Pirate Accessory Liability – Developing a modern legal regime governing incitement and intentional facilitation of maritime piracy

Roger L Phillips

Available at: https://works.bepress.com/roger_phillips/1/
Pirate Accessory Liability – Developing a modern legal regime governing incitement and intentional facilitation of maritime piracy

Roger L. Phillips

Abstract

Despite the exponential growth of piracy off the coast of Somalia since 2008, there have been no prosecutions of those who have profited most from ransom proceeds; that is crime bosses and pirate financiers. As U.S. courts begin to charge higher-level pirates, they must ascertain the status of customary international law as reflected in the UN Convention on the Law of the Sea. UNCLOS includes two forms of accessory liability suited to such prosecutions, but a number of ambiguities remain in the interpretation of these forms of liability. These lacunae cannot be explained by reference to the plain terms of the UNCLOS or the travaux préparatoires and leaving domestic jurisdictions to fill these gaps risks creating a fragmented, and potentially contradictory, legal framework. On the contrary, resort to general principles of law ascertained by international criminal tribunals creates a predictable, and consistent, understanding of these modes of responsibility. This article shows how the jurisprudence of the ad hoc criminal tribunals fills the gaps in the law related to incitement and intentional facilitation of piracy. It further shows how these modes of responsibility are particularly suited to charges of financing pirate organizations or inciting children to participate in pirate enterprises.
TABLE of CONTENTS

I. Introduction ........................................................................................................................................3

II. Confronting Incitement and Intentional Facilitation of Piracy in U.S. Courts .........................6
   B. Direct Incorporation of International Law ..........................................................................................8

III. Historical Development of Juridical concept of Piracy .................................................................8
   A. UNCLOS Definition ............................................................................................................................9
   B. Sources of International Law ..............................................................................................................9
   C. Piracy as an International Crime .........................................................................................................10
   D. Principle of Legality – nullum crimen sine lege ...............................................................................16

IV. General Definitional Questions – Article 101(a) .......................................................................18
   A. Actus reus - the high-seas requirement ..............................................................................................18
   B. Mens Rea? - the private ends requirement .........................................................................................19
   C. Instigation and Intentional facilitation in the Harvard Draft ............................................................20

V. International Criminal Law as a source of modes of responsibility ...........................................21
   A. Incitement/Instigation under International Criminal Law .................................................................21
      1. Instigation - Basic Contours ...............................................................................................................23
      2. Application of Incitement to Recruitment of Child Pirates .............................................................24
   B. Intentional Facilitation under International Criminal Law ..............................................................26
      1. Aiding and abetting – Basic Contours ..............................................................................................26
      2. Pirate Negotiators as aiders and abettors .......................................................................................27
      3. Providing Material Support and Financing Piracy .........................................................................28

VI. Conclusion .........................................................................................................................................28
I. Introduction

After a long period of stagnation, the law of maritime piracy, in the United States as well as internationally, is experiencing a period of renaissance. The rise of piracy off the coast of Somalia coupled with a strong international commitment to prosecute pirates in municipal jurisdictions\(^1\) has created an abundance of case law from trial and appellate courts in this niche field. Courts in France\(^2\), Netherlands, Spain, Italy, the U.S., Seychelles\(^3\), Kenya\(^4\), Malaysia and Mauritius among others, are grappling with novel issues arising from this international crime of universal jurisdiction.\(^5\) On these difficult issues, little guidance can be derived from the antiquated and in some ways outmoded understanding of piracy.\(^6\) What these states\(^7\) share is the basic definition of piracy adopted in the 1982 United Nations Convention on the Law of the Sea (UNCLOS).\(^8\) But UNCLOS has left numerous legal lacunae that must addressed in order to complete a framework for the prosecution of pirates, and in particular those who finance criminal organizations engaged in or incite others to participate in piracy.

The United States has been particularly active over the last two years in pursuing piracy prosecutions in federal court. Because the U.S. piracy statute incorporates “the law of nations,”\(^9\) U.S. courts are faced with a difficult task of ascertaining customary international law in view of the gaps left by the applicable treaty. This deficiency has been brought to the fore in part because of whom the modern-day prosecutions are targeting. Although, a number of prosecutions have moved forward against low-level foot-soldiers\(^10\), there is no shortage of men willing to take their place. Therefore, in order to undercut the piracy business model, the

\(^1\) This article refers to domestic law as “municipal law” in adherence to its common usage in the two fields informing the debate (i.e. international criminal law and international public law).

