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Salvage Awards on the Somali Coast: Who Pays for Public and Private Rescue Efforts in Piracy Crises?

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Salvage Awards on the Somali Coast: Who Pays for Public and Private Rescue Efforts in Piracy Crises?

Abstract

This paper, a contribution to the "Troubled Waters: Combating Modern Piracy with the Rule of Law" symposium, explores the question of who pays for rescue efforts associated with maritime piracy. The paper explores the availability of admiralty law's salvage awards to governmental and non-governmental actors who intervene to rescue vessels and crew from pirates. Such awards provide an unusual incentive to rescue, traditionally unavailable for land-based rescue, but may raise complicated questions of policy and international law. The paper concludes by comparing salvage awards to a recent trend in American states to adopt "Search and Rescue" expense statutes allowing governments to charge those rescued from land-based wilderness perils for the costs associated with intervention.

Keywords

Salvage Law, piracy law, Indonesia's Malacca Straits, coast of the Horn of Africa, salvage awards

SALVAGE AWARDS ON
THE SOMALI COAST:
WHO PAYS FOR PUBLIC AND PRIVATE
RESCUE EFFORTS IN PIRACY CRISES?

GEOFFREY CHRISTOPHER RAPP*

Pirates could happen to anyone.

—Tom Stoppard, ROSENCRANTZ & GUILDENSTERN ARE DEAD¹

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1. TOM STOPPARD, ROSENCRANTZ AND GUILDENSTERN ARE DEAD 89 (1967).

INTRODUCTION

Observers of the spate of piracy crises along the coast of the Horn of Africa² over the past two years and near Indonesia's Malacca Straits in the 1990s have no doubt wondered how a massive freighter, with dozens of crewmembers traveling at a high rate of speed, can be hijacked by a fishing boat staffed by pirates armed with nothing more than small arms.³ It may be surprising that the crews of shipping vessels do not defend themselves or simply outrun their much smaller attackers.⁴

Corporate directives and the mandate of shipping firms' "hull policies" may provide the explanation. Even a small chance of a total loss for a ship (or massive liability in the event of a petrochemical spill or similar disaster)⁵ far outweighs a seven-figure payout to modern-day pirate gangs.⁶ Therefore, cautious corporations direct their captains to enforce a policy of zero resistance,⁷ and insurance companies—before offering piracy clauses in primary insurance contracts covering vessels and cargo (hull policies)⁸ or in separate

2. Eugene Kontorovich, "A Guantanamo on the Sea": *The Difficulties of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243, 243 ("In the summer of 2008, an epidemic of piracy broke out in the Gulf of Aden, off the Horn of Africa, with record numbers of ships attacked and captured.").

3. John S. Burnett, *Grand Theft Nautical*, N.Y. TIMES, Dec. 5, 2008, at A39 (questioning how "a dozen pirates in two puny boats armed with rifles and a grenade launcher" are able to board a ship "seven times the size of the Titanic and longer than the Chrysler building is tall").

4. *But see Somalia: North Korea Ship Foils Pirates*, N.Y. TIMES, Sept. 16, 2009, at A12 (recounting that some ships have successfully evaded pirate attacks, even in the face of rocket-propelled-grenade fire).

5. Burnett, *supra* note 3, at A39 ("No one wants to contemplate the effects of an exploding tanker laden with 300,000 tons of crude oil If that amount of crude were to escape, the environmental damage to the Indian Ocean and East African coast, upon which millions earn their living, would be catastrophic.").

6. While the amount of ransom paid to pirates is often shrouded in secrecy, recent payments "are widely believed to be in the range of \$1,000,000 to \$2,000,000, or more, per event." Jonathan Spencer, *Hull Insurance and General Average—Some Current Issues*, 83 TUL. L. REV. 1227, 1258 (2008). By the time the ransom is assembled (in the form of small bills) and transported to the "drop site," total expenses could "easily approach half a million dollars." *Id.*

7. Merchant sailors once commonly carried small arms. However, concerns about liability and safety have led most commercial shipping companies to ban crews from possessing weapons. Keith Bradsher, *Rescue Revives Debate Over Arming Crews*, N.Y. TIMES, Apr. 13, 2009, at A8. Today, industry groups advocate a policy of "no resistance" by vessel captains when boarded by pirates. CHAMBER SHIPPING OF AMERICA, BEST MANAGEMENT PRACTICES TO DETER PIRACY IN THE GULF OF ADEN AND OFF THE COAST OF SOMALIA 2–10 (2009), <http://www.knowships.org/images/Roundtable-Anti-Piracy-Best-Management-Practices.pdf>.

8. Michael H. Passman, *Interpreting Sea Piracy Clauses in Marine Insurance Contracts*, 40 J. MAR. L. & COM. 59, 60–61 (2009) ("Since marine insurance began, loss caused by piracy has either been specifically covered or excluded. . . . [L]oss caused by pirates was traditionally covered as a separate named peril in the standard hull policy.").

(and increasingly pricey)⁹ piracy insurance policies¹⁰—may demand that their insured avoid the risks of total loss associated with violent resistance and instead submit to a pirate’s efforts to take control of a ship.¹¹

Moreover, because insurance policies cover the total loss of a ship and its cargo but often do not allow claims to be filed for expenses associated with rescuing or averting loss,¹² insured shipping companies may rationally choose to avoid any significant expenditure of resources in rescuing their vessels from pirate attacks. This is the case in spite of the relatively low cost of a typical resistance effort. Shipping vessels could be effectively armed or include armed guards at a fraction of the cost of a typical military-style rescue mission like the one staged earlier this year by the U.S. Navy.¹³

9. See Keith Bradsher, *Insurance Premiums Rise as Threats to Ships Grow*, N.Y. TIMES, Aug. 25, 2005, at C5 (“[M]any insurers have begun charging extra premiums for ship passage through the strait [of Malacca].”).

10. Many such policies are offered under the rubric of kidnap and ransom (K & R) insurance, “a line of business that has existed for decades” and “is now being extended to vessels and their crews” at increasingly higher premium rates. Spencer, *supra* note 6, at 1259. Others are offered under “war risk” policies. Passman, *supra* note 8, at 61 (“Under these new clauses, coverage for piracy is included only by purchasing a separate war risk policy, paying an additional premium, and submitting to additional reporting requirements.”). For an example of a separate “war risk” policy covering piracy, see generally AMERICAN INSTITUTE OF MARINE UNDERWRITERS, AIMU WAR RISK OPEN POLICY (12/2/1993) COMPARED WITH THE LONDON INSTITUTE WAR CLAUSES (CARGO) (1/1/1982),

<http://www.aimu.org/aimuforms/WarRiskOpenPolicy.pdf> (providing information about risks covered under an AIMU policy, as well as the type of coverage offered).

11. War risk clauses in hull policies often exclude liability for damage resulting from “capture, seizure, arrest, restraint or detainment.” Daryl G. Parker, Annotation, *War Risks*, in MARINE P & I POLICY ANNOTATIONS: ANNOTATIONS OF THE AMERICAN STEAMSHIP OWNERS MUTUAL PROTECTION AND INDEMNITY ASSOCIATION FORM POLICY 105, 105–06 (1982). Damage sustained during resistance to pirate operations might therefore be excluded from the primary policy coverage for most shipping vessels. For example, most policies exclude coverage for any “voyage or . . . trade” that is deemed “imprudent, unsafe, unduly hazardous or improper.” Because the legality of armed security on merchant vessels is unclear, and the industry recommends passivity in the face of pirate boarding parties, it might be that any damage resulting from resistance efforts would be excluded as the result of “unsafe” activity. See Rhys Clift, Partner, Hill Dickinson LLP, Piracy a Brief Overview (Oct. 15, 2009), available at <http://www.iumi.com/index.cfm?id=7295> (citing Best Maritime Practices’ suggestion to cooperate with pirates).

12. See generally Spencer, *supra* note 6, at 1230–31 (discussing continued uncertainty concerning whether rescue and salvage expenses must be covered by maritime insurance policies).

