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The Human Rights and Maritime Law Implications of a Piracy Ransom Ban for International Shipping

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Abstract

Piracy for ransom remains a significant maritime security threat adversely affecting the interests of the shipping industry, maritime trade and the welfare of seafarers. The profits made by pirates through ransoms have led to several states, including the United Kingdom, to argue in favour of an absolute ban on ransom payments to pirates. These proposals are heavily influenced by similar policies adopted in the context of terrorist hostage-taking, in which it is often argued that ransoms sustain terrorism and an absolute ban on terrorist financing must therefore be imposed in an effort to eliminate terrorist attacks. However, this article argues that maritime piracy for ransom operates in a strictly commercial environment that is fundamentally different from terrorism, and therefore a ransom ban could cause more loopholes and practical problems than it would resolve. An examination of the current policies on ransom payments shows that there is no universal ban on piracy ransoms and that such payments remain legal and compatible with public policy in the UK. It is also explained that a ban on ransom payments to pirates could have significant human rights implications for the protection of seafarers, who are the targets of the piracy for ransom model, and it is debatable whether an absolute ransom ban can be reconciled with the human rights obligations flag states have towards those held hostage on board their vessels. The economic cost of a ransom ban is also discussed, and it is explained that a ban could increase industry costs instead of reducing them. It is also argued that such a ban is not compatible with the current interpretation of the Marine Insurance Act 1906, reinforcing the overall conclusion that an absolute ban on ransom payments to pirates is not fit for purpose.

Keywords: piracy, seafarers, ransom ban, flag states, Marine Insurance Act 1906

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1. Introduction

Piracy remains a major maritime security threat adversely affecting the interests of the shipping industry, maritime trade and the welfare of seafarers.¹ The sharp decline in successful vessel hijackings in the Gulf of Aden in 2014 sparked hope that piracy had come to an end, but nothing could be further from the truth.² The widespread concern that large-scale piracy for ransom might re-emerge due to that the withdrawal of naval forces, relaxed self-protection measures, and a failure to tackle the underlying causes of piracy - such as poverty, corruption and unemployment - were vindicated by renewed attacks in the Gulf of Aden.³ Between January and June 2016 alone, 17 vessels were boarded and two were hijacked in Africa, while 24 vessels were boarded and three were hijacked in Southeast Asia.⁴ During these incidents, 118 seafarers were subjected to violence and 108 of them were taken hostage.⁵ In October 2016, the crew of the *FV Naham 3*, a Taiwan-owned fishing vessel, was released after spending five years in captivity, bringing back to the forefront the dangers of hostage-taking and the suffering of remaining hostages. While precise figures are lacking, following the release of the *FV Naham 3* crew, it was reported that several pirate attacks had taken place against fishing vessels and a number of hostages remained in captivity in Somalia.⁶

1 Piracy is defined in Art 101 of the 1982 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS), according to which piracy takes place on the high seas (Art 101(a)(i)) and therefore certain attacks against ships within the territorial or archipelagic waters of African and Southeast Asian States do not qualify as piracy. However, this gap has been filled by the International Maritime Organization (IMO), which defines as armed robbery 'any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea' (IMO, 'Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships' (18 January 2010) Resolution A.1025(26) Annex, para 2.2). In this article, the term 'piracy' is used to cover both acts of piracy and armed robbery, and the term 'pirates' refers to both those being suspected and convicted of being involved in acts of piracy and armed robbery.

2 UNSC 'Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia' (7 October 2016) UN Doc S/2016/843, paras 5-8; Christian Bueger, 'Learning from Piracy: Future Challenges of Maritime Security Governance' (2015) 1 *Global Affairs* 33, 37-38; CHP Post Online, 'Denmark pulling out of the fight against Somali pirates' (21 November 2016) <<http://cphpost.dk/news/denmark-pulling-out-of-the-fight-against-somali-pirates.html>> accessed 19 February 2017.

3 Reuters, 'Somali pirates hijack Indian commercial ship in second attack in weeks' (*The Telegraph*, 3 April 2017) <www.telegraph.co.uk/news/2017/04/03/somali-pirates-hijack-indian-commercial-ship-second-attack-weeks/> accessed 16 April 2017; Report of the Secretary-General (n 2). For the root causes of piracy in Somalia, Nigeria and Southeast Asia, see Andrew Palmer, *The New Pirates: Modern Global Piracy from Somalia to South China Sea* (I.B. Tauris 2014) 7-16; David Ong, 'Alternative Approaches to Piracy and Armed Robbery in Southeast Asian Waters and off the Horn of Africa: A Comparative Perspective' in Panos Koutrakos and Achilles Skordas (eds), *The Law and Practice of Piracy at Sea: European and International Perspectives* (Hart Publishing 2014) 269-76; and Martin Murphy, 'Petro-Piracy: Predation and Counter-Predation in Nigerian Waters' in Douglas Guilfoyle (ed), *Modern Piracy – Legal Challenges and Responses* (Edward Elgar 2013) 61-90.

4 ICC International Maritime Bureau, 'Piracy and Armed Robbery against Ships' (1 January – 30 June 2016) 8 <www.icc.se/wp-content/uploads/2016/07/2016-Q2-IMB-Piracy-Report-Abridged.pdf> accessed 17 February 2017.

5 *ibid* 10. For 2015, see ICC International Maritime Bureau, 'Piracy and Armed Robbery against Ships' (1 January – 31 January 2015) <www.icc.se/wp-content/uploads/2016/07/2016-Q2-IMB-Piracy-Report-Abridged.pdf> accessed 17 February 2017; Oceans Beyond Piracy (OBP), 'The State of Maritime Piracy 2014' (2015) <<http://oceansbeyondpiracy.org/reports/sop2015/summary>> accessed 19 February 2017.

6 Saeed Kamali Dehghan, 'We had to eat rats, say sailors held by Somali pirates for four years' (*The Guardian*, 24 October 2016) <www.theguardian.com/world/2016/oct/24/we-had-to-eat-rats-say-sailors-held-by-somali-pirates-for-four-years> accessed 17 February 2017; Report of the Secretary-General (n 2) paras 3, 9-10.



The figures show that despite the efforts of the international community to eliminate piracy, the ‘kidnap for ransom’ model of piracy - the hijacking of a vessel and its crew for the purpose of extracting a ransom - remains a widespread technique employed by pirates around the world.⁷ The reason is that pirates make significant profits from ransom payments. In 2015 alone, it was reported that a total of \$1.6 million (USD) was paid in ransom to pirates operating in the Gulf of Guinea, while it is estimated that between \$340 million and \$435 million was paid in ransom for ships and/or seafarers kidnapped by Somali pirates between 2005 and 2015.⁸

Concern has been raised that ransom payments to pirates fund more pirate attacks, motivate more people to get involved in the lucrative business of piracy, and thus fuel more kidnappings for ransom, putting the welfare of more seafarers at risk.⁹ These fears have prompted some, including the former UK Prime Minister David Cameron, to advocate in favour of an absolute ban on ransom payments to pirates.¹⁰ The rationale of banning ransom payments as a means of preventing hostage-taking is not new. It originates from the fight against terrorist hostage-taking and the non-concession policies of a number of states that firmly believe that ransom payments sustain terrorism.¹¹ Therefore, they have opted to let their nationals taken hostage die instead of paying a ransom to terrorists who may

7 For a definition of the ‘kidnap for ransom’ model, see the FAFT Report, ‘Organised Maritime Piracy and Related Kidnapping for Ransom’ (2011) 5-6 <www.fatf-gafi.org/media/fatf/documents/reports/organised%20maritime%20piracy%20and%20related%20kidnapping%20for%20ransom.pdf> accessed 19 February 2017.

8 World Bank, ‘Pirate Trails: Tracking the Illicit Financial Flows from Pirate Activities off the Horn of Africa’ (2013) 27-28; OPB (2015) (n 5) 20; OBP, ‘The State of Maritime Piracy 2013’ (2014) 10 <<http://oceansbeyondpiracy.org/sites/default/files/attachments/SoP2013-Digital.pdf>> accessed 19 February 2017. Unless otherwise stated, all sums listed are in US dollars (USD).

9 Secretary Clinton’s Remarks at London Conference on Somalia (2012) <<http://iipdigital.usembassy.gov/st/english/texttrans/2012/02/20120223143901su0.5437062.html>> accessed 19 February 2017; Nick Hopkins, ‘Judith Tebbutt case puts spotlight on government’s ransom policy’ (*The Guardian*, 21 March 2012) <www.theguardian.com/uk/2012/mar/21/judith-tebbutt-spotlight-ransom-policy> accessed 19 February 2017; Robert Rotberg, ‘Combating Maritime Piracy: A Policy Brief with Recommendations for Action’ (World Peace Foundation, Policy Brief #11, 26 January 2010) <www.somalilandpress.com/wp-content/uploads/2010/02/Combating-Maritime-Piracy.pdf> accessed 19 February 2017.

10 Prime Minister’s Speech at Somalia Conference (2012) <www.gov.uk/government/speeches/prime-ministers-speech-at-somalia-conference> accessed 19 February 2017.

11 BBC, ‘UN urges end to ransom payments to terrorist groups’ (28 January 2014) <www.bbc.co.uk/news/world-25923084> accessed 19 February 2017; UNSC ‘Letter dated 27 October 2014 from the Chair of the Security Council Committee pursuant to Resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and Associated Individuals and Entities Addressed to the President of the Security Council’ (29 October 2014) UN Doc S/2014/770, paras 49-59.



use it for further propaganda and other terrorist activities.¹² Arguably, a ban on ransom payments to terrorists and pirates has a deterrent effect. However, in this article, it is argued that an absolute ban on ransom payments to pirates as the solution to piracy is a rather simplistic approach.