\(^2\) See e.g. \textit{Le Ponant}, Cour D’assises de Paris (2ème section), No. 11/022, Arret Criminel, 14 Juin 2012.


\(^5\) 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. It may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law, including piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture. See \textit{PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION} (2001), available at \url{http://lpa.princeton.edu/hosteddocs/unive_jur.pdf} (last visited Oct. 3, 2012).

\(^6\) See e.g. \textit{United States v. Smith}, 18 U.S. (5 Wheat.) 153, 161, 5 L. Ed. 57 (1820)

\(^7\) This article uses the term state to refer to member states of the united nations general assembly as is consistent with international public law.


\(^9\) 18 USC 1651 provides “Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”

international community, and the U.S. State Department, have focused their attention on pirate financiers and negotiators.\(^{11}\) The modes of participation used by UNCLOS to capture

\(^{11}\) S.C. Res. 1950, U.N. SCOR, 65\(^{th}\) Sess., 6429\(^{th}\) Mtg., UN Doc. S/RES/1950 (2010), paras 15-17 (urging all States to take appropriate actions under their existing domestic law to prevent the illicit financing of acts of piracy and the laundering of its proceeds; and urging States, in cooperation with INTERPOL and Europol, to further investigate international criminal networks involved in piracy off the coast of Somalia, including those responsible for illicit financing and facilitation; and stressing in this context the need to support the investigation and prosecution of those who illicitly finance, plan, organize, or unlawfully profit from pirate attacks off the coast of Somalia; S.C. Res. 1976, U.N. SCOR, 66\(^{th}\) Sess., 6512\(^{th}\) Mtg., UN Doc. S/RES/1976 (2011), paras 15, 17 (underlining the need to investigate and prosecute those who illicitly finance, plan, organize, or unlawfully profit from pirate attacks off the coast of Somalia, recognizing that individuals and entities who incite or intentionally facilitate an act of piracy are themselves engaging in piracy as defined under international law and expresses its intention to keep under review the possibility of applying targeted sanctions against such individuals and entities if they meet the listing criteria set out in paragraph 8 resolution 1844 (2008); and inviting States and regional organizations, individually or in cooperation with, among others, UNODC and INTERPOL, to assist Somalia and other States of the region in strengthening their counter-piracy law enforcement capacities, including implementation of anti-money-laundering laws, the establishment of Financial Investigation Units and strengthening forensic capacities, as tools against international criminal networks involved in piracy, and stresses in this context the need to support the investigation and prosecution of those who illicitly finance, plan, organize, or unlawfully profit from pirate attacks off the coast of Somalia; S.C. Res. 2015, U.N. SCOR, 66\(^{th}\) Sess., 6635\(^{th}\) Mtg., UN Doc. S/RES/2015 (2011), para. 17 (underlining the importance for [specialized] courts to have jurisdiction to be exercised over not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks; S.C. Res. 2018, U.N. SCOR, 66\(^{th}\) Sess., 6645\(^{th}\) Mtg., UN Doc. S/RES/2018 (2011), para. 5 (calling upon States of ECOWAS, ECCAS and GGC, in conjunction with flag States and States of nationality of victims or of perpetrators of acts of piracy or armed robbery at sea, to cooperate in the prosecution of alleged perpetrators, including facilitators and financiers of acts of piracy and armed robbery at sea committed off the coast of the Gulf of Guinea, in accordance with applicable international law, including human rights law); S.C. Res. 2020, U.N. SCOR, 65\(^{th}\) Sess., 6663\(^{rd}\) Mtg., UN Doc. S/RES/2020 (2011), preamble, paras 4, 15 (recognizing the need to investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks and reiterating its concern over a large number of persons suspected of piracy having to be released without facing justice, reaffirming that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community and being determined to create conditions to ensure that pirates are held accountable and recognizing the need to investigate and prosecute not only suspects captured at sea, but also anyone who incites or intentionally facilitates piracy operations, including key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks; and calling upon all States to criminalize piracy under their domestic law and to favourably consider the prosecution of suspected, and imprisonment of convolled, pirates apprehended off the coast of Somalia, and their facilitators and financiers ahere, consistent with applicable international law including international human rights law; G.A. Res. 66/231, U.N. GAR, 66\(^{th}\) Sess., UN Doc. A/RES/66/231 (2012), para. 85 (encouraging States to ensure effective implementation of international law applicable to combating piracy, as reflected in the Convention, and calls upon States to take appropriate steps under their national law to facilitate, in accordance with international law, the apprehension and prosecution of those who are alleged to have committed acts of piracy, including the financing or facilitation of such acts, also taking into account other relevant instruments that are consistent with the Convention); S.C. Res. 2036, U.N. SCOR, 67\(^{th}\) Sess., 6718\(^{th}\) Mtg., UN Doc. S/RES/2036 (2012), preamble (expressing its grave concern at the threat posed by piracy and armed robbery off the coast of Somalia, recognising that the ongoing instability in Somalia contributes to the problem of piracy and armed robbery at sea off the coast of Somalia and stressing the need to investigate, prosecute, and to imprison when duly convicted
this type of conduct is “intentional facilitation” or “incitement” to piracy, two forms of accessory liability. This is where U.S. and other courts have encountered some difficulty. None of the older cases address these modes of responsibility. Even in the modern era of piracy, there have been no prosecutions of the bosses who have financed pirate enterprises and there has been no discussion in the academic literature of these two terms. Piracy will continue, either in Somalia or elsewhere, so long as pirate financiers are left to pursue their criminal enterprises with impunity. Therefore, a legal framework for the prosecution of pirate financiers is essential to putting a stop to this scourge.