13. See Robert D. McFadden & Scott Shane, *Navy Rescues Captain, Killing 3 Pirate Captors*, N.Y. TIMES, Apr. 13, 2009, at A1 (describing the Naval rescue of the Maersk Alabama). The cost of military operations to rescue vessels and crew are difficult to estimate, but are likely more than the cost of hiring embarked security forces to protect merchant vessels. See *infra* note 161. Those costs are also hard to determine precisely, but many security companies advertise discounted services and claim to offer cost-effective armed security for merchant vessels. For instance, Espada Logistics and Security Group charges \$54,000 for a three-day escort vessel off the

This Article addresses the question of “who pays” for the cost of these potential rescue efforts, which are a seemingly inefficient expenditure of wealth given the lower prevention costs available. Under long-established principles of admiralty law, one who voluntarily undertakes to rescue another vessel from “maritime peril” is entitled to a salvage award for their efforts.¹⁴ This award—typically in the range of four percent to twenty-five percent¹⁵ of the value of the vessel—is calculated based upon the risk associated with the rescue and a number of other factors.¹⁶

The question implicit in any discussion of salvage awards is whether piracy amounts to a threat sufficient to trigger admiralty law’s special salvage award. If ships themselves do not defend or make any attempt to defend against pirates, are they really in “peril” sufficient to trigger an obligation to pay a salvage award? In particular, is a pirated ship in “maritime peril” if its owner or insurer believes that payment of a ransom will lead to the ship’s safe return? Are there any other legal theories—such as quasi-contract—that could be used by a potential rescuer to claim a reward for its services?

A second set of questions surrounds which parties might claim salvage awards in piracy rescue cases and who would pay such awards. Can governmental actors recover such awards? Private vigilante crews? Can such awards be sought solely from vessel owners, or could insurance companies, arguably responsible for the piracy crisis due to likely interpretation of insurance contracts and policy guidance offered to insured, also be held responsible?¹⁷ May cargo owners recover through established principles of general average contribution?¹⁸ Moreover, to what extent does the possibility of

Gulf of Aden. See Africa Shipping Line, Security Group Espada Now On Hire Along East Coast of Africa, <http://asldubai.blogspot.com/2010/01/security-group-espada-now-on-hire-along.html> (last visited 22 Apr. 2010). ISSG Holdings offers armed on-board security for \$12,000 per day and promises that “smaller shipping companies [can] take advantage of low rates as well.” See PRLog, Anti Piracy Maritime Security Costs Disclosed, <http://www.prlog.org/10561580-anti-piracy-maritime-security-costs-disclosed.html> (last visited 22 Apr. 2010).

14. See, e.g., *The Sabine*, 101 U.S. 384, 384 (1879) (setting forth the three elements of a valid salvage claim under admiralty law).

15. See *Margate Shipping Co. v. M/V JA Orgeron*, 143 F.3d 976, 993–95 (5th Cir. 1998) (providing a chart that lists the salvage award for rescuing vessels in terms of percentage of value of the vessel and recognizing that the award usually amounts to four to twenty-five percent of the value of the ship).

16. See *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869) (listing six factors to be considered when determining the amount of the salvage award).

17. See *infra* Part II.B.2. (describing how insurance shipping policies create incentives for crews to avoid resisting attacks by pirates).

18. See *Barnard v. Adams*, 51 U.S. (10 How.) 270, 303 (1850) (explaining that general average contribution is founded in the law of equity and requires that there be (1) an imminent and inevitable danger to the crew, cargo, and ship; (2) a transfer

salvage awards create opportunities for private actors—some might call them vigilantes—to protect and rescue ships from pirates where international organizations and conventions have seemingly failed?¹⁹ Finally, this Article also addresses the policy implications of this legal framework: Are vessels in more danger, or less, given what the law says to potential rescuers about their rights to recovery?

Useful comparisons can be drawn between the issues arising in connection with salvage awards in maritime piracy cases with a recent spate of “search and rescue” expense statutes passed by American states.²⁰ Although not applicable in the choke-points of the seven seas likely to be targeted by pirates, these statutes provide a similar mechanism for holding those responsible for a rescue to account for the costs of that rescue. A comparative consideration will help flush out the policy implications to the application of salvage awards in piracy cases.

This Article aims to make an important contribution to the literature on the contemporary problem of maritime piracy. Too often, legal scholars have exclusively focused either on the international law framework for controlling piracy,²¹ or on the question²² of whether piracy amounts to “terrorism.”²³ Admiralty

of danger from the whole to a particular portion of the whole; and (3) a successful attempt to avoid the danger).

19. See Ethan C. Stiles, Note, *Reforming Current International Law to Combat Modern Sea Piracy*, 27 SUFFOLK TRANSNAT'L L. REV. 299, 316–20 (2004) (stating that private antipiracy efforts may supplement state-sponsored efforts where the state does not have the resources to combat piracy).

20. See *infra* Part III (describing recent state statutes that authorize recovery of expenses associated with various rescues).

21. See, e.g., Kontorovich, *supra* note 2, at 246 (arguing that international law limits the power of nations to prosecute and detain pirates); see also George D. Gabel, Jr., *Smoother Seas Ahead: The Draft Guidelines as an International Solution to Modern-Day Piracy*, 81 TUL. L. REV. 1433, 1434 (2007) (recommending guidelines to deal with piracy's growing effects on international trade); LT Mike Madden, USN, *Trading the Shield of Sovereignty for the Scales of Justice: A Proposal for Reform of International Sea Piracy Laws*, 21 U.S.F. MAR. L.J. 139, 148 (2009) (arguing that existing international conventions regulating piracy need to be updated); Steven R. Swanson, *Terrorism, Piracy, and the Alien Tort Statute*, 40 RUTGERS L.J. 159, 162, 202 (2009) (comparing the development of international law in the context of terrorism and piracy). But see Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 40 (2007) (arguing that existing international law provides an adequate framework for antipiracy efforts).

22. I would argue that the “terror creep” language aims to add emotional appeal to the case for greater antipiracy efforts, but offers little hope of incentivizing actors, private or public, to combat this problem.

23. See, e.g., Milena Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More is Needed*, FORDHAM INT'L L.J. (forthcoming 2010), available at <http://ssrn.com/abstract=1468021> (referring to pirates as “sea-terrorists”); Jason Power, Note, *Maritime Terrorism: A New Challenge for National and International Security*, 10 BARRY L. REV. 111, 115–16 (2008) (comparing the definitions and history of piracy

law—once a core course in most American law schools but now a forgotten or neglected subject²⁴—has received little attention in connection with its potential role to incentivize private actors to step up where governments have failed to combat the emerging threats to commerce on the world’s waterways.

I. SALVAGE LAW

A. *Basics*

1. *Substance*

The “law of salvage” is “[d]eeply ingrained in British and American law,” though its origins can be found in the legal codes of early Mediterranean seafaring city-states.²⁵ The purpose of a salvage award is to encourage rescue,²⁶ and experience has proven that a monetary award is “the most efficacious method of achieving that end.”²⁷ The costs and dangers associated with maritime salvage and rescue efforts, without the promise of a monetary return, render it likely that “aid would not be forthcoming. . . .”²⁸

A “salvor” is “anyone who saves maritime property from a peril.”²⁹ As one author put it, “just about anybody can be a salvor.”³⁰ Courts

and terrorism to suggest that, because of their similarities and interaction with one another, the two comprise “Maritime Terrorism”).

24. Admiralty law is “[r]arely taught in American law schools” and “even more rarely discussed by non-specialists in the academic community” Ernest A. Young, *It’s Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 472 (2004). Sara Stadler’s survey of law school curricula led her to conclude that admiralty law is long dead in law schools: “[T]he doctor called a ‘code’ in admiralty law more than a decade ago.” Sara K. Stadler, *The Bulls and Bears of Law Teaching*, 63 WASH. & LEE L. REV. 25, 75 (2006).

25. Angela Joy Davis, *Beyond Repatriation: A Proposal for the Equitable Restitution of Cultural Property*, 33 UCLA L. REV. 642, 658 (1985).

26. *Int’l Aircraft Recovery, L.L.C. v. Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255, 1261 (11th Cir. 2000) (reasoning that the need to facilitate efficient rescue means that the prior assent of the owner or master is not required); see also Davis, *supra* note 25, at 659 (explaining that in order to receive a salvage award the salvor must have voluntarily acted to save the owner’s property, and must have succeeded in doing so).

