

**BORROWING FROM CIVIL AVIATION SECURITY:
DOES INTERNATIONAL LAW GOVERNING AIRLINE HIJACKING OFFER
SOLUTIONS TO THE MODERN MARITIME PIRACY EPIDEMIC OFF THE
COAST OF SOMALIA?**

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Oceans Beyond Piracy
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Executive Summary

Maritime piracy off the coast of Somalia continues to spiral into an increasingly threatening international crisis, with attacks in the Gulf of Aden increasing during the first half of 2011. While more states have been prosecuting pirates in their national courts during the last year, United Nations officials have indicated that as many as 90 percent of pirates captured by national navies are subsequently released due to complicated legal and financial burdens associated with prosecution. In the search for solutions to the current maritime piracy problem, international legal initiatives addressing civil aviation security may offer insight.

A global trend of airline hijackings beginning in the late 1960s and culminating in the terrorist attacks of September 11, 2001, catalyzed various initiatives that have improved the efficacy of aviation security. The international legal regime governing civil aviation security developed through various international treaties, conventions, agreements, declarations, and resolutions from important international institutions. Likewise, the United States, as the world's largest aviation market, has also contributed to the international civil aviation regime through its domestic legislation. Taken together, this broad international legal regime offers a valuable example of cooperation and collaboration between various international stakeholders to address a trend in international crime.

While there are limitations that must be considered in drawing an analogy between airline hijackings and maritime piracy due to contextual and legal distinctions, there are significant similarities that foster effective comparison of approaches. In particular, the civil aviation security regime may inform the following initiatives relevant to maritime piracy: the elimination of safe havens through the enforcement of international agreements obliging states to prosecute piracy crimes; increased port security to ensure the use of Best Management Practices to avoid piratical acts; economic sanctions targeting financiers of piracy crimes; and enhanced communication and coordination among stakeholders affected by the piracy crises.

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Introduction

Piracy attacks off the coast of Somalia continue to increase in 2011, with 18 successful attacks out of 177 attempts during the first half of the year.² At the time of this writing, pirates held 26 ships in the region, with a total of 601 hostages.³ With much of the Somali state effectively ungoverned, pirates are operating from the Somali coast with domestic impunity, even though these attacks often involve extreme violence against seafarers.⁴ Indeed, an attack on an American-owned yacht in February 2011 resulted in the killing of four United States citizens.⁵ While the number of states prosecuting acts of piracy in national courts has risen and the total number of prosecutions has nearly doubled within the last year, according to the United Nations Special Advisor on Piracy, Jack Lang, 90 percent of all pirates captured by national navies were released because no states were willing to accept them for prosecution.⁶

The United Nations Security Council has recently considered the possibility of establishing specialized Somali anti-piracy courts designated for prosecuting piracy crimes in the region.⁷ However, such international criminal tribunals are notoriously wasteful, legally complicated, and politically charged.⁸ Ad hoc arrangements such as the use of Kenyan courts for a de-facto international piracy tribunal have served as temporary solutions, but these options have deteriorated due to political barriers and a lack of resources.⁹ While other solutions are being considered, prosecution of piracy crimes is currently limited to states employing their own national courts under their own national laws,¹⁰ or extraditing pirates to other states willing to prosecute.¹¹ While piracy crimes establish special “universal jurisdiction” that allows prosecution of pirates by any state, some states remain unwilling to prosecute without a well-defined national interest at

² See U. N. Secretary-General, *Modalities For the Establishment of Specialized Somali Anti-Piracy Courts*, Annex I, U.N. Doc. S/2011/360 (June 15, 2011) [hereinafter Report of the Secretary-General], available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/358/22/PDF/N1135822.pdf?OpenElement>.

³ *Id.*

⁴ *Id.*

⁵ Adam Nagourney & Jeffrey Gettleman, *Four Americans Held on Hijacked Yacht are Killed*, N.Y. TIMES, Feb. 22, 2011, available at <http://www.nytimes.com/2011/02/23/world/africa/23pirates.html>.

⁶ Press Release, Security Council, In Race Between Pirates and International Community, Pirates Clearly Winning, Secretary-General’s Top Legal Adviser on Piracy Warns Security Council, U.N. Press Release SC/10164, (Jan. 25 2011), available at <http://www.un.org/News/Press/docs/2011/sc10164.doc.htm>.

⁷ *Id.* at 1-26.

⁸ See generally Daryl A. Mundis, *Improving the Operation and Functioning of the International Criminal Tribunals*, 94 AM. J. INT’L L. 759 (2000).

⁹ See Report of the Secretary-General, supra note 2, at Annex V (“In March 2010, Kenya gave six months’ notice of its withdrawal from the arrangements that it had entered into with Canada, China, Denmark, the European Union, the United Kingdom and United States, for the transfer of piracy suspects.”).

¹⁰ See, e.g., *United States v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2010); *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010).

¹¹ See, e.g., Report of the Secretary-General, supra note 2, at Annex V (“Seychelles has arrangements with Denmark, the European Union, the United Kingdom and the United States for the transfer of piracy suspects for prosecution. Seychelles’ willingness to accept the transfer of suspects under these arrangements is contingent upon being able to transfer convicted persons to Somalia to serve their prison sentences there.”).

stake.¹² This catalyzes the widespread “catch-and-release” policy that appears to be incentivizing piratical acts.¹³

Given the complicated mix of variables contributing to the modern maritime piracy problem, it may be helpful to draw approaches used to solve problems of similar complexity. In particular, the international legal regime governing civil aviation security that developed to address a frightening trend in hijackings of commercial aircraft beginning in the late 1960s could offer solutions for addressing the maritime security problem off the coast of Somalia.

Around 80 percent of the earliest hijacking incidents in the United States involved Cuban political refugees seeking a safe haven in either the United States or Cuba (depending on their political bent) by demanding commercial flights re-route to their desired destination.¹⁴ Other hijackings occurred during the 1970s for the purpose of obtaining money by holding passengers hostage.¹⁵ During the second half of the 1970s and early 1980s, many hijackings occurred to promote political objectives based on already existing international conflicts.¹⁶

Through international collaboration resulting in various treaties, conventions, resolutions, declarations, informal agreements, and widespread security measures, the number of hijackings in the United States and worldwide dropped dramatically in the late 1980s. In fact, there were no hijackings of United States-flagged aircraft from 1992-2000.¹⁷ Despite this marked improvement in aviation security, on September 11, 2001, four United States aircraft were hijacked by members of the *Al Qaeda* terrorist network and used as weapons on iconic targets with the intent to maximize civilian casualties. This revealed additional vulnerability of the civil aviation security regime, which was subsequently overhauled.

Since 2001, the international legal regime governing civil aviation security, however imperfect, is thought to be stronger than ever. This paper traces the history of its development and explores the international cooperation that has contributed to its success to determine whether lessons learned in civil aviation security could translate into initiatives for eradicating the modern maritime piracy epidemic.

¹² See Eugene Kontorovich & Steven Art, *An Empirical Examination of Universal Jurisdiction for Piracy*, 104 AM J. INT’L L. 436, 451 (2010) (“The Chief prosecutor in Hamburg, Germany, where pirates caught by that country would probably be tried, stated: ‘[T]he German judicial system cannot, and should not, act as World Police. Active prosecution measures will only be initiated if the German State has a particular, well-defined interest....’”).

¹³ For a discussion of the catch-and-release problem, see International Efforts to Combat Maritime Piracy: Hearing Before the House of Representatives Committee on Foreign Affairs Subcommittee on International Organizations, Human Rights and Oversight, 111th Congress (2009), available at <http://foreignaffairs.house.gov/111/49546.pdf>

¹⁴ See Paul Stephen Dempsey, *Aviation Security: The Role of Law in the War Against Terrorism*, 41 COLUM. J. TRANSNAT’L L. 649, 655 n.23 (2002-2003).

¹⁵ *Id.* at 653.

¹⁶ *Id.* at 653.

¹⁷ *Id.* at 656, n.27.

The International Legal Regime Governing Maritime Piracy

Piracy, along with crimes against humanity, genocide, slavery, and torture, is one of the few international offenses known as *jus cogens* or “compelling law” that establishes universal jurisdiction.¹⁸ This special jurisdiction transcends the territorial limitations usually involved in the exercise of criminal jurisdiction by recognizing core values that are shared by the international community.¹⁹ The Princeton Principles on Universal Jurisdiction, a contemporary restatement of international law on the subject, explains the concept this way: “Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.”²⁰ However, universal jurisdiction is only “permissive,” meaning states are entitled but not required, to prosecute even crimes as universally condemned as piracy.

International agreements attach various obligations to signatories in the fight against piracy. One of the most important agreements is the United Nations Convention on the Law of the Sea (UNCLOS), which is nearly universally ratified²¹ and codifies customary international law²² on the subject. Under article 100 of UNCLOS, signatories are obliged to actively cooperate to the fullest possible extent in the repression of piracy.²³

Another important international agreement is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), which provides for parties to create criminal offenses and establish jurisdiction over piracy crimes, but also requires them to accept delivery of persons responsible for or suspected

¹⁸ See Stephen Macedo ed., *The Princeton Principles on Universal Jurisdiction* in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (2001) at 22 [hereinafter Princeton Principles on Universal Jurisdiction]

¹⁹ See M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW (Stephen Macedo ed., 2001) at 42.