Although one alleged pirate who has appeared on a targeted sanctions list appears to have been captured by the Iranian Navy, there is no indication that he has been brought to trial. See Daniel Nyassy, Most wanted ‘Carlos the Jackal’ Somali pirate seized, Daily Nation (last visited October 1, 2012) (noting capture of Mohamed Garad by Iranian navy in operation to free Chinese fishermen from Somali hijackers); See also, Federal Register 19869, Vol. 75, No. 72, April 15, 2010 available at http://www.gpo.gov/fdsys/pkg/FR-2010-04-15/pdf/2010-8878.pdf (last visited Oct. 3, 2012)(imposing economic sanctions on Mohamed Abdi Garad).

ROBIN GEISS AND ANNA PETRIG, PIRACY AND ARMED ROBBERY AT SEA - THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN 65 (Oxford Univ. Press 2011)(noting the various ambiguities contained in Articles 101(b) and (c) have been the subject of remarkably little discussion and no established consensus has emerged); Douglas Guilfoyle, Book Review: Piracy and Armed Robbery at Sea: The Legal Framework for Counter-piracy Operations in Somalia and the Gulf of Aden, 11 INT’L CRIM. L. REV. 891, 912-913 (2011)(same); The only discussion on these modes of responsibility appears to be in the blogosphere, see especially, Douglas Guilfoyle, Committing Piracy on Dry Land: Liability for Facilitating Piracy, EJIL Talk, July 26, 2012, http://www.ejiltalk.org/committing-piracy-on-dry-land-liability-for-facilitating-piracy/comment-page-1/#comment-24232

15 Mark T. Nance & Anja P. Jakobi, Laundering Pirates? The Potential Role of Anti-money Laundering in Countering Maritime Piracy, 10 J. Int’l Crim. Just. 857, 860 (2012)(noting “In the case of piracy, if the source of financing is extra-regional, putting pressure on piracy in one region will only cause those financiers to look for investment opportunities in regions where counter-piracy efforts are less developed. An effective counter-piracy strategy requires acknowledging that likelihood, and also requires knowing whether funding is, in fact, extra-regional”); See also, Id. at 877 (concluding that fighting piracy at the point of attack, rather than at the point of organization and funding, will be just as ineffective as fighting drug trafficking at the point of sale has been).
Two legal questions are made paramount by on-going prosecutions in the U.S.: (1) whether these forms of accessory liability are limited to complicit acts themselves committed on the high seas (the “high seas” requirement) and (2) whether an accessory can commit piracy without having robbed his victim (the “private ends” requirement). This article discusses these, as well as other fundamental issues regarding the forms of responsibility in question.

Part II highlights these legal issues using two U.S. cases as a backdrop; one involving an alleged pirate negotiator; and a second involving alleged foot-soldiers. Part III examines the international law sources for piracy. As the UNCLOS definition of piracy represents customary international law on the subject, the first order of business is to ascertain the meaning of the words used in the treaty by reference to the usual sources of customary law, including the travaux préparatoires. It is shown that this analysis fails to answer all of the pressing questions. Two additional sources might serve to fill these gaps: (1) the substantive law of the prosecuting State or (2) general principles of law derived from the jurisprudence of international criminal tribunals. Part IV argues that for purposes of foreseeability, consistency in application and conceptual coherence, the latter source is the most appropriate and Part V shows how general principles of law answer the questions facing courts regarding the application of incitement and intentional facilitation of piracy.