27. Lawrence Jarett, *The Life Salvor Problem in Admiralty*, 63 YALE L.J. 779, 781 (1954).

28. Note, *Calculating and Allocating Salvage Liability*, 99 HARV. L. REV. 1896, 1899 (1986) [hereinafter *Calculating Salvage Liability*].

29. ROBERT FORCE, FEDERAL JUDICIAL CENTER, ADMIRALTY AND MARITIME LAW 155 (2004), available at [http://www.fjc.gov/public/pdf.nsf/lookup/admiralt.pdf/\\$file/admiralt.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/admiralt.pdf/$file/admiralt.pdf).

30. Jason Parent, *No Duty to Save Lives, No Reward for Rescue: Is that Truly the Current State of Salvage Law?*, 12 ANN. SURV. INT’L & COMP. L. 87, 101 (2006).

have construed the term salvor liberally in salvage claims to reward the “perilous service” of a maritime rescuer.³¹

Three basic elements must be proven in order to trigger a salvage award.³² “First there must be a service to maritime property which is in real or impending danger.”³³ The danger must be such that a prudent captain would have accepted salvage efforts at a price equivalent to the award eventually imposed.³⁴ However, because of the immediacy associated with maritime peril, and the number of potential contracting parties, it is simply infeasible to imagine the ship’s master actually negotiating for rescue services.³⁵ Moreover, any such contract might be unenforceable in light of the contract’s potentially exploitative nature.³⁶ Salvage awards provide a post-hoc substitute for contract in this high-transaction-cost setting.³⁷ In order to be eligible to pursue a salvage award, both the rescuer (the salvor) and the ship or cargo rescued (the property) must be in danger.³⁸

The second element requires that “the service must be voluntary in nature,”³⁹ rather than an obligation imposed by contract. Any contractual or customary duty to provide a rescue would defeat a claim for a salvage award.⁴⁰ Instead, a party contractually obligated to rescue a ship would be limited to the compensation spelled out in the contract’s terms.⁴¹

31. FORCE, *supra* note 29, at 154 (noting that public policy requires a salvage award for those who expose themselves to dangerous situations to provide aid to shipowners).

32. Jarett, *supra* note 27, at 780.

33. *Id.*

34. Margate Shipping Co. v. M/V JA Orgeron, 143 F.3d 976, 986 (5th Cir. 1998) (“In an ideal world, every meeting of salvor and salvee would result in a freely negotiated contract for salvage services priced at a competitive level. In the real world, most meetings of salvor and salvee cannot be resolved in this fashion.” (citing William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83, 89 (1978))).

35. Landes & Posner, *supra* note 34, at 100.

36. See generally Shahar Lifshitz, *Distress Exploitation Contracts in the Shadow of No Duty to Rescue*, 86 N.C. L. REV. 315, 324–37 (2008) (discussing the lack of clarity surrounding when duress and unconscionability could be used to invalidate contracts entered into by those in distress).

37. See *Margate Shipping*, 143 F.3d at 986 (discussing the economics of salvage awards).

38. See Davis, *supra* note 25, at 659 (distinguishing between salvage awards and the doctrine of quasi-contract).

39. Jarett, *supra* note 27, at 780.

40. See *Calculating Salvage Liability*, *supra* note 28, at 1897 (noting that seamen and tug-owners may have a contractual duty to keep the ship afloat and thus would be ineligible for a salvage award).

41. Capt. Bruce D. Landrum, USMC, *Salvage Claims for the Navy and Coast Guard: A Unified Approach*, 38 NAVAL L. REV. 213, 214 (1989).

Third, the salvage effort must be at least partially successful in saving the property in peril.⁴² A “fruitless rescue” will go unrewarded.⁴³ One reason for this is that salvage award claims were historically brought *in rem*, and a salvor’s claim amounted to a lien against the property saved.⁴⁴ If the rescuer’s efforts were unsuccessful, of course, there would be no property against which a lien could attach. Requiring payment where an effort is unsuccessful might also impose an unduly harsh burden on the owner of the vessel unsuccessfully rescued.⁴⁵ If successful, the rescuer acquires a present possessory property right in the subject of the rescue.⁴⁶ This lien takes on the highest priority with respect to the property—ship or cargo—that was saved.⁴⁷

The amount of the award is not limited to the *expenses* incurred in the course of the rescue efforts.⁴⁸ The degree of danger to human life and property, the value of the property saved, the danger posed to the rescuer or her property, and the rescuer’s skill and conduct can all be taken into account when valuing a salvage award.⁴⁹ The value of labor expended by salvors⁵⁰ and their “promptness” may also be considered.⁵¹ The upper limit of any award is “the value of whatever property escapes destruction plus whatever freight charge

42. See *The Sabine*, 101 U.S. 384, 384 (1879) (“Proof of success, to some extent, is as essential as proof of service, for if the property is not saved, or if it perishes, or, in case of capture, if it is not retaken, no compensation will be allowed.”); Jarett, *supra* note 27, at 780 (noting that recovery requires success or “proximate contribution to the ultimate success”).

43. *Calculating Salvage Liability*, *supra* note 28, at 1897.

44. *Id.* at 1911.

45. *Id.*

46. See Davis, *supra* note 25, at 659 (commenting that the salvor’s property interest is subject to the payment of the salvage award and subject to “the salvor’s own duty to care for the property in the same manner as would a reasonable and prudent owner”).

47. See Jarett, *supra* note 27, at 781 (adding that the lien accrues immediately upon the performance of the service).

48. See *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869) (“Compensation as salvage is not viewed by the admiralty courts merely as pay, on the principle of a quantum meruit . . . but as a reward given for perilous services, voluntarily rendered, and as an inducement to seamen and others to embark in such undertakings to save life and property.”); see also Davis, *supra* note 25, at 660 (arguing that several considerations are used to determine the amount of salvage awards).

49. See Davis, *supra* note 25, at 660 n.86 (describing several factors while noting that although it is a British treatise, “Kennedy’s [Civil Salvage] is frequently cited and followed in American salvage cases” (citing K. MCGUFFIE, *Kennedy’s Civil Salvage* 174 (4th ed. 1958))).

50. See Robert A. Long, Jr., Note, *A Theory of Hypothetical Contract*, 94 YALE L.J. 415, 432 n.110 (1984) (discussing the market for rescue services (citing *The Blackwall*, 77 U.S. (10 Wall.) at 14)).

51. See *Calculating Salvage Liability*, *supra* note 28, at 1898 (stating that courts frequently use the list of factors set forth in *The Blackwall* when determining salvage awards (citing *The Blackwall*, 77 U.S. (10 Wall.) at 14)).

was paid or payable.”⁵² In practice, the determination of particular awards is an “unpredictable, erratic process.”⁵³ Critics have suggested that such awards are inadequate in that they ignore the opportunity cost of the rescue effort as well as some of the wear-and-tear on the rescuing vessel’s components that are not easily measured as an “expense” associated with the rescue.⁵⁴

The authority for granting salvage awards is premised upon the rescue of property. Under English common law, no salvage awards are permitted merely for rescuing human life.⁵⁵ Where life *and* property are saved, the value of the award can be increased based on the lives saved, but no award is permitted where only “free bodies” are recovered.⁵⁶ While English law has evolved to provide expense-based compensation to one who saves a life without saving any accompanying property, American law has stubbornly clung to the notion that salvage awards can only be granted where property has been rescued.⁵⁷

2. Procedure

A claim for a salvage award is brought *in rem* against the ship or cargo.⁵⁸ Federal district courts have original subject matter jurisdiction over salvage claims.⁵⁹ A salvor must bring a claim within two years of providing rescue services.⁶⁰

Regardless of where a rescue occurred, American courts can exercise *quasi in rem* jurisdiction over a rescued vessel and provide an appropriate forum for resolution of salvage claims in connection with

52. *Id.* at 1897.

53. *See id.* at 1896 (arguing that “judges have invoked a broad array of public policies and normative principles in defending their decrees,” which results in dissimilar awards for similar cases).

54. *See id.* at 1903 (discussing variable costs associated with salvage awards).

55. *See* Jarett, *supra* note 27, at 781 (noting that the goal of salvage awards was the preservation of property).

56. *Id.* at 781–82.

57. *See id.* at 783–84 (noting that because slaves were historically considered property, rescuing slaves could serve as the basis of a salvage award); *see also* 46 U.S.C. § 80107 (2006) (“A salvor of human life . . . is entitled to a fair share of the payment awarded to the salvor for salvaging the vessel or other property . . .”).