²⁰ Princeton Principles on Universal Jurisdiction supra note 18, at 21.

²¹ It should be noted that the United States has not ratified UNCLOS; However, the United States District Court for the Eastern District of Virginia has recently held that UNCLOS reflects customary international law on piracy and is therefore applicable to the United States in some respects. See *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010).

²² Customary international law is derived from “a general and consistent practice of states followed by them from a sense of legal obligation.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

²³ United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, [hereinafter UNCLOS] available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf. UNCLOS defines piracy in article 101 to include any acts of violence, detention or depredation committed for private ends by the crew or passengers of a private ship against another ship, or person or property on board that ship. To satisfy the UNCLOS definition, piratical acts must be committed on the high seas, outside the jurisdiction of any state or within the exclusive economic zone of any state. Acts that incite or intentionally facilitate these acts may also fit this piracy definition. The 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and other international legal instruments further define the scope of piracy crimes.

of seizing a ship by force, threat, or other forms of intimidation.²⁴ SUA also urges parties to cooperate with the United Nations Secretary General and the International Maritime Organization (IMO) to build judicial capacity for prosecuting piracy suspects.²⁵ Article 10 of the SUA Convention requires signatories to either prosecute or extradite piracy suspects.²⁶ This provision on its face incorporates the legal maxim *aut dedere aut judicare*—the obligation of states to prosecute or extradite the accused.²⁷ However, it is unclear what obligations are triggered when the coastal state is unwilling or unable to prosecute the suspects.²⁸

Taken together, UNCLOS and SUA appear to require states to prosecute pirates in some instances.²⁹ Under UNCLOS, states have a duty to cooperate through active measures, while SUA requires parties to extradite or submit offenders to their competent authorities for prosecution.³⁰ While the SUA obligations could be circumvented if parties refuse to take custody of pirates in the first place, the UNCLOS obligation to cooperate in the repression of piracy appears to limit this loophole.³¹

In addition to the obligations imposed by widely ratified international agreements, various resolutions issued by the United Nations General Assembly have also encouraged member states to update their national laws to ensure a domestic prosecutorial framework is in place to combat piracy.³² They also recognize that some states lack provisions in their domestic law that criminalize and provide procedural capacity for prosecuting piracy.³³ One report of the United Nations Secretary General goes so far as to provide elements that are needed within national jurisdictions for successful prosecutions.³⁴

²⁴ See Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, [hereinafter SUA Convention], available at http://oceansbeyondpiracy.org/sites/default/files/sua_convention.pdf.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See generally Declan Costello, *International Terrorism and the Development of the Principle Aut Dedere Aut Judicare*, 10 J. INT'L L. & ECON. 483 (1975); Colleen Enach-Brown & Ari Fried, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law*, 43 MCGILL L. J. 613 (1998).

²⁸ Joseph Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 AM. U. L. REV. 1267, 1292 (2009-2010) [hereinafter Insanga].

²⁹ See Eugene Kontorovich, *A Guantanamo at Sea: The Difficulty of Prosecuting Pirates and Terrorists*, 98 CALIF. L. REV. 243, 254-55 (2010).

³⁰ *Id.*

³¹ *Id.*

³² See, e.g., G.A. Res. 55/7, U.N. Doc. A/RES/55/7 (Feb. 27, 2001) available at http://www.itlos.org/fileadmin/itlos/documents/basic_texts/trust_fund_terms_eng.pdf; G.A. Res. 59/24, U.N. Doc. A/RES/59/24 (Feb. 4, 2005) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/477/64/PDF/N0447764.pdf?OpenElement>; G.A. Res. 60/30, U.N. Doc. A/RES/60/30 (Mar. 8, 2006) available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/489/34/PDF/N0548934.pdf?OpenElement>.

³³ See *supra* note 32..

³⁴ See U.N. Secretary-General, Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea Off the Coast of Somalia, Including, in Particular, Options for Creating Special Domestic Chambers Possibly with International Components, a Regional Tribunal or an International Tribunal and Corresponding Imprisonment Arrangements, Taking into Account the Work of the Contact Group on Piracy Off the Coast of Somalia, the Existing Practice in

The United Nations Security Council has also authorized states and interested multilateral coalitions to undertake all necessary measures for the purpose of suppressing acts of piracy and armed robbery off the coast of Somalia.³⁵ This has served as an ad hoc mechanism for amending UNCLOS to allow states to engage in the hot pursuit of suspected pirates in the territorial waters of another coastal state.³⁶

Despite this ostensibly robust legal regime for prosecuting acts of piracy, few nations have actually done so.³⁷ As one commentator has noted, “[w]hen the responsibility to prosecute belongs to every state, the practical effect is that no state seems to accept it, apart from those states that have immediate national interests at stake.”³⁸ Thus, the international community must consider innovative approaches to ensure compliance with international agreements to reign in maritime piracy in the Gulf of Aden.

International Legal Regime Governing Civil Aviation Security

Given the scale of the maritime piracy problem and the difficulty involved in generating compliance with international agreements that entail prosecution of piracy crimes, it may be helpful to consider approaches employed to enhance security in civil aviation.³⁹ International law addressing attacks on aviation and airport security is based on several international conventions drafted under the auspices of the United Nations International Civil Aviation Organization (ICAO). These include the Tokyo Convention of 1963⁴⁰; The Hague Convention of 1970⁴¹; The Montreal Convention of 1971⁴²; Annex 17 to the

Establishing International and Mixed Tribunals, and the Time and Resources Necessary to Achieve and Sustain Substantive Results, U.N. Doc. S/2010/394 (July 26, 2010) [hereinafter Possible Options to Further the Aim of Prosecuting Persons Responsible for Acts of Piracy] *available at* <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/425/07/PDF/N1042507.pdf?OpenElement> (“The elements that are needed within the national jurisdiction for successful prosecutions are criminal offences of piracy and armed robbery at sea; criminal responsibility of those who participate in, or attempt to commit, such offences; provisions establishing national criminal jurisdiction over piracy offences committed on the high seas; and the necessary evidentiary and procedural provisions to conduct prosecutions.”).

³⁵ *See, e.g.*, S.C. Res. 1872, U.N. Doc. S/RES/1872 (May 26, 2009), *available at* <http://www.treasury.gov/resource-center/sanctions/Documents/1872.pdf>; S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008), *available at* [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1851\(2008\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1851(2008)).

³⁶ *See* Isanga, *supra* note 28, at 1273 (“...UNCLOS is premised upon a traditional understanding of piracy—one that assumes that the state system works effectively and that a state can enforce its own laws in its territorial sea. However, as recent events demonstrate, this is often not the case.”)

³⁷ *See* Report of the Secretary-General, *supra* note 2, at Annex I (noting that only 20 nations have prosecuted crimes of piracy in the modern era).

³⁸ Isanga, *supra* note 28, at 1271.

³⁹ For a comprehensive discussion of international civil aviation security law, *see* Dempsey, *supra* note 13.

⁴⁰ Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. [hereinafter Tokyo Convention] *available at* <http://treaties.un.org/doc/db/Terrorism/Conv1-english.pdf>.

⁴¹ Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105, [hereinafter Hague Convention] *available at* <http://treaties.un.org/doc/db/Terrorism/Conv2-english.pdf>.

Chicago Convention of Civil Aviation of 1944⁴³; The Montreal Protocol of 1998⁴⁴; and the Montreal Convention of 1991⁴⁵. Other air security agreements have emerged outside of ICAO auspices, including the European Convention on the Suppression of Terrorism⁴⁶ and the Bonn Declaration on Hijacking.⁴⁷ Although not all of these conventions are ratified by ICAO member states, the widespread acceptance of the conventions by major economic powers arguably establishes customary international law that would bind both signatories and non-signatories alike.⁴⁸

The United Nations General Assembly and the Security Council have also issued resolutions and declarations condemning aircraft hijacking.⁴⁹ The United Nations has further catalyzed the adoption of various international conventions regarding the prevention and suppression of terrorism, hijackings and financing of such activities.⁵⁰ ICAO has likewise issued various similar resolutions developing the body of international law governing airline hijackings.⁵¹

The United States also engaged in an immense domestic legislative response to aerial terrorism, especially following the September 11, 2001 attacks.⁵² As the world's largest airline market, United States legislation has a significant impact on global regulation because foreign airlines and flights from foreign airports that do not meet United States security standards are effectively prohibited from accessing its lucrative market.⁵³

Despite significant challenges, these international agreements, domestic laws, United Nation resolutions, and leveraging mechanisms have worked to establish a regulatory regime designed to prevent and deter aircraft hijackings. By strengthening airport and

⁴² Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177 [hereinafter Montreal Convention] *available at* <http://treaties.un.org/doc/db/Terrorism/Conv3-english.pdf>.

⁴³ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention] *available at* <http://www.icao.int/icao/en/leb/chicago.pdf>.

⁴⁴ Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, 1589 U.N.T.S. 474 [hereinafter Montreal Protocol of 1988] *available at* http://dgca.nic.in/int_conv/Chap_XIX.pdf. The Montreal Protocol of 1988 added additional requirements for security in airports serving civil aviation.

