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Notes & Comments

Suing Organized Piracy:

An Application of Maritime Torts to Pirate Attacks, and Subsequent Civil Actions Against the Supporters of Organized Piracy

Alistair Deans

BACKGROUND

In April of 2009, the United States held its breath as newly inaugurated President Barack Obama faced what might arguably have been his first midnight phone call. Pirates had attacked the *Maersk Alabama*, a container ship carrying food to Kenya for the World Food Program.¹ Behind the scenes, the crew locked themselves in the engine room where they cut the power and barricaded the hatch.² Unfortunately, the pirates caught Captain Richard Phillips and three others outside the engine room.³ After

1. Alan Cowell, *Pirates Attack Maersk Alabama Again*, N.Y. TIMES, Nov. 19, 2009, at A12; see also *Pirates Constant Menace to Food Lifeline*, WORLD FOOD PROGRAMME (Apr. 14, 2009), <http://www.wfp.org/stories/pirates-constant-menace-food-lifeline>.

2. Mitra Malek, *Pirated Ship's Steward 'Still Shaken Up'*, PALM BEACH POST, May 1, 2009, at A1.

3. *Id.*

some of the crewmen in the now 125 degree compartment wounded a pirate during a scuffle, the other pirates fled with Captain Phillips as warships closed on the drifting freighter.⁴ For days, the pirates were trapped in the ship's lifeboat with their sole hostage as the United States Navy followed closely behind.⁵ Media coverage was virtually around the clock as everyone waited to see how the drama would unfold. Then, with no warning to the watching world, Navy SEALs shot and killed all but one of the pirates, rescuing Captain Phillips and ending the standoff.⁶ President Obama had long since given the Navy a green light to use appropriate force or kill the pirates in an emergency, earning the Commander in Chief the respect of the armed forces and getting the captain safely home.⁷

Though no longer the romantic novel fodder it once was, piracy persists throughout the world. Typical incidents are rather mundane reporting for modern media, and range from high-speed boats coming alongside large cargo ships at night, taking what they can without being noticed and then leaving before sunrise, to what may be loosely described as armed robbery at sea.⁸ These attacks occur across the globe, but appear to be centralized in a few key locations, such as the south East Asian Sea, both the east and west coasts of Africa, and the Caribbean Sea.⁹ The last few years however, have seen a developing system of organized piracy off Somalia's coast, which has proven to be a game changer in terms of scope and tactics.

Following the rescue of the crew, Richard Hicks, an able-bodied seaman aboard the *Maersk Alabama* sued Maersk Line, Limited and Waterman Steamship Corporation in Texas state court under the Jones Act, claiming damages in excess of

4. *Id.*

5. Transcript of LOU DOBBS TONIGHT, CNN, (Apr. 13, 2009 7:00), available at <http://transcripts.cnn.com/TRANSCRIPTS/0904/13/ldt.01.html>.

6. *Id.*

7. *Id.*

8. Int'l Chamber of Commerce Int'l Mar. Bureau [IMB], *Piracy and Armed Robbery Against Ships: Annual Report 1 January-31 December 2008*, Jan. 2009 at 43-70. The report plots every successful and unsuccessful attempt at piracy in the world, with hot spots easily distinguishable. *Id.* at 88-92. Throughout all areas of the world other than Somalia and the Gulf of Aden, pirate attacks are almost always either a version of silent or armed robbery at sea. *Id.* at 43-70.

9. *See id.*

\$75,000.¹⁰ While this may seem litigious, especially since no such litigation has ever been brought before, general maritime law (“GML”) and some particular maritime statutes, including the Jones Act, allow for exactly this sort of action.¹¹

This Comment proposes that litigation based on pirate attacks should be encouraged because a fundamental goal of tort law is the encouragement of better preventative measures in the future by holding accountable those who are best able to take those measures. This Comment will examine a strategy for not only compensating victims of piracy via maritime litigation, but also for employing the litigation as a weapon against the institution of organized piracy. Part I will explain how Somali pirates are unique among modern pirates. Part II will analyze the utility of the Jones Act in making pirate victims whole. Part III will explore some possibilities for a contribution action by Jones Act defendants against supporters of piracy to bleed away their funding and spending, using suits against terrorist organizations for guidance.

This Comment will conclude with an explanation of how, if used as an economic weapon against the allies of organized piracy, American jurisprudence might work in conjunction with politicians at home and abroad as well as the international militaries in a three pronged attack to effect the necessary infrastructure change on the ground in Somalia to end its pirate problem. While this Comment will focus on Somalia, it is important to remember that several areas of the world either have piracy or suffer similar states of lawlessness. Though it may seem cheap and easy for parties to simply pay the ransoms for now, Somali piracy as an institution must be stamped out quickly lest

10. Complaint at 1,3,4, *Hicks v. Waterman S.S. Corp.*, No. 2009-26129 (Dist. Ct. of Harris Cnty., Tex. Apr. 27, 2009). Richard Hicks reserved the right to amend his complaint for further damages and specifically requested a jury trial. *Id.* at 8.

11. *Hicks v. Waterman* was removed to the Southern District of Texas in May of 2009 on the somewhat confused argument that the Maritime Transportation Security Act of 2002 preempts the Jones Act, which it does not. The case was then remanded to the District Court of Harris County, Texas, in September of 2009, and was voluntarily dismissed without prejudice by Mr. Hicks in December of 2009. Court documents are listed under Case No. 200926129 at <http://www.hcdistrictclerk.com/eDocs/Public/Search.aspx>.

foreign organizations spring up in its image.

I. ORGANIZED PIRACY

In order to turn a Jones Act litigation into something more than a relief mechanism for pirate victims, we must first understand the causes and system of organized piracy. While a Brandeis-like examination of every conceivable fact or rumor is beyond the scope of this Comment, Part I will lay some groundwork for understanding what is happening and how we might prevent it in the future.

A. The Causes

Following a brief respite in late 2006, the world saw a dramatic increase in pirate activity off the coast of Somalia, a growth to which the *Maersk Alabama* eventually fell victim.¹² The rise of piracy off Somalia is explained rather easily. Following the disintegration of Siad Barre's central authority around 1990, Somalia degenerated into a state of clan warfare, with neighboring countries faring little better.¹³ With the exception of brief control in 2006 by the Union of Islamic Courts, Somalia has experienced a complete lack of central government for nearly twenty years.¹⁴

The Ethiopian backed Transitional Federal Government ousted the Union of Islamic Courts in late 2006, causing a surge in chaos and violence as an Islamic insurgency flared in Mogadishu, killing tens of thousands and leaving a million homeless.¹⁵ Even though the African Union sent troops to restore order, militias, including the allegedly al-Qaeda linked al Shabaab, began targeting peacekeepers, leaving only portions of Mogadishu under some form of governmental control by mid-2009.¹⁶ In the midst of

12. Thean Potgieter, *The lack of maritime security in the Horn of Africa region: scope and effect*, 31 STRATEGIC REV. S. AFR., May 1, 2009 at 4, available at 2009 WLNR 19153858. Piracy in Somalia began growing in the late 1990s as the government situation in Somalia deteriorated. *Id.* at 2, 4. Piracy rates dropped in 2006 following the seizure of Mogadishu by the Union of Islamic Courts ("UIC"), only to re-emerge strong after Somali and Ethiopian troops ousted the UIC. *Id.* at 4.

13. *Id.* at 2.

14. *Id.* at 2-3.

15. *Id.* at 2.

16. Potgieter, *supra* note 12, at 2.

this civil war, the northern region of Somaliland claimed independence, and the central eastern region of Puntland increasingly began asserting autonomy. Neither is recognized as a state, but Mogadishu does not have enough authority to control them.¹⁷ To break the situation down succinctly, since the militia commander Muhammed Farah 'Aideed' took Mogadishu in 1990, Somalia has been a land of chaos, banditry, mass starvation, and civil violence perpetuated by warlords.¹⁸ Coastal policing has utterly disappeared.