58. MARTIN J. NORRIS, *THE LAW OF SALVAGE* 434 (1958).

59. 28 U.S.C. § 1333(1) (2006) (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”); *see also* THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 783 & n.8 (2d ed. 1994) (noting that federal jurisdiction to grant salvage awards is exclusive because the common law courts “did not recognize the remedy of compensation in salvage cases”).

60. *See* 46 U.S.C. § 80107 (making an exception for instances that the plaintiff could not obtain jurisdiction over the ship within a two-year period).

rescue of vessels from pirates.⁶¹ So long as the vessel is brought within the jurisdiction of a court, a salvage award claim could be sought for services rendered to that vessel.

3. *Related claims in quasi-contract*

Outside of the maritime domain, common law has historically been hostile to awarding restitution to one who provides “unsolicited benefits.”⁶² It may be that the common law’s treatment of volunteers reflects the notion that the non-monetary benefits of being deemed a “hero” will suffice to motivate and reward rescuers in the non-maritime context, while “glory-seeking passers-by are unlikely on the high seas.”⁶³

Nevertheless, the quasi-contractual notion of “unjust enrichment” has occasionally been applied to those providing voluntary rescue, but it requires both that the rescuee be “enriched” and that the enrichment be “unjust” if uncompensated.⁶⁴ According to the Restatement (Third) of Restitution and Unjust Enrichment, a person “who takes effective action to protect another’s property” is entitled to claim restitution when “the circumstances justify the claimant’s decision to intervene without a prior agreement” and “it is reasonable for the claimant to assume that the defendant would wish the action performed.”⁶⁵ Restitution awards under this section would be “(i) the loss avoided by the defendant or (ii) a reasonable charge for the services provided, whichever is less.”⁶⁶ The authors of the Restatement recognize, however, that such claims are viewed “skeptically.”⁶⁷

The salvage award itself provides the rescuer’s exclusive claim for recovery of the property imperiled. However, quasi-contract theories

61. See *Moyer v. Wrecked and Abandoned Vessel*, 836 F. Supp. 1099, 1104 (D.N.J. 1993) (explaining the difficulty of moving a shipwrecked vessel into the territorial waters of the United States). The *quasi in rem* jurisdiction of federal courts extends into international waters. *Id.*

62. See Long, *supra* note 50, at 417 (listing the limited instances in which the common law allowed unsolicited intervenors to recover unsolicited benefits).

63. See Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 103 (1985) (asserting that the law’s treatment of volunteers reflects a moral consensus that good and bad deeds should not be regulated by economic incentives).

64. See Long, *supra* note 50, at 418 (arguing that “unjust enrichment” is a highly abstract concept requiring clarification).

65. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 21 (Tentative Draft No. 2, 2002).

66. *Id.*

67. See *id.* cmt. a (differentiating between restitution claims for the protection of property and those pertaining to life and health).

can be employed even in maritime rescues to allow recovery of costs associated with rescues that preserve human life.⁶⁸

B. Application to Piracy

Piracy is a “danger” sufficient to trigger salvage award rights.⁶⁹ Piracy threatens a vessel or cargo owner’s “possession” just as much as a “peril at sea caused by the elements of nature.”⁷⁰ Interpretation of marine insurance contracts has long held piracy to be one of the “perils of the sea” . . . even if ‘piracy’ was not specifically mentioned.”⁷¹ Piracy itself, of course, is a term subject to many different interpretations, and its definition varies between common law, international law, criminal law, and insurance law.⁷² Admiralty law, however, makes clear that salvage awards are appropriate where a vessel is “recaptured or retaken from an enemy, pirate or privateer” and that “[s]ince possession of the owner was displaced by the usurpation, a restoration of the property to him is just as much a beneficial service, as recovering it from a peril of the sea caused by the elements of nature.”⁷³

However, is the vessel really in “peril” if it is insured fully against piracy? This question may be of limited utility because not all vessels have insurance coverage against the risk of piracy, and the considerable variation in definitions of “piracy” could lead to uncertainty about whether any loss would be covered.⁷⁴

Salvage awards are not available where the “owner of the property to be rescued successfully and properly rejects salvage assistance.”⁷⁵ In order to reject salvage, and thus avoid a salvage award, the owner of the property must have been in actual possession at the time she refused salvage, and the rejection must also be one that was

68. See, e.g., *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830, 834–35 (2d Cir. 1977) (rejecting the argument that quasi-contract can never apply to maritime rescues).

69. Davis, *supra* note 25, at 659.

70. *Id.* at 661 n.90.

71. Passman, *supra* note 8, at 61 (noting, however, that loss caused by pirates was traditionally covered under a separate insurance policy).

72. *Id.* at 61–62.

73. See NORRIS, *supra* note 58, at 43–44 (explaining that the capture of a vessel by a hostile power terminates the seamen’s contract with their ship; therefore, if the seamen succeed in regaining the vessel, they become entitled to a salvage award).

74. See generally Passman, *supra* note 8 (arguing that gaps in insurance law and multiple interpretations of “piracy” leave potential coverage gaps under maritime policies).

75. See David J. Bederman & Brian D. Spielman, *Refusing Salvage*, 6 LOY. MAR. L.J. 31, 36 (2008) (stating that this is the case even when public policy objectives and compliance with government regulations and general maritime law requirements are met).

consistent with what a prudent owner would have done.⁷⁶ In addition, the owner must refuse salvage through effective communication and in good faith.⁷⁷

In a piracy context, owners of vessels have, by definition, lost “actual possession” of the vessel. If the vessel’s crew has surrendered to pirates, the crew is not capable of remedying the peril in which it finds itself, and therefore is unable to refuse salvage.⁷⁸ Arguably, a vessel owner could only refuse salvage in the form of rescue from pirates if the pirates were in the course of executing their assault on the vessel, rather than at the point of having secured control of the helm. Once the crew of a vessel is incapable of making an effective rejection, a voluntary salvor “may proceed to preserve the vessel and cargo in expectation of a reward.”⁷⁹

Moreover, to effectively reject a salvage effort, a vessel owner must act in a way that is consistent with what the prudent vessel owner would do. The Supreme Court has held that “express acceptance of the service is not always essential to the validity of the claim. It is enough if, under the circumstances, any prudent man would have accepted.”⁸⁰

Finally, refusal can be insufficient to bar a salvage award where declining the rescue jeopardizes other interests.⁸¹ When a crew or cargo is threatened with harm absent rescue, the refusal of a vessel owner to accept salvage will be ineffective.⁸² Since pirates threaten crew as well as cargo,⁸³ it seems unlikely that any vessel owner could

76. *Id.*

77. *Id.*

78. *See, e.g.,* *Hamburg-Am. Line v. United States*, 168 F.2d 47, 56 (1st Cir. 1947) (holding that salvage claims were good, even when forced upon a vessel, because the crew aboard a sinking ship was not able to meet its peril).

79. *See* GERARD J. MANGONE, UNITED STATES ADMIRALTY LAW 209 (1997) (adding that voluntary salvors may also receive a salvage award in cases of abandonment).

80. *Bederman & Spielman, supra* note 75, at 40 (quoting *Merritt & Chapman Derrick & Wrecking Co. v. United States*, 274 U.S. 611, 613 (1927)); *see also* *Tidewater Salvage, Inc. v. Weyerhaeuser Co.*, 633 F.2d 1304, 1307 (9th Cir. 1980) (“An owner, acting as a prudent person, may refuse salvage assistance by completed communication to the prospective salvor at any time before the act of salvage.”).

81. *See Int’l Aircraft Recovery, L.L.C. v. Unidentified, Wrecked and Abandoned Aircraft*, 218 F.3d 1255, 1262 (11th Cir. 2000) (“[T]he owner of a vessel in marine peril [may] decline the assistance of others so long as only the owner’s property interests are at stake.”); *see also* *Bederman & Spielman, supra* note 75, at 43–44 (discussing salvage refusals implicating third-party interests).

82. *See* *Bederman & Spielman, supra* note 75, at 44 (emphasizing that judicial recognition of a prudent owner’s rejection of salvage applies when “only the owner’s property is in peril”).