⁴⁵ Convention on the Marking of Plastic Explosives for the Purpose of Detection, March 1, 1991, 2122 U.N.T.S. 359. *available at* <http://treaties.un.org/doc/db/Terrorism/Conv10-english.pdf>

⁴⁶ European Convention on the Suppression of Terrorism, Jan. 27, 1977, Europe T.S. No. 90 [hereinafter European Convention] *available at* <http://conventions.coe.int/Treaty/en/Treaties/html/090.htm>.

⁴⁷ Joint Statement on International Terrorism, Pub. Papers 1308, July 17, 1978 [hereinafter Bonn Declaration]. The Bonn Declaration is an agreement of the G-7 leaders (Canada, France, West Germany, Italy, Japan, the United Kingdom, and the United States) providing that all flights would be stopped to or from any nation that refused to return a hijacked aircraft or refused to prosecute or extradite a hijacker.

⁴⁸ For example of this rationale, *see United States v. Hasan*, 747 F. Supp. 2d 599, 633 (E.D. Va. 2010) (holding that the definition of piracy in UNCLOS reflects the current state of customary international law for purposes of interpreting United States piracy legislation even though the United States is not a signatory).

⁴⁹ *See* Dempsey, *supra* note 13, at 687.

⁵⁰ *Id.* at 688.

⁵¹ *Id.*

⁵² *Id.* at 691.

⁵³ *Id.*

aircraft security, prosecuting hijackers and terrorists, and imposing de facto sanctions on states that provide safe havens for such offenders, aviation security has evolved into a viable legal framework that may contribute to solutions in other sectors facing similar issues.

The Chicago Convention

The development of an international legal regime governing aviation security began at the end of the Second World War when fifty-two nations met and drafted the Convention on Civil Aviation of 1944, known as the Chicago Convention.⁵⁴ In Chicago, the International Civil Aviation Organization (ICAO) was established as a specialized agency of the United Nations with the principle mandate of advancing aviation safety and security.⁵⁵ ICAO is unique from other United Nations entities in terms of its organizational structure.⁵⁶ Its Council is a permanent body vested with quasi-legislative power in its ability to adopt International Standards and Recommended Practices (SARPS) and Annexes, and its ability to settle disputes arising under the Chicago Convention.⁵⁷

The Tokyo Convention of 1963

Although it was not originally intended to address airline hijackings, the Tokyo Convention of 1963 in Article 11 requires contracting states in which a hijacked aircraft lands to “take all appropriate measures to restore control of the aircraft to its lawful commander.”⁵⁸ The Convention also prohibits acts that could jeopardize the safety of commercial aircraft or passengers during flight, and establishes jurisdiction in the state of the aircraft’s registry.⁵⁹ However, it does not oblige signatories to prosecute or extradite hijackers and fails to address acts of sabotage that occur before an aircraft’s departure.⁶⁰ While the Tokyo Convention served as a foundation for other international conventions to build upon, its adequacy faded as terrorist attacks increased.⁶¹

The Hague Convention of 1970

Responding to the increase in terrorism against commercial aircraft during the late 1960’s, ICAO organized the Hague Convention, which formally declared hijackings of an aircraft to be an “international offense.”⁶² The Hague Convention took further steps to clarify jurisdictional questions, and compelled states to either extradite or prosecute

⁵⁴ *Id.* at 661-663.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 662-663.

⁵⁸ *Id.* at 663-666; Tokyo Convention, *supra* note 40, art. 11.

⁵⁹ See Dempsey, *supra* note 13, at 663-666.

⁶⁰ *Id.*

⁶¹ *Id.* at 666.

⁶² *Id.* at 666-668.

hijackers.⁶³ It also requires states to punish terrorist acts through “severe penalties” through their domestic laws.⁶⁴

The Hague Convention is thought to have contributed to the decline in the number of hijackings following its promulgation.⁶⁵ This is largely attributed to the deterring function that mandatory prosecution or extradition played in eliminating safe havens for hijackers.⁶⁶ The proscribed enhanced penalties may also have played a role.⁶⁷

However, it should be noted that the United States and Cuba signed a Memorandum of Understanding just three years later to address the Cuban hijacking problem. Like the Hague Convention, the agreement required the prosecution or extradition of Cuban hijackers with the goal of eliminating safe havens. Thus, the Memorandum of Understanding with Cuba may also have contributed to the decline in hijackings immediately following the Hague Convention.⁶⁸

The Montreal Convention of 1971

While the Hague Convention appears to have been successful in many respects, the Montreal Convention remedies some of its deficiencies, such as issues related to airport security and aircraft sabotage prior to flight.⁶⁹ It also substantially overlaps the Hague Convention on other issues.⁷⁰ However, even taken together, both conventions have been criticized as not actually requiring prosecution or extradition but only imposing an obligation to present the case before appropriate authorities who have the discretion to decide whether prosecution is warranted.⁷¹

In application, the Montreal Convention has also been problematic, as demonstrated by contentious litigation before the International Court of Justice (ICJ).⁷² This case arose out of a dispute between the United States and Libya in 1971, following the explosion of Pan Am flight 103 over Lockerbie, Scotland, in which two Libyan nationals were suspected of putting a bomb onboard.⁷³ When the United States sought extradition of the Libyan nationals, Libya refused, reasoning that it would prosecute the alleged perpetrators under its domestic law in accordance with the Montreal Convention.⁷⁴ Relying on Article 14 of the Montreal Convention, Libya brought the United States before the ICJ on grounds that the United States had breached the arbitration requirements for disputes arising out of the Montreal Convention.⁷⁵

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 668.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 668-675.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 673.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

Indeed, it appeared that Libya had complied with the Montreal Convention and the United States, by refusing to go to arbitration on the issue, had not. But there were suspicions that the Libyan government was complicit in the bombing and would not adequately prosecute the suspects.⁷⁶ To further confuse the matter, the United Nations Security Council intervened, issuing two resolutions regarding Libya's alleged role in the Lockerbie bombing and mobilizing economic sanctions.⁷⁷

When the dispute finally came before the ICJ, the Court ruled that under Article 25 of the United Nations Charter, both states were obliged to follow the decisions of the Security Council, despite any other obligations expressed in international agreements, including the Montreal Convention.⁷⁸ Various forms of Security Council sanctions followed, and eventually, Libya surrendered the two suspects to the United Kingdom to be tried and convicted before a Scottish court in the Netherlands.⁷⁹ The United States and Libya never went to arbitration on the dispute, despite the explicit provisions of the Montreal Convention.⁸⁰

In sum, the Lockerbie case demonstrates two problems with the Montreal Convention. First is the problem of inconsistent treaty enforcement under certain circumstances. For example, Libya's apparent complicity in the airline bombing contributed to the United States' decision to breach the explicit arbitration provision in the Montreal Convention. Second is confusion over the hierarchical nature of various sources of international law. The ICJ decision on the Lockerbie incident provided a controversial determination that the legal authority of the Montreal Convention is diminished when read in light of related United Nations Security Council resolutions.

Annex 17 to the Chicago Convention (1974)

In 1974, under Article 54 of the Chicago Convention, the ICAO Council exercised its quasi-legislative powers to issue Annex 17.⁸¹ This provision addresses various security measures regarding civil aviation, including standards and qualifications for security personnel at international airports.⁸² Annex 17 binds ICAO member states to establish national civil aviation programs and supporting government institutions.⁸³ These institutions are required to share aviation threat information and cooperate with other states regarding their national security programs.⁸⁴

⁷⁶ *Id.* at 673-675.

⁷⁷ *Id.* This included language obliging all states to prohibit aircraft traffic originating from or destined to Libya from flying over their territory.

⁷⁸ Dempsey, *supra* note 13, at 673-675.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 675-680.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

European Convention of 1977

The European Convention is one of two international agreements related to aviation security initiated outside of the ICAO auspices.⁸⁵ This convention seeks to ensure the prosecution of terrorist acts by encouraging extradition between contracting states, defining acts not to be considered political offenses that could otherwise limit extradition rights.⁸⁶ However, the European Convention has also been criticized as deficient in several respects.⁸⁷

The Bonn Declaration of 1978

The G-7 heads of state issued the Bonn Declaration on Hijacking in July of 1978.⁸⁸ The Declaration has no binding effect on the parties, but establishes the intention for these major economic powers to cease all flights to or from any country that fails to extradite or prosecute hijackers.⁸⁹ These potential sanctions from representatives of seventy percent of world aviation traffic created significant obligations on non-party states.⁹⁰ The Declaration has subsequently been invoked to threaten sanctions against Afghanistan and later against South Africa.⁹¹

The Montreal Protocol of 1998 and the Montreal Convention of 1991

Following the bombing of several major airports in the 1980's that resulted in the death of waiting passengers, ICAO issued a Protocol that effectively extended the principal provisions of the Montreal Convention to airport facilities.⁹² In 1991, subsequent to the attack on Pan Am flight 103, the United Nations Security Council passed Resolution 635, which urged ICAO to devise an international regime for marking of plastic and sheet explosives for detection purposes.⁹³ ICAO responded with the Montreal Convention of 1991, which calls on member states to prevent the manufacture and control the movement of unmarked explosives.⁹⁴

United Nations and ICAO Declarations, Resolutions & Conventions

⁸⁵ *Id.* at 680-682.