II. Confronting Incitement and Intentional Facilitation of Piracy in U.S. Courts


The case of U.S. v. Ali Mohamed Ali brings into relief a central issue regarding pirate accessory liability. On November 7, 2008, pirates attacked and seized the M/V CEC Future in the Gulf of Aden. A few days later, the defendant boarded the ship, utilizing his English-language skills to negotiate a ransom from the ship owners for its release. Ali was arrested more than two years later when federal agents invited him to the U.S. for an educational conference (allegedly purchasing a round-trip plane ticket for him). He was charged with aiding and abetting piracy, among other counts. On Ali’s motion to dismiss the piracy charge in the indictment, a federal district judge significantly narrowed the scope of the legal charges in the indictment. Although noting that piracy was a universal jurisdiction crime, the judge held that only conduct on the high seas could constitute piracy. Therefore, at trial, likely in 2013, “it will be the government’s burden to convince the jury beyond a reasonable doubt that Ali intentionally facilitated acts of piracy while he was on the high seas.” In other words, if Ali negotiated the ransom from within Somali territorial waters (within 12 nautical miles of Somalia’s coastline), such conduct would not constitute piracy. The high seas issue became even more pronounced at a subsequent hearing when the judge noted, “The
government essentially confessed error and admitted that it had scant evidence to show that Ali aided and abetted the pirates while he was on the high seas,” though it had claimed otherwise at an earlier hearing. In fact, the government may only be able to prove that Ali boarded the ship in territorial waters and sailed through international waters for a matter of minutes.23 Considering these allegations, limiting the jurisdictional and definitional application of piracy to high seas conduct would likely lead to an acquittal of Ali on the piracy charges even if he admitted to negotiating the ransom from Somali waters. Such a result would have significant repercussions for future prosecutions of those who negotiate ransoms or finance pirate operations.24

A second case, U.S. v. Dire et. al. raises an equally fundamental issue. On April 1, 2010, the U.S. naval frigate, the USS Nicholas disguised as a merchant vessel, was attacked by the defendants on the high seas between Somalia and the Seychelles.25 Though the defendants were armed with AK-47s and rocket propelled grenades and had fired upon the naval frigate, for obvious reasons they were unable to board it or to take property.26 The defendants argued that their actions did not constitute piracy because they lacked animus furandi (an intent to rob), which the U.S. Supreme Court held in the 1820 case of U.S. v. Smith was a requisite element of piracy.27 On appeal, the 4th Circuit settled a disagreement between two lower courts as to whether piracy under the “law of nations” encompassed the alleged conduct if indeed the defendants lacked animus furandi.28 It concluded that the federal piracy law “incorporates a definition of piracy that changes with advancements in the law of nations.”29 In the opinion of the 4th Circuit, the present day customary law definition of piracy no longer requires animus furandi and therefore it rejected the defendant’s arguments.

Not only does U.S. v. Dire highlight the changing nature of the definition of piracy, but it focuses attention on the ill-defined mens rea of piracy. This is particularly true with regard to incitement and intentional facilitation pursuant to Article 101(1)(c) of UNCLOS as there is

---

24 In a separate case, federal prosecutors have charged Mohammad Saaili Shibin with aiding and abetting piracy by negotiating two ransoms. In a motion to dismiss the piracy count, the defendant argued that he was not alleged to have acted on the high seas and therefore cannot be charged with piracy. See United States v. Shibin, ___ F. 3d ___ (E.D. Va. 2012)[2012 U.S. Dist. LEXIS 97921] at 11. The federal district court denied the motion, holding it raises highly factual issues, “including when the Defendant joined the conspiracy, the location of the Marida Marguerite [the pirated vessel] at various times, and what occurred on the Marida Marguerite after Defendant personally came aboard.” United States v. Shibin, ___ F. 3d ___ (E.D. Va. 2012)[2012 U.S. Dist. LEXIS 97920] at 2-3. This suggests the federal court considered the locus of the crime (either on the high seas or elsewhere) was not a jurisdictional issue, but an issue of fact. However, there was not detailed analysis on this point. Therefore, Shibin is of lesser import to this article unless and until an appeals court addresses the legal issues raised in the motion to dismiss. Shibin was subsequently found guilty of piracy by a jury. See Somali Mohammad Shibin guilty over Quest hijacking, BBC News, 30 April 2012 available at http://www.bbc.co.uk/news/world-us-canada-17875710 (last visited on 22 Sept. 2012). He was then sentenced to 12 life-terms of imprisonment. See Brock Vergakis, U.S. judge gives Somali pirate 12 life sentences, Aug. 13, 2012 available at http://www.usatoday.com/news/national/story/2012-08-13/somali-pirate-sentencing/57037162/1 (last visited Sept. 22, 2012).
26 Dire, 680 F.3d at 449, 451.
27 United States v. Smith, 18 U.S. (5 Wheat.) 153, 161, 5 L. Ed. 57 (1820)(“There is scarcely a writer on the law of nations, who does not allude to piracy as a crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, animo furandi, is piracy.”)
29 United States v. Dire, 680 F.3d at 469.
no caselaw interpreting these terms. The issues raised in Ali and Dire will continue to arise in prosecutions in the U.S. and other municipal jurisdictions alike. Thus, a proper understanding of incitement and intentional facilitation of piracy is fundamental to bring to justice pirates while fully respecting international standards of justice.