83. Somali pirates, for instance, have threatened to kill the crew of captured ships if their demands are not met. *See, e.g.,* Andrés Cala & Alan Cowell, *After 6 Weeks, Somali Pirates Free Crew of Spanish Vessel*, N.Y. TIMES, Nov. 18, 2009, at A10 (reporting

effectively reject a salvage offer aimed at recapturing a ship under pirate control.

II. WHO MIGHT CLAIM AND PAY?

A. *Who Might Claim?*

1. *Government actors*

In practice, much direct counter piracy and antipiracy work is done by the U.S. Navy. Once primarily a “blue-water” force, Navy doctrine has adjusted to focus on the littoral (coastal) battlefield,⁸⁴ providing the Navy with greater experience in the waters where many modern pirates operate and a greater likelihood of having forces close at hand when pirates strike.⁸⁵

Salvage awards are only permitted for voluntary rescues. At first blush, it might seem that governmental actors—in particular the forces of the U.S. Navy and Coast Guard—would have an existing duty to rescue that would bar the recovery of such awards by governmental entities. In fact, however, courts have long held that the U.S. Navy “should have the same right to claim a salvage award as any other owner of a salving vessel.”⁸⁶ Statutory amendments have confirmed that the Secretary of the Navy “may settle any claim by the United States for salvage services rendered by the Department of the Navy and may receive payment of any such claim.”⁸⁷ Where the Navy acts to save “distressed property or life at sea,” it acts outside of the “scope of the usual or expected duty of U.S. Navy personnel and for

that pirates had threatened to kill Spanish crew members unless Spain agreed to release two pirates captured by the Spanish Navy).

84. See LTJG James Kraska, JAGC, USNR, *The U.S. Navy and No-Pay, No-Cure Salvage Law*, 41 NAVAL L. REV. 135, 152 (1993) (describing the Naval operating environment as the “most congested and hazardous maritime geography during peacetime and war”).

85. See *id.* (arguing that, given the Navy’s expansive new strategy, it is ironic that it still conducts its salvage business “within a legal architecture which is frequently unacceptable to the providers of emergency salvage”).

86. Landrum, *supra* note 41, at 216; see also *In re American Oil*, 417 F.2d 164, 169 (5th Cir. 1969), *amended on other grounds by* 419 F.2d 1321 (5th Cir. 1969) (noting that Congress has expressly authorized the Air Force and Navy to bring salvage claims); *Port Tack Sailboats, Inc. v. United States*, 593 F. Supp. 597, 606 (S.D. Fla. 1984) (granting the Navy a lien for its salvage efforts); Schoenbaum, *supra* note 59, at 788 (arguing that the Navy and other military vessels are entitled to salvage because “such services are beyond the scope of their official mission” (citing *The Impoco*, 287 F. 400, 402 (S.D.N.Y. 1922))).

87. 10 U.S.C. § 7363(a) (2006); see also 46 U.S.C. § 30916(a) (2006) (“The United States, and the crew of a merchant vessel owned or operated by the United States . . . may bring a civil action to recover for salvage services provided by the vessel and crew.”).

performing those functions they may be entitled to a salvage award.”⁸⁸ The Coast Guard may also assert salvage claims, but only where its actions are outside of its statutory authority.⁸⁹ Where the Coast Guard simply engages in its ordinary duty “of answering the distress calls of those at sea,” it is not entitled to claim a salvage award.⁹⁰

In spite of its apparent legal right to assert a salvage claim, the federal government has been reluctant to claim such awards, perhaps because doing so would appear undignified for the government of a nation-state.⁹¹ In *The Impoco*,⁹² a case involving a salvage claim by the United States for services rendered by an army transport ship, Judge Ward opined, “[w]hile I can see that a sovereign would and perhaps should consider it beneath his dignity to ask for compensation for services in saving property at sea, I can imagine no legal reason to prevent him from doing so.”⁹³

Typically, the government limits such claims to recovery of actual expenses incurred during a rescue effort (rather than the full award permitted under admiralty law) or in response to suits *against* the government by private parties alleging negligence in connection with a rescue effort.⁹⁴ The claim for a salvage award may also permit the government to achieve certain geopolitical objectives, such as laying claim to the vessel of a nation with which the United States is not at war.⁹⁵

The Coast Guard, by contrast, does not have strong justification for entitlement to a salvage award.⁹⁶ The statutes permitting the Navy to seek salvage awards make no mention of the Coast Guard⁹⁷ (which is

88. NORRIS, *supra* note 58, at 128.

89. See *United States v. EX-USS Cabot/Dedalo*, 297 F.3d 378, 386 (5th Cir. 2002) (holding that various statutory provisions made it “abundantly clear” that the Coast Guard’s duty was mandatory, not optional, and therefore the Coast Guard could not make a salvage claim).

90. See Parent, *supra* note 30, at 100–01 (elaborating that salvage claim may prevail if the service rendered is outside the normal scope of employment).

91. See Landrum, *supra* note 41, at 217 (noting how *The Impoco* court’s comment that “asking for compensation was beneath the dignity of the sovereign” might have discouraged the claims). But see FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., *ADMIRALTY LAW IN A NUTSHELL* 135 (4th ed. 2001) (“The Navy often claims salvage awards.”).

92. 287 F. 400 (S.D.N.Y. 1922).

93. *Id.* at 402.

94. See Landrum, *supra* note 41, at 218 (noting that, in these cases, the courts have not granted awards per se, but have instead used the claim for salvage only as an offset or not at all).

95. *Id.* at 218 & n.38 (citing NORRIS, *supra* note 58, at 131) (suggesting that the government did so in one instance to arrest a German ship prior to the United States entering the Second World War).

96. *Id.* at 220.

97. *Id.*

not a component of the Department of the Navy during times of peace). Moreover, the statutes specifying the powers and duties of the Coast Guard impose duties to provide maritime rescue, possibly negating the “voluntary” nature of a rescue—a requirement for a salvage award—on the part of the Coast Guard.⁹⁸ Some courts, however, have suggested that these statutory provisions should be read as *permissive* and thus that the Coast Guard should be able to seek salvage awards.⁹⁹

A number of policy arguments can be advanced against permitting the government to claim a salvage award. These arguments would likely resemble those put forth to justify the anachronistic and arguably ethnically-biased “Firefighter’s Rule,”¹⁰⁰ which bars firefighters and other professional rescuers from suing the parties whose negligence necessitated a rescue when the rescuer suffers an injury.¹⁰¹ Part of the rationale prohibiting professional rescuers from obtaining monetary awards for injuries is that tax receipts finance government-funded rescue agencies, and a separate salvage award could impose “double taxation” on the party rescued.¹⁰² This argument would not apply to foreign-flagged vessels,¹⁰³ which would receive a windfall from being rescued by the naval forces of another country.¹⁰⁴

Another argument against allowing the government to claim salvage awards might be that no such award is needed to incentivize

98. *Id.*; see also MANGONE, *supra* note 79, at 211 (“[W]hen the [Coast Guard] is acting within the call of its duty it may receive no salvage award.”).

99. See Landrum, *supra* note 41, at 221–22 (citing *In re American Oil Co.*, 417 F.2d 164, 167–70 (5th Cir. 1969)) (explaining that the *American Oil* court viewed the United States’ decision not to pursue a salvage award for Coast Guard services as a policy decision rather than an understanding that the government was precluded from doing so).

100. In a forthcoming article, I plan to argue that the Firefighter’s Rule has been preserved as a form of workplace “primary assumption of risk” even as that doctrine has been disfavored in the workplace throughout the last century. One reason for the continued survival of this rule is that firefighters have historically been members of ethnic and religious groups frequently discriminated against (most commonly Irish Catholics), while property owners have been members of more dominant ethnic groups and economic classes.

101. See generally *Ouachita Wilderness Inst., Inc. v. Mergen*, 947 S.W.2d 780, 784 (Ark. 1997) (explaining that the policy considerations motivating the Fireman’s Rule stem from the dangerous purpose of the profession).

102. See Landrum, *supra* note 41, at 229 (exploring whether Naval and Coast Guard rescues should be considered public functions).