⁸⁶ *Id.*

⁸⁷ *Id.* at 682 (“Four major defects limited the effectiveness of the European Convention. First, only a handful of states initially signed the Convention. Second, it did not authorize any collective action by those states against non-contracting states. Third, Article 13 of the Convention allowed a state, at the time of signing or ratifying the Convention, to reserve the right to refuse extradition with respect to any of the offenses mentioned in Article 1 that it unilaterally considers to be politically inspired. Four of the fourteen states that originally signed the Convention made such a reservation at the time. Fourth, the European Convention contained no enforcement mechanism beyond the submission of disputes to arbitration.”)

⁸⁸ *Id.* at 682-686.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 686.

⁹³ *Id.*

⁹⁴ *Id.*

The United Nations General Assembly and the Security Council have issued various resolutions and declarations since the late 1960s pertaining to interference with civil aviation.⁹⁵ ICAO has also issued various resolutions contributing to the international legal regime on aviation security.⁹⁶ While relevant, these declarations, resolutions and conventions have limited legal effect. International organizations such as the United Nations and its entities derive their legal authority from agreements in their constituent documents. Some resolutions adopted by the United Nations can be seen as binding international law for member states; by signing on to the United Nations Charter member states agree to be bound by some of its acts.⁹⁷ Additionally, declaratory resolutions of international organizations may provide some evidence of what states collectively view the law to be.⁹⁸ Thus, resolutions and declarations of the United Nations, especially those that are adopted unanimously, may be viewed as evidence of customary international law.⁹⁹ Despite their indefinite legal effect, United Nations resolutions, declaration, and conventions demonstrate the development of a global commitment to eradicate airline hijacking and other terrorist activities affecting civil aviation.

United States Domestic Legal Regime Governing Civil Aviation Security

Due to the United States' position as the world's largest aviation market, its domestic laws and regulations have a significant effect on the international legal regime governing aviation security. Following the first hijacking of a United States commercial aircraft in

⁹⁵ *Id.* at 687-688. The United Nations General Assembly first condemned acts related to civil aviation in 1969, urging all States to take effective measures against unlawful interference with civil aircraft in flight. Subsequently, the United Nations Security Council issued a resolution condemning airline hijacking in 1970, in response to four hijackings by Palestinian guerillas. In 1973, the Security Council issued another resolution condemning acts that result in the loss of innocent life and the endangering of international civil aviation. In 1977, the General Assembly called for enhanced measures to suppress interference with civil aviation, and the same year the United Nations adopted the International Convention for the Suppression of Terrorist Bombing. In 1979, the United Nations also organized the Convention Against the Taking of Hostages and the International Convention for the Suppression of Financing of Terrorism. In 1985, the General Assembly issued a broader condemnation of all practices of terrorism. Following the September 11, 2001 terrorist attacks on four commercial aircraft in the United States, the General Assembly called for international cooperation to prevent acts of terrorism. The Security Council, in 2002, also called upon states to cooperate in preventing terrorism through various measures.

⁹⁶ *Id.* at 688-691. In 1998, the ICAO General Assembly adopted resolutions calling on member states to ratify relevant international conventions on aviation security and to pair ratification with domestic law implementing those obligations. After the September 11 attacks, the ICAO General Assembly passed several other resolutions, including a call for ICAO to establish a security audit program. ICAO has also promulgated international legislative standards under Amendment 10 to Annex 17 of the Chicago Convention. This encouraged states to ensure that principles safeguarding international civil aviation are applied to domestic operations to the extent practicable.

⁹⁷ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 22, at § 102 cmt. (g-h) (1987). ("Some international agreements that are constitutions or charters of international organizations confer power on those organizations to impose binding obligations on their members by resolution, usually by qualified majorities. Such obligations derive their authority from the international agreement constituting the organizations, and resolutions so adopted by the organization can be seen as "secondary sources" of international law for its members. For example, . . . The International Civil Aviation Organization may set binding standards for navigation or qualifications for flight crews in aviation over the high seas.")

⁹⁸ *Id.*

⁹⁹ *Id.* at §103(c).

1961, Congress responded by federal legislation criminalizing hijacking and other related activities.¹⁰⁰ In subsequent years, the United States created a body of law to combat terrorism domestically and internationally, focusing on both prevention of airline hijackings and punishment of perpetrators.¹⁰¹

In particular, the Antihijacking Act of 1974¹⁰² and the Foreign Airport Security Act of 1985¹⁰³ have significant implications on the international aviation security regime. Taken together, these pieces of legislation grant the President the power to suspend landing rights of any nation that harbors hijackers and also requires foreign airlines to adopt and implement security measures established by the United States government in order to access United States airports.¹⁰⁴ In fact, the Department of Transportation has at different times decertified various foreign airports.¹⁰⁵ As one commentator has said, “Given the significant economic penalty for denial of the opportunity to serve the U.S. market, these moratoria have been highly effective in encouraging governmental and airport authorities to attain security compliance.”¹⁰⁶

Additionally, during the Cold War, in response to a growing number of hijackers of Cuban origin, the United States and Cuba exchanged diplomatic notes constituting a Memorandum of Understanding that neither country would serve as a safe haven for hijackers.¹⁰⁷ With both the United States interests and the Cuban interests represented through third parties¹⁰⁸ because diplomatic relations had been severed, the two sides exchanged a series of notes that, among other things, announced an agreement to try hijacking offenders under national laws with the “most severe penalty” available or otherwise extradite them to the territory of the other party. Following this agreement, the number of attempted hijackings of aircraft in the United States dropped significantly from twenty-five hijackings per year prior to the agreement to only one the following year. This remarkable change suggests that the existence of a sanctuary nation for hijackers enabled the Cuban hijacking problem.¹⁰⁹

While United States legislation on aviation security has evolved through several decades, the most significant changes occurred following the September 11 attacks. Prior to

¹⁰⁰ Federal Aviation Act of 1958, § 902 Publ. L. No. 87-197, § 1, 75 Stat. 466 (1961) (repealed in 1994).

¹⁰¹ For a comprehensive discussion of U.S. domestic aviation security law, *see* Dempsey, *supra* note 13, at 694-726.

¹⁰² Antihijacking Act of 1974, Pub. L. 93-366, tit. I, 88 Stat. 409 (1974).

¹⁰³ The Foreign Airport Security Act of 1985, Pub. L. 99-83, tit. V, pt. B, 99 Stat. 222 (1985).

¹⁰⁴ *Id.* This includes a security audit program implemented by the Department of Transportation. If the Department finds that an airport has failed to apply appropriate security measures, it may decertify.

¹⁰⁵ *See* Dempsey, *supra* note 13, at 706. (“At various times, the DOT has decertified and the recertified various foreign airports—including Lagos, Bogota, Athens, Manila, and Beirut—on the basis of FAA security audits.”)

¹⁰⁶ *Id.* at 707.

¹⁰⁷ Exchange of Notes Constituting an Agreement Relating to Hijacking of Aircraft and Vessels and Other Offenses (With Memorandum of Understanding), U.S.-Cuba Feb. 15, 1973 16 U.N.T.S. 85 *available at* <http://treaties.un.org/doc/Publication/UNTS/Volume%20916/volume-916-I-13067-English.pdf>.

¹⁰⁸ *Id.* The United States interests were represented by the Czechoslovak Embassy in Washington and the Cuban interests represented through the Swiss Embassy in Havana.

¹⁰⁹ Dempsey, *supra* note 13, at 702.

September 11, Congress had given the Department of Transportation jurisdiction to regulate many of facets of airport security.¹¹⁰ Under the pre-9/11 security regime, the Federal Aviation Administration (FAA) regulated security, and airlines were responsible for satisfying FAA requirements through measures such as screening passengers and baggage, and policing non-secure airport areas.¹¹¹ These airlines, being cost conscious, outsourced security responsibilities to private firms.¹¹² This was problematic because security firms paid and trained their employees cheaply, leading to an inadequate security force cadre.¹¹³

Following September 11, the United States massively overhauled its security regime, and signed into law the Air Transportation Safety and System Stabilization Act and the Aviation and Transportation Security Act.¹¹⁴ The former was primarily concerned with addressing the economic harm suffered by airlines as a result of the terrorist attacks by providing assistance designed to head off a collapse of the industry.¹¹⁵ It also established a Victim's Compensation Fund to serve as an alternative for family members who might otherwise file traditional negligence suits against the airlines in federal courts.¹¹⁶

The Aviation and Transportation Security Act, on the other hand, took substantive steps to restore the public's confidence in flying.¹¹⁷ It federalized the airport security function previously fulfilled by the private sector under FAA regulations, and replaced it with the Transportation Security Administration (TSA) as part of the Department of Transportation.¹¹⁸ The new TSA was required to coordinate with intelligence agencies and to implement security requirements involving enhanced equipment and technology and new procedures for screening individuals and luggage.¹¹⁹ Airport security personnel were also subjected to background checks and became federal employees, and a variety of other security measures were imposed on passengers and airport employees.¹²⁰

Fourteen months after the attacks of September 11, Congress passed the Homeland Security Act, which established a new Department of Homeland Security (DHS), consolidating twenty-two existing agencies, including the new TSA.¹²¹ DHS was given a

¹¹⁰ *Id.* at 720-721.

¹¹¹ *Id.*

¹¹² *Id.* at 721.

¹¹³ *Id.*

¹¹⁴ *Id.* at 712-14.