One of the chief coastal resources for Somalis is tuna,¹⁹ which provided hope to local sailors and former militiamen that they might scratch a living from an otherwise devastated land without serving a warlord. With the utter collapse of any significant source of local leadership, coastal rights for Somalis came under attack by foreign fishing fleets using destructive fishing practices.²⁰ Likewise, nearby countries considered the lawless Somali coast an ideal place to dump toxic waste.²¹ As a result, a desperate but well-armed citizenry took the law into their own hands and began boarding the offending foreign ships to demand tolls for trespassing into Somali waters, and in some cases simply to bully the foreign sailors into leaving.²²

17. *Id.*

18. *Id.*

19. Musse Gabobe Hassan & Mahamud Hassan Tako, *Illegal Fishing and Dumping Hazardous Wastes Threaten the Development of Somali Fisheries and the Marine Environment* (September 7-9, 1999), <http://www.mballi.info/doc236.htm>. The report lists 17 other fish that make up Somali catches, as well as 2 shellfish. *Id.* See also CIA, *THE WORLD FACTBOOK*, 2009, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html#Econ> (last visited Mar. 11, 2011) (noting that fish are a principal export of Somalia, and that "[i]n the absence of a formal banking sector, money transfer/remittance services have sprouted throughout the country, handling up to \$1.6 billion in remittances annually.").

20. Hassan & Tako, *supra* note 19.

21. *Id.*

22. Somali citizens assert that illegal fishing is main cause of the piracy in Somalia. Robyn Hunter, *Somali Pirates Living the High Life*, BBC NEWS, Oct. 28, 2008, available at <http://news.bbc.co.uk/1/hi/africa/7650415.stm> (comment by Abdulkadil Mohamed, resident of Garowe). See also In *Crisis-Ridden Somalia, Enjoying the 'Piracy Bubble'*, THE SOMALILAND TIMES, Oct. 14, 2008, available at <http://www.somalilandtimes.net/sl/2008/352/27.shtml> (interview with pirate commander Abdi Garad who asserts that they are defending their waters against toxic dumping and plundering of resources; pirate Jama Ahmed adds that they are merely taxing offenders as

These humble beginnings of this arguably necessary vigilantism on the high seas quickly evolved into a sophisticated business. Somalia's ever-present warlords and military trained citizenry easily organized themselves into what some locals call a coast guard,²³ some call the Somali Marines,²⁴ but most recognize as modern pirates. Today's piracy is not a free-for-all of high seas renegades, but instead an organized and sophisticated system of criminal activity.²⁵ Section B reveals some details of this organization, which show that a telling difference between Somalia's organized piracy and that of the rest of the world is the tactics employed. While most of the rest of the world's pirate incidents could be classified as silent or armed robbery, all but two of the attacks off Somalia and the Gulf of Aden are some form of hijacking and ransom.²⁶ This dramatic shift from modern pirate tactics correlates to and probably spawned increased pirate aggressiveness off the remainder of Africa's coast in the last two

the government would do if it could). An analysis of worldwide pirate attacks in 2008 shows that attacks on fishing vessels account for a much higher percentage of total attacks off Somalia than anywhere else, making pirate victims off Somalia three times as likely to be fishermen as they would be anywhere else on earth. IMB, *supra* note 8, at 43-87. This statistic is either the result of Somali pirates specifically targeting fishing boats, or the result of a higher percentage of fishing boats in the Somali area, an area known as a heavy commercial lane. Interestingly all fishing vessels attacked off Somali were not Somali, while all fishing vessels attacked in the rest of the world were local to the regions in which they were attacked. *Id.* The details of the pirate attacks can be found in the International Maritime Bureau's 2008 report on worldwide piracy. *Id.*

23. Hunter, *supra* note 22. Resident Abdulkadil Mohamed asserts that the pirates there call themselves "coastguards" rather than pirates. *Id.*

24. Mohammed Adow, *The pirate kings of Puntland*, ALJAZEERA (June 16, 2009, 7:17) <http://english.aljazeera.net/news/africa/2009/06/2009614125245860630.html> (interviewing Said Elmi Mohamud, a resident of Eyl).

25. See *Pirates turn hi-tech: Interpol reveals organised crime link to Somalia*, HERALD SUN (Melbourne), Oct. 15, 2009. Jean-Michel Louboutin, executive director of police services at Interpol, calls Somali piracy organized crime controlled by syndicates. *Id.*

26. IMB, *supra* note 8, at 43-70. For the purpose of analyzing the style of attacks only the attacks listed by IMB as successful were used, as those that were unsuccessful leave one to guess at what the pirates' intentions may have been. One incident in the Gulf of Aden would be better classified as armed robbery; another incident in the Gulf of Aden would be better classified as a repulsed attack and probably should have been in the unsuccessful list. *Id.* at 56-62, 75-85. Of all the forty-four attacks in the Gulf of Aden thirty-nine appear to have been linked to Somalia, and the remaining five are of unknown origin. *Id.* at 56-62.

years.²⁷

B. The Business

In Somalia, piracy is proving to be one of the few profitable industries. The town of Eyl is one of the main pirate strong points due to its location²⁸ and has become a boomtown where pirates are buying Mercedes-Benzes and are building fancy houses.²⁹ It usually takes three or four pirate attacks to capture a single ship for ransom, and each attack's preparation costs a little over \$30,000.³⁰ Pirates obtain this money via ransoms as well as from financiers (including local and foreign businessmen, wealthy expatriates, and Islamic militant group al-Shabaab) who receive up to 50% of the ransom.³¹ The pirates do not skirt about the seas haphazardly, but instead target specific ships long before they have arrived in the area.³² To do this, they use a combination of internet searches and information provided by their overseas contacts.³³ Despite the staggering increase in successful attacks, the risk to individual vessels remains low thanks to the heavy volume of commercial traffic in the area, a factor that favors the pirates because they can continue attacking ships without provoking a determined response from the shipping industry.³⁴

At least two legitimate organizations are profiting from organized piracy off Somalia. Maritime insurance and security contractors have each realized profits from contributing to resolution of pirate attacks. With demand in Iraq decreasing,

27. *Id.* at 55-62. For the rest of Africa excluding Somali, the year began with regular attacks of armed or silent robbery, but towards the end of the year pirates were becoming more violent and almost all of their attacks are better classified as armed robbery. *Id.* at 62-70.

28. See Scott Carney, *Cutthroat Capitalism*, WIRED, July 2009, at 110. North of Eyl is the Horn of Africa and the Gulf of Aden where the majority of attacks occur. All ships coming through the Suez Canal, which connects the Mediterranean Sea to the Indian Ocean, must pass through the Gulf of Aden. This commerce route sees 7.5% of annual sea trade. *Id.*

29. William Reed, *The Business of Piracy*, BIRMINGHAM TIMES, Apr. 16, 2009, at A4.

30. Carney, *supra* note 28. This figure is based on a twelve-man pirate crew, some attacks involve crews of up to one hundred men. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (interview of unnamed pirate from Eyl).

34. *Id.*

security contractor companies now act as negotiators between ship owners and pirates when a ransom is demanded.³⁵ Not only do they make calls back and forth over the course of repeated attacks, thus establishing trust with the pirates for future negotiations, they also handle the drop off of the cash.³⁶ With the drop off costing about \$1 million, the addition of all the other fees can make their price as high as the ransom.³⁷

Meanwhile, maritime insurance has begun selling kidnap and ransom ("K&R") policies based on individual charters.³⁸ By purchasing K&R policies, carriers are assured of coverage in the event of a pirate attack, whereas protection and indemnity ("P&I") insurance, hull policies, and war risk coverage are arguably not applicable and may require legal action to enforce.³⁹ The price of a \$3 million K&R policy skyrocketed from a few thousand dollars to about \$30,000 from April of 2008 to April of 2009.⁴⁰ With about 20,000 ships traversing the area in 2008 and around forty successfully attacked⁴¹ even if only half the ships bought full policies and each of the attacked ships had such a policy resulting in a \$3 million ransom (which was not nearly the case), and security contractors took an equal share for their services, insurance companies would still profit by \$60 million.⁴² Despite the costs for carrier companies, commerce will continue through the area simply because it is cheaper to buy the K&R policies than

35. *Id.*

36. *Id.* Because of Somalia's complete lack of modern banking, ransoms are always paid in cash. Mohamed Olad Hassan & Elizabeth Kennedy, *Somali Pirates Transform Villages into Boomtowns*, ASSOCIATED PRESS, Nov. 20, 2008, available at 2008 WL 22119128.

37. Carney, *supra* note 28.

38. Cyril Tuohy, *The Recasting of Purpose: With hull policies excluding terrorism, carriers have extended their kidnap-and-ransom policies to cover piracy risks on a per-transit basis*, RISK & INS., Aug. 2009, at 21.