103. *Id.*

104. Arguably, receiving benefits while bearing less of the cost could incentivize U.S. ships to seek “foreign” affiliations. See *id.* (“Of course, foreign ships would then receive the benefits while bearing less of the cost.”).

government actors (in comparison to private rescuers).¹⁰⁵ However, where wartime needs stretch defense budgets thin, some guarantee that operational expenses could be recovered might encourage more aggressive intervention by military and civilian coastal defense and patrol forces. One might also deploy the usual “flood of litigation” argument, pointing out that government rescues are common and arguing that salvage claims could burden court dockets. However, any argument that substantive doctrine should be affected by concerns over litigation volume ought to be viewed with suspicion.¹⁰⁶

2. *Private “vigilante” crews*

In addition to governmental actors, private salvors are also entitled to claim salvage awards for providing voluntary maritime rescue. This becomes increasingly important given that the high value of freight vessels (and their cargoes) seized by Somali pirates may entice private actors to enter the business of antipiracy.¹⁰⁷

International law considerations may prove to be relevant in evaluating the legality of private rescuers’ conduct. For example, private pirate-hunting vigilantes could run afoul of United Nations Conventions limiting antipiracy efforts to nation-states. An Internet posting recently detailed a reported offer by a Russian cruise line of “pirate-hunting vacations.”¹⁰⁸ Eugene Kontorovich responded to the posting, stating that Article 107 of the United Nations Convention on the Law of the Sea¹⁰⁹ (UNCLOS) allows only “warships” to seize pirates, implying that private antipiracy efforts could violate UNCLOS and expose such actors to prosecution *as pirates* themselves.¹¹⁰

105. *See id.* (adding that parties rescued by the government will receive a windfall, where parties rescued by private actors will be required to pay).

106. In a forthcoming article, I plan to explore the use of the “floodgates” metaphor in American tort jurisprudence, from an empirical and literary studies perspective.

107. *See* Carolyn Liss, *Private Security Companies in the Fight Against Piracy in Asia*, in *PIRACY, TERRORISM AND SECURING THE MALACCA STRAITS* 103, 111 (Graham Gerard Ong-Webb ed., 2006) (discussing the increased demand and availability of private security companies in the Asian maritime sector).

108. Posting of Kenneth Anderson to *Opinio Juris*, <http://opiniojuris.org/2009/07/01/a-pirate-hunting-vacation/> (July 1, 2009, 16:27 EST).

109. Article 107 provides that “[a] seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.” United Nations Convention on the Law of the Sea art. 107, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

110. Posting of Eugene Kontorovich to *Opinio Juris*, <http://opiniojuris.org/2009/07/01/a-pirate-hunting-vacation/> (July 1, 2009, 18:25 EST).

However, private actors might not need to concern themselves with being labeled pirates according to the UNCLOS definition of piracy. UNCLOS defines piracy as “illegal acts of violence or detention . . . committed for private ends . . . on the high seas . . . against a ship . . . in a place outside the jurisdiction of any State.”¹¹¹ Ships held by pirates in Somali ports, for instance, would fall under the jurisdiction of Somalia, so seizing such ships would arguably violate Somali criminal law rather than the international law of the sea. Moreover, rescue efforts launched by private actors would not be directed “against a ship” but rather *for the sake of* the wrongfully detained ship.¹¹² Finally, lax enforcement of maritime laws may give private antipiracy firms confidence that they are unlikely to face prosecution for activities of questionable legality.¹¹³

Regardless of the legal framework in which they might operate, private security firms have begun to offer maritime protection to potential shipping clients.¹¹⁴ Private security companies “offer a wide selection of services” to address “different kinds of piracy.”¹¹⁵ For example, the former “Blackwater” firm, now known as Xe,¹¹⁶ “is marketing a sophisticated suite of over-the-horizon indication and warning capabilities designed to help vessels avoid trouble.”¹¹⁷ This includes deploying the “183-foot MacArthur, a reconfigured vessel of the National Oceanic and Atmospheric Administration with a range of 7,000 nautical miles . . . [and] helicopter capability.”¹¹⁸ Another

111. UNCLOS, *supra* note 109, art. 101.

112. Therefore, because private salvors are not acting “against the ship,” they would not be considered pirates under the definition set forth by UNCLOS. *Id.*

113. See Liss, *supra* note 107, at 114 (claiming that the inability of governments to oversee the seas creates opportunities for private security companies to engage in illegal activities).

114. See James Kraska & Brian Wilson, *Repressing Piracy in the 21st Century: An International Maritime Threat Response Plan*, 40 J. MAR. L. & COM. 43, 48 (2009) (“Companies are working to quickly fill an emerging security demand.”).

115. Liss, *supra* note 107, at 112–13.

116. The firm changed its name after “Blackwater” became “radioactive” due to accusations that security contractors employed by the firm had massacred Iraqi civilians in 2007. See *CNN: The Situation Room* (CNN television broadcast Aug. 22, 2009) (transcript on file with the American University Law Review) (reporting that Xe still has a number of government contracts). The new name, Xe, is the symbol on the periodic table of elements for Xenon, selected because it is an inert gas that is virtually undetectable, as the newly monikered firm hopes to be. *Id.* As *Newsweek* magazine wrote, “It’s a classic trick for a company suffering through public disgrace: change your name. The latest example is Blackwater.” *Sorry, Don’t Know Anyone by That Name*, NEWSWEEK, Mar. 2, 2009, at 9. Whether the name change will result in a successful rebranding of the company is still in doubt. See Kristen Collins, *The Name is Xe. Just Xe.*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 14, 2009, at 1A.

117. Kraska & Wilson, *supra* note 114, at 47.

118. *Id.*

firm has been hired by the Somali government to fight piracy in the nation's coastal waters.¹¹⁹

The possibility that private firms will see significant monetary opportunity in connection with engaging in rescues of vessels seized by Somali pirates may raise some troubling concerns. During their recent experience on the ground in Iraq, private security firms have often appeared to act without the restraint associated with governmental armed forces.¹²⁰ Xe, now a potential industry leader in private anti-piracy efforts, in particular has been accused of crimes against Iraqi citizens. While known as Blackwater, the firm was involved in 200 shooting incidents in Iraq, and in 2007 its employees were accused of killing seventeen innocent civilians, leading to manslaughter charges against six employees of the firm.¹²¹ The firm has now been expelled from that country.¹²² Should it branch from providing warning of pirate activity to providing armed recapture of seized vessels, Xe might demonstrate the kind of disregard for human life that attracted critics in Iraq. Moreover, pirates might find themselves subject to a policy of "shoot first and ask questions later."

A greater concern is that because the payoff in the form of a salvage award derives primarily from the value of the property saved, a profit-maximizing vigilante firm might choose to place recovery of a vessel above the safety or security of the captured crew.¹²³ Governments have checks and balances in place that private security firms do not, including accountability to voters and the obligation to adhere to customary international law.¹²⁴ Additionally, a large number of private antipiracy firms operating near the Horn of Africa would complicate governmental operations, reduce the certainty that governments could recover salvage awards for their efforts, and might therefore reduce the likelihood of military and official action to rescue captured crews and vessels from pirates. Therefore, to

119. See *US firm to fight Somali pirates*, BBC NEWS, Nov. 25, 2005, <http://news.bbc.co.uk/2/hi/africa/4471536.stm> (describing the role Topcat Marine Security will play in defending Somalia's territorial waters).

120. See Collins, *supra* note 116, at 1A (discussing allegations against Blackwater during its involvement in Iraq, including numerous shootings and the use of unarmored vehicles to save money).

121. *Id.*

122. See *id.* (stating that the serious allegations regarding Blackwater's conduct led to a decision by Iraqi officials to prohibit Blackwater from operating in Iraq).

123. See Parent, *supra* note 30, at 117 (recognizing financial incentives that could negatively affect the motivation of otherwise well-intentioned salvors).

124. See Karolina Milewicz, *Emerging Patterns of Global Constitutionalization: Toward a Conceptual Framework*, 16 IND. J. GLOBAL LEGAL STUD. 413, 426-27 (2009) (discussing the rule of law and comparing checks and balances to formal international law as similar limits on political power).

preserve government involvement in salvage efforts, it might be necessary to limit the freedom of private firms.