¹¹⁵ *Id.*; Air Transportation Safety and System Stabilization Act, Pub. L. 107-42, 115 Stat. 230 (2001).

¹¹⁶ See Dempsey, *supra* note 13, at 712-714; Air Transportation Safety and System Stabilization Act, Pub. L. 107-42, 115 Stat. 230 (2001).

¹¹⁷ See Dempsey, *supra* note 13, at 713-717; Aviation and Transportation Security Act, Pub. L. 107-71, 15 Stat. 597 (2001).

¹¹⁸ See Dempsey, *supra* note 13, at 713-717; Aviation and Transportation Security Act, Pub. L. 107-71, 15 Stat. 597 (2001).

¹¹⁹ See Dempsey, *supra* note 13, at 713-717; Aviation and Transportation Security Act, Pub. L. 107-71, 15 Stat. 597 (2001).

¹²⁰ See Dempsey, *supra* note 13, at 713-717; Aviation and Transportation Security Act, Pub. L. 107-71, 15 Stat. 597 (2001).

¹²¹ See Dempsey, *supra* note 13, at 717-719; Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002).

massive budget and employed around 170,000 workers.¹²² Its mission was to prevent terrorist attacks in the United States and to minimize various vulnerabilities to terrorism.¹²³ This DHS mandate includes broad jurisdiction over immigration and commerce flow, as well as various particulars specific to airline security, including the auditing mechanism embodied in the U.S. Foreign Assessment Program.¹²⁴

Compliance and Enforcement in Civil Aviation Security

One challenge to ensuring compliance with international agreements is that there are no enforcement mechanisms or law enforcement agencies comparable to those on the domestic level. Domestically, nations maintain law and order over their territory—a practice that has no equivalent in the community of nations. Thus, nations cannot rely on an international enforcement agency to ensure compliance with international obligations. The narrow exceptions include areas where dispute settlement mechanisms, such as the World Trade Organization Dispute Settlement Body, have been delegated authority.¹²⁵

However, states tend to comply with their international obligations when it is cost-justified based on motivations related to self-interest.¹²⁶ States may comply because they recognize that non-compliance could diminish their reputation and hinder future international cooperation.¹²⁷ States may also comply out of fear of retaliation through economic sanctions or other coercive mechanisms applied by international actors in response to noncompliance.¹²⁸ However, when a state's narrow self-interest in non-compliance outweighs any potential benefits of compliance, states may be more likely to violate international agreements or other international legal norms.¹²⁹

¹²² See Dempsey, *supra* note 13, at 717-719; Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002).

¹²³ See Dempsey, *supra* note 13, at 717-719; Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002).

¹²⁴ See Dempsey, *supra* note 13, at 717-719; Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (2002).

¹²⁵ See, e.g., Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 1867 U.N.T.S. 154, *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm.

¹²⁶ See, e.g., Jack L. Goldsmith & Eric Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT'L L. 113 (2003-2004).

¹²⁷ *Id.* at 135.

¹²⁸ *Id.*

¹²⁹ See *id.* at 137 (“...a reputation for compliance with international law is not necessarily the best—and certainly not the only—means of accomplishing foreign policy objectives. States can benefit from reputations for toughness or even for irrationality or unpredictability. Powerful states, like the United States, cannot be punished effectively when they violate international law, so they may do better by violating international law when doing so shows that they will retaliate against threats to national security. Weak states with idiosyncratic domestic arrangements, like Iraq or North Korea, may benefit by being unpredictable or irrational... One might conclude that all things being equal, nations will strive to have reputations for compliance with international law, but reputations for compliance will not always be of paramount concern because all things are not equal.”)

States or other entities may find it useful to catalyze compliance through international coercive mechanisms at their disposal. The international community and the United States in particular have generated compliance in the context of aviation security through coercive means, such as cutting off the economic benefits to non-complying states by barring access to domestic airports. With the immense leverage that the United States controls by being the world's largest aviation market, it is able to generate compliance with both international regulatory regimes and domestic regulations through auditing programs governing aviation security and safety.

At various times in the modern era, the United States has used economic leverage to propel compliance with domestic security standards monitored by FAA security audits, including decertification of airports in Lagos, Bogotá, Athens, Manila, and Beirut.¹³⁰ This auditing process, with the looming moratoria as an enforcement mechanism, has contributed to compliance with international and United States standards on aviation security.¹³¹ A revealing example is Libya's decision to accept responsibility and pay damages to victims of the Pan Am flight 103 explosion over Lockerbie, Scotland, to avoid an indefinite bar from serving the United States aviation market.¹³² However, in the context of aviation safety, when the United States has employed similar unilateral oversight, there has been considerable backlash under the reasoning that uneven unilateral sanctions were applied to impose unfair trade practices, with special treatment given politically and economically important countries such as Russia and China.¹³³

In sum, compliance with international agreements is governed primarily by self-interest, rather than any traditional law enforcement apparatus. This contributes to a flexible, albeit elusive and unpredictable, international legal regime. While coercive measures may be employed as de facto enforcement mechanisms, international legal norms, even when codified in treaties and other agreements, are not subject to traditional external law enforcement.

Borrowing Aviation Security Measures in the Fight Against Maritime Piracy

I. Limitations to the Analogy

Drawing legal analogies between the airline industry and the shipping industry is not a novel practice. Both industries involve the transport of goods and persons through international territory that is not subject to the jurisdiction of any one state. When drafting international maritime security agreements, the language of international conventions on aviation security has been borrowed, verbatim in some instances.¹³⁴ And indeed, hijacking of aircraft has sometimes been called "air piracy."

¹³⁰ Dempsey, *supra* note 13, at 706.

¹³¹ *Id.*

¹³² *Id.*

¹³³ See Paul Stephen Dempsey, *Compliance & Enforcement in International Law: Achieving Global Uniformity in Aviation Safety*, 30 N.C.J. INT'L L. & COM. REG. 1, 33 (2004-2005).

¹³⁴ Additionally, UNCLOS includes language that incorporates both ships and aircraft in many respects. See UNCLOS, *supra* note 24.

However, there are clear limitations when making comparisons between viable security regimes governing the two industries. The most obvious is that airline hijackings typically involve many unsuspecting civilian travelers, while modern maritime piracy usually affects only a limited number of professional seafarers. Furthermore, security breaches in civil aviation appear to have a more discernible impact on the public psyche. For example, after September 11, the United States airline industry and the broader economy suffered due to consumer fear affecting the public willingness to fly. This resulted in domestic legislation in the United States designed to avoid the airline industry's economic collapse.¹³⁵ The United States Congress also federalized airport security functions previously performed only by the airlines under FAA regulations in part to restore public confidence in flying.¹³⁶ Piracy appears to have had less of an effect on the general public. While substantial at an estimated seven to twelve billion dollars per year,¹³⁷ the economic costs of piracy have been absorbed by the shipping industry and only marginally impact the price of most goods and the global economy.¹³⁸ Additionally, while the great human costs of piracy are immeasurable in many respects, these costs affect a smaller demographic, primarily seafarers and their families, resulting in less outcry from the general public.¹³⁹

Other distinctions exist that may preclude a seamless transfer of lessons from aviation security to address maritime piracy. While airline hijackings can be deterred through airport security measures, enhanced port security, in contrast, could only serve as a limited piece in a more comprehensive solution to the piracy epidemic. Pirates primarily depart from the ungoverned coast of Somalia or mother ships based in the open waters of the Gulf of Aden. This is distinguishable from airline hijacking which necessarily involves the infiltration of the internationally regulated security infrastructure at airports.

Another limitation in the airline-to-shiping analogy relates to the vulnerability of hijackings in the air versus the sea. The scenario of hostages trapped on an aircraft at 30,000 feet with limited fuel capacity is not directly replicated on the open seas, where hostages can be held for extended periods of time. This results in differing rescue options, with negotiators in the shipping industry sometimes spending months negotiating ransom agreements with pirates. Airline hijackings, on the other hand, necessarily pose an imminent threat to the hostages.

However, there have been instances where hijackers have held hostages on an airline tarmac for an extended period of time, similar to the current piracy practices in the Gulf

¹³⁵ See Air Transportation Safety and System Stabilization Act, *supra* note 115.

¹³⁶ See Dempsey, *supra* note 13, at 714.

¹³⁷ ANNA BOWDEN, ONE EARTH FUTURE FOUNDATION, THE ECONOMIC COST OF MARITIME PIRACY, (2010), <http://oneearthfuture.org/images/imagefiles/The%20Economic%20Cost%20of%20Piracy%20Full%20Report.pdf>.

¹³⁸ *Id.*; However, there may be a variety of indirect economic costs that negatively impact the broader global economy in areas such as foreign direct investment inflows, delivery of foreign aid, and commodity and food prices.