B. Direct Incorporation of International Law

Piracy is defined in the U.S. purely by reference to international law. In U.S. v. Dire and U.S. v. Said, a three judge panel of the 4th Circuit held that UNCLOS reflects the definition of piracy under customary international law and that the U.S. piracy statute (18 USC 1651) incorporates this definition. The D.C. District Court also followed this reasoning and holding in Ali. It should be noted that almost all recent piracy cases in the United States have been prosecuted in the 4th Circuit. Therefore the view of the 4th Circuit is particularly influential in the development of modern piracy jurisprudence. The significance of this conclusion is two-fold: (1) In order to determine the bounds of 18 USC 1651, U.S. courts must ascertain the status of customary international law of piracy; and (2) The definitional contours of piracy are the same under international and domestic U.S. law. In other words, the following analysis has import to both U.S. and other municipal jurisdictions.

III. Historical Development of Juridical concept of Piracy

The most significant development in piracy law over the last century has been the formulation of a general definition accepted by the international community. The definition was formulated by the Harvard Review of International Law in 1932 based upon a comprehensive review of customary international law at that time. That definition formed the basis of the 1958 Law of the Sea Convention (LOS) provisions on piracy to which the United States is a party. Finally, in 1982, UNCLOS came into force with an almost identical definition of piracy. There are 164 States Parties to UNCLOS and nearly universal recognition that the definition of piracy in UNCLOS is customary. Although the U.S. is not


31 Ali, ___ F. Appx. ____; Slip opinion at 28.


33 Dire, 680 F.3d at 460; Hasan, 747 F. Supp. 2d at 627 (“The plain language of 18 U.S.C. § 1651 reveals that, in choosing to define the international crime of piracy by [reference to the "law of nations"], Congress made a conscious decision to adopt a flexible -- but at all times sufficiently precise -- definition of general piracy that would automatically incorporate developing international norms regarding piracy. Accordingly, Congress necessarily left it to the federal courts to determine the definition of piracy under the law of nations based on the international consensus at the time of the alleged offense.”); Ali, ___ F. Appx. ____; Slip opinion at 25 (“The court must decide how the law of nations defines piracy.”)

34 Harvard Draft, supra note ____.


36 UNCLOS, Article 101.

a state party to UNCLOS, the U.S. has accepted the definition of piracy in UNCLOS as customary international law for the last four presidencies.\(^{38}\)

A. UNCLOS Definition

Article 101 of UNCLOS has been accepted by U.S. courts as the customary international law definition. It states:

(1) Piracy consists of any of the following acts:
   (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
      (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
      (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
   (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
   (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Of course we are here primarily concerned with Article 101(1)(c). However, Article 101(1)(c) incorporates aspects of Article 101(a) and (b) and therefore the entire Article must be examined. Apart from the plain language of Article 101, several other sources of international law are necessary to ascertain the contours of piracy.

B. Sources of International Law

The first question that must be answered is what sources are properly considered in defining the terms in question. The Statute of the International Court of Justice provides that the sources of international law include: international conventions, custom (as evidence of general practice), and general principles of law recognized by the civilized nations.\(^{39}\) The “general principles language” was inserted into the ICJ Statute to close the gap that might be uncovered in international law and solve the problem of non liquet.\(^{40}\) Judicial decisions and the teachings of “the most highly qualified publicists” are also considered subsidiary means for determining rules of law.\(^{41}\)

The International Court of Justice has declared that the substance of customary international law derives from the actual practice of states and opinio juris.\(^{42}\) A customary rule must be in

---


\(^{39}\) STATURE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, art. 38 (a), (b), (c), Stat. 1055, 33 U.N.T.S. 993.