B. Who Might Pay?

1. Vessel and cargo owners

Anyone “involved in the common venture must pay its proportionate share of the award.”¹²⁵ Vessel owners, as well as “cargo interests,” may be obliged to contribute to a salvage award.¹²⁶ Cargo owners are liable for whatever sum is decreed by an admiralty court.¹²⁷

Generally speaking, cargo owners are not required to cover salvage costs paid for cargo other than their own.¹²⁸ However, courts will generally “apportion the award as between the vessel and cargo on a pro rata basis.”¹²⁹ Under this precedent, cargo owners would pay their percentage of the value of the saved cargo.¹³⁰

2. Insurers

Under most American-issued hull insurance policies, a vessel owner is entitled to insurance coverage for any salvage award he or she is forced to pay.¹³¹ In other words, if the vessel is recovered from a maritime peril—and the insurer avoids having to pay out to cover a loss of the vessel—labor and other costs associated with salvage (though perhaps not the entire award) may be covered. In contrast, in the event that the salvage/rescue effort is unsuccessful, no such labor costs would be paid; of course, if the efforts were not at least a partial success, no salvage award would be imposed either.¹³²

125. FORCE, *supra* note 29, at 159.

126. *Id.*

127. See NORRIS, *supra* note 58, at 331 (noting the possibility that parties may settle the salvage claim out of court).

128. See Spencer, *supra* note 6, at 1244 (“[C]argo insurers have guaranteed the payment of such special charges as are determined to be properly due in respect of the goods.”).

129. NORRIS, *supra* note 58, at 334 (citation omitted).

130. *Id.*

131. Spencer, *supra* note 6, at 1230, *citing* Am. Inst. of Marine Underwriters, American Institute Hull Clauses (June 2, 1977), *available at* <http://www.aimu.org/aimuforms/7.pdf>; *see also* THOMAS J. SCHOENBAUM, KEY DIVERGENCES BETWEEN ENGLISH AND AMERICAN LAW OF MARINE INSURANCE: A COMPARATIVE STUDY 5 (1999) (“The basic hull insurance policy covers the vessel, her machinery, and certain liabilities for collision as well as general average and salvage charges.”). Complications can arise, however, if the salvage award is connected with a “total loss” of the vessel. See Spencer, *supra* note 6, at 1230 (discussing the complications of a “total loss” on insurance coverage and the extension of coverage in those situations).

132. See *supra* notes 41–44 and accompanying text.

3. *Nation-states*

Salvage actions are *in rem* actions that impose a lien on the vessel recovered.¹³³ The only parties liable to pay in the action itself are the vessel and cargo owners.¹³⁴ Insurance companies are, by contract, potential sources of funds to pay salvage awards.¹³⁵ Once a vessel or cargo owner has been compelled to pay a salvage award, however, the vessel owner might seek to identify other responsible parties and seek to recover from those who *caused* the vessel to be subject to a salvage award.¹³⁶ It might be possible to articulate claims against nations that have harbored pirates, alleging that their actions caused the salvage award liability that vessel owners may face after being rescued by public or private actors. While the Foreign Sovereign Immunities Act (FSIA) provides foreign nation-states with general immunity from claims for damages in U.S. courts, it carves out an exception for “certain acts of state sponsored terrorism.”¹³⁷ To the extent that piracy is equated with terrorism, and to the extent that states harbor pirates or sponsor pirate activities, claims might be viable in spite of the general immunity provided by FSIA. Actions under FSIA’s state sponsored terror exception generally require that the U.S. Department of State designate the nation as a state sponsor of terrorism.¹³⁸ Currently, only four nations are on that list, and Somalia is not included.¹³⁹

The primary obstacle to recovering any form of damages from governments that harbor or facilitate pirate activities is that most of these governments have extremely limited fiscal and public resources.

133. See Patrick J. Long, Comment, *The Good Samaritan and Admiralty: A Parable of a Statute Lost at Sea*, 48 BUFF. L. REV. 591, 602 (2000) (describing the historical roots of the *in rem* requirement (citing *The Fusilier*, 16 Eng. Rep. 19, 21 (1865))).

134. See *supra* notes 127–130 and accompanying text.

135. See *supra* notes 131–132 and accompanying text.

136. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 21 illus. 11 (Tentative Draft No. 2, 2002) (presenting a scenario where the shipowner can implead the party causing the accident and allow the salvor to obtain damages against that other party); see also *Tice Towing Line v. James McWilliams Blue Line*, 51 F.2d 243, 246 (S.D.N.Y. 1931) *modified*, 57 F.2d 183 (2d Cir. 1932) (holding that a party whose negligence causes a vessel to incur salvage liability is liable for such salvage costs).

137. See 28 U.S.C. § 1605(a)(7) (2006) (enumerating situations where foreign states are not immune from the jurisdiction of American courts); Kristine Cordier Karnezis, Annotation, *Award of Damages Under State-Sponsored Terrorism Exception to Foreign Sovereign Immunities Act*, 182 A.L.R. FED. 1 (2002) (discussing situations where the exception has been used to establish jurisdictions in American courts).

138. See United States Dep’t of State, State Sponsors of Terrorism, <http://www.state.gov/s/ct/c14151.htm> (listing “[c]ountries determined by the Secretary of State to have repeatedly provided support for acts of international terrorism”) (last visited Apr. 22, 2010).

139. See *id.* (listing Cuba, Iran, Sudan, and Syria as the nations designated as state sponsors of terrorism).

This is also precisely the reason those governments are unable to combat pirate gangs or are vulnerable to bribery and manipulation by well-funded (or at least high liquidity) sea bandits.

III. EMERGING STATE RESCUE-COST RECOVERY LAWS

Salvage law has long provided financial benefits to those who provide maritime rescue services. Until recently, those who provide rescues on land have not been entitled to any form of compensation for their services, except where such compensation is governed by contract.¹⁴⁰

Two developments have led to a shift in the treatment of land-based rescuers, creating the possibility of recovery for governmental actors providing rescues on land. The first development is the widespread strain on governmental resources.¹⁴¹ State and local governmental authorities have faced budget shortfalls for years, and the costs of rescue are increasingly viewed as a potential revenue strain.¹⁴² Second, as sports like mountain climbing and other wilderness activities increase in popularity, increasing numbers of Americans are entering previously underexplored terrain and finding themselves in need of expensive search and rescue assistance,¹⁴³ often requiring the use of pricey equipment while exposing rescue personnel to significant physical danger. From a political economy perspective, it is no surprise that local governments have started to find ways to impose rescue costs on tourists (often non-residents) rather than leaving rescue expenses on the shoulders of local government entities—and by extension on local taxpayers.¹⁴⁴

140. See *infra* note 145 and accompanying text.

141. See *infra* notes 147–150 and accompanying text (discussing recent state legislative efforts to reimburse entities that conduct search and rescue operations on land or sea).

142. See, e.g., Rosemary Shinohara, *City Trims Fire Department's Specialty Services to Save Cash*, ANCHORAGE DAILY NEWS, Feb. 24, 2010 (reporting Anchorage's decision to disband a number of the fire department's special programs, including the wilderness rescue team, to save \$150,000), available at <http://www.adn.com/2010/02/23/1154005/fire-department-reduces-services.html>.

143. See Travis W. Heggie & Tracey M. Heggie, *Search and Rescue Trends Associated With Recreational Travel in US National Parks*, 16 J. TRAVEL MED. 23, 23 (2009) (“As more and more tourists pursue their leisure endeavors in environments such as national parks, it is inevitable that the medical community and [search and rescue] organizations will have to deal with an increasing number of lost, ill, and injured tourists. They will also have to deal with the increasing costs of [search and rescue] operations.”).

144. See Bill Hedden, *The Monument in a Changing West*, 21 J. LAND RESOURCES & ENVTL. L. 535, 536 (2001) (“Possibly, the worst product of industrial tourism is the person who gets lost in the backcountry, imposes the costs of a massive search and rescue on the local people, and then sues.”).

Although similar salvage rights have not traditionally allowed those who provide rescues on land to recover any monetary award for successful rescues,¹⁴⁵ recent statutory initiatives in various American states have sought to provide some right to recovery for rescuers, typically for the costs associated with rescue. The common law's "free public services doctrine" ordinarily bars governmental actors from seeking to recover rescue costs from those in danger,¹⁴⁶ but various statutes have carved out important exceptions.