¹³⁹ For an overview of the human costs of the piracy crisis, see KAIJA HURLBURT, ONE EARTH FUTURE FOUNDATION, THE HUMAN COST OF SOMALI PIRACY, (2010), available at http://www.oceansbeyondpiracy.org/sites/default/files/human_cost_of_somali_piracy.pdf

of Aden. A relevant example is the so-called Entebbe incident in 1976, involving a raid by Israeli Defense Forces on Air France flight 139 in Entebbe, Uganda. On June 24, the flight had been hijacked by members of the Popular Front for the Liberation of Palestine, flown to Benghazi, Libya, for refueling, and then continued on to Entebbe airport.¹⁴⁰ The hijackers demanded the release of 53 imprisoned “freedom fighters” in Israel, France, Switzerland, Kenya, and West Germany, in exchange for the safe return of 241 passengers and 12 crewmembers on the aircraft.¹⁴¹ The hijackers subsequently released all hostages except 102 who identified themselves as Israeli.¹⁴² On July 3, Israeli Defense Forces conducted a military raid to rescue the hostages, which resulted in the death of all of the hijackers, twenty Ugandan soldiers, three of the hostages and one Israeli soldier.¹⁴³ The Entebbe incident in many respects resembles current acts of piracy off the coast of Somalia; however, this scenario is an exception that is not indicative of typical airline hijacking.

It is also important to note that some distinctions between acts of maritime piracy and acts of terrorism involve motivations and sometimes carry legal implications.¹⁴⁴ For terrorists, hijackings of aircraft or other vessels are typically used to achieve political demands, such as leveraging the release of prisoners for political purposes or for demonstrating broader political opposition by killing innocent civilians. In contrast, pirates, while they often attack civilians indiscriminately and use extreme violence, are ultimately driven by the desire to steal property or leverage a monetary ransom.

Despite the motivational divide between piracy and terrorism, the line separating the two is sometimes blurred.¹⁴⁵ For example, in 2000, *Al Qaeda* conspired to ram a boat filled with explosives into a United States destroyer in the port of Aden.¹⁴⁶ While this was unsuccessful, *Al Qaeda* succeeded in attacking the USS Cole later that year. Since then, similar terrorist attacks were made on French vessels. The *Al Qaeda* network is also believed to control a “navy” used to transport explosives, such as those used to bomb the U.S. embassies in Kenya and Tanzania. The current Somali piracy epidemic also appears to increasingly represent a confluence between acts of terrorism and acts of piracy. *Al-*

¹⁴⁰ See *Terrorists: The Rescue: “We Do the Impossible,”* TIME, July 12, 1976, available at <http://www.time.com/time/magazine/article/0,9171,914272,00.html>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ For a general overview of these distinctions, see Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT’L & COMP. L. REV. 293 (2006).

¹⁴⁵ *Id.* at 310. (“Both [seventeenth century piracy and modern organized terrorism] are (1) organizations composed of volunteers, which (2) have common goal of gaining the notice of the nations states by (3) committing acts of terro, which may include destruction and seizure of state or private property, frustration of commerce, and homicide. Both (4) exist outside the territorial and jurisdictional boundaries of any stat, and thus may not be properly said to be resident in any state; (5) use this extra-nationality as a means of pursuing their activities against states and, consequently; (6) may be considered not as the enemy of one particular state (even if that is the only state directly affected) but of all states; and (6) are fully cognizant not only of existing outside jurisdiction, but outside of society itself, and use this also as a weapon against the states.”).

¹⁴⁶ George D. Gabel, Jr., *Smoother Seas Ahead: The Draft Guidelines As An International Solution to Modern-Day Piracy*, 81 TUL. L. R. 1433, 1438 (2007).

Shabaab, which the United States has deemed a terrorist organization¹⁴⁷, is thought to be involved at some level with piratical acts off the coast of Somalia.¹⁴⁸ Thus, in some respects, the distinction between terrorism and maritime piracy remains muddled.

In fact, one of the most important international agreements relevant to piracy, the SUA Convention, was organized in the wake of an event that more closely resembled terrorism than an act of modern day piracy. In 1985, members of the Palestine Liberation Front (PLF) seized control an Italian cruise ship, the *Achille Lauro*, in the eastern Mediterranean Sea.¹⁴⁹ The terrorists asked for the release of fifty Palestinian prisoners in Israel, and when the Israeli authorities refused, the terrorists shot and killed an American passenger.¹⁵⁰ Following the *Achille Lauro* incident, the United Nation's International Maritime Organization (IMO), took steps to improve international maritime security, including the adoption of the SUA Convention in 1988.¹⁵¹ Indeed, piracy as a crime is not mentioned specifically in the SUA Convention; it instead codifies crimes involving violent and unlawful acts at sea, which could be read to incorporate piracy crimes and certain acts of maritime terrorism.

Despite the any overlap between piracy and terrorism, there are significant jurisdictional distinctions that affect legal approaches to solving the issues, one of which was discussed recently in a United States Federal Court. In *United States v. Yousef*, the Second Circuit Court of Appeals reversed a New York District Court's holding that the bombing of a Philippine aircraft was subject to United States jurisdiction under the universal jurisdiction principle.¹⁵² It reasoned that crimes of terrorism are "not unequivocally condemned by all States" and that "[t]he class of crimes subject to universal jurisdiction traditionally only include piracy."¹⁵³ While acknowledging that universal jurisdiction over war crimes and crimes against humanity became customary international law after the Second World War, the Court determined that "terrorism" is distinguishable in that it does not have a precise definition and has not achieved universal condemnation.¹⁵⁴ Citing language from another Federal case eighteen years prior, the Court reasoned that "[w]hile this nation unequivocally condemns all terrorist acts, that sentiment is not universal..."¹⁵⁵

¹⁴⁷ U.S. Dep't of State, Office of the Coordinator for Counterterrorism, *Designation of al-shabaab as a Foreign Terrorist Organization*, Feb. 26, 2008, available at <http://www.state.gov/s/ct/rls/other/des/102446.htm>.

¹⁴⁸ See Richard Lough, *Piracy Ransom Cash Ends up with Somali Militants*, REUTERS, July 6, 2011, <http://www.reuters.com/article/2011/07/06/somalia-piracy-idUSLDE7650U320110706>. However, no direct connection is thought to exist between al-Shabaab and Somali pirates. This may be due to clan differences with the pirates hailing from Somalia's Majourteen clan based in the central and northern parts of the country and al-Shabaab being made up of clans from Mogadishu and southern Somalia. See Julie Cohn, *Backgrounder: Terrorism Havens: Somalia*, COUNCIL ON FOREIGN RELATIONS, June 2010, available at <http://www.cfr.org/somalia/terrorism-havens-somalia/p9366>.

¹⁴⁹ For a discussion of various incidents of maritime terrorism and legal responses and reactions to them, see Dennis L. Bryant, *Historical and Legal Aspects of Maritime Security*, 17 U.S.F. Mar. L. J. 1 (2005).

¹⁵⁰ *Id.* at 3-5.

¹⁵¹ *Id.*

¹⁵² *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003).

¹⁵³ *Id.* at 103.

¹⁵⁴ *Id.* at 105.

¹⁵⁵ *Id.* at 106.

and that terrorism “concerns an area of international law in which there is little or no consensus and in which the disagreements concern politically sensitive issues.”¹⁵⁶ The Court then determined that “there continues to be strenuous disagreement between States about what actions do or do not constitute terrorism, nor have we shaken ourselves free of the cliché that ‘one man’s terrorist is another man’s freedom fighter.’”¹⁵⁷ The Court thus concluded that “terrorism”—unlike piracy and war crimes—does not provide a basis of universal jurisdiction.”¹⁵⁸

Another jurisdictional distinction between the two is that an airline always flies the flag of the nation in which it is registered where ships may fly a flag of convenience based on the freedom of the seas principle that governs international maritime law.¹⁵⁹ For example, Panama, Liberia, and the Marshall Islands are popular flags of convenience for maritime shipping because those flag states afford shipping companies cheaper registration fees and limited regulations compared to other states. The airline industry, on the other hand, does not operate with the same level of flexibility regarding registry. This further exemplifies the complexities that legal borrowing between the two industries could entail.

II. Lessons from Civil Aviation

Despite the limitations in drawing a legal analogy, some of the strategies used to deter airline hijackings may be applicable in the fight against maritime piracy. In particular, approaches used in the international legal regime governing civil aviation may be useful to (A) eliminate safe havens for pirates by ensuring legal accountability, (B) mobilize port security systems to encourage best management practices for avoiding piracy attacks, (C) freeze assets of those who fund piracy enterprises, and (D) enhance communication and coordination among the various stakeholders relevant to the fight against piracy.

A. Elimination of Safe Havens

International collaboration targeted at the elimination of safe havens for airline hijackers has involved strategies that may directly translate to the current maritime piracy epidemic where Somalia is currently unable to hold pirates accountable for the crimes originating in its borders. The Somali state has been in disarray for much of the last three decades and has recently served as a safe haven for pirates that operate in the Gulf of Aden. The United Nations Development Programme (UNDP) and the United Nations Office on Drugs and Crime (UNODC) have concluded that the criminal and procedural codes across the three regions of Somalia are critically out of date.¹⁶⁰ Indeed, out of the three regions of Somalia, only Puntland has a piracy law, albeit one that appears inconsistent

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 107.

¹⁵⁸ *Id.*

¹⁵⁹ See President of the Air Navigation Commission, Progress Report on the Issue of Flags of Convenience (Int’l Civil Aviation Org., Working Paper) available at <http://www.icao.int/Hyperdocs/display.cfm?V=2&name=C-WP%2F13133&Lang=E>.