39. *Id.*

40. Carney, *supra* note 28.

41. *Id.*

42. (10,000 ships x \$30,000 annual premium - \$120 million ransoms paid - \$120 million for contractor services = \$60 million profit). In all likelihood, more than half the shipping industry will buy these policies, contractor costs are not always as high as ransoms, and only the highest ransoms were \$3 million; however, not all ships seeking coverage will buy the full \$3 million policy; so the \$60 million profit for insurance is a rough estimate. Insurance companies are, however most assuredly profiting from the risks involved. This Comment is not implying immorality, but merely points out this fact for practical analysis.

it is to bypass this important sea-lane.⁴³

It would appear piracy is flourishing not only because of local lawlessness, but because the organizations involved (pirates, financiers, insurance, security contractors, and even the carriers) are profiting more by tolerating it than they would by addressing it.

C. Methods of Support

As this Comment focuses on judicial methods that can combat piracy without inflaming the situation, it is necessary to identify where the pirates get their support. While ransom money is revitalizing the impoverished Somali coast, any civil action brought against the formerly poverty stricken Somalians would be unadvisable, for it would further alienate the western world in the eyes of people who thought they were doing what they had to do to survive. Therefore, while this note examines a litigation route against piracy, it should be clear that such actions should not target those parties who acted out of desperation, such as some early pirates and local Somalians in pirate towns, but rather target the people who supported piracy or failed to take necessary steps against piracy, such as ship owners, charterers, Somalian diaspora, and businesses.

It is no secret that organized piracy in Somalia is growing. Nor is it wild speculation to infer that the pirates are receiving support from somewhere. Pirate Ahmed Dahir Suleyman says, “[W]e have negotiators, translators and agents in many areas. . .let me say across the world. These people help us during exchanges of ransom and finding out the exact person to negotiate with.”⁴⁴ Allegations abound that the Somali diaspora (communities of expatriate Somalis living abroad but maintaining ties to their homeland)⁴⁵ in Canada, Minneapolis, and many other

43. See Carney, *supra* note 28. It costs millions of dollars extra and an additional 10,000 miles to go around Cape Horn rather than through the Suez Canal and into “Pirate Alley.” In addition, Cape Horn substitutes the small risk of piracy for the arguably more substantial risk of notoriously bad weather. See *id.*

44. *Somali Pirates Get Help From Expats in Canada*, ASSOCIATED PRESS, Dec. 11 2008, available at <http://www.thestar.com/News/World/article/552023134> (interview with pirate Ahmed Dahir Suleyman in Eyl).

45. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 345 (11th ed. 2004). Diaspora is defined as “people settled far from their ancestral homelands.” *Id.*

places throughout the western world send pirates both information about shipping itineraries as well as money to fund the attacks.⁴⁶ Due to the lack of modern financial institutions in Somalia, diaspora send money through an informal, honor based financial system called “hawala,” which requires special operators to take money from the sender at one end and instructs a friend, relative, or other agent at the other end to hand money over to the recipient.⁴⁷ However, wiring services are also used for part of the journey between North America and East Africa.⁴⁸

In addition to monetary aid from wealthy relatives living abroad,⁴⁹ pirates are most certainly transacting with nearby businesses. Take for example the simple act of counting a ransom. The pirates are known to use the same money-counting machines that foreign exchange bureaus employ around the world to ensure it is not counterfeit.⁵⁰ In a country with no effective banking system that necessitates all cash payments,⁵¹ one is left to wonder where former fishermen and militiamen acquired such equipment. Luckily, the pirates themselves are all too willing to explain themselves to reporters; “[g]etting this equipment is easy for us, we have business connections with people in Dubai, Nairobi, Djibouti and other areas. . . we send them money and they send us what we want.”⁵² While businessmen, diaspora, and others who support and benefit from organized piracy will undoubtedly deny the allegations, evidence of these transactions most certainly exists. Therefore, a proper investigation by experienced attorneys, private investigators, or law enforcement should turn up quite a few businesses in the wealthier neighboring areas around Somalia that are knowingly selling goods and services to pirates, as well as investors throughout the world.⁵³

46. Mohamed Ahmed, *Somali Sea Gangs Lure Investors at Pirate Lair*, REUTERS, Dec. 1, 2009 available at <http://www.reuters.com/assets/print?aid=USTRE5B01Z920091201>; *Somali Pirates*, *supra* note 41.

47. *See Somali Pirates*, *supra* note 41.

48. *Id.*

49. It should be remembered that Somali culture is clan based, making a never before met relative pirate in Eyl closer to expatriates living in Toronto than the people living two blocks away. *See generally*, Potgieter, *supra* note 12.

50. Hassan & Kennedy, *supra* note 34.

51. *Id.*

52. *Id.*

53. Reed, *supra* note 29.

D. Possible Solutions

As stated earlier, aside from making a plaintiff whole through recovery, a primary goal of torts is the deterrence of harmful or inefficient behavior. In the grand scheme of things, one might argue that Somali piracy is a temporary difficulty that will result in long-term improvements. Specifically, it deters illegal fishing and dumping of toxic waste, and it is transferring wealth from those who have plenty to those that have little. This wistful approach aside, piracy is recognized as wrong worldwide, and not even the Somalis like to think of these men as pirates, preferring to think of them as militias, coast guardsmen, or Marines. While the people of Somali should not be left to starve, neutral seafarers should not be required to suffer for them. Equity demands that the victims of piracy be made whole and piracy be stopped, but depriving the Somali people, for whom life has been so difficult for so long, of their few meager gains would be distasteful and probably pointless.

Making victims of piracy whole is fully within the powers of maritime torts. While monetary compensation might never fully replace what a victim has lost, it is the system in place. Eradicating piracy takes more. While the militaries of many countries can be set loose on the pirates, force will only go so far and it will cost a great amount of tax dollars not to mention man hours. Naval ships cannot be everywhere at once, and interceptions typically occur only after a distress signal is received.⁵⁴ This is a reactive approach, and if relied upon it will drain our servicemen, national budget, and leave a high risk that the call will be too late and another *Maersk Alabama*-like standoff will ensue, with no guarantees of a second success.

Military force must be supplemented. Political action would likely help a great deal by eradicating some of the causes of piracy.⁵⁵ For example, having the navies in the region search for illegal fishing vessels or illegal dumpers, or commissioning investigations of these activities, or sponsoring some type of United Nations involvement would likely deter or even halt the

54. This Comment's assertion that most military actions against piracy is reactionary is based on numerous incidents occurring in 2008 and 2009.

55. To date, there has been some successes against piracy in Puntland attributable to political action.

illegal fishing and dumping. By giving Somalia what it needs in the form of policing territorial waters, politicians could destroy the moral foundation of Somali pirates, who purport to be protecting their country's interests. Other political solutions surely abound but are beyond the scope of this Comment.

In examining possible solutions, one must not ignore the probability that while Somali piracy seems to have begun as a response to injustice, it has now grown into something else. Current accounts reveal an organized business based on the inability of foreign powers to control an area where business is more willing to pay the fines than to pay for the change. A ready analogy might be drawn to organized crime, which thrives where commerce exists in a relatively lawless area. In the case of maritime commerce, it is simply cheaper to risk or even suffer ransom payments than it is to pay for counter piracy methods such as alternate routes or security teams,⁵⁶ therefore the carriers take the risk.

If piracy has morphed from a necessary evil into organized crime, than eradication of the causing problems will do little more than unmask it for what it truly is. In this likely scenario, the only real way to stop it, short of the desirable but unlikely return of effective government to Somalia, is to make it unprofitable as a business.⁵⁷ Victims of terrorism have been suing terrorists for a number of years now for the dual purposes of recovery and weakening the economic support of terror networks.⁵⁸ It follows that this approach can also be applied to organized piracy.

II. MAKING THE VICTIMS WHOLE

The first question posed by this Comment is whether a victim of piracy may bring a Jones Act claim against his or her employer;

56. To date it appears that many carriers have employed private security teams for their ships, which have met with some success. Of note was the second attack on the *Maersk Alabama*, which an onboard private security team repulsed.

57. Some might argue for an all-out military operation, citing American success against the Barbary Pirates in the early 19th century; however, this Comment simply presumes that the western world's track record of planning and supporting military operations in developing countries is not promising.

58. See John D. Shipman, Comment, *Taking Terrorism to Court: A Legal Examination of the New Front in the War on Terrorism*, 86 N.C. L. REV. 526, 568-70 (2008).

and the simple answer is yes. This part of the Comment will examine how the Jones Act and other maritime causes of action may be applied to people who are hijacked, kidnapped, injured, or killed by pirates. It will ultimately conclude that, because of the notice provided to shippers and carriers, a failure to take the advised precautions against piracy will likely support a finding that the ship was unseaworthy at the start of the voyage, making a ship owner liable to the seamen aboard for any resulting harm. This will have the dual results of making the victim whole, as well as placing an additional monetary burden on maritime insurance, which may then refocus on the institution of organized piracy.

