legislation that limits the liability of ship owners when defending their ships,<sup>332</sup> Congress should also pass legislation that limits liability of private contractors who actively hunt for pirates.

#### CONCLUSION

The reemergence of pirates as a significant threat to commercial shipping is forcing the legal systems of the world to adapt. Since the United States cannot devote naval resources to protecting the merchant fleet the way it once could, it should craft policy and legislation that enables the private sector to fight piracy. The United States should continue to provide incentives for shipping companies to adequately protect their ships through increased exposure to civil liability, while attempting to regulate the paying of ransoms. This approach would deter pirate attacks, promote stability in shipping markets, and protect mariners from being looted, kidnapped, and ransomed. The United States should also look to private contractors to supplement its naval presence in the Gulf of Aden. These contractors can be regulated by an evolving legal regime that includes centuries-old, common-law principles as well as recent developments, both of which ensure criminal and civil sanctions for contractors who go beyond the bounds of

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<sup>329</sup> *Id.* at 10-11.

<sup>330</sup> See *supra* note 261 and accompanying text.

<sup>331</sup> The test set forth in *Saleh* is prefaced with the clause "[i]n wartime." *Saleh*, 580 F.3d at 9.

<sup>332</sup> See *supra* note 166 and accompanying text.

their commissions. Following these two approaches, the United States can ensure the safety of its shipping industry while preserving its military commitments around the globe.

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