¹⁶⁰ See Report of the Secretary-General, *supra* note 2, at 5.

with international standards.¹⁶¹ While the UNDP and the UNODC have been working with legal drafting experts from Somaliland and Puntland to develop judicial capacity to prosecute piracy crimes, ensuring the existence of adequate codes relevant for investigation, prosecution, trial and imprisonment in Somalia is a long-term goal.¹⁶² In the near term, however, this lack of judicial capacity in the Somali state serves as a catalyst for piracy crimes. Thus, when pirates are caught and subsequently released without prosecution, Somalia serves as a safe haven that incentivizes future piratical acts.

Being unable to rely on Somalia to prosecute pirates within its borders, the international community must, at least temporarily, seek to deter and eliminate safe havens through prosecution outside the current Somali judicial system. The enforcement of international agreements with provisions that attempt to bar catch-and-release policies is a vital part of the solution.

In particular, the principle of *aut dedere aut judicare* (extradite or prosecute) embodied in some relevant international agreements seeks to eliminate safe havens by creating jurisdiction through an agreement by contracting states. In the context of aviation security, Article 7 of the Montreal Convention establishes *aut dedere aut judicare* jurisdiction, obliging states to either prosecute offenders or to extradite them for prosecution by another state party to the Convention.¹⁶³ In relevant part, the Montreal Conventions reads:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.¹⁶⁴

Likewise, the SUA Convention governing maritime security includes similar language in Article 10 (1):

The State Party in the territory of which the offender or the alleged offender is found shall...if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.¹⁶⁵

¹⁶¹ *Id.*

¹⁶² *Id.* In addition to the lack of judicial capacity in Somalia, it also serves as a safe haven because pirates hold hijacked ships off the coast and are not blocked or penalized for doing so by the local government or the Somali Transitional Federal Government.

¹⁶³ See Montreal Convention, *supra* note 42, at art. 7; The Bonn Convention and the Hague Convention also contain language that oblige states to prosecute or extradite suspects.

¹⁶⁴ See Montreal Convention, *supra* note 42, at art. 7.

¹⁶⁵ SUA Convention, *supra* note 24, at art. 10 (1).

In practice, the Montreal Convention has been used to assert jurisdiction and facilitate extradition over crimes against civil aviation. For example, despite the lack of jurisdiction over airline hijackings based on the universality principle discussed above in the *Yousef* case¹⁶⁶, the United States was able to assert jurisdiction over the accused in part because of obligations attached by the Montreal Convention.¹⁶⁷

There is significant evidence that *aut dedere aut judicare* arrangements have provided a deterring effect to hijackers that could also translate to reducing piracy crimes if adequately enforced. For example, as discussed above, the United States Memorandum of Understanding with Cuba during the height of the airline hijacking scare appears to have contributed to the marked curtailing of hijackings in subsequent years. Currently, Somali pirates have a sanctuary nation in the ungoverned Somali state, just as the Cuban hijackers had a safe haven from prosecution based on cold war politics. While the SUA Convention contains language that obliges signatories to extradite or prosecute in the same way that the Montreal Convention does, it has apparently been unable to muster the same level of compliance or cooperation. Although an arrangement with Somalia's de facto leaders to prosecute or extradite is an untenable solution due to the country's current political chaos, enforcement of *aut dedere aut judicare* provisions among other interested states could curtail the catch-and-release policies in the same way that the United States-Cuba Memorandum of Understanding did during the hijacking crisis.

Part of the non-compliance problem may be that some countries lack a modern understanding of their own laws and national authorities governing piracy crimes.¹⁶⁸ Despite the SUA Convention's obligations and the existence of universal jurisdiction authorizing prosecution, nations cannot comply with commitments to prosecute if they lack the judicial capacity to prosecute pirates under their national laws. Consequently, some states may need to revise their domestic anti-piracy legislation to fill any legal gap between the right to prosecute piracy crimes under universal jurisdiction, the obligation to cooperate and prosecute or extradite under UNCLOS and SUA, and the domestic authority to do so under national laws.

Indeed, United Nations Security Council Resolution 1918 calls on states to criminalize piracy under their domestic codes,¹⁶⁹ and a subsequent report of the Secretary-General

¹⁶⁶ See discussion in this paper, *supra* page 19-20 .

¹⁶⁷ *U.S. v. Yousef*, 327 F.3d 56, 96 (2d Cir. 2003). In *Yousef*, the Court asserted jurisdiction over the accused through Article 7 of the Montreal Convention.

¹⁶⁸ See Stephen D. Mull, Senior Advisor to the Under Secretary for Political Affairs, U.S. Dep't of State, Statement at International Efforts to Combat Maritime Piracy: Hearing Before the House of Representatives Committee on Foreign Affairs Subcommittee on International Organizations, Human Rights and Oversight (Apr. 30, 2009) [hereinafter Mull Statement] available at <http://foreignaffairs.house.gov/111/49546.pdf>. (“...there is a broad consensus in participating in this common effort to deter pirate attacks, but each country has their own set and their own understanding of what their national legal authorities are. And so, we feel very comfortable, as Americans, apprehending pirates on the high seas and bringing them to trial; other countries do not. And so we are working to try to fill in those gaps to make sure that catch and release won't happen in the future.”)

¹⁶⁹ See S.C. Res. 1918, U.N. Doc. S/RES/1918 (Apr. 27, 2010) available at http://oceansbeyondpiracy.org/sites/default/files/unsc_res_1918_2010.pdf (“...Calls on all States, including

provides elements needed within national jurisdictions for successful prosecutions.¹⁷⁰ However, even if states do not have the judicial capacity to try pirates under their domestic law, SUA obliges signatories to extradite offenders in accordance with Article 10 (1). If the state does not extradite, it is obliged by SUA to prosecute “without exception whatsoever.”¹⁷¹

One problem with the enforcement of the SUA Convention is rooted in what appears to be a lack of political will that might otherwise drive compliance. While crimes of terrorism are by nature politically charged and may consequently mobilize prosecution based on public perception, crimes of piracy are less visible and typically involve seafarers working for large shipping companies that have their own narrow commercial interest at stake, rather than a broader public interest.

Another problem is that SUA requires a nexus be established between the alleged act and the prosecuting state. A nexus may be based on a variety of factors, including territory, nationality of the victim, or flag of registry.¹⁷² Establishing a nexus in the context of piracy can be difficult because pirates are often caught by national navies without a clear national nexus to the alleged crime, outside of any country’s territory and without a genuine link¹⁷³ to the flag state due the regular practice of flying the flag of a nation with an open registry.¹⁷⁴ This complication is distinguishable from airline hijacking cases that will inevitably establish a clear nexus in the shape of at least one nation because an aircraft is required to fly the flag of the state in which it is registered and will ultimately be forced to land in a state’s territory.¹⁷⁵

States in the region, to criminalize piracy under their domestic law and favourably consider the prosecution of suspected, and imprisonment of convict, pirates apprehended off the coast of Somalia, consistent with applicable international human rights law...”).

¹⁷⁰ See Possible Options to Further the Aim of Prosecuting Persons Responsible for Acts of Piracy, *supra* note 34 (“The elements that are needed within the national jurisdiction for successful prosecutions are criminal offences of piracy and armed robbery at sea; criminal responsibility of those who participate in, or attempt to commit, such offences; provisions establishing national criminal jurisdiction over piracy offences committed on the high seas; and the necessary evidentiary and procedural provisions to conduct prosecutions.”).

¹⁷¹ See SUA Convention, *supra* note 24, at art. 10 (1).

¹⁷² *Id.* at art. 6.

¹⁷³ See UNCLOS, *supra* note 23, art 91, which requires a “genuine link” between ship and state for nationality to be conferred upon that ship. For a discussion of what is meant by a genuine link and what consequences follow from its absence see Robin R. Churchill, *The Meaning of the “Genuine Link” Requirement In Relation to the Nationality of Ships*, International Transport Workers Federation (2000), available at <http://www.oceanlaw.net/projects/consultancy/pdf/ITF-Oct2000.pdf>

¹⁷⁴ Additionally, most nations with popular open registries are not likely to take up the challenge of prosecuting crimes of piracy committed against ships under their registry; they may be unable to prosecute due to a lack of judicial capacity or unwilling to prosecute because there is only a tenuous link to their national interests.

¹⁷⁵ One possible solution for addressing the uncertain nexus problem when piracy crimes are committed is to establish a nexus hierarchy framework that would rank nations’ link to the crimes. This could alleviate some of the confusion involved in the determination of which nation(s) have the clearest stake in prosecuting the crimes.

One approach borrowed from aviation security is to employ economic coercion as an enforcement mechanism to ensure compliance with international standards. The United States has barred access to its airports when states have been found through its auditing mechanism to be in non-compliance with its aviation security requirements. This has proved to be an effective enforcement option as states have regularly improved their security measures to meet United States' standards and regain access to the largest aviation market in the world.

With United States trade moving primarily through the shipping industry, economic leverage to catalyze compliance on the piracy issue also appears viable on its face. However, imposing trade restrictions on states that refuse to comply with prosecute-or-extradite treaty obligations would likely violate the more comprehensive agreements governing international trade. Such a response could also cause significant foreign policy fallout between strategically significant allies.¹⁷⁶ Furthermore, piracy crimes often establish a nexus to multiple states, so in many circumstances it could be difficult to determine where to direct economic sanctions.

Nonetheless, the United States and other interested parties must take a comprehensive approach when enforcement of international treaties implicates direct national security interests. While the risk of economic coercion in this regard has foreign policy risks, these risks must be weighed against the national and global security interests impacted by widespread non-compliance.