Terrorist and pirate hostage-taking appear to have some common characteristics, such as the seizure of hostages for the purposes of extracting a ransom, but they also have fundamental asymmetries that are ignored by those advocating against ransom payments to pirates.¹³ While terrorist hostage-taking involves a spread of political and religious beliefs that lead to ideological conflicts and are too controversial to address and too elusive to regulate,¹⁴ maritime piracy for ransom in the Africa and Southeast Asia regions operates in a strictly commercial environment that allows for some regulation. Therefore, it is argued that an absolute ban on ransom payments to pirates would have an adverse and multifaceted impact on the shipping industry - especially UK shipping interests.

This article starts with an analysis of the commonalities and differences between terrorist and pirate hostage-taking. This is followed by an examination of the existing international and national policies on ransom payments to terrorists and pirates, which will lead to the conclusion that ransom payments to pirates are not illegal. This article then analyses the human rights implications of a potential ban on ransom payments. It will be argued that piracy for ransom targets seafarers, and therefore more emphasis should be placed on their protection. Flag states have human rights obligations towards those abducted on board their vessels and a ban on ransom payments cannot be reconciled with these obligations.¹⁵ The discussion continues by assessing the financial implications for the shipping industry, since the likelihood of securing the release of vessels, cargos and crews would decrease, but the evolving pirate activities would not. Furthermore, it explains the uncertainty surrounding how the Marine Insurance Act 1906 (MIA 1906) and its current interpretation by UK

12 The US has a long-standing non-negotiation policy which dates back to the Carter and Reagan presidencies and was confirmed by the Bush and Obama governments. See Jonathan Powell, *Talking to Terrorists: How to End Armed Conflicts* (London 2014) 15-18. See also the Press Statement by Richard Boucher, 'International Terrorism: American Hostages' (*U.S. Department of State Archive*, 20 February 2002) <<https://2001-2009.state.gov/r/pa/prs/ps/2002/8190.htm>> accessed 19 February 2017. See also Meadow Clendenin, 'No Concessions with No Teeth: How Kidnap and Ransom Insurers and Insureds are Undermining U.S. Counterterrorism Policy' (2006) 56(3) *Emory Law Journal* 741. For the UK approach see Counter-Terrorism and Security Bill Factsheet <www.gov.uk/government/uploads/system/uploads/attachment_data/file/540539/CTS_Bill_-_Factsheet_9_-_Kidnap_and_Ransom.pdf> accessed 19 February 2017; and Keith Bloomfield, 'Hostage-taking and Government Response' (2001) 146 *Defence and International Security* 23. See also the discussion in Yvonne Dutton and Jon Bellish, 'Refusing to Negotiate: Analysing the Legality and Practicality of a Piracy Ransom Ban' (2014) 47 *Cornell International Law Journal* 299, 309-12.

13 Douglas Guilfoyle, 'Piracy and Terrorism' in Koutrakos (n 3) 44-52; Natalie Klein, *Maritime Security and the Law of the Sea* (OUP 2011) 147-48; Anna Petrig and Robin Geiss, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 42-44.

14 A clear example is the lack of a definition of terrorism. For the working definition of terrorism see UNSC Res 1566 (8 October 2004) UN Doc S/RES/1566 at 3. See also Jean-Marc Sorel, 'Some Questions about the Definition of Terrorism and the Fight against its Financing' (2003) 14 *EJIL* 365, 366-71.

15 Sofia Galani, 'Somali Piracy and the Human Rights of Seafarers' (2016) 34 *Netherlands Quarterly of Human Rights* 71, 81-82; Malcolm Evans and Sofia Galani, 'Piracy and the Development of International Law' in Koutrakos (n 3) 356; Urfan Khaliq, 'Jurisdiction, Ships and Human Rights Treaties' in Henrik Ringbom (ed), *Jurisdiction over Ships – Post-UNCLOS Developments on the Law of the Sea* (Brill 2015) 337.



courts would protect the losses sustained by ship and cargo owners.¹⁶ In light of these considerations, this article concludes that an absolute ban on ransom payments to pirates could cause more loopholes and practical problems than it could potentially resolve. In light of the recent attacks in the Gulf of Aden, and the widespread concern that large-scale piracy for ransom might return and thus exorbitant ransom payments might resurface, it is important to reinforce the position that an absolute ban on ransom payments is not the solution to the problem of maritime piracy for ransom.

2. International and national policies on ransom payments

Before assessing the adverse impact that a possible ban on ransom payments could have on seafarers and the shipping industry, it is worth comparing terrorist and pirate hostage-taking and presenting the current policies on ransom payments to terrorists and pirates. This discussion will end by reference to the latest initiatives by some of the states that oppose ransom payments to pirates and terrorists.

2.1 Terrorist and pirate hostage-taking

Distinguishing between terrorist and pirate hostage-taking is not an easy task and various overlaps can be identified. First and foremost, the taking of hostages both by terrorists and pirates can fall within the Article 1 definition of hostage-taking under the 1979 International Convention against the Taking of Hostages.¹⁷ The reason is that pirates seize and detain hostages for the purposes of compelling a third party, usually a state or a shipping company, to do an act (pay a ransom) as an explicit condition for the release of the hostages.¹⁸ Pirate hostage-taking could also fall under Article 3 of the 1988 Convention for the Suppression of Unlawful Acts at Sea (SUA Convention) as pirates unlawfully and intentionally seize and exercise control over a ship by force or threat of force.¹⁹ Stateless territories, failed states and corruption are also seen as the common denominator in the creation of terrorist groups and pirate gangs.²⁰ However, labelling pirates as terrorists and prosecuting them on the basis of the anti-terrorism conventions is going a step too far.²¹ Pirate hostage-taking takes place

16 See Robert Soady, 'A Critical Analysis of Piracy, Hijacking, Ransom Payments, and Whether Modern London Insurance Market Clauses Provide Sufficient Protection for Parties Involved in Piracy for Ransom' (2013) 44 *Journal of Maritime Law and Commerce* 1.

17 International Convention against the Taking of Hostages (adopted 17 December 1979, entered into force 3 June 1983) 1316 UNTS 205 (Hostages Convention).

18 Petrig and Geiss (n 13) 43-44.

19 The SUA Convention (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 201 was adopted in response to the seizure of the *Achille Lauro* by Palestinian fighters, who sought the release of fellow fighters in exchange for the hostages, and in an effort to establish criminal jurisdiction over unlawful acts at sea that do not fall within the definition of piracy under Art 101 UNCLOS. See Malvina Halberstam, 'Terrorism on the High Seas: The *Achille Lauro*, Piracy and the IMO Convention on Maritime Safety' (1988) 82 *The American Journal of International Law* 269, 276-91.

20 Palmer (n 3) 71-91.

21 Guilfoyle (n 13) 47.



solely for private ends, and pirates have shown in practice that they are willing both to negotiate and release their hostages once their ransom demands are met. In contrast, terrorist hostage-taking takes place for ideological beliefs, and political demands, such as the release of fellow fighters or the recognition of independence of a disputed territory, are almost impossible to meet as a condition of release of the hostages.²² Terrorists also take hostages for the purposes of drawing media attention and promoting their political manifesto, which can be achieved by murdering hostages if their demands are not met.²³ In addition, pirates hold their hostages in unknown locations, which makes a rescue mission difficult, and therefore negotiations and ransom payments might be the only available tools for the rescue of seafarers.²⁴ Terrorists, on the other hand, do not hesitate to seize hostages in public places, such as schools or shopping malls, and therefore a rescue mission can be a viable alternative to ransom payments.²⁵

For all the reasons set out above, this article argues that terrorist and pirate hostage-taking are fundamentally different, and therefore the responses to pirate hostage-taking should not be premised on the rationale employed by states in the fight against terrorism. Terrorist and pirate hostage-taking require tailored responses capable of safeguarding the lives of hostages primarily, as well as the political and financial interests at stake, and therefore transposing counter-terrorism policies to acts of piracy cannot be the way forward.

2.2 Ransom payments to terrorist groups

The prevention of direct or indirect financing of terrorist acts is considered an effective tool in the fight against terrorism, and has been incorporated into a number of counter-terrorism responses adopted over the years. One of the earliest collective responses against the financing of terrorism is the International Convention for the Suppression of the Financing of Terrorism, which criminalises any act of a person that ‘by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part’ for committing any act of terrorism including hostage-taking, aircraft hijacking and the seizure of vessels.²⁶ The international community further demonstrated its commitment to suppress the funding of terrorism when it established the UN Security Council Committee pur-

22 See, for example, the seizure of the Moscow Theatre by Chechen fighters demanding that the Russian government recognise the independence of Chechnya in exchange for the release of hostages discussed in *Finogenov and Others v Russia* App nos 18299/03 and 27311/03 (ECtHR, 4 June 2012). See also Section 3.2 below.

23 See, for example, the scenes of the beheadings of hostages held by the Islamic State, which were widely circulated online by the terrorists. BBC, ‘Islamic State “beheads US hostage Steven Sotloff”’ (3 September 2014) <www.bbc.co.uk/news/world-middle-east-29038217> accessed 19 February 2017.

24 For the definition of kidnapping see A. Hunsicker, *Understanding International Counter Terrorism: A Professional's Guide to the Operational Art* (Universal Publishers 2006) 202-03.

25 For the Beslan School siege see Section 3.2 below. See also Daniel Howden, ‘Terror in Nairobi: the full story behind al-Shabaab’s mall attack’ (*The Guardian*, 4 October 2013) <www.theguardian.com/world/2013/oct/04/westgate-mall-attacks-kenya> accessed 19 February 2017.