A. Hypothetical

Setting the *Maersk Alabama* and other actual incidents aside, consider a hypothetical pirate attack. A United States flagged container ship named *Kill Devil Hills* is scheduled to transit the Gulf of Aden. Bogue Island Inc. owns it and Carrier Lines Ltd. charters it. Many of the containers contain commercial electronics, such as laptop computers, and stereo equipment. The managing agent of the corporation, Mr. Agent, saw the news reports on piracy but has not been informed of the International Maritime Bureau's warnings and recommendations for safe passage. Though he could alter the route, coordinate with the international armada, hire private security, or equip the ship with barbed wire he does none of these things. Mr. Agent has done the math and decided it would be less expensive to buy a kidnapping and ransom policy with a liability clause from his maritime insurance provider.

Meanwhile, in the weeks prior to passing through the gulf, the American crew aboard the *Kill Devil Hills* undergoes some rudimentary anti-piracy training led by the well-intentioned but unrealistic master of the vessel, Captain Daring. He shows them hand-to-hand techniques, advises them in ship handling maneuvers for warding off a pirate attack, and provides doughnuts and coffee. Meanwhile, phone calls are placed from communities of Somali diaspora in Maine, Canada, and France to Eyl, Somalia. Several more phone calls follow, along with wire transfers from several bank accounts in the first three locations to an account in Dubai. Transfers from the Dubai bank account are issued to business dealers in Kenya for undisclosed purposes.

Coastal Kenyans soon notice workers loading electronics equipment, rifles, ammunition, one heavy machine gun, several rocket propelled grenades, food, gasoline, qat (a local stimulant), lines, grappling hooks, and medical supplies into an old, ratty looking skiff with twin high-powered engines. A well-trained machinist and an English interpreter arrive and board the boat with a crew recently arrived from a stolen Yemenis fishing vessel anchored offshore. They leave Kenyan waters and unite with the fishing vessel, which then heads for the Gulf of Aden.

The *Kill Devil Hills* goes through the Gulf of Aden, having picked up a passenger, and is attacked by twelve Somali Pirates carrying grappling hooks, AK 47s, and electronics equipment in a ratty looking skiff with twin high powered engines. The crew uses the training Captain Daring provided, by maneuvering, firing the high-pressure hose at the pirates, then fleeing to the bridge where they make a stand as the chief engineer disables their reduction gear. In the ensuing fight, two Somali pirates are injured as well as two American crewmen; several others receive minor injuries. The pirates haul the crew and passengers onto the forecandle and make a big show of planning to execute them all for resisting. Eventually, the pirate leader cools the rest down, and the crew and passenger are locked in the pantry. At all times, the master of the ship, Captain Daring, keeps their hopes up and acts as their spokesperson with their captors. Sadly, the passenger has a heart attack and dies. Soon after, the pirate machinist fixes the broken reduction gear and the *Kill Devil Hills* is sailed towards Eyl.

Meanwhile, Mr. Agent contacts his insurance which negotiates a quick ransom of four million, costing an additional two million in negotiation and delivery fees, and the *Kill Devil Hills* is released. After evacuating the two severely injured crewmembers by helicopter the vessel arrives in France just in time to satisfy the carriage contract. However, two containers of valuable electronics are heat damaged. Meanwhile, two of the slightly injured crewmembers are showing signs of posttraumatic stress disorder ("PTSD"), one of the two severely injured crewmen succumbs to her wounds and dies in the hospital, and the other has lost an eye, has a crippled right leg, and is also showing signs of PTSD. The crew is now seeking justice.

B. The Jones Act and General Maritime Law

Since 1789, the United States Constitution has granted to federal courts jurisdiction in all cases of maritime and admiralty giving the United States Supreme Court (“the Court”) appellate jurisdiction.⁵⁹ Since that time, federal courts fashioned a unique brand of general maritime law (“GML”), which provides certain protection to sailors, longshoremen, and sea-going passengers. In 1903, the Court held that under the GML an injured seaman could not bring a negligence action against an employer, officer, or agent absent a finding that the negligence was tantamount to unseaworthiness.⁶⁰ Generally, a vessel is unseaworthy if it was not reasonably fit for its intended purpose when it began its voyage. The GML, instead, allowed an injured seaman to sue for housing, food, and wages due from the time of injury to the completion of the voyage, as well as medical expenses incurred from the time of injury until the seaman attained maximum recovery (either the seaman is fully healed, dead, or medical science can simply do no more).⁶¹ People were appalled that a sailor injured because a ship was unseaworthy could recover more than maintenance and cure, but a sailor injured only because of a master’s negligence could not. In 1915, the United States Congress addressed the situation by creating a statutory remedy for seamen who suffer injury or death during the course of employment due to negligence even when the vessel is seaworthy.⁶² This congressional action became known as the Jones Act and has provided a remedy for seamen injured or killed on the job for most of the twentieth century.⁶³

The Jones Act provides, in pertinent part, that any “seaman injured in the course of employment” may bring suit “with the

59. U.S. CONST. art. III, § 2.

60. *The Osceola*, 189 U.S. 158, 175 (1903).

61. *Id.* Maintenance and cure is almost always recoverable. All that is generally required is that a sailor’s illness or injury be sustained while the sailor was in service of the ship, and that the illness or injury is neither intentionally self-inflicted nor the result of some willful and wanton misconduct. Recovery consists of lost wages for the voyage as well as food, lodging, and medical expenses until maximum cure has been achieved.

62. *See* 46 U.S.C. § 30104(a) (2006).

63. *Id.*

right of trial by jury, against the employer.”⁶⁴ The standards for recovery for negligence are those applied in the Federal Employers’ Liability Act (“FELA”).⁶⁵ FELA provides that an employer is liable for any defects caused “in whole or in part” by its negligence.⁶⁶ While contributory negligence may reduce a plaintiff’s recovery it never eliminates it.⁶⁷ Further, there is no contributory negligence where an employer’s negligence includes violation of a statute intended to prevent the injury suffered.⁶⁸ There is no assumption of risk in the face of a relevant safety statute violation or where the injury was caused by the negligence of the employer’s “officers, agents, or employees.”⁶⁹ FELA is, however, rather vague on what specific types of damages are permitted, so the courts have read this to mean that the Jones Act “[i]ncorporat[ed] FELA unaltered” and, accordingly, FELA’s history of damage awards was now that of the Jones Act.⁷⁰

Note that FELA imposes liability for any defect caused “in whole or in part” by an employer’s negligence, and that there is no assumption of risk in the face of a relevant safety statute violation.⁷¹ The Jones Act incorporates these and all other FELA provisions, creating a benefit for pirate victims thanks to the imposition of liability for any defects and simply asks jurors to decide whether “employer negligence played any part, even the slightest, in producing the injury or death.”⁷² Therefore the Jones Act uses a minimal standard, any negligence, however minute, is enough to make an employer completely liable for any injuries resulting.⁷³

64. *Id.* This paper will ignore the issues of who qualifies as a seaman, employer, or vessel as well as what point in time employment begins and ends.

65. 45 U.S.C. § 51 et seq. (2006).

66. *Id.* §§ 51, 52.

67. *Id.* § 53.

68. *Id.*

69. *Id.* §§ 53, 54.

70. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). The pertinent discussion specifically addresses the wrongful death section of FELA but the discussion is applicable to injury as well.

71. 45 U.S.C. §§ 51, 54.

72. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957) (citing *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508 (1957)).

73. *Id.*; see also *Litherland v. Petrolane Offshore Constr. Servs.*, 546 F.2d 129, 131 (5th Cir. 1977) (holding that negligence that plays any part, however small, in causing the injuries creates liability).

However, while Jones Act litigation bars an assumption of risk defense, courts sometimes take the facts supporting risk assumption and instead apply them to comparative negligence for reduction of damages.⁷⁴ As you can see, the Jones Act essentially uses only comparative negligence to reduce a tort victim's recovery.