\(^{40}\) MALCOLM N. SHAW, INTERNATIONAL LAW 93 (Cambridge 5\(^{th}\) Ed. 2003).


\(^{42}\) North Sea Continental Shelf Cases (Federal Republic of Germany/ Denmark ; Federal Republic of Germany/Netherlands, Judgment (February 20, 1969), (ICJ Reports 1969) p. 44, para. 77 (“Not only must the acts
accordance with a constant and uniform usage practiced by the states in question.\textsuperscript{43} State practice must be both extensive and virtually uniform in the sense of the provision invoked.\textsuperscript{44} However, it is not necessary that the practice in question be in absolutely rigorous conformity with the purported customary rule.\textsuperscript{45} Sources of custom might include multilateral and bilateral treaties and travaux préparatoires of these treaties, UN General Assembly and Security Council resolutions. Absolute consensus is not required and the contrary views of several states cannot overrule an established customary international law rule.\textsuperscript{46} However, custom must exhibit qualities of constancy and uniformity to be considered established in international law.\textsuperscript{47}

The US Supreme Court has endorsed a similar conception of customary international law since \textit{The Paquete Habana} in 1900 holding:

\textit{[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.}\textsuperscript{48}

This article will examine each of these sources in search of guidance.

\paragraph{C. Piracy as an International Crime}

In order to justify reliance on international criminal law as a source of the substantive law of piracy, it must be shown that piracy is, in fact, an international crime. Some legal scholars assert to the contrary that the internationally accepted definition of piracy in UNCLOS Article 101 is merely jurisdictional.\textsuperscript{49} In other words, it is representative of an agreement to endeavour to suppress acts of piracy and permits states to exercise jurisdiction over acts of piracy pursuant to municipal law.\textsuperscript{50} But, it is argued, this definition does not set forth the...
substantive law applicable in any given municipal system which is left for each system to define by its own terms. Proponents of this view note that Article 101 does not prohibit an individual from engaging in conduct defined as piracy, nor does it impose a particular sentencing regime.\textsuperscript{51} UNCLOS merely \textit{permits} states parties to exercise jurisdiction where an act set forth in Article 101 has been committed. This argument finds support in Article 14(2) of the Harvard Draft which provides, “Subject to the provisions of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.”\textsuperscript{52} In short, it is asserted that piracy is not an international crime and UNCLOS does not set forth substantive law.\textsuperscript{53}

The origins of this line of reasoning can perhaps be traced to Professor Rubin in his piracy treatise originally published in 1988.\textsuperscript{54} Rubin groups piracy with war crimes as “acts which international law requires states to punish by their municipal law in all cases within their enforcement jurisdiction,” leaving only the crime of aggression in the category of truly international crimes because the former do not define and punish piracy as such.\textsuperscript{55} He also asserts that giving piracy the status of an international crime would violate the principle of \textit{nullum crimen sine lege} because there is no statute binding upon a tribunal in which piracy is defined.\textsuperscript{56}

There are several reasons to doubt this conclusion. First, Rubin leaned on the conclusions of Schwarzenberger who in 1950 categorized piracy as a municipal crime.\textsuperscript{57} At the time, Schwarzenberger concluded that international criminal law did not exist as a branch of law.\textsuperscript{58} If it is true that international criminal law was not a branch of law when Schwarzenberger wrote his treatise, this is no longer true today. This alone undercuts the taxonomy set created by Schwarzenberger, and later adopted by Rubin. Furthermore, the fact that UNCLOS does not define municipal piracy or set forth a specific sentencing regime, does not mean that piracy should be considered something other than an international crime. Since 1988, the statutes of the \textit{ad hoc} tribunals have granted jurisdiction over crimes that were not previously codified in treaty or statute. Although the crime of genocide used particularly strong language “criminalizing” such conduct, crimes against humanity and war crimes were not codified as