26 Art 2(a) and Annex of the International Convention for the Suppression of the Financing of Terrorism (signed 9 December 1999, entered into force 10 April 2002) 2178 UNTS 197.



suant to Resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaeda and associated individuals and entities.²⁷ The Committee assumed the task of overseeing the implementation by Member States of the sanctions imposed against targeted individuals and entities associated with Al-Qaeda, including an assets freeze, travel ban and arms embargo.²⁸

The plague of hostage-taking by the Islamic State (IS) gave momentum to the international community to adopt harsher measures against the financing of terrorism through ransom payments. In 2014, the UK Ambassador to the UN Mark Lyall Grant announced that Al-Qaeda and its affiliated groups made at least \$105 million in ransom payments for hostages between 2011 and 2013.²⁹ On the basis that ransom payments fuel terrorist activities, the Ambassador drafted and put before the United Nations Security Council (UNSC) a resolution urging states to end ransom payments to terrorist groups. The resolution, which was adopted unanimously, requires states to stop providing directly or indirectly any funds, including ransom payments, to individuals, groups or entities on the Al-Qaeda sanctions list.³⁰ The resolution also calls upon states ‘to prevent terrorists from benefiting directly or indirectly from ransom payments or from political concessions and to secure the safe release of hostages.’³¹ The commitment of states to end ransom payments to terrorist groups was reinforced in UNSC Resolution 2253 (2015). The UNSC unanimously reiterated their commitment to securing the release of hostages without ransom payments and expanded the Al-Qaeda sanctions framework to include the IS in an effort to end the financing of terrorism.³² It is now well-established that financing terrorism through ransom payments is not permitted either by paying a sum directly to a terrorist group or indirectly through intermediaries.³³

In line with its international efforts, the UK also amended the Terrorist Act 2000 to fill then-existing gaps in relation to ransom payments at the national level. Section 15(3) of the Act criminalised direct and indirect financing of terrorist acts, but did not explicitly refer to ransom payments paid by insurance companies. Section 15(3) was amended by Section 42 of the Counter-Terrorism and Security Act 2015, which makes payment by an insurer in response to a terrorist demand an offence punishable by imprisonment or forfeiture of the amount paid under the insurance contract, but arguably this provision is inapplicable to acts of piracy.³⁴ The UN has taken a clear stance against

27 UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267; UNSC Res 1989 (17 June 2011) UN Doc S/RES/1989.

28 The latest version of the Al-Qaeda Sanctions List established and maintained by the 1267/1989 Committee (2015) is <www.un.org/sc/suborg/en/sanctions/1267/qa_sanctions_list> accessed 19 February 2017.

29 BBC (n 11).

30 UNSC Res 2133 (27 January 2014) UN Doc S/RES/2133, para 2.

31 *ibid* para 3.

32 UNSC Res 2253 (17 December 2015) UN Doc S/RES/2253, paras 3 and 5.

33 UNSC Res 2161 (17 June 2014) UN Doc S/RES/2161, para 7. See also the FAFT Report, ‘Financing of the Terrorist Organisation Islamic State in Iraq and the Levant (ISIL)’ (2015) 18 <www.fatf-gafi.org/media/fatf/documents/reports/Financing-of-the-terrorist-organisation-ISIL.pdf> accessed 26 February 2017.

34 Ince & Co, ‘UK Counter Terrorism and Security Bill – does it affect ransom payments to pirates?’ (2014) <www.incelaw.com/en/knowledge-bank/publications/uk-counter-terrorism-and-security-bill-does-it-affect-ransom-payments-to-pirates> accessed 19 February 2017.



the payment of ransoms to terrorists, and the UK has allied itself with this approach and appears determined to suppress the financing of terrorism, even if banning ransom payments means that UK nationals are left to be murdered by terrorist groups.³⁵ Despite the emerging consensus on the matter, the enforcement of such a ban remains extremely challenging with some states agreeing with it in theory, while continuing to make ransom payments to secure the release their nationals taken hostage by terrorist groups.³⁶

2.3 Ransom payments to pirates

While the UK appears determined to ban ransom payments to terrorists, its stance on ransom payments to pirates has not always been so straightforward. The UN Monitoring Group on Somalia and Eritrea has repeatedly criticised the inadequacy of the UK responses to Somali piracy, including the UK's opposition to US proposals on piracy ransoms.³⁷ In April 2010, US Executive Order 13536 concerning Somalia blocked the property of those persons that contribute to Somali piracy, and any flows of assets, in the form of transfer, payment, export or withdrawal, to those persons involved in piracy.³⁸ The US aimed to further expand this restriction and lobbied the UNSC to list persons and entities that pose a threat to the stability in Somalia under UNSC Resolution 1844 (2008).³⁹ Amongst others, the US suggested the listing of Abshir Abdillahi and Mohamed Abdi Garaad, known as the leaders of Somali piracy. However, the UK deviated from these recommendations and objected to the adoption of the resolution.⁴⁰ Contrary to its stance on ransom payments to terrorists, the UK government opposed the resolution arguing that the UK legal system lacks a defence of duress, which could lead to the prosecution of families making ransom payments to save the lives of seafarers.⁴¹ Beyond this humanitarian approach, it has also been argued that the UK, as a hegemonic state of maritime business, opposed the proposals restricting ransom payments to pirates in an effort to safeguard the interests of UK shipping and marine insurance companies.⁴²

Ransom payments to pirates have also been examined by UK courts, which concluded that this type of payment is neither illegal under UK law nor incompatible with public policy. In the case

35 Karen Yourish, 'The Fates of 23 ISIS Hostages in Syria' (*The New York Times*, 10 February 2015) <www.nytimes.com/interactive/2014/10/24/world/middleeast/the-fate-of-23-hostages-in-syria.html> accessed 19 February 2017.

36 Kashmira Gander, 'Isis hostage threat: Which countries pay ransoms to release their citizens?' (*Independent*, 3 September 2014) <www.independent.co.uk/news/world/politics/isis-hostage-threat-which-countries-pay-ransoms-to-release-their-citizens-9710129.html> accessed 26 February 2017; Timothy McGrath, 'These are the countries that have (probably) paid hostage ransom to the Islamic State' (*Global Post*, 28 January 2015) <www.globalpost.com/dispatch/news/war/150121/these-are-the-countries-have-probably-paid-ransom-the-islamic-state> accessed 26 February 2017.

37 UNSC 'Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 2002' (13 July 2012) UN Doc S/2012/545, paras 30-31. See also the discussion in Achilles Skordas, 'The Dark Side of Counter-Piracy Policies' in Koutrakos (n 3) 318-20.

38 Executive Order 13536 concerning Somalia – Blocking Property of Certain Persons Contributing to the Conflict in Somalia (2010) <www.presidency.ucsb.edu/ws/?pid=87737> accessed 19 February 2017. For the Order, and other relevant US legislation on ransoms, see Lawrence Rutkowski, Bruce Paulsen and Jonathan Stoian, 'Mugged Twice?: Payment of Ransom on the High Seas' (2010) 59 *American University Law Review* 1425.

39 UNSC Res 1844 (20 November 2008) UN Doc S/RES/1844, para 8.

40 House of Commons - Foreign Affairs Committee, 'Piracy off the coast of Somalia - Tenth Report of Session 2010–12' (2012) <www.publications.parliament.uk/pa/cm201012/cmselect/cmfaff/1318/1318.pdf> para 114.

41 *ibid*; for a discussion on the defence of duress in US criminal law, see Dutton and Bellish (n 12) 316-20.

42 Report of the Monitoring Group (n 37) Annex 4, 34, 211.



of *Royal Boskalis*, the Court of Appeal examined an appeal brought by five Dutch companies that owned and operated a dredging fleet, which was insured against war risks by the defendants under an insurance contract in the Ship and Goods (SG) form set out in Schedule 1 to the MIA 1906 containing a 'sue and labour' clause.⁴³ The dredging fleet was operating in an Iraqi port, but, following Iraq's invasion of Kuwait, the UN imposed sanctions on Iraq, which responded by seizing all the assets of companies operating on its land, including the plaintiffs' dredging fleet and employees. The plaintiffs had to pay large amounts of money for the demobilisation of the fleet and the release of their employees and sought to recover their losses under the 'sue and labour' clause. The legality of the ransom payment was examined by Lord Justice Phillips who argued that pursuant to Section 78(4) MIA 1906, the assured has a duty to take reasonable steps to mitigate the loss, which includes the payment of a reasonable ransom that has regard to the value of the property at risk. More specifically, Lord Justice Phillips argued that:

[t]he terms in which the duty under section 78(4) is expressed are wide enough on their natural meaning to embrace expenditure necessary to procure the release of a vessel that has been seized and I see no reason of policy or practice why they should not do so. If that is right, then it would be strange indeed if such expenditure did not fall within the sue and labour clause. In my judgment the assumption [...] that payment of a ransom, if not itself illegal, is recoverable as an expense of suing and labouring is well founded.⁴⁴

Lord Justice Phillips' reasoning touched upon the compatibility of ransom payments with public policy, but he did not elaborate further on this issue. This does not mean that UK courts have left any doubts regarding this issue, as is evidenced by the *Bunga Melati Dua* case.⁴⁵ The case concerned the seizure of a vessel by Somali pirates and the appellant's appeal against a decision that the capture of a vessel by pirates did not create an immediate total loss of the cargo. The appellant argued that regardless of the prospects of recovery of a vessel, the payment of a ransom should not be taken into account for calculating the possibilities of recovery, as there was no duty of an insured under Section 78(4) MIA 1906 to pay the ransom. The appellant further argued that, in any case, ransom payments were contrary to public policy.⁴⁶ The latter claim was rejected by the Court of Appeal and Lord Justice Rix reasoned that:

[t]here is thus something of an unexpressed complicity: between the pirates, who threaten the liberty but by and large not the lives of crews and maintain their ransom demands at levels which industry can tolerate; the world of commerce, which has introduced precautions but advocates the freedom to meet the realities of the situation by the use of ransom payments; and the world of government, which stops short of deploring the payment of ransom but stands aloof, participates in protective na-

43 *Royal Boskalis Westminster N.V. and Others v Mountain and Others* [1999] QB 674.

44 *ibid* 720. Ransom payments to pirates used to be an offence in 1782 under the Ransom Act (22 Geo. III c. 25) which has been repealed. For this act and subsequent legislation banning ransom payments to pirates, see Peter MacDonald Eggers QC, 'The Insurance Protection against Piracy' in Guilfoyle (n 3) 289.

45 *Masefield AG v Amlin Corporate Member Ltd* [2011] 1 WLR 2012. See also the discussion in MacDonald Eggers QC, *ibid* 290-95.