In addition to the ability to recover for any damage, however slight, and the abolishment of contributory negligence as a complete bar to recovery, plaintiffs in Jones Act cases automatically have a statutory right to a trial by jury⁷⁵ and may generally allege both negligence and unseaworthiness. Seaworthiness claims mirror strict liability claims, in that an owner can be liable without having knowledge of any defects.⁷⁶ Seaworthiness is a warranty requiring an owner, or even an owner pro hac vice, to provide a reasonably safe working environment via proper equipment and a properly trained crew.⁷⁷ Typically, courts in admiralty prefer "to give than to withhold the remedy,"⁷⁸ and the history of Jones Act application evidences courts' willingness to permit seaman recovery in most situations. For example, the Court has upheld findings of unseaworthiness where a ship was not properly equipped with an ice cream chipper,⁷⁹ where one of the crewmen became homicidal but exhibited absolutely no signs until underway,⁸⁰ and even where a

74. *E.g.*, *Rivera v. Farrell Lines, Inc.*, 474 F.2d 255, 257-58 (2d Cir. 1973), *cert denied*, 414 U.S. 822 (1973) (holding that a plaintiff's knowledge of hazardous condition without evidence of an additional negligent act was not sufficient to establish contributory negligence because assumption of risk has been abolished by statute); *but see Rouchleau v. Silva*, 217 P.2d 929, 933 (Cal. 1950) (holding that assumption of risk facts could instead be applied to apportionment of damages under theory of comparative negligence).

75. 46 U.S.C. § 30104(a) (2006).

76. *Keen v. Overseas Tankship Corp.*, 194 F.2d 515, 518 (2d Cir. 1952).

77. *Id.*

78. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 387 (1970) (quoting *The Sea Gull*, 21 F.Cas. 909, 910 (C.C.Md. 1865)).

79. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 522-23 (1957) (holding that reasonable jury could conclude that employer was negligent when baker cut his hand on butcher knife trying to chip hard ice cream where (1) employer had failed to furnish ship's baker with ice chipper, (2) ice cream was removed from deep freeze too late to thaw, and (3) chef had instructions to provide prompt service).

80. *Keen*, 194 F.2d at 518 (requiring a crewmember, like equipment aboard the ship, to be "equal in disposition and seamanship to the ordinary

worn out wrench slipped, hitting the plaintiff's toe, resulting in gangrene and the amputation of his leg.⁸¹ Admiralty courts will submit the question of liability to the jury so long as there is the slightest conceivable possibility of a causal link; the warranty of seaworthiness can apply to almost anything and requires no affirmative action or knowledge on the defendant's part; and there is often a thin line between negligence and unseaworthiness.

An examination of likely recoveries is necessary for a useful analysis of such actions against owners and charters, since ultimately they must take proper steps to protect against piracy. A crewmember's loss of earning capacity is recoverable and depends on the degree of injury, life expectancy, and earning capacity at the time of injury.⁸² Recoveries may also be made for "pain, suffering, mental anguish, discomfort, and inconvenience."⁸³ With the exception of loss of society, seamen are generally able to recover quite well, and while loss of earnings are calculable to a degree, the damage level for pain and suffering as well as loss of enjoyment of life (as encompassed by the discomfort and inconvenience language) is a question for the jury.

The GML still provides for an action for maintenance and cure, and injured seamen will almost always recover with or without a Jones Act claim, because employers have an automatic duty to provide it.⁸⁴ Maintenance and cure consists of medical expenses from the time the injury is discovered until maximum recovery is obtained, wages due for the voyage, and food and lodging due for the duration of the voyage.⁸⁵ In the case of pirate

men in the calling").

81. *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 327 (1960).

82. *See Downie v. United States Lines Co.*, 359 F.2d 344, 347 (3d Cir. 1966), *cert. denied*, 385 U.S. 897 (1966).

83. *Id.* (holding discomfort and inconvenience are interpretable as loss of enjoyment of life); *see also Blanco v. Phoenix Compania De Navegacion*, 304 F.2d 13, 16 (4th Cir. 1962).

84. *See Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527-28 (1938) (holding that an owner need not be negligent or culpable to assert a maintenance and cure claim and that even incurable diseases not caused by the voyage require maintenance and cure).

85. *Id.* at 654. Maximum recovery could mean complete recovery, the maximum recovery possible (such as replacing a lost limb with a prosthetic and conditioning the patient to its use through therapy), or death. Food, lodging, and lost wages are only recoverable for the duration of a voyage. Hence, if a seaman is badly injured within the first minute of a three month voyage, the employer must still feed, house, and pay the seaman for three

attacks, seamen will be able to recover: (1) the medical expenses for treatment of any injuries attained; (2) the expenses for food and lodging (if they are removed from the vessel) equal in value to what was provided aboard for the remainder of the voyage; and (3) their wages for the voyage. Furthermore, a seaman who is denied maintenance and cure may pursue punitive damages for breach of duty.⁸⁶ Ultimately, maintenance and cure damages will vary greatly depending upon the type of injury, how long it takes the seaman to fully recover, and the seaman's wage level.

Posttraumatic stress disorder ("PTSD") is a common injury among pirate victims. In fact, while the suit against Maersk Lines and Waterman Steamship fails to describe Mr. Hicks' injury (it does however seek maintenance and cure)⁸⁷ press interviews indicated that PTSD was probably the crux of his complaint.⁸⁸ Courts interpreting the Jones Act permit recovery for PTSD, which is often a large sum, depending on the circumstances. While the Hicks complaint prays for \$75,000 and reserves the right to amend the amount in the future,⁸⁹ a twenty year overview of Jones Act claims, including an allegation of PTSD, shows recoveries ranging from \$40,000 to \$1.75 million, with the most typical recovery falling somewhere around \$400,000.⁹⁰ Going by

months.

86. See *Atlantic Sounding Co. v. Townsend*, 129 S.Ct. 2561, 2566 (2009). The Court explained that because the Jones Act was created to expand rather than restrict a seaman's recovery, the GML recoveries are preserved where not incorporated by the Act, and among them is the ability to pursue punitive damages. *Id.* at 2570-71. The Court's punitive damages focus seems to be entirely on maintenance and cure denials. See *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962) (holding that awarding of attorney's fees was a permissible means of punishing refusal to provide maintenance and cure).

87. Complaint at 4, *Hicks v. Waterman S.S. Corp.*, No. 2009-26129 (Dist. Ct. Harris Cnty., Tex. Apr. 27, 2009).

88. See *Malek*, *supra* note 2. Like many other Jones Act cases alleging PTSD, Mr. Hicks repeatedly stated that he "didn't know if [he] was going to live or die" and that he was unsure if he would ever return to merchant marine life. See *id.*

89. Complaint at 8, *Hicks v. Waterman S.S. Corp.*, No. 2009-26129 (Dist. Ct. Harris Cnty., Tex. Apr. 27, 2009).

90. See, e.g., *Pallis v. United States*, No. 3:07-CV-00202, 2008 WL 5545389 (S.D. Tex. Dec. 23, 2008); *Hamilton v. Maritrans, Inc.*, No. 3:06-CV-607, 2007 WL 4570276 (S.D. Tex. Oct. 1, 2007); *Acevedo v. Sea-Land Serv., Inc.*, No. 91032, 1990 WL 10080361 (Cal. Super. Ct.); *Bryant v. DHL Marine, Inc.*, No. 821-329, 1987 WL 957673 (Cal. Super. Ct.); *Lecain v. Exxon Shipping Co.*, No. 92-26833-21, 1995 WL 680960 (Fla. Cir. Ct. Jan. 17, 1995);

these figures, Hicks is fairly conservative in asking for \$75,000 and will likely receive a good chunk of it, if not in settlement then in a jury verdict.

C. Death on the High Seas Act

The Death on the High Seas Act (“DOHSA”) is another statutory construction providing a remedy for a “decedent’s spouse, parent, child, or dependent relative” where the death occurred on the high seas more than three nautical miles from the United States shore.⁹¹ Such an action may be brought against either the person or vessel whose “wrongful act, neglect, or default” caused the death.⁹² Both Americans and foreign citizens may bring a DOHSA claim, for it is well established that foreign citizens may bring a cause of action in American courts, and though maritime liability statutes have some restrictions on claims by non-Americans, generally such a claim will be maintainable under DOHSA.⁹³

Under DOHSA, victims of piracy have a source of recovery that extends beyond their own employers to the supporters of piracy. The statutory history of DOHSA shows that, as originally worded, it applies to persons, vessels, and corporations, but was revised to apply only to persons and vessels “because of 1 U.S.C. §1.”⁹⁴ 1 U.S.C. §1 describes “[w]ords denoting number, gender, and so forth” and defines “person” as including “corporations, companies, associations, firms, partnerships, societies, and joint stock companies.”⁹⁵ Hence, it is possible to bring an action

Roberts v Ridgon Marine Corp., No. CV-06-8843, 2007 WL 2728322 (Tex. Dist. Ct. Aug. 22, 2007); Poole v Cal Dive Int’l, Inc., No. 2002-3652, 2003 WL 22998460 (Tex. Dist. Ct. Oct. 3, 2003). It should be noted that these figures do not adjust for inflation during that time.