\begin{itemize}
  \item Even if this is accepted, with each municipal jurisdiction that passes legislation incorporating the UNCLOS definition as the law of piracy, and courts subsequently interpret the contours of the law, the law of piracy has developed general principles adhered to by all nations. Whether considered general principles or customary law, these principles appear to be universal and a manifestation of an international crime of piracy. \textsuperscript{51}
  \item Harvard Research on International Law, ‘Piracy’, 26 \textit{American Journal of International Law}, Supplement: Codification of International Law (1932) 743, 760 (hereafter ‘Harvard Draft’), Article 14(2). \textsuperscript{52}
  \item In further support of this argument, it is asserted: (1) the sources of law considered by the 1932 Harvard Draft considered the piracy to be a municipal crime only; (2) the draft itself asserts that it derives from municipal law; (3) Article 101 does not state that it is prohibited for an individual to engage in such conduct or threaten the commission of acts of piracy as punishment whereas other conventions, such as the Genocide Convention explicitly state that genocide “is a crime under international law” and the Rome Statute which provides that war crimes incur individual responsibility and are liable for punishment; (5) finally, that certain states definitions of piracy under municipal law may expand the definition within UNCLOS Article 101. \textit{See Geiss and Petrig, supra note __, 139-142.} \textsuperscript{53}
  \item \textit{Rubin supra note ___} \textsuperscript{345} (“[T]he international law relating to ‘piracy’ comes down to the adoption of principles of ‘passive personality’ to activities in which the prescribing state’s only connection with the act to which it attaches legal consequences is the nationality of the victim or the property affected by the act.”) \textsuperscript{54}
  \item \textit{Rubin supra note ___} \textsuperscript{338-339.} \textsuperscript{55}
  \item \textit{Rubin, supra note ___} \textsuperscript{343.} \textsuperscript{56}
  \item Georg Schwarzenberger, \textit{The Problem of an International Criminal Law}, 3 Current Legal Problems 263 (1950). \textsuperscript{57}
  \item Schwarzenberger, \textit{supra} note __, at 263. \textsuperscript{58}
\end{itemize}
crimes by any specific treaty.\textsuperscript{59} In order to respect the principle of legality, the ad hoc tribunals have relied on the definitions of these crimes established by customary international law.\textsuperscript{60} At the ad hoc Tribunals, sentencing has been informed by municipal practice, but this does not mean that the crimes considered by these Tribunals are municipal crimes.

It has also been argued that piracy is not an international crime because it lacks the gravity of other international criminal law offences.\textsuperscript{61} Cassese makes a similar distinction, asserting that the international criminalization of piracy, unlike crimes against humanity or war crimes, does not serve a community value and therefore does not meet the definition of an international crime as set forth in his writings.\textsuperscript{62} However, the continued validity of this perception is doubtful considering the extraordinary growth of piracy off the coast of Somalia since 2008 and in the Gulf of Guinea more recently. The U.N. Security Council, in a dozen Resolutions and reports, declared that it is “Gravely concerned by the threat that acts of piracy and armed robbery against vessels pose […]” and notes that such conduct “exacerbate[s] the situation in Somalia which continues to constitute a threat to international peace and security in the region.”\textsuperscript{63}

\textsuperscript{59} GUÉNAEL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 8 (Oxford Univ. Press 2005)(noting that “with the exception of perhaps the Genocide Convention, none of the instruments which they [the ad hoc tribunals] could apply in relation to their subject-matter jurisdiction may be said to provide for international crimes. First, there is no international treaty which could arguably [be] said to provide for the criminalization of crimes against humanity. Concerning war crimes, it must be noted that neither the Geneva Conventions, nor their Additional Protocols may serve - nor were they ever meant to serve - as a basis for a criminal conviction […] That is not to say that a number of provisions [contained therein] may not have become criminal offences under customary international law as indeed many have.”); see also, M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY – HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 20 (Cambridge Univ. Press 2011); Guilfoyle, Book Review, supra note __ at 912-913(noting the evidence may support the conclusion that municipal laws on piracy “over or under-implement a general rule of international law criminalizing piracy” and questioning the view that a lack of specific treaty prohibition or threat of punishment renders the UNCLOS definition of piracy merely jurisdictional.)

\textsuperscript{60} METTRAUX, supra note __, 9; KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL COMPARATIVE CRIMINAL LAW 374 (concluding “common or customary law creation can meet the goals of the principle of legality as well as statutory enactments (or nearly as well), [and therefore pose] no a priori problem with the notion of an international criminal law binding individuals[…]”).

\textsuperscript{61} Eugene Kontorovich, The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation, 45 Harv. J. Int’l Law 183 (2004)(arguing the legality of privateering, which essentially amounts to piracy authorized by a state, undercuts the gravity of the offence of piracy); but see, GEISS AND PETRIG, supra note __, 145-46 (noting privateering was first and foremost a means and method of naval warfare and therefore the fact that privateering was lawful does not necessarily undermine the gravity of acts of piracy committed in times of peace).