46 *Masefield AG* (2011) para 2.



val operations but on the whole is unwilling positively to combat the pirates with force. Mr Williams described it as a 'fragile status quo'. In these morally muddied waters, there is no universally recognised principle of morality, no clearly identified public policy, no substantially incontestable public interest, which could lead the courts, as matters stand at present, to state that the payment of ransom should be regarded as a matter which stands beyond the pale, without any legitimate recognition. There are only elements of conflicting public interests, which push and pull in different directions, and have yet to be resolved in any legal enactments or international consensus as to a solution, save that of wary watchfulness, the deployment of naval resources as a form of law enforcement or policing operation, and a regard for 'a comprehensive approach, seeking to address political, economic and security aspects of the crisis in a holistic way'.⁴⁷

The excerpt summarises in an eloquent manner the complexities of the fight against piracy and the practical benefits of ransom payments to shipping interests. The decision of the Court of Appeal not to bar or otherwise hinder ransom payments to pirates has been well-received by the shipping industry because it gives shipowners room to manoeuvre as regards how to negotiate and secure the release of the crew, vessel and cargo.⁴⁸

In contrast, the efforts of the UK government to ban ransom payments to pirates found no support by states nor the shipping industry. In February 2012, David Cameron told the London Conference on Somalia that ransom payments to pirates should be banned.⁴⁹ To that end, Cameron established the International Piracy Ransoms Task Force, the objective of which is:

to develop a greater understanding of the payment of ransoms in cases of piracy, in order to put forward policy recommendations to the international community as to how to avoid, reduce or prevent the payment of ransoms. The ultimate goal of this effort is to reach a point where pirates are no longer able to profit from ransom payments and thus abandon the practice of kidnapping for ransom.⁵⁰

Despite the justifications provided for banning piracy ransom payments, only 14 states participated in the Task Force and some of the largest flag and ship register states, such as the Marshall Islands,

47 *ibid* para 71.

48 Philip Roche and Peter Glover, 'Public policy and the payment of ransoms - *Masefield AG v Amlin Corporate Member* [2011] EWCA Civ 24' (2011) <www.nortonrosefulbright.com/knowledge/publications/48452/public-policy-and-the-payment-of-ransoms-masefield-ag-v-amlin-corporate-member-ewca-civ-24> accessed 26 February 2017; John Knott, 'Somali Piracy: The Effect of Ship Hijacking on Marine Insurance Policies' (2010) <www.idaratmaritime.com/wordpress/?p=246> accessed 26 February 2017; James Gosling and Richard Neylon, 'Banning ransom payments to Somali pirates would outlaw the only method a shipowner has to remove his crew from harm's way and rescue his vessel and cargo' (*Lloyd's List*, 1 November 2011) <www.hfw.com/Banning-ransom-payments-to-somali-pirates> accessed 26 February 2017.

49 Prime Minister's Speech (n 10).

50 London Conference on Somalia: Communique (23 February 2012) <www.gov.uk/government/news/london-conference-on-somalia-communique--2> accessed 19 February 2017; Final Report of the International Piracy Ransoms Task Force (11 December 2012) excerpts available at <<https://piracy-law.com/2013/01/20/the-report-of-the-international-piracy-ransoms-task-force-is-available/>> accessed 1 April 2017.



the Bahamas and Greece, are missing from the list of participants.⁵¹ At the same time, the shipping industry expressed its concern over the suggested ban on humanitarian, financial and environmental grounds.⁵² The lack of support possibly justifies the constrained recommendations published by the Task Force in its final report to the Contact Group on Piracy off the Coast of Somalia in 2012, which are not reflective of Cameron's ambitions to eliminate ransom payments.

The Task Force recommended the development of strategic partnerships between flag states, the private sector, law enforcement agencies and military responders in an effort to break the piracy business model and prepare for potential hostage situations, better coordination of information-sharing to provide evidence to pursue and prosecute all involved in piracy, and implementation of anti-piracy measures, including better compliance with Best Management Practices.⁵³ Missing from the report are clear-cut policy recommendations that could lead to an absolute ban on ransom payments. In other words, the recommendations were tailored to accommodate the UK government's interest restricting the profits made by pirates from ransom payments, as well as the needs of the shipping industry to retain flexibility in handling hostage-taking situations. The latest UK policy paper on piracy off the coast of Somalia also shows that the government did not push forward a ban on ransom payments made to pirates.⁵⁴ On the contrary, according to unofficial reports, the UK government confirmed that ransom payments to pirates will remain legal, and the UK Shipping Minister John Hayes stated that '[i]t is already an offence to make ransom payments to terrorists, [but] the situation is different in piracy cases. Whilst the government strongly advises against making ransom payments to pirates, doing so is not illegal under UK law.'⁵⁵

The indecisiveness of the UK government in relation to piracy ransoms suggests that it is aware of the implications an absolute ban on piracy ransom payments could have for shipping interests. The shipping industry has firmly opposed a ban and the following discussion explains that the concerns expressed by the maritime world are not baseless. As explained below, outlawing ransom payments to pirates could have serious human rights implications for seafarers, especially those taken hostage, and could cause detrimental inconsistencies in the way the current marine insurance framework operates in the UK.⁵⁶

51 The task force was constituted of 14 members: Australia, Denmark, France, Germany, Italy, Liberia, Malaysia, Norway, Panama, Spain, Ukraine, the United Arab Emirates, the United Kingdom and the United States: House of Commons Hansard, 'International Piracy Ransoms Task Force' (Written Statements Vol 555, 12 December 2012) <<https://hansard.parliament.uk/Commons/2012-12-12/debates/12121236000016/InternationalPiracyRansomsTaskForce>> accessed 26 February 2017.

52 See the letter of the Round Table of International Shipping Association (14 March 2012) <www.intertanko.com/Global/Prime%20Minister%20David%20Cameron%20140312.pdf> accessed 19 February 2017.

53 Piracy Ransoms Task Force publishes recommendations (11 December 2012) <www.gov.uk/government/news/piracy-ransoms-task-force-publishes-recommendations> accessed 19 February 2017.

54 2010 to 2015 government policy: piracy off the coast of Somalia (Policy paper, 8 May 2015) <www.gov.uk/government/publications/2010-to-2015-government-policy-piracy-off-the-coast-of-somalia/2010-to-2015-government-policy-piracy-off-the-coast-of-somalia> accessed 19 February 2017.

55 World Maritime News, 'UK Keeps Piracy Ransom Payment Legal' (21 January 2015) <<http://worldmaritimenews.com/archives/150000/uk-keeps-piracy-ransom-payment-legal/>> accessed 19 February 2017.

56 See Sections 3.2 and 4.1 below.



3. Ransom payments and the human rights of seafarers

The protection of the human rights of seafarers has been one of the main arguments by shipping companies against the ban on piracy ransoms. The Round Table of International Shipping Associations has clearly stated that banning ransoms is equal to leaving seafarers to the ‘mercy of violent organised crime in a society where life has little value.’⁵⁷ Other maritime analysts suggest that paying a ransom is the ‘only hope’ a shipowner has for securing the release of crew and vessel in practice.⁵⁸ Courts have also stressed how important negotiations and ransom payments are for safeguarding the human rights of hostages. While there is no clear-cut obligation imposed on flag states to pay ransoms to secure the release of hijacked vessels and crews, it is argued here that flag states bear human rights obligations towards those on board seized vessels and questioned how flag states will be able to respond to these obligations if ransom payments are banned.⁵⁹

3.1 The nature of piracy for ransom

Piracy for ransom, by definition, has a specific aim: the taking of hostages for the purpose of extracting a ransom payment. Given that seafarers are the target of pirates, the human cost of piracy should be the focal point. However, as the author has highlighted elsewhere, counter-piracy measures lack a victim’s perspective, which could enhance protection of the human rights of seafarers, and the decision to push for an absolute ban on ransom payments further fails to consider the human cost of piracy as seafarers could suffer and die as a result.⁶⁰

Empirical data shows that, between 2010 and 2015, almost 9,705 seafarers were attacked in the Indian Ocean and 2,060 were taken hostage, 78 of whom remained in captivity in 2015.⁶¹ While Somali piracy was declining, West African pirates became more active and 2,949 seafarers were attacked and 493 were taken hostage between 2013 and 2015.⁶² In addition, almost 7,328 seafarers were subjected to attacks in the Southeast Asia region in 2014-15 and 167 were detained on board hijacked vessels in 2015 alone.⁶³ The accounts of released hostages also revealed the increasing threats

57 Letter of the International Shipping Associations (2012) (n 52).

58 Charles Marts, ‘Piracy Ransoms - Conflicting Perspectives’ (One Earth Future Foundation Working Paper, 2010) 8-13 <http://oceansbeyondpiracy.org/sites/default/files/ransom-charlie_marts.pdf> accessed 19 February 2017; Gosling and Neylon (n 48); Ioannis Chapsos, ‘UK banning paying ransoms to terrorists, pirates?’ (*Maritime Executive*, 5 December 2014) <www.maritime-executive.com/article/UK-banning-paying-ransoms-to-terrorists-pirates-2014-12-05> accessed 26 February 2017; Ince & Co, ‘Paying Ransoms – Could the US make this more difficult?’ (2011) <incelaw.com/en/documents/pdf_library/strands/shipping/article/paying-ransoms-could-the-us-make-this-more-difficult.pdf> accessed 26 February 2017.

59 See (n 15) above.

60 Galani (n 15) 71-98.

61 ICC (n 4) 10. For an analysis of the human cost of piracy see OBP ‘The State of Maritime Piracy 2015’ (6 June 2016) 13-14 <http://oceansbeyondpiracy.org/sites/default/files/State_of_Maritime_Piracy_2015.pdf> accessed 8 May 2017; OBP (2015) (n 5) 27-28; OBP (2014) (n 8) 2.