91. 46 U.S.C. § 30302 (2006).

92. *Id.*

93. 46 U.S.C. § 30105 (non-citizens employed by a party engaged in exploration, development, or production of offshore mineral or energy resources are not covered if the death occurred in foreign territorial waters or overlaying a foreign continental shelf, unless the employer is engaged in bulk transportation of oil by vessel, or the country with jurisdiction has no available remedy, or the country of citizenship has no available remedy). *Id.*

94. 46 U.S.C. § 30302 note (2006) (Historical and Revision Notes).

95. 1 U.S.C.A. § 1 (2011). See *Williams v. United States*, 42 F.R.D. 609 (S.D.N.Y. 1967) (quoting *Sims v. United States*, 359 U.S. 108, 112 (1959)) (holding that whether the term person includes a state or not “depends upon

against supporters of organized piracy as their wrongful acts contributed to the individual's death. However, this Comment presumes that the representatives of a decedent will not wish to spend the significant time and large amounts of money on a complicated suit against pirates. Rather they will wish to achieve a quick recovery against the employer under the Jones Act, or vessel and owner under DOHSA and the GML.

The problem with DOHSA damages is that it specifically provides for pecuniary damages only, and allows a proportional reduction of these damages where the deceased's negligence contributed to his or her death.⁹⁶ These pecuniary damages are interpreted to mean loss of support and funeral expenses, but do not include lost future earnings.⁹⁷ This Comment mentions DOHSA merely to illustrate that other legal mechanisms exist (both statutory and under the GML) that may be used to compensate pirate victims for their injuries.

D. Brief Application of the Law

For the sake of simplicity, let us ignore all the interesting twists and turns that actions under the Jones Act, DOHSA, and the GML could take with regard to the hypothetical case of the *Kill Devil Hills*, and instead focus on the most likely outcome. The crewmembers are seamen for purposes of GML and Jones Act application, and should therefore recover maintenance and cure, which requires no showing of either negligence or unseaworthiness. There is a good chance that the court will find that the *Kill Devil Hills* was unseaworthy for purposes of the Jones Act and GML, because its voyage entailed traversing known pirate waters, yet the owner took no precautions to protect the ship and crew from that obvious risk.⁹⁸ Therefore, the ship was

[] legislative environment" of the applicable statute); *see also* Moran v. United States, 102 F.Supp. 275, 277, 279 (D. Conn. 1951) (finding that the United States may be sued under provisions of DOHSA).

96. 46 U.S.C. §§ 30303-04 (2006).

97. Miles v. Apex Marine Corp., 498 U.S. 19, 35 (1990); Sabine Towing Co. v. Brennan, 85 F.2d 478, 481 (5th Cir. 1936), *cert. denied*, 299 U.S. 599 (1936), and *reh. denied*, 299 U.S. 624 (1936).

98. While picking a different sea route is probably not a reasonable precaution, given the tremendous cost and additional risk involved in bypassing the Gulf of Aden, the failure to hire a professional security team for that leg of the voyage and especially the failure to equip the ship with

not reasonably fit for her intended voyage. Likewise, the court will probably find that the injuries were caused to some degree by the negligence of the employer, in that Mr. Agent knew of the possibility of pirate attack but did nothing other than buying additional insurance,⁹⁹ and the romantic but reckless Captain Daring convinced an unarmed crew to physically resist armed pirates.¹⁰⁰ The plaintiffs can easily establish causation; therefore, they can recover with either a finding of unseaworthiness or negligence.

Recovery amounts in the case of the *Kill Devil Hills* could range into millions of dollars. There are several plaintiffs who are exhibiting signs of PTSD, and those that were injured may recover among other things for pain and suffering as well as lost future income and possibly even loss of enjoyment of life. The estates of the two deceased plaintiffs (one of whom was not a seaman but is still covered under DOHSA) may also recover, for the pecuniary losses specified in DOHSA often add up to hefty amounts depending on the decedent's earning history and number of qualifying dependents. Suffice it to say that even if the defendants in this hypothetical settle, they could easily end up paying more to the plaintiffs than they did to the pirates.

III. TAKING THE FIGHT TO ORGANIZED PIRACY

Having concluded that seamen and other victims may recover under admiralty law for injuries resulting from piracy, this Comment now sails further into uncharted waters. The question becomes: how to employ such actions against the institution of organized piracy. The companies and owners of merchant ships, while named as defendants in the suits, are paying most if not all of the recoveries from their insurance policies. Maritime insurance companies ("insurance") however, have their own

overhanging barbed wire or to coordinate with the international armada or join a convoy will likely be enough to establish unseaworthiness.

99. This hypothetical presumes that even though the owner of the *Kill Devil Hills* and employer of the crew are different entities, the employer as charterer of the ship acts as a sort of temporary owner, or owner "pro hac vice."

100. This Comment is ignoring any application of the Limitation of Liability Act, which would be easily overridden by the knowledge attributable to the owner through Mr. Agent, as well as the negligence of Captain Daring, which is also attributable to the owner when death or injury results.

business to run, and the need to reduce risk and recoup lost damage awards should be a strong incentive to seek compensation for maritime tort losses from the pirates themselves. This Comment now proposes that to combat organized piracy, Jones Act defendants should seek guidance from those victims of the War on Terror who struck back at their tormentors with American tort law.

A. Additional Monetary Losses to Piracy

In addition to the tort recoveries of pirate victims, the expenses of ransom, cargo loss, cargo damage, breach of contract, and the extraordinary business loss of having an entire working ship simply sitting still while ransom negotiations are ongoing combine to place a huge burden on owners, charterers, and insurance. While the *Maersk Alabama* did not ultimately pay a ransom, the hypothetical *Kill Devil Hills* does, and trends throughout the globe already show that insurance provides both the ransom and the costs of delivery to the pirates,¹⁰¹ and some of the other costs that can result from a pirate attack, such as damaged cargo, fallen market prices, breach of contract, speed retarding sea growth on the hull, and so on. Remember that in our hypothetical the *Kill Devil Hills* delivered two damaged containers of valuable electronics, for which the cargo insurer will want reimbursement. At least some of these losses are recoverable in admiralty.

The point in mentioning recoveries for cargo, breach of contract, ransoms, and the like is that owners and insurance will have more piracy related expenses than those imposed by liability to the victims. These aggregate expenses will hopefully have the dual effect of motivating insurance providers to initiate suits to recoup losses, while piling additional monetary losses on the financial supporters and profiteers of piracy, making it less profitable and therefore a less desirable business. The numerous Jones Act claims that may result from an attack (each of which

101. Friederike Krieger, *Owners Turn to Kidnap and Ransom Cover*, LLOYD'S LIST, May 28, 2009, at 9. The U.S. based insurer Chubb is already offering K&R policies that include liability cover. *Id.* Other types of pre-existing insurance may also be used to cover pirate imposed expenses in lieu of a K&R policy. *Id.*

could, in the case of an injured crewmember, result in multi-million dollar recoveries) can at least contribute to an overall recovery against organized piracy and may even be the trigger for corporate action.

B. Jones Act Contribution and FELA

The automatic incorporation of FELA case history into Jones Act litigation provides an especially useful mechanism for tackling piracy. The Court has held that in FELA litigation, an injured plaintiff may bring suit solely against his or her employer, and recover for the full injury even when multiple other tortfeasors may have contributed to the injury.¹⁰² If the injury was caused in any degree by the employer's negligence, the employer is liable for all of the injury, less only what was caused by the employee's negligence. Having satisfied the judgment, the employer is then free to seek contribution from the other tortfeasors.¹⁰³ Likewise, the employer may implead third parties into Jones Act litigation for apportionment in the forum,¹⁰⁴ and the plaintiffs may even cross claim against the third party defendants.¹⁰⁵

Because Congress incorporated FELA into the Jones Act, the decisions in FELA cases became precedent for Jones Act litigation and hence, seamen injured in a pirate attack may seek total recovery (absent anything attributable to their own negligence) from their employers. The employers are then free to seek contribution from the pirates or the supporters of piracy at their leisure.¹⁰⁶ In the practical world, this precedent allows the injured seamen, who will rarely have the time or the resources to go through a complicated suit against organized piracy, a quick and easy road to relief, while insurance companies, who will ultimately bear the monetary loss, may proceed against the

102. *Norfolk & W. Ry. Co. v Ayers*, 538 U.S. 135, 165-66 (2003).