B. Port Security

Airport and aircraft security has been a vital mechanism for deterring airline hijackings, and, while port security is far less promising for preventing piracy attacks, it is possible that enhanced security at ports could serve a useful purpose in the fight against piracy off Somalia's coast. In particular, ports could serve as checkpoints determining whether ships are outfitted to implement piracy-detering strategies, such as internationally recognized Best Management Practices (BMPs).¹⁷⁷ Currently, it is believed that shipping companies do not always employ BMPs as suggested by maritime security experts.¹⁷⁸ As ships remain vulnerable to piratical acts and attacks continue to be successful, the piracy problem is only perpetuated.

The New York Declaration which was adopted on the eve of the Fourth Plenary Session of the Contact Group on Piracy off the Coast of Somalia, represents a commitment by

¹⁷⁶ Targeting sanctions against already impoverished states in the horn of Africa region could also be problematic because economic instability in the region is a known driver of the piracy crisis. Further economic hardship may only aggravate the piracy problem by limiting alternative means of livelihood.

¹⁷⁷ See, e.g., BEST MANAGEMENT PRACTICES TO DETER PIRACY OFF THE COAST OF SOMALIA AND IN THE ARABIAN SEA AREA: SUGGESTED PLANNING AND OPERATIONAL PRACTICES FOR SHIP OPERATORS, AND MASTERS OF SHIPS TRANSITING THE GULF OF ADEN AND THE ARABIAN SEA, Version 3 (2010) available at http://www.secure-marine.com/bmp3/bpm3_pdf.pdf.

¹⁷⁸ *Id.*

various states to promulgate BMPs designed to avoid, deter or delay acts of piracy.¹⁷⁹ This Declaration includes commitment that signatories will ensure the vessels on their registry have adopted and documented appropriate self-protection measures.¹⁸⁰ While limited in scope, the New York Convention could serve as a model for international cooperation on BMP assurance if a broader scale commitment is negotiated to incorporate more signatories and include enforcement mechanism using port security checkpoints. While port security is not likely to deter piracy in the same way that airport and aircraft security deters hijackings, it is an important piece of a complex solution to the piracy epidemic.

C. Asset Freezes

Another option for borrowing from aviation security measures to combat piracy is the freezing of assets. As Stephen D. Mull, Senior Advisor to the Under Secretary for Political Affairs at the United States Department of State pointed out in a hearing before the United States House of Representatives Committee on Foreign Affairs, freezing assets is a difficult task because asset flows to pirates are “typically contained in suitcases stuffed with \$100 bills or euros flung on to the decks of ships from helicopters as a part of ransom payments.”¹⁸¹ If asset freezes are a viable option, this could be conducted through the United States Department of Treasury Office of Foreign Assets Control, which administers and enforces economic and trade sanctions based on US foreign policy and national security goals.¹⁸² The Department of Treasury has a long history of implementing sanctions for such purposes, and following September 11, an Executive Order established sanctions to block property and prohibit transactions with persons who commit, threaten to commit, or support terrorism.¹⁸³

In fact, Treasury has already implemented sanctions against persons contributing to the conflict in Somalia.¹⁸⁴ In particular, an Executive Order issued by President Obama on April 12, 2010, includes a determination that “piracy threatens the peace security or stability of Somalia” and “provides authority to target for sanctions those who engage in or support acts of piracy off Somalia’s coast, including those who provide weapons, communication devices, or small boats and other equipment to pirates.” While this

¹⁷⁹ See New York Declaration, Sept. 10, 2009, available at <http://www.fco.gov.uk/resources/en/pdf/3849543/ny-declaration.pdf>.

¹⁸⁰ *Id.*

¹⁸¹ See Mull Statement, *supra* note 167, at 9.

¹⁸² For more information on the U.S. Dep’t of the Treasury, Office of Foreign Assets Control, see <http://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>.

¹⁸³ U.S. DEP’T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, WHAT YOU NEED TO KNOW ABOUT U.S. SANCTIONS, available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/terror.pdf>.

¹⁸⁴ U.S. DEP’T OF THE TREASURY, OFFICE OF FOREIGN ASSETS CONTROL, SOMALIA: WHAT YOU NEED TO KNOW ABOUT PERSON CONTRIBUTING TO THE CONFLICT IN SOMALIA (2010) available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/somalia.pdf>.

approach is encouraging, sanctions may be ineffective when pirates operate with liquid assets.¹⁸⁵

D. Enhanced Communication and Coordination

Another approach for borrowing from the international civil aviation security regime in the fight against maritime piracy is to consider the framework developed in security coordination. Some commentators have suggested that ICAO's role in air transportation could serve as a model for security cooperation that could translate in the maritime commons.¹⁸⁶ In particular a white paper delivered before the 2011 Maritime Security Conference in Kiel, Germany, points out that early international cooperation in civil aviation, like maritime initiatives, focused on safe navigation and effective communication; however, more recently, ICAO has focused on information sharing and evolving security standards. Drawing from principles established in civil aviation security, the paper highlights enablers for greater maritime security awareness, including consolidated legal and policy strategies¹⁸⁷; information sharing¹⁸⁸; data and information standards¹⁸⁹; surveillance and technology¹⁹⁰; commercial interests¹⁹¹; and inter-organizational relationships.¹⁹²

¹⁸⁵ Further calling into question the efficacy of asset freezes, the Executive Order issuing economic sanctions on those who support piracy has been contentious because some fear that seafarers or shipping companies who pay pirate ransoms to avoid casualties or protect property could be held liable for doing so.

¹⁸⁶ See MARITIME SECURITY CONFERENCE, A FRAMEWORK FOR ENHANCED INTERNATIONAL MARITIME SECURITY COOPERATION (White Paper) *available at* http://www.cjoscoemaritimeconference.org/read_ahead/MSA%20Strategic%20Framework_Draft_A4.pdf.

¹⁸⁷ *Id.* at 5-7 (“As a general rule most nations are able and willing to share [information], however, there can be considerable obstacles to sharing of maritime information that need to be addressed. These obstacles generally fall into at least one of three categories: (a) Legal Obstacles... (b) Policy Obstacles... (c) Information Classification/ Security Obstacles...”).

¹⁸⁸ *Id.* at 7-8 (“In order to achieve the required level of situational awareness, all stakeholders will need to implement a ‘responsibility-to-share’ philosophy in their mandated practices and actively work to identify and mitigate the obstacles encountered in sharing information.”).

¹⁸⁹ *Id.* at 8-9 (“A global set of standards and best practices for the exchange of comprehensive maritime information is needed to support and build situational awareness among global maritime interests. Safety and security protocols have been established for the civil air transportation system through the efforts of [ICAO]. A similar convention to support a set of international maritime standards and governance for maritime situational awareness and security is also necessary.”).

¹⁹⁰ *Id.* at 9-10 (“Acquisition of the technology to support the exchange of data is primarily driven by national requirements rather than international desires. Given that there is an overarching need for these technologies to be interoperable with those of other nations or multinational organizations, commonly accepted standards... are important.”)

¹⁹¹ *Id.* at 10-11 (“Commercial participation in [maritime situational awareness] mitigates potential costs incurred during disruption of trade networks. Applying law enforcement pressures on illicit supply chains which compete with legitimate enterprises or which threaten the security of the state is dependent on the information that is only available to commercial organizations... Benefits for commercial interests include standardized regulatory compliance which provides faster turnarounds with greater costs savings. Continuous information sharing with coast guard, port and customs authorities throughout voyage could lead to less time in port and to a more efficient movement of goods.”).

¹⁹² *Id.* at 11-12 (“Whether among agencies within a given nation, with similar counterparts in regional cooperatives, or in a global alliance, the creation and maintenance of trusting relationships to foster the exchange of maritime data is a fundamental requirement [of maritime situational awareness].”).

The paper further argues that as an international organization with a history of impartially organizing various stakeholders through entities such as ICAO, the United Nations demonstrates how awareness can be fostered to reach security objectives through multilateral institutions.¹⁹³ In particular, ICAO's success may serve as a model for establishing an international agency to support an enhanced global framework for international maritime situational awareness and security cooperation.¹⁹⁴ the white paper suggests that the International Maritime Organization could fill this role, having been established under the United Nations charter to provide services akin to those of ICAO.¹⁹⁵ It reasons that "an international agency sponsored by the UN or as a subset of an existing UN agency is necessary to assure and international, impartial, non-military approach to global maritime security."¹⁹⁶ Under such impartial guidance, it argues, nations would be more willing to cooperate than if nations or regional organizations lead unilaterally.¹⁹⁷

Conclusion

Any solution to effectively address the maritime piracy crises off the coast of Somalia must be comprehensive. While port security to ensure compliance with BMPs, economic sanctions targeted at piracy financiers, and enhanced communication among stakeholders are important considerations, the problem of piracy is unlikely to be eradicated while national navies continue to catch and release piracy suspects. Civil aviation security law provides an applicable example of the international community's capacity to enforce prosecution or extradition of terrorists and hijackers. Anti-piracy stakeholders, including national governments, the shipping industry, and international organizations tasked with ensuring international peace and security, should consider these successes in limiting airline hijackings through legal accountability as they work together to reign in piracy in the Gulf of Aden.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*