62 OBP (2016) *ibid* 30-31; OBP (2015) *ibid* 67-68; OBP (2014) *ibid* 4-5.

63 OBP (2016) *ibid* 42; OBP (2015) *ibid* 78-79.



and violence that seafarers have to deal with on a regular basis. Whether detained while pirates seek to secure a ransom or loot the cargo, seafarers are subjected to cruelties and indignities.⁶⁴ Hostages are detained in cramped and squalid conditions, suffer from malnutrition and a lack of drinkable water, do not have access to any medical support, are punched, pushed or slapped, and are often used as human shields.⁶⁵ Captain Krzysztof Kozlowski, who was taken hostage aboard the *MV Szafir* while sailing in the Gulf of Guinea, described his ordeal stating that '[the pirates] were aiming at us with machine guns. Right between the eyes. There was not any possibility to do anything. We had to adjust to them, it was the only chance to survive.'⁶⁶ The psychological impact on seafarers of hostage-taking as well as of crossing sea routes contaminated with piracy is also irreversible.⁶⁷ Almost all seafarers who transited the Western Indian Ocean Region High Risk Area (HRA),⁶⁸ were attacked by pirates and taken hostage have suffered from various forms of depression and post-trauma disorders.⁶⁹ The psychological abuses hostages undergo cause further difficulties in them reintegrating into their families and communities. Chirag Bahri, one of the hostages released from the *Marida Marguerite*, commented on the difficulties he encountered after his release:

[s]ome men return to find their marriages broken off; mothers have died or fathers have died because they couldn't take the stress. When they come back it's to a totally new life. It's totally different to the life they left behind. Often a seafarer's own behaviour has changed from spending so long with pirates. He has become more bad-tempered, more aggressive.⁷⁰

Maritime piracy for ransom poses a significant threat to seafarers. The abuses seafarers are subjected to show that pirates use them as their 'bargaining chips' and the accounts of released seafarers confirm that pirates do not hesitate to subject them to physical and/or psychological abuse if it will enable a ransom payment. The analysis of the human cost of piracy shows that hostage-taking could

64 Detention of the crew while seafarers loot the cargo and other valuables is mostly common in Southeast Asia. OBP (2016) *ibid.* See Ong (n 3) 267-98 and Robert Beckman, 'Piracy and armed robbery against ships in Southeast Asia' in Guilfoyle (n 3) 13-34.

65 UNSC 'Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia' (12 October 2015) UN Doc S/2015/776 para 8; UNODC, 'Hostage Support Programme (Project 045) (Part of the Maritime Crime Programme) - Lessons Learned After Action Review Improvement Plan' (2014) 7-8, 19. See also Galani (n 15) 76-77, and Barry Hart Dubner and Kimberly Chavers, 'The Dilemma of Piratical Ransoms: Should They be Paid or Not? On the Human Rights of Kidnapped Seamen and Their Families' (2013) 18 *Barry Law Review* 297, 309-13.

66 OBP (2016) (n 61).

67 Michael Garfinkle, Craig Katz and Janaka Saratchandra, 'The psychological impact of piracy on Seafarers' (2012) 8 <http://seamenschurch.org/sites/default/files/sci-piracy-study-report-web_1.pdf> accessed 17 February 2017; OBP (2015) (n 5) 32-33, 87-90; Conor Seyle, 'After the Release: The Long-Term Behavioural Impact of Piracy on Seafarers and Families' (2016) 16-19 <<http://oceansbeyondpiracy.org/sites/default/files/attachments/after-release-impact-seafarers.pdf>> accessed 19 February 2017.

68 According to the definition given by the IMO, the HRA 'defines itself by where pirate activity and/or attacks have taken place. See IMO, 'Piracy and Armed Robbery against ships in waters off Somalia' (MSC.1/Circ.1339) (2011) 4.

69 Garfinkle, Katz and Saratchandra (n 67) 8; OBP (2015) (n 5) 32-33, 87-90; Seyle (n 67) 16-19.

70 Ben Farmer, 'The human cost of piracy: broken victims of violence' (*The Telegraph*, 10 February 2014) <www.telegraph.co.uk/sponsored/culture/captain-phillips-film/10388296/somali-piracy-victims.html> accessed 26 February 2017.



violate the human rights of seafarers as their right to life is constantly threatened, they are detained, they are physically and psychologically abused, and they are deprived of any form of privacy.⁷¹ A possible ban on ransom payments could further aggravate the suffering of seafarers as flag states would miss the opportunity to secure the release of crew members from the hands of armed and violent pirate gangs.

3.2 Ransom payments from a victim's perspective

As explained, at least for the time being, there is no universal ban on ransom payments to pirates and the practice remains both legal and compatible with public policy in the UK. What has not been discussed is the emphasis the European Court of Human Rights (ECtHR) has placed on negotiations and concessions and the importance of ransom payments discussed in the jurisprudence of UK courts as a means of safeguarding the human rights of hostages.

The ECtHR has only examined the issue of negotiations and concessions in the context of terrorism, but the emphasis it has placed on them for the safe release of hostages echoes that of the shipping industry and UK courts in underlining the importance of ransom payments for seafarers. Regarding negotiations, states retain wide sovereign powers in the fight against terrorism and there is no uniform policy requiring states to either negotiate or not to negotiate. In the landmark case of *Finogenov and Others v Russia*, the Russian government's response to the Moscow theatre siege, namely its compliance with the right to life, was examined. The victims and their families filed a complaint against Russia with the Strasbourg Court arguing, *inter alia*, that the lack of professional negotiations with the hostage-takers constituted a breach of the right to life.⁷² However, the ECtHR deferred when asked to adjudicate on negotiation policies. The Court offered a wide margin of appreciation to states and concluded that it is:

far beyond the competence of this Court, which is not in a position to indicate to member States the best policy in dealing with a crisis of this kind: whether to negotiate with terrorists and make concessions or to remain firm and require unconditional surrender. Formulating rigid rules in this area may seriously affect the authorities' bargaining power in negotiations with terrorists.⁷³

Nevertheless, the ECtHR has repeatedly highlighted the significance of negotiations and has never fully released states from an obligation to negotiate for the sake of the hostages lives, since negotiations can be a prerequisite to human rights compliant rescue operations. In *Tagayeva v Russia*, in which the Court was asked to examine the legality of the Russian rescue operation during the Beslan school siege that claimed the lives of more than 300 people, the Court stated that 'in a situation

71 Galani (n 15) 73-77; UNGA 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson' (4 June 2012) UN Doc A/HRC/20/14, paras 11-14; UNGA 'Report of the Human Rights Council Advisory Committee - Human rights and issues related to terrorist hostage-taking' (4 July 2013) UN Doc A/HRC/24/47, paras 23-24.

72 *Finogenov and Others v Russia* (2012) para 167.

73 *ibid* para 223.



which involves a real and immediate risk to life and demands the planning of a police and rescue operation, one of the primary tasks of the competent authorities should be to set up a clear distribution of lines of responsibility and communication' amongst the responsible agencies, which are tasked with, *inter alia*, 'choosing negotiation strategies'.⁷⁴ The Court's case law on military operations and rescue missions has also established that military operations aimed at rescuing hostages must be planned with accuracy in advance so as to ensure that lethal force is only used as a last resort and only if it is strictly necessary to save innocent lives.⁷⁵ It has also stated that the primary aim of a rescue operation should be the protection of hostages from unlawful violence.⁷⁶

In light of this jurisprudence, this article concludes that a failure of authorities to negotiate before conducting a rescue mission might breach Convention rights. During the negotiation stage, authorities have the opportunity to evaluate the situation and gather invaluable information about the number of hostages and their conditions, the number of hostage-takers, their equipment, their motives and the location.⁷⁷ Authorities can also influence hostage-takers to shift their unrealistic demands into more feasible requests, such as food and water.⁷⁸ This can also tire and defeat the confidence of hostage-takers and pave the way for their surrender or a successful rescue operation.⁷⁹ Skipping this stage means that states may miss the opportunity to properly plan a rescue mission. Probing into the hostage-taking situation allows authorities to assess the volatile factors that can adversely affect the outcome of a rescue mission and ensure the protection of the lives of hostages.⁸⁰ Negotiations with pirates seem to be vital for naval forces too, as the latter often have to operate in unfriendly waters, under extremely unfavourable weather conditions and unable to deal with the unpredictable reactions of pirates.⁸¹ This shows that prior negotiations could assist them in planning and conducting a human rights compliant rescue mission for the release of seafarers.

74 *Tagayeva and Others v Russia* Apps nos 26562/07, 14755/08, 49339/08, 49380/08, 51313/08, 21294/11, and 37096/11 (ECtHR, 13 April 2017) para 570.

75 *McCann v UK* App no 18984/91 (ECtHR, 27 September 1995) paras 150, 200; *Andronicou and Constantinou v Cyprus* App no 86/1996/705/897 (ECtHR, 9 October 1997) paras 183-85, 213.

76 *Isayeva, Yusupova and Bazayeva v Russia* App nos 57947/00, 57948/00 and 57949/00 (ECtHR, 24 February 2005) para 171.

77 Guy Olivier Faure, 'Negotiating with Terrorists: A Discrete Form of Diplomacy' (2008) 3 *The Hague Journal of Diplomacy* 179, 185.

78 See Adam Dolnik and Keith Fitzgerald, 'Negotiating Hostage Crises with the New Terrorists' (2011) 34 *Studies in Conflict & Terrorism* 267, 267-68.

79 William Zartman, 'Negotiating with Terrorists' (2003) 8 *International Negotiations* 443, 447-48; Dolnik and Fitzgerald, *ibid* 274-75; Richard Hayes, Stacey Kaminski and Steven Beres, 'Negotiating the Non-Negotiable: Dealing with Absolutist Terrorists' (2003) 8 *International Negotiations* 451, 454.

80 Adam Dolnik, 'Negotiating the Impossible? The Beslan Hostage Crisis' (The Royal United States Services Institute for Defence and Security Studies Whitehall Report 2-07, 2007) 22-24.