103. *Id.* at 165 n. 23.

104. *Id.*

105. *See Carpenter v. Mobile Dredging & Pumping Co.*, No. 99-5386, 2004 U.S. Dist. LEXIS 4112, at *1 (E.D. Pa. Mar. 15, 2004).

106. *See, e.g., Cooper v. Meridian Yachts, Ltd.* 575 F.3d 1151 (11th Cir. 2009). In this case, a sea captain was injured by a food lift and the employer and ship owner settled and brought a third party action against the ship builder. *Id.* at 1158-61. Some of the claims were dismissed after finding that the negligence and products liability were controlled by Dutch law due to the location of the food lift. *Id.* at 1158, 1180.

institution of organized piracy with the superior legal resources at their disposal.¹⁰⁷ The injured seaman will obtain speedy relief and organized piracy will face a much more formidable legal foe.

One might argue that insurance is unlikely to bring about such a complicated suit, simply because they would not wish to waste the time and legal fees on the mere possibility of contribution, which is a different situation than their necessary defense against claims by Jones Act seamen. This argument ignores the influence of greed¹⁰⁸ (applications of which can be useful) by assuming that insurance companies are content to take the losses and be happy with the profits they make out of the ratio of sold K&R policies to actual recoveries. However, implicit in the preceding citations is the fact that employers, owners, and their insurance providers often commence contribution and indemnity suits rather than simply eating the cost of a plaintiff's recovery.

C. Rule B and Asset Seizure

The Federal Rules of Civil Procedure Supplemental Rule B ("Rule B") allows plaintiffs in suits at admiralty to attach defendants' tangible and intangible property when the defendants are not present within a district.¹⁰⁹ This is a powerful rule that makes it possible for plaintiffs to pin down the assets of highly mobile defendants, and in practice it is often used as leverage in settlement negotiations.¹¹⁰ For seven years, the Second Circuit held that electronic fund transfers ("EFTs") constituted property and was attachable under Rule B.¹¹¹ The application of Rule B by

107. See *Tri-State Oil Tool Indus., Inc. v. Delta Marine Drilling Co.*, 410 F.2d 178, 186-87 (5th Cir. 1969) (holding that a party that is actively negligent should bear the consequences and indemnify a passively wrong Jones Act defendant, even when there was no contractual relationship between the two). This is applicable to a pirate victim's employer who seeks contribution against the supporters of piracy who were the active wrongdoers but have no contractual relationship to the employer.

108. A gentler way to put it is, "fiduciary responsibility to investors to cultivate the company's financial resources."

109. FED. R. CIV. P. SUPP. R. B(1)(a).

110. Traditionally, the rule was intended to allow the quick arrest of a defendant's ship as it stopped briefly in a port. Defendants almost always provide a relief fund to secure the release of the ship so that it may go back to making money, rather than sit idle in a port and collect rust as the litigation drags out. Today the rule is used to seize almost any kind of property.

111. See *Winter Storm Shipping, Ltd. v TPI*, 310 F.3d 263, 278 (2d Cir.

the Second Circuit created a boom for maritime attorneys as most financial institutions throughout the world wire money through banks in New York City, and most money transfers by parties throughout the world therefore pass momentarily through the Second Circuit, becoming attachable. The banking industry found Rule B's application extremely burdensome and in autumn of 2009 the Second Circuit overruled itself, holding that EFTs were no longer attachable under Rule B because for the split second it takes for one to pass through the district, neither the party sending nor the party receiving has a property interest in it.¹¹² The Second Circuit's reversal of precedent no doubt upset maritime practitioners while pleasing bankers in New York City; and it remains to be seen whether other circuits will ever weigh in on the matter, as the burdens to bankers probably influenced the decision more than the argument that parties do not possess a property interest in their EFTs.¹¹³

In overruling its former application of Rule B, the Second Circuit noted that Rule B is intended to be a quasi- in- rem action, and may still be applied to bank accounts so long as they are not EFT's transitioning through an intermediary bank.¹¹⁴ However, EFT's traceable to illegal activity are still subject to forfeiture for purposes of in rem jurisdiction.¹¹⁵ As piracy is undeniably illegal,

2002).

112. *Shipping Corp. of India Ltd. v Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 67, 71 (2d Cir. 2009), *cert. denied*, 130 S.Ct. 1896 (2010).

113. *See id.* at 61-64. The court spends a lot of time discussing the unforeseen effects of Winter Storm, the negative commentary, and the attempts by lower courts to curb the affect than it spends on its analysis of the issue, and even states, "the effects [of allowing Rule B attachment of EFTs] on the federal courts and international banks in New York are too significant[.]" *Id.* at 67.

114. *Id.* at 69-71.

115. *Id.* at 68-69; *see* 18 U.S.C. § 981 (2006). Rule B is a different mechanism than the civil forfeiture, which could be applied in an action against organized piracy but would likely involve more burden to a plaintiff than a Rule B attachment. For example, in a civil forfeiture, the property must be seized by the Attorney General, Secretary of Treasury, or U.S. Postal Service, and may then be disposed of in a number of ways including as restoration to a victim. 18 U.S.C. §§ 981(b)(1), 981(e)(6) (2006). Rule B attachments require far less effort, and typically take only a matter of hours between identifying the property and having it seized. Rule B is designed and operates for speed, so that historically a defendant's ship would not have time to dock, conduct business, and weigh anchor before the sheriff arrived with a court order to impound it.

EFT seizure prior to judgment may still be possible, and Rule B still provides the ability to seize bank or other non-EFT assets to secure jurisdiction and a judgment fund. All that is needed is an appropriately tailored admiralty action against the proper defendants, and an affidavit stating that the defendant cannot be found within the district.¹¹⁶ So long as the underlying claim is maritime¹¹⁷ (which pirate attack is), and the named third party defendants have established minimum contacts with the United States,¹¹⁸ an action exists.

D. The RICO and Anti-Terrorism Acts

Assume that the insurance and Bogue Island Inc. (our hypothetical ship owner) have hired private investigators to identify the parties that invested in or supported the attack on *Kill Devil Hills*. Also assume that having identified some supporters of the attack (such as the diaspora communities in Maine, Canada, and France, and the Kenyan businesses), the owners and insurers, as defendants in a Jones Act case, have brought a third-party action and attached assets pursuant to Rule B.¹¹⁹ In addition to indemnification or contribution, the owners and insurers as third party plaintiffs may now bring additional claims against the supporters of piracy.¹²⁰

The Racketeer Influenced and Corrupt Organizations Act ("RICO") makes it criminal for any person associated with an enterprise engaged in foreign commerce to conduct its activities through a pattern of racketeering activity.¹²¹ More importantly for the matter at hand, those injured either in business or

116. See FED. R. CIV. P. Supp. R. B(1)(b).

117. *Id.* at A(1)(A).

118. See *e.g.*, *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648, 655 (2d Cir. 1979).

119. See FED. R. CIV. P. 14(a)(1).

120. See *id.* at (a)(3); see also *id.* at 9(h). The requirement that the additional claims be made in admiralty should not be a problem as the probative facts supporting all of the claims was an organized pirate attack on a vessel engaged in commerce in navigable waters. This should satisfy both the nexus and locus tests required for admiralty jurisdiction. See *Sisson v. Ruby*, 497 U.S. 358, 362, 364 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 673-74 (1982); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972).

121. 18 U.S.C. § 1962 (2006); see also *id.* §1961 (defining racketeering activity); see also *id.* § 1962(c) (prohibiting racketeering activity).

property damaged by a RICO violator may bring suit, and “shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee,” a recovery that would be extremely desirable to insurance burdened by pirate attacks.¹²² One might argue that any Somali pirate is associated with the Somali fishing industry (a foreign commerce enterprise due to the exportation of shellfish), and that the repeated acts of kidnapping are punishable by more than one year’s imprisonment in at least one if not all of the states.¹²³ Therefore, Somali pirates are all chargeable under the RICO act under at least one of several interpretations.¹²⁴ The civil provisions allow a plaintiff to recover against anyone who is chargeable under RICO, which arguably includes those who support piracy by providing money, equipment, or information.¹²⁵

Insurance plaintiffs may encounter problems in alleging RICO violations against supporters of organized piracy. Victims of terrorism have supplemented their claims against terrorism and its supporters with RICO violations, but have found courts “quick to dismiss RICO claims” despite a congressional intent to provide terrorist victims with additional relief.¹²⁶ The quick dismissals seem based on plaintiffs failing to allege that the “defendants were ‘central figures’ in the [underlying] schemes” and appear to result from a court desire to deter frivolous RICO litigation resulting from the hefty recovery levels.¹²⁷ There has also been some disagreement as to whether a civil action under

122. 18 U.S.C. § 1964(c) (2006).