Such statutes generally have two dimensions: who is subject to a government claim for reimbursement and what types of expenses can be recovered. Regarding who is subject to a claim for reimbursement, states have typically taken three approaches. First, some statutes allow recovery by governmental authorities for any government rescue. For example, in Maine rescue costs are recoverable regardless of whether the person rescued was negligent or not.¹⁴⁷ A second approach established by some statutes allows recovery only where those in need of rescue trespassed onto closed land or ignored posted warnings. For instance, Hawaii recently enacted a Search and Rescue Reimbursement Act, which imposes rescue costs on those who ignore posted warnings¹⁴⁸ and allows the government to bring a cause of action against a person who benefitted from the rescue efforts.¹⁴⁹ The statute aims to offset the significant costs of search and rescue as well as to preserve the life and safety of those involved in the rescue.¹⁵⁰ Similarly, in California, any person who enters an area closed to the public "or an area that a reasonable person under the circumstances should have known was

145. See Stephen F. Friedell, *Compensation and Reward for Saving Life at Sea*, 77 MICH. L. REV. 1218, 1221 n.8 (1979) ("Generally, one who saves the property of another on land without the request of the owner to do so is denied any compensation, even if he expected to be compensated."); M.B.W. Sinclair, *The Cherry Valley Case: How Wrong Can Economists Be About Salvage?*, 31 TULANE MAR. L.J. 57, 70-71 (2006) ("[I]t is remarkable that there should be salvage awards in our maritime law; were a similar act of salvage performed on land, our courts would not give an award to the rescuer, but would rather regard him as a mere volunteer or an officious intermeddler.").

146. See generally Michael I. Krauss, *Public Services Meet Private Law*, 44 SAN DIEGO L. REV. 1, 33-46 (2007) (defending the free public services doctrine).

147. ME. REV. STAT. ANN. tit. 12, § 10105 (2004) ("The commissioner may recover all costs directly related to a specific search and rescue operation . . .").

148. Search & Rescue Reimbursement Act (Act 66), HAW. REV. STAT. § 137-1 (2009); see also Renee Furuta, Recent Development, *1999 Hawai'i Legislation Update*, 22 U. HAW. L. REV. 323, 334-35 (2000) (discussing the scope and implications of the Search & Rescue Reimbursement Act).

149. See Furuta, *supra* note 148, at 335 (listing the entities against whom the government may bring suit to seek reimbursement, including an individual's guardian or estate).

150. *Id.* at 334.

closed to the public” is liable to the government, for-profit entities, or not-for-profit entities that provide an appropriate response.¹⁵¹ Finally, some statutes allow recovery only against adventurers who acted in a negligent manner prior to the circumstances necessitating rescue. New Hampshire’s provision allows recovery from any person who negligently necessitated rescue, providing that “any person determined by the [Fish and Game] department to have acted negligently in requiring a search and rescue response by the department shall be liable . . . for the reasonable cost of the department’s expenses for such search and rescue response.”¹⁵²

The second dimension along which these statutes vary has to do with the kinds of expenses that are recoverable. In some states, such as Hawaii, actual fuel costs, equipment costs, and wages of rescue workers are specifically mentioned as recoverable.¹⁵³ In California, recoverable expenses include the cost of services and the salaries of emergency personnel.¹⁵⁴ Idaho has a similar provision, though it limits liability to \$4000 in expenses for a single incident.¹⁵⁵

In other states, legislation imposes an obligation on the person rescued to compensate any person injured in the course of a rescue (whether or not such an obligation could be crafted under state common law). Hawaii’s statute, for instance, includes a catchall recovery for “any and all other expenses relating to a search and rescue operation’ to cover any remaining costs that were not specifically enumerated.”¹⁵⁶

These statutes reflect growing policy recognition that the costs of rescue efforts are significant and strain limited governmental resources.¹⁵⁷ Efforts by local governments to recover expenses associated with rescuing citizens belie the notion that asking for reimbursement is “beneath the dignity of the sovereign,”¹⁵⁸ which has been offered as an explanation of why governmental actors rarely

151. CAL. GOV’T CODE § 53159 (West Supp. 2010).

152. N.H. REV. STAT. ANN. § 206:26-bb (Supp. 2009).

153. See HAW. REV. STAT. ANN. § 137-1 (LexisNexis 2006) (defining search and rescue expenses).

154. See CAL. GOV’T CODE § 53159(a)(1) (“Expenses of an emergency response’ . . . include the cost of providing police, firefighting, search and rescue, and emergency medical services at the scene of an incident, and salaries of the persons who respond to the incident . . .”).

155. IDAHO CODE ANN. § 6-2401 (2004).

156. Furuta, *supra* note 148, at 334 (citing Search & Rescue Reimbursement Act (Act 66), § 2, HAW. REV. STAT. §§ 137-1–3 (2009)).

157. See *id.* (detailing the policy rationale motivating the passage of the Hawaii Search and Rescue Reimbursement Act).

158. See *supra* note 91 and accompanying text (discussing the reasons that governments have not traditionally pursued salvage claims).

seek recovery by way of a maritime salvage award.¹⁵⁹ The costs of antipiracy rescues carried out by the U.S. Navy are difficult to estimate, given the secrecy that typically surrounds the management of special operations forces' budgets.¹⁶⁰ Surely, the costs of such operations meet or exceed the cost of land-based rescues, particularly if the expenses associated with training operators are taken into account.¹⁶¹

However, none of the state laws allowing recovery of rescue expenses go so far as to award a share of property recovered in a rescue to the rescuing agency, as is possible under the law of maritime salvage awards. Several explanations for this discrepancy may exist. For one, land rescue typically targets saving human life, and adventurers in the wilderness rarely have property of comparable value to that of maritime vessels, which can be factored into rescue expenditures.¹⁶² In addition, it may be that while the risks associated with land rescue are high and the opportunities to contract for agreed upon rescue-service pricing are difficult to find, they still do not equate to the dangers and transaction costs present in the maritime domain.¹⁶³

CONCLUSION

Salvage awards have long been praised in legal scholarship as an example of an economically efficient approach to promoting rescue, particularly because of the high transaction costs associated with negotiated rescue contracts in the maritime setting.¹⁶⁴ Government resources to provide rescue across the vast expanse of ocean are limited, and salvage awards increase the number and enthusiasm of

159. See *supra* notes 91–93 and accompanying text.

160. See David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 274 n.51 (2010) (recognizing the intelligence budget as an example of congressional secrecy).

161. It costs as much as \$500,000 to train a Navy SEAL such as those who rescued Captain Richard Phillips from Somali pirates last year. Stephanie Gaskell, *Years of Training Go Into One Shot*, N.Y. DAILY NEWS, Apr. 14, 2009, at 8.

162. See Ross A. Albert, Comment, *Restitutionary Recovery for Rescuers of Human Life*, 74 CAL. L. REV. 85, 113 (1986) (explaining the way that the historical nature of salvage awards as *in rem* proceedings affects restitutionary remedies for life rescuers).

163. See Parent, *supra* note 30, at 111 (“[R]escue at sea generally involves greater risk to both rescuer and rescued, greater chance of hardship or death if a first attempt is unsuccessful and greater expense to the rescuer.”).

164. See, e.g., Landes & Posner, *supra* note 34, at 100–03 (discussing six factors that determine the amount of a salvage award and likewise contribute to a salvor’s decision to rescue a ship); *Calculating Salvage Liability*, *supra* note 28, at 1899 (claiming that salvage awards are the most efficient tool to promote maritime salvage).

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potential salvors.¹⁶⁵ Salvage awards for those who rescue mariners and vessels from Somali pirates might also have favorable effects in disincentivizing shipping companies from sending their crews and fleets into high piracy waterways.

However, private antipiracy efforts could potentially raise legal and safety concerns. Pirates could become more aggressive in response, and “[l]ives could be lost, cargo damaged and vessels might be set on fire.”¹⁶⁶ Nevertheless, the common law of salvage awards provides a remedy that creates the possibility for rescue costs to be borne by vessel and cargo owners. Only time and experience will determine whether increasing the rate at which such awards are sought produces policy gain or ill.

165. See *Calculating Salvage Liability*, *supra* note 28, at 1900 (arguing that awarding private parties is the most efficient method to reduce burdens on the government and ensure salvage efforts are conducted).

166. Kraska & Wilson, *supra* note 114, at 47.