81 For example, Somali pirates have used seafarers as human shields during rescue operations or have murdered hostages in response to rescue efforts, see UN News Centre, 'UN agency deplores pirates' use of seafarers as human shields' (19 April 2011) <www.un.org/apps/news/story.asp?NewsID=38147#.WLMNyjuLTIU> accessed 26 February 2017, and The Telegraph, 'Somali pirates sentenced to life in prison for killing four Americans' (3 August 2013) <www.telegraph.co.uk/news/worldnews/northamerica/usa/10220279/Somali-pirates-sentenced-to-life-in-prison-for-killing-four-Americans.html> accessed 26 February 2017. See also the discussion in Galani (n 15) 88-89.



The approach of the European Union Committee of the House of Lords further strengthens this point. When the Committee examined the EU's Operation Atalanta, and more specifically issues of 'hostage taking and ransoms' in the region, it concluded that:

[w]e understand that skilled ransom negotiators can help to keep risk to life and vessels, as well as ransom payments, to a minimum. Where ship owners intend to pay a ransom to recover their vessel and crew, we recommend that they use experienced and effective ransom negotiators. Where insurance policies do not already insist on experienced negotiators, they should do so.⁸²

In addition to the importance of negotiations, UK courts have also stressed the vitality of ransom payments for the protection of seafarers in the *Royal Boskalis* and *Bunga Melati Dua* cases. In *Royal Boskalis*, the issue was discussed by Lord Justice Phillips, who argued that:

[p]reservation of life cannot be equated with preservation of property. Provided that the expenses can reasonably be said to have been incurred for the preservation of the property, it does not seem to me either sound in principle or desirable that the assured should be penalised if they were sufficiently concerned for lives at risk to have been concerned to save not only their property but those lives.

Although there is not a direct reference to the human rights of seafarers, the quote suggests that seafarers do have a right to life – a right that should be protected and prioritised even over the right of shipowners to protect their property. The issue was also discussed by High Court Justice Steel in *Bunga Melati Dua*.⁸³ The judge relied on the current state of Somalia, as a failed state, and the nature of Somali piracy and found that:

[t]he absence of any national administration means that any attempt to intervene by diplomatic means is fraught with difficulty. Equally any concept of military intervention involves legal and technical difficulties, leaving aside the risk to captured crews. In short the only realistic and effective manner of obtaining the release of a vessel is the negotiation and payment of a ransom.

From a victim's perspective, the reasoning is significant as it not only highlights that ransom payments are the 'only' realistic method of protecting seafarers, but it also explicitly states that diplomatic and military interventions can be useful alternatives, albeit not the most effective ones for securing the release of hostages. On appeal, Lord Justice Rix also acknowledged that piracy threatens the liberty and lives of seafarers, further indicating that the human rights of seafarers are constantly at risk.⁸⁴ The Court relied on the aforementioned report of the European Union Committee of the House of Lords, and especially on excerpts that focus on the vitality of ransom payments for the protection of the lives of seafarers, before concluding that ransom payments are compatible with public policy.⁸⁵

82 House of Lords - European Union Committee, 'Combating Somali Piracy: the EU's Naval Operation Atalanta - 12th Report of Session 2009–10' (2010) 58.

83 *Masefield AG v Amlin Corporate Member Ltd* [2010] EWHC 280.

84 *ibid* para 71.

85 *ibid* paras 67-70.



3.3 Flag state human rights obligations and ransom payments

The ECtHR and UK courts have discussed the importance of negotiations and ransom payments respectively, while the shipping industry has insisted on the payment of ransoms for securing the release of seafarers taken hostage. However, ransom payments have not been recognised as a binding obligation imposed on flag states. It is, however, worth questioning how flag states will respond to the positive obligations they have towards those seized on board vessels flying their flags if ransom payments are banned.

The International Covenant on Civil and Political Rights (ICCPR) and European Convention on Human Rights (ECHR) have been interpreted to apply on board vessels. Article 2(1) ICCPR stipulates that '[e]ach state Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant' and therefore states have the obligation to respect and ensure the rights laid down in the Covenant to anyone under their effective control, even if not situated within the territory of the State Party.⁸⁶ In light of these obligations, it has been argued that 'for the Covenant purposes, a flag state may have obligations towards those on board a registered ship even though he or she is outside the territory of the state party because the victim is still subject to the state's jurisdiction due to being on a registered vessel.'⁸⁷ In *Bankovic*, the ECtHR addressed the application of the ECHR to vessels and the human rights obligations towards those on board vessels flying the flags of the Council of Europe member states. Despite the notoriously restrictive approach taken by the Court in *Bankovic*, it confirmed that a state has jurisdiction over a vessel flying its flag.⁸⁸ In its later jurisprudence, the Court developed the extraterritorial application of the Convention arguing that a state has jurisdiction for the purposes of Article 1 ECHR when it exercises effective spatial or personal control beyond its borders.⁸⁹ With regards to the protection of human rights at sea, the Court has found that states have to comply with their Convention obligations when their state agents intercept persons at sea.⁹⁰

86 HRC 'General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add. 13, para 10. See also HRC 'Concluding Observations: Israel' (21 August 2003) UN Doc CCPR/CO/78/ISR. The International Court of Justice (ICJ) has also concluded that the ICCPR applies to occupied territories, see *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 ICJ 136, 179; *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v Uganda)* (Judgment) 2005 ICJ 168.

87 Khaliq (n 15) 337.

88 *Banković and Others v Belgium and other 16 Contracting States* App no 52207/99 (ECtHR, 12 December 2001) paras 67, 73.

89 For the spatial control test see *Cyprus v Turkey* App no 25781/94 (ECtHR, 10 May 2001) para 78; *Al-Skeini and Others v UK* App no 55721/07 (ECtHR, 7 July 2011) para 114. For the personal control test see *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005) para 91; *Hassan v UK* App no 29750/09 (ECtHR, 16 September 2014) para 76.

90 *Medvedyev and Others v France* App no 3394/03 (ECtHR, 10 July 2008) paras 65-69; *Rigopoulos v Spain* App no 37388/97 (ECtHR, 12 January 1999); *Hirsi Jamaa and Others v Italy* App no 7765/09 (ECtHR, 23 February 2012) para 81. See also Anna Petrig, *Human Rights and Law Enforcement at Sea: Arrest, Detention and Transfer of Piracy Suspects* (Brill 2014) 139-45.



Given that flag states have jurisdiction on board vessels for the purposes of the ICCPR and the ECHR, the next question that should be addressed is the nature of the flag states' obligations. That is to say, it should be determined whether the extraterritorial obligations of flag states extend to respecting human rights on board a vessel (to refrain from breaching human rights) or to protecting human rights on board a vessel (to prevent or put an end to interferences with the enjoyment of human rights caused by third parties) or both. General Comment 31 clearly indicates that states have both negative (to respect human rights) and positive (to protect human rights) obligations when they exercise jurisdiction extraterritorially.⁹¹ Under the ECHR, states also have both negative and positive extraterritorial human rights obligations.⁹² However, there are two important qualifications that apply to positive human rights obligations. The first is that states do not have to secure the whole range of rights protected under the Convention, but the protection they offer depends on the jurisdiction states exercise extraterritorially. As the ECtHR put it, 'the Convention rights can be tailored and divided.'⁹³ The other qualification is that states are expected to prevent or put an end to interferences with human rights by third parties only when they 'know or ought to have known' that individuals are at risk.⁹⁴

So how can these human rights obligations be translated in the context of piracy? It is now widely accepted that seafarers transiting the HRA are at risk.⁹⁵ It has therefore been argued that flag states might be in breach of their human rights obligations if they fail to take appropriate preventive measures against the seizure of the vessel and crew or fail to put an end to hostage-taking of seafarers.⁹⁶ While flag states are not expected to protect the full spectrum of human rights on board vessels, they still have to prevent or put an end to breaches of the right to life and freedom from torture, in addition to conducting independent and effective investigations into breaches of these rights.⁹⁷ If a blanket ban on ransom payments is introduced, it is hard to see how flag states will be able to comply with their positive human rights obligations towards seafarers. As discussed above, diplomatic means or rescue missions can be used, but ransom payments remain the only effective tool flag states have to secure the release of seafarers taken hostage.

91 HRC 'General Comment No. 31' (n 86) para 10.

92 *A and Others v UK* App no 3455/05 (ECtHR, 19 February 2009) para 22; *Z and Others v UK* App no 29392/95 (ECtHR, 10 May 2001) paras 73-74. See also Alastair Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004).

93 *Al-Skeini* (2011) para 137.

94 *Osman v UK* EHRR 1998-VIII (ECtHR, 28 October 1998) para 115; *Opuz v Turkey* App no 33401/02 (ECtHR, 9 June 2009) para 148; *A and Others v UK* (2009) para 22; *Z and Others v UK* (2001) paras 73-74; *E and Others v UK* App no 33218/96 (ECtHR, 26 November 2002) para 22.

95 Evans and Galani (n 15) 356; Galani (n 15) 81-82.

96 Stefano Piedimonte Bodini, 'Fighting Maritime Piracy under the European Convention on Human Rights' (2011) EJIL 829, 839; Efthymios Papastavridis, 'European Convention on Human Rights and the Law of the Sea: The Strasbourg Court in Unchartered Waters?' in Malgosia Fitzmaurice and Panos Merkouris (eds), *The Interpretation and Application of the ECHR – Legal and Practical Implications* (Martinus Nijhoff Publishers 2013) 129-30; Tom Obokata, 'Maritime piracy as a violation of human rights: a way forward for its effective prevention and suppression?' (2013) 17 *The International Journal of Human Rights* 18, 27.

97 *Jaloud v Netherlands* App no 47708/08 (ECtHR, 20 November 2014) paras 154, 183-228.