\textsuperscript{62} ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 10-12 (Oxford Univ. Press, 2d ed. 2008)(asserting “piracy was (and is) not punished for the sake of protecting a community value.”). Cassese defines an international crime as the cumulative presence of four elements: (1) a violation of international customary rules which are (2) intended to protect community values; and where (3) there exists a universal interest in repressing these crimes; and (4) the absence of state immunity. He asserts that piracy fails to satisfy the second element because the penalization of piracy does not protect a community value. He also excludes the slave trade and trafficking in women because such are only provided for in treaty, not in customary law; but see OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 455 (Antonio Cassese ed. in chief, Oxford Univ. Press 2009)(“Piracy is an international crime according to customary and treaty law […]”). Further, Cassese wrote his initial views on piracy in 2003, later updated in 2008. This was before the rise of piracy off the coast of Somalia. Numerous Security Council resolutions now recognize the gravity of the situation and the mutual interest in putting an end to the scourge. See supra note __.

\textsuperscript{63} See e.g. S.C. Res. 1816, 62nd Sess., 5902nd Mtg., UN Doc. S/RES/1816 (2008), preamble (noting that it is Gravely concerned by the threat that acts of piracy and armed robbery against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, the safety of commercial maritime routes and to international navigation […] [and] Determining that the incidents of piracy and armed robbery against vessels in
Further to Cassese’s objection, the criminalization of piracy does serve to protect a community value: the principle of freedom of the high seas which is an independent binding legal norm and an obligatory rule of international customary law. The crystallization of this norm was the culmination of a debate between those claiming sovereignty over portions of the high seas and those who would argue for the freedom of navigation as Grotius supported. Grotius concluded that the right to international trade and commerce is an absolute right for the benefit of all nations and individuals and therefore overseas commerce cannot be limited by any people or authority. An even more fundamental underlying rationale for the principle of freedom of the seas is the compelling need to avoid interminable conflict over a geographic area that is not subject to partition. Insofar as the need to transport goods in international commerce over the high seas is an interest of all states, any attempt to circumscribe this right may ultimately lead to conflict. An attack on the principle of high seas freedoms is an attack against the peace of mankind – thus justifying the application of the term hostis humani generis. The crime is indeed grave in the sense of other international crimes, not for the criminal base (i.e. the murder, theft, etc.). Indeed, the crime base of genocide may be established by a single murder or act of sexual violence so long as the requisite mens rea is present. The fact that the crime base is limited to a single murder or act of sexual assault does not undermine the gravity of the crime of genocide. It is grave for its effect, and potential effect on a shared community value. In this regard, the crime of piracy shares certain attributes with the crimes of aggression of which the International Military Tribunal at Nuremberg stated, “[t]o initiate a war of aggression […] is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.” The initiation of conflict

the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region); In any event, the gravity of particular acts of piracy may not be the chief concern in this regard as the shared-interest of the international community that is eroded by the perpetration of acts of piracy is the infringement on the free flow of international commerce. This shared community value may serve as the basis under Cassese’s framework for considering piracy to be an international crime.

64 Lapidoth, supra note ___ at 271; Guilfoyle, Shipping Interdiction, supra note ___ at 28-29.
66 Ruth Lapidoth, Freedom of Navigation – Its Legal History and Its Normative Basis, 6 J. MAR. L. & COM. 257, 267-68 (noting British claims to the sea were also one of the major causes for the outbreak of two wars between England and Holland in the 17th Century and “the open sea not belonging to anybody, the oceans should be open to peaceful navigation of all nations.”); Heller-Roazen, supra note ___ 124 citing Emerich de Vattel, The Law of Nations, or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns, trans. Charles G. Fenwich (Washington D.C.: Carnegie Institution of Washington, 1916)(“[W]e say that a Nation that wishes to arrogate to itself an exclusive right to the Sea, and to defend it by force, insults all Nations, whose common right it violates. All have good grounds to unite against it to suppress it. Nations have the greatest interest in ensuring the Law of Peoples be universally respected, since it is the basis of their tranquillity. If someone openly troubles that law, all may and must arise against him. United their forces to punish that common Enemy, they will acquit themselves of their duties to themselves and to the human Society of which they are members.”)
67 Harvard Draft, supra note ___ at 797: “It is not of the essence of a single piratical act that the interests of the whole world be directly threatened by it or by the purposes of its perpetrators, nor does