123. *Id.* § 1961 (2006). The reference to state law is how the statute defines the underlying crimes that might constitute racketeering for a civil RICO action. *See id.*

124. *See id.* § 1962 (2006). The RICO act makes a large number of activities criminal; the defining element seems to be the existence of a pattern of such activity. *See id.* § 1962(b).

125. *See id.* § 1964(c) (2006). The criminal section of RICO includes those parties associated with an enterprise that affects foreign commerce (which could include businesses, investors, or diaspora communities that communicate with Somali pirates) if those parties participate even indirectly with the racketeering activity (such as providing money and information to those who repeatedly engage in successful or attempted acts of piracy). *See id.* § 1962(c).

126. Shipman, *supra* note 59 at 543.

127. *Id.* (quoting *In re Terrorist Attacks I*, 349 F. Supp. 2d 765, 827-28 (S.D.N.Y. 2005)).

RICO may compensate personal injuries.¹²⁸

Nevertheless, a RICO action might prevail against organized piracy for three reasons. First, even though the Anti-Terrorism Act (“ATA”) may be applicable to piracy, it was not specifically designed for pirate victims. The courts hearing terrorist lawsuits may have dismissed the RICO claims because of the existence and purpose of the ATA, which provides equal relief. Secondly, unlike the supporters and funders of terrorism who get no monetary return for their contributions, the supporters of organized piracy are not acting out of religious charity. They are investing money in a racketeering organization in expectation of return profits. For these reasons it is possible for a RICO claim to prevail against the supporters of organized piracy. Third, even though the plaintiffs’ physical injuries might not satisfy standing under RICO, the third party plaintiffs’ injuries do, for their businesses have suffered monetary losses, both direct (in the case of ransoms) and indirect (in the case of Jones Act judgments or settlements), because of the pirate attack. The possibility of a successful RICO action is made more probable by the Court’s past holding that civil RICO should be liberally construed to better deter racketeering activities which harm foreign commerce.¹²⁹

The ATA may also be useful as organized piracy arguably exhibits some of the defining qualities of international terrorism.¹³⁰ The difference is that where traditional terrorists want to effect political or religious change through violence, traditional pirates want money. As stated earlier, Somalia’s organized piracy differs from the random acts of nautical robbery that dominate the rest of the globe. Somali pirates began by saying that they wanted foreign encroachment in their territorial waters to stop, a motivation that is analogous to many demands by modern terrorist organizations. Likewise, Somali pirates have

128. See *Burnett v. Al Baraka Inv. & Dev. Corp.*, 274 F. Supp. 2d 86, 102 (D. D.C. 2003) (holding that those physically injured or killed in the attacks on Sept. 11, 2001 have no standing to sue under RICO, which requires an injury to business or property). *But see* *Rice v. Janovich*, 742 P.2d 1230, 1237-38 (Wash. 1987) (holding that lost wages resulting from the personal injury sustained in a bombing satisfied standing under RICO).

129. See *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 497, 497-98 (1985).

130. See 18 U.S.C. § 2331(1) (2006) (defining “international terrorism,” in pertinent part, as violent acts committed primarily outside U.S. jurisdiction that are intended to coerce a government).

recently increased their level of violence, allegedly in response to the incarceration of several comrades.¹³¹ Such use of kidnapping, violence, and assassination to affect government conduct outside American jurisdiction is the very definition of international terrorism and supports such a finding in contribution litigation.¹³²

The civil provisions of the ATA allow suit by a U.S. national injured in “person, property, or business” by the terrorist acts and requires a recovery of treble damages as well as the cost of the suit and attorney’s fees.¹³³ Aside from this favorable recovery allowance, the ATA also allows suit against parties that aid and abet terrorist organizations, including those who provide the necessary funds.¹³⁴ This will probably make it easier to establish liability than under RICO. Like RICO, the ATA presents a powerful claim that would be quite profitable for insurance and very damaging to the institution of piracy. This Comment leaves further examination or rebuttal of these and any other legal theories, as well as the application of other federal statutes against organized piracy, to the investigators, litigators, and legal scholars.

This Comment concludes by positing that either the ATA or RICO Act may be applicable to an insurance company against the institution of organized piracy. When pirate victims bring suit against their employers or ships’ owners, the insurance defendant may extend the action against pirates, expatriate supporters, business supporters, business borrowers, corrupt politicians, and whoever else that they can identify through investigation who is connected to the organization. In this third-party action, the insurer may claim alternate causes of action under the ATA and RICO acts under Rule 14(a)(3) because its monetary losses are due to the same third-party defendant activity that injured the

131. Paul Goldsmith, *Are Pirates Really in Pursuit of High-Value Loot?*, *THE EAST AFRICAN* (Nairobi), Nov. 23, 2009 (noting that two recent local assassinations were probably due to the deceased’s jailing of local pirates, and also noting that the recent hellish conditions imposed on a crew of kidnapped Spanish fishermen contrasted with the usual humane treatment because the Spanish government was holding two pirates).

132. See 18 U.S.C. § 2331(1) (2006).

133. 18 U.S.C. § 2333(a) (2006).

134. *Boim v. Quranic Literacy Inst.*, 127 F. Supp. 2d 1002, 1003, 1021 (N.D. Ill. 2001), *aff’d* 291 F.3d 1000 (7th Cir. 2002).

plaintiff, namely the pirate attack.¹³⁵ While a court will not likely allow claims under both statutes to go forth at once, by pleading them in the alternate there is a good possibility that one will succeed. Because the pirate activity satisfies the nexus and locus tests for admiralty jurisdiction, the supplemental rules for speedy attachment of assets to provide not only quasi in rem jurisdiction but a ready relief fund may be used to guarantee payment of the inevitable judgment.¹³⁶

CONCLUSION

To briefly conclude, it appears that piracy off the coast of Somalia began in the vacuum of lawlessness as a response to foreign encroachments on territorial waters. It has since evolved into a system of organized crime, in which many parties are profiting. Even though the deprived citizens of Somalia may be benefiting from this institution, organized piracy must be quickly put down to avoid similar institutions sprouting elsewhere throughout the world. To that end, military force is necessary only for the short term to provide security, political action is necessary to improve Somalia's internal controls via a worldwide response, and the assets of those parties who support and profit from organized piracy, not out of desperation but out of greed, must be seized to deter future profiteers.

The Jones Act is designed to provide maximum protection for seaman, because they work in a hostile environment from which they cannot simply walk away mid voyage. It allows a good recover at a minimum showing of negligence and causation. It is very likely that a victim of piracy can recover for injuries against a ship owner and his or her employer under the Jones Act. Not only American seaman, but foreign seaman can take advantage of such litigation under appropriate conditions.

The vessel owners' and the insurance's losses in a Jones Act

135. See FED. R. CIV. P. 14(a)(3).

136. In this manner, third-party plaintiffs can avoid the typical outcome for terror litigants, in which the defendants never appear and a default judgment is entered, only for the defendants to then argue the damages for years on end. Most of the interesting legal work involved with the pre-9/11 terror litigation has been the efforts by plaintiffs' attorneys to seize assets to satisfy the judgments. The judgments were fairly easy to obtain, but pinning down the assets post judgment has proven difficult.

litigation combine with other business losses sustained in a pirate attack. By bringing a contribution action against the pirate organizations and their supporters an insurer may be able to recoup business losses and hurt the institution of piracy by making it less profitable. By including RICO or ATA claims, insurance and owners can recover court costs and threefold their losses, making such an action very desirable and further hurting piracy. While admiralty law allows speedy attachment of assets to secure quasi in rem jurisdiction and a recovery fund, the pirates themselves will likely have no assets worth attaching. However, diaspora communities and businesses who aid and invest in organized piracy probably do have such assets and may also be joined as defendants to the action. By bringing alternate statutory claims, an insurance attorney may be able to attain large recoveries, thus further undermining the business of piracy and aiding in its eradication.