Flag states bound by the ECHR bear another human rights obligation relevant to piracy: not to expose individuals to ill-treatment or other human rights violations, even if such treatment is imposed by non-state actors.⁹⁸ A ban on ransom payments could lead to two different, but both unwanted, outcomes. First, states would not be able to continue sending their vessels to seas contaminated by piracy, as it would expose individuals to risk without being able to offer them any adequate safeguards if they are taken hostage. Second, seafarers could also refuse to transit areas affected by piracy, as they would know that shipowners and states will be barred from securing their release through a ransom payment. Such a restriction would cause unprecedented financial damage to the shipping industry, as the bulk of world trade is carried by sea through straits and seas prone to pirate attacks.⁹⁹ Seafarers sent to transit areas affected by piracy and taken hostage might be destined to perish, as the most effective method of release - ransom payments - would be banned.

It cannot be said that extending the human rights obligations of states on ships flying their flag is uncontroversial. To begin, the operation and manning of vessels by private ship companies suggests that flag states do not have effective control over what occurs on board a vessel.¹⁰⁰ It is also hard to argue that the drafters of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) had human rights obligations in mind when they agreed that vessels are subjected to the exclusive jurisdiction of their flag state on the high seas (Article 92) and the latter has to effectively exercise this jurisdiction (Article 94) by ensuring respect for international rules and standards.¹⁰¹ However, piracy has been an illuminative example of the challenges that human rights face in the 21st century and it is therefore imperative that human rights be protected in the maritime domain. There is an emerging consensus that the UNCLOS is a living instrument and should be interpreted to address human rights challenges at sea.¹⁰² At the same time, it has been argued that the ICCPR and the ECHR should not be interpreted in a legal vacuum.¹⁰³ In light of these developments, combined with the increasing threats faced by seafarers, this article submits that an absolute ban on piracy ransom payments cannot be reconciled with the human rights obligations of flag states towards seafarers seized on board vessels flying their flags, and flag states should carefully consider the welfare of seafarers in the fight against piracy.

98 *Soering v UK* App no 14038/88 (ECtHR, 7 July 1989) para 91; *Chahal v UK* App no 22414/93 (ECtHR, 15 November 1996) para 80, *Saadi v Italy* App no 37201/06 (ECtHR, 28 February 2008) para 138. On this analogy, see also Galani (n 15) 81-82.

99 More than 90% of the world's trade is transported by sea, and more specifically through the Gulf of Aden, Malacca Straits, Singapore Straits and South China Sea that remain the most dangerous waters around the globe, see the ICC figures <<https://icc-ccs.org/piracy-reporting-centre/prone-areas-and-warnings>> accessed 27 February 2017.

100 Khaliq (n 15) 339-43.

101 For the duties of flag states see Richard Barnes, 'Flag States' in Donald Rothwell and others (eds), *The Oxford Handbook of the Law of the Sea* (OUP 2015) 304-24.

102 Khaliq (n 15) 339-40. See also Tulio Treves, 'Human Rights and the Law of the Sea' (2010) 28 *Berkeley Journal of International Law* 1, and Irini Papanicolopulu, 'The Law of the Sea Convention: No Place for Persons?' (2012) 27 *The International Journal of Marine and Coastal Law* 867.

103 *Judge v Canada*, Communication No. 829/1998, UN Doc CCPR/C/78/D829/1998 (2003) para 10.3; *Assanidze v Georgia* App no 71503/01 (ECtHR, 8 April 2004) para 137; see also George Letsas, 'The Truth in Autonomous Concepts: How to Interpret the ECHR' (2004) 15 *EJIL* 279. See also the developing approaches of the HRC in relation to death row and extradition in Amrita Mukhrejee, 'The ICCPR as a 'Living Instrument': The Death Penalty as Cruel, Inhuman and Degrading Treatment' (2004) 68 *The Journal of Criminal Law* 507.



4. Ransom ban: ending piracy or shipping interests?

A ban on ransom payments to pirates would not only affect the protection of seafarers, but also the financial interests of shipowners and the international shipping industry as a whole. Shipowners and insurers will not be allowed to pay ransoms to secure the release of vessels, cargos or crews. It is doubtful whether the UK could justify such a move on either financial or legal grounds. As will be explained, if a ban on ransoms is implemented, the economic cost of piracy could be much higher than it is now. It is also questioned how such a ban will comply with the MIA 1906 - as it currently stands and is being interpreted by UK courts - meaning that the UK might have to reform its statutory provisions if a ban is implemented.

4.1 The economic cost of piracy before and after a ban on ransoms

Admittedly, the economic cost of piracy has increased over the last decade and has adversely affected international shipping interests. A decade ago, when pirate attacks began increasing, the shipping industry faced reproach for failing to effectively respond to piracy.¹⁰⁴ However, over the years these allegations proved to be untrue by the costly counter-piracy measures implemented by the shipping industry and its intense efforts to protect their vessels and crews against piracy. For example, the economic cost of African piracy between 2010 and 2015 was estimated to be about \$21.1 billion, of which almost \$15.5 million was covered by the shipping industry itself.¹⁰⁵ These costs included marine insurance, labour expenses, security equipment, guards and increased speed costs.¹⁰⁶ The addition of ransom payments further demonstrate the astronomical expenses that the shipping industry has assumed to protect its interests against piracy. It is estimated that between \$340 million and \$435 million was paid in the form of ransoms for ships and/or seafarers kidnapped by Somali pirates between 2005 and 2015.¹⁰⁷ Oceans Beyond Piracy (OBP) also estimated that \$1.6 million was paid in ransoms to recover hostages abducted by pirates in West Africa in 2015.¹⁰⁸ An estimated total of \$8.5 million is the reported loss the shipping industry sustained in stolen goods and cargo by pirates in the West Africa and Southeast Asia regions in 2016.¹⁰⁹

The reported costs of maritime piracy make it undeniable that piracy, and especially the criminal business of hostage-taking, has yielded huge profits for pirate gangs and caused significant financial damages to the shipping industry. It is these costs, and especially the ransom payments, that have compelled the US and UK to advocate in favour of an absolute ban on ransom payments.¹¹⁰ Howev-

104 House of Commons - Foreign Affairs Committee (n 40) at 111.

105 OBP (2016) (n 61) 15-22, 31-37; OBP (2014) (n 8) 7-37, 54-64; OBP, *The Economic Cost of Somali Piracy 2012* (2013) 1-72; OBP, *The Economic Cost of Somali Piracy 2011* (2012) 1-61.

106 *ibid.*

107 See (n 8).

108 OBP (2016) (n 61) 32.

109 *ibid.* 36, 49.

110 See Section 2.3 above.



er, what has not been reported is an estimate of the cost of piracy had the ransom ban been in place. For example, the value of the *Bunga Melati Dua* and her cargo was \$80 million, but the vessel was released in exchange for a \$2 million ransom, which is only a small fraction of the actual value of the vessel.¹¹¹ The last commercial vessel, *MT Smyrni*, seized by Somalis was released in 2013 for a ransom that reportedly totalled \$13 million.¹¹² While the exorbitant ransom was extensively reported, what failed to receive equal attention was the fact that the vessel was carrying 135,000 metric tonnes of Azerbaijan crude oil with a market value of approximately \$130 million.¹¹³ Unfortunately, there does not appear to be any collected information on the actual value of the seized vessels and the market value of cargos. Although it can still be argued that, had a ban been in place, the financial damage caused by the seizures of the *Bunga Melati Dua* and the *MT Smyrni* alone would have amounted to \$210 million, without calculating the actual value of the *MT Smyrni*. This amount equals over half of the total sum paid to Somali pirates for the release of 152 vessels hijacked between 2005 and 2012.¹¹⁴ This suggests that while the ransoms demanded by pirates seem extortionate, they remain a manageable cost for the shipping industry.

In addition, the claim of those who advocate for a ransom ban that the economic cost of piracy will decrease when ransom payments end is speculative at best. There is no guarantee that pirates who currently employ the 'kidnap for ransom' model will not turn to other models of piracy, such as those in West Africa, where pirates seize oil tankers for their cargo,¹¹⁵ or in Southeast Asia, where the crews are murdered and vessels are being renamed, registered as new and sold.¹¹⁶ This means that pirates will carry on making profits from seizing vessels, while shipowners will be unable to secure the release of their crews and vessels. Whereas shipowners could save the costs of ransom payments, they would sustain greater costs by the loss of their vessels and cargos. At the same time, the costs of counter-piracy measures would likely remain high or could increase even further, as the shipping industry would have to take all possible precautions to protect their vessels knowing that hijacked vessels will be irretrievably lost following a ban on ransoms.

Given the financial crisis that hit the maritime sector at the beginning of 2016, a discussion of the financial implications of a ransom ban for the shipping industry is highly topical.¹¹⁷ The Baltic Dry Index, which measures the cost of shipping raw materials such as iron ore, coal and grains, plummeted to all-time lows during the first two months of 2016.¹¹⁸ The shipping crisis coincided with the economic slowdown in China, the world's largest consumer of commodities, which is therefore con-

111 *Masefield AG* (2011) para 11.

112 UNSC 'Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia' (21 October 2013) UN Doc S/2013/623, para 6.

113 OceanusLive.org, 'Tankers Royal Grace and Smyrni Released by Somali Pirates' (9 March 2013) <www.oceanuslive.org/main/viewnews.aspx?uid=00000660> accessed 26 February 2017. For more case studies, see the FAFT Report (n 7) 11-12, 14-16.

114 World Bank (n 8) 41.

115 For piracy in the coasts of West Africa see Marts (n 58) 9-11, Murphy (n 3) 61-90.

116 Ong (n 3) 270-75; Beckman (n 64) 14-16.

117 Palmer (n 3) 210-21.

118 DryShips Inc. <www.dryships.com/pages/report.php> accessed 26 February 2017.



sidered to be the main cause of the crisis.¹¹⁹ The rapid expansion of more efficient and energy-saving fleets that followed the increase in oil prices resulted in a number of vessels failing to make any profits and struggling to repay interest on their debts.¹²⁰ This has put banks' lending portfolios under huge pressure without excluding the possibility of distressed sales or seizure of vessels, as happened with Hanjin Shipping's bankruptcy.¹²¹ Maritime analysts have not linked the 2016 shipping crisis with counter-piracy related costs or the premiums that shipowners have been paying to insure the vessels and crews against pirate attacks. However, it is difficult to ignore that the shipping industry was already under huge financial pressure due to piracy just before the crisis hit. In 2015 alone, the economic cost of African piracy was almost \$1.7 billion of which \$1.2 billion was industry, labour and insurance costs.¹²² It is therefore argued that an absolute ban on ransom payments could cause further needless financial uncertainty and turmoil to the maritime sector by, *inter alia*, increasing the likelihood that brand new vessels will be irretrievably lost - despite not having turned a profit due to the remaining interest or capital debts.

It is also hard to see how the UK government would justify such a ban and the resulting consequential losses to the UK marine insurance industry. While the UK might no longer be one of the big international fleet owners, UK banks remain huge players in shipping finance. For example, in 2015, the Royal Bank of Scotland had total loan exposures of £8.3 billion (GBP) and Lloyd's gross written premium for marine liability was £2.2 million.¹²³ An absolute ban would restrict Kidnap & Ransom (K&R) policies or other policies that cover ransom payments either in the UK or abroad, which would make it extremely difficult for lenders to be repaid for hijacked vessels that cannot be retrieved.¹²⁴ This is not to say that foreign marine insurance businesses would face the same problems, as it is unclear how, if at all, an international ransom ban would be enforced.¹²⁵ Thus, while the financial interests of the UK shipping industry would steadily decline, other states that have proven themselves to be more flexible in maritime business and where open registries and flag of conveniences operate - such as Liberia and Panama - could transform into marine insurance hubs.

119 Berenberg Aspekte, 'Causes of the Shipping Crisis' (2016) <www.berenberg.de/fileadmin/user_upload/berenberg2013/01_Private_Banking/Kompetenzzentren/20160321_aspekte_Maritime_2_Shipping_Crisis.pdf> accessed 19 February 2017.

120 John Ficenc, 'Zombie ships send maritime freight into worst crisis in living memory' (*The Telegraph*, 22 January 2016) <www.telegraph.co.uk/finance/12108453/Zombie-ships-send-maritime-freight-into-worst-crisis-in-living-memory.html> accessed 19 February 2017.

121 The Guardian, 'Hanjin Shipping bankruptcy causes turmoil in global sea freight' (2 September 2016) <www.theguardian.com/business/2016/sep/02/hanjin-shipping-bankruptcy-causes-turmoil-in-global-sea-freight> accessed 19 February 2017.

122 OBP (2016) (n 61) 21-2, 36-37.

123 Ficenc (n 120); Lloyd's 'Aggregate Accounts 2015' 16. <www.lloyds.com/~media/files/lloyds/investor%20relations/2015/annual%20results/lloyds_aggregate_accounts_2015.pdf> accessed 19 February 2017.

124 Christopher Douse, 'Combating Risk on the High Sea: An Analysis of the Effects of Modern Piratical Acts on the Marine Insurance Industry' (2010) 35 *Tulane Maritime Law Journal* 276, 276-77.

125 For the challenges of implementing an absolute ban on ransom payments, see Dutton and Bellish (n 12) 324-25.



In light of these considerations, the argument that a ban on ransom payments could minimise the profits of piracy, yet increase the financial benefits of the shipping industry, are ill-founded. The nature of modern piracy is continuously evolving and highly adaptive, which means that pirates will remain a threat to maritime commerce even after an absolute ban is agreed. At the same time, the ban could have severe financial implications for an already financially unstable maritime industry, which have received no consideration by the advocates of a ransom ban.

4.2 The MIA 1906 and a ban on ransom payments

In addition to the weak arguments that a ban on ransom payments could reduce the costs of piracy for international shipping and eliminate piracy, further legal questions arise as to how the ban would fit within the current interpretation of the MIA 1906.¹²⁶ In the *Bunga Melati Dua* case, legal issues arising from the capture of a vessel by pirates were examined. The UK court interpreted the policies under the MIA 1906 and concluded that the seizure of a vessel by pirates is not an actual total loss, as the insured vessel is not destroyed nor so damaged as to cease to be a thing of the kind insured, or an asset irretrievably lost.¹²⁷ The seizure was neither a constructive total loss, which happens only in cases in which 'the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred'.¹²⁸ Both conclusions were justified on the basis that pirates seize vessels with the intention of extracting a ransom and, once the ransom is paid, the vessel, cargo and crew return to the shipowners.¹²⁹ At the same time, it has been concluded that when a sue and labour clause exists in a policy, 'it is the duty of the assured and his agents, in all cases, to take such measures as may be reasonable for the purpose of averting or minimising a loss'.¹³⁰ In the context of piracy, the term 'reasonable' has been interpreted to include the payment of a ransom with due regard to the value of the vessel and cargo.¹³¹

In light of the proposed ban, it remains questionable how the MIA 1906 will be implemented and interpreted if the ban is realised. Would the seizure of the vessel be treated as an actual total loss? Such an interpretation would cause premiums to increase sharply resulting in even higher costs for ship and cargo owners. Additionally, how would the term 'reasonable' be defined? If ransoms are forbidden, would the shipowners be expected to take alternative forms of *reasonable* actions to mitigate losses? And what would these actions be: negotiations, rescue missions, or compromises other

126 For the development of piracy as a peril insured under the MIA 1906 see Gotthard Gauci, 'Piracy and its Legal Problems: With Specific Reference to the English Law of Marine Insurance' (2010) 41 *Journal of Maritime Law and Commerce* 541, 544-52; Douse (n 124) 278-86; Soady (n 16) 1-4.

127 Section 57(1) MIA 1906; *Masefield AG* (2011) para 56.

128 Section 60(1) MIA 1906; *Masefield AG* (2010) para 66.

129 See also the relevant commentary in Gauci (n 126) 552-58; Kate Lewins and Robert Merkin, '*Masefield AG v Amlin Corporate Member Ltd; The Bunga Melati Dua - Piracy, Ransom and Marine Insurance*' (2011) 35 *Melbourne University Law Review* 717, 726-33; Paul Todd, 'Maritime Fraud and Piracy' (London, *Lloyd's List*, 2010) 22-24; Soady (n 16) 16-25.

130 Section 78(4) MIA 1906.

131 See Section 2.3 above.



than monetary concessions? Despite the criticism that the MIA 1906 might not be consistent with modern commercial law practices, it remains one of the most influential pieces of marine insurance law worldwide as it has been in force for more than a century and has had all its provisions judicially tested.¹³² It is therefore difficult to see how a ban on ransom payments could fit within the provisions of the MIA 1906 and the judicial interpretation of these provisions by the UK courts without affecting commercial certainty.¹³³

It has also been established that the crew cannot be insured under a hull or cargo policy, and while a ransom paid for the crew might be recovered, the best way for a shipowner to secure their release without sustaining financial damage is through K&R policies.¹³⁴ Nevertheless, if the UK were to implement a ban similar to that imposed on terrorists, K&R policies would be criminalised. As a result, shipowners will not be able to rescue their crews nor could they recover losses sustained by having to compensate the victims.¹³⁵ The adverse impact of the lack of a K&R policy on seafarers taken hostage has been confirmed in the grimmest of ways as the hostages who have spent the longest time in captivity were those on whom there was no K&R policy and the shipowners refused to assume the financial burden of paying a ransom for their release.¹³⁶ On top of all this, the severe human rights violations, discussed above, that seafarers would suffer cannot be overlooked as a ransom ban would lessen the likelihood of securing the release of those taken hostage.

5. Conclusion

In an era when terrorist hostage-taking poses a significant threat to innocent victims and generates a considerable profit for terrorist groups, a ban on ransom payments to terrorists is an expected reaction. This is not to say that the same approach should be applied to the seizure of vessels and crew members by pirates. Maritime piracy operates in a commercial environment and a ban on ransom payments would likely have an adverse impact on international shipping. This article examined the existing international and national policies on ransom payments and clarified that, for the time being, there has been no universal ban on ransom payments to pirates and such payments remain legal and compatible with public policy in the UK. It was also explained that ransom payments are vital for the protection of seafarers, who have become targets of modern piracy.

132 Howard Bennett, 'The Marine Insurance Act: Reflections on a Centenary' (2006) 18 *Singapore Academy of Law Journal* 669, 691.

133 *ibid* 673-77.

134 *Royal Boskalis Westminster N.V.* (1999) 739. See also the discussion in Douse (n 124) 286-87 and Todd (n 129) 24-25, 29-30.

135 For example, the Filipino Government requires all maritime employers to compensate Filipino seafarers, who are estimated to be up to 670,000 of the world's 1.37 million seafarers, by entitling them to 200% of wages and benefits while transiting the HRA. The entry into force of the International Labour Organisation's (ILO) 2006 Maritime Labour Convention (MLC) in 2013 also ensures that all seafarers who are eligible for hazard pay receive the extra compensation for transiting the HRA. See OBP (2014) (n 8) 22.

136 UNODC, 'Maritime Crime Programme' (March 2014) 1 <www.unodc.org/documents/easternafrika/UNODC_MCP_Brochure_March_2014.pdf> accessed 26 February 2017.



An examination of the evolving human rights framework, and more specifically the positive human rights obligations of flag states, demonstrated that it will be challenging for flag states to comply with their human rights obligations if a ransom ban is implemented. In addition to the human rights implications for the protection of seafarers, the discussion on the adverse commercial impact of a ransom ban on the international shipping industry concluded that a ban could increase costs for the shipping industry, as vessels and crews would be irretrievably lost. The issue would become even more complicated in the UK, given that the current interpretation of the MIA 1906 not only permits ransom payments, but it also requires the shipowner to negotiate the release of the vessel and crew by agreeing to a ransom before relying on insurance. A universal ban on ransom payments seems utopian, and the UK plan to restrict ransom payments to pirates, similar to the restrictions imposed in the context of terrorism, would only give rise to more inconsistencies and put the interests of the UK marine industry at risk. It is therefore concluded that the arguments that an absolute ban on ransom payments to pirates could eliminate piracy and protect the interests of the international shipping industry are ill-founded and this policy is not fit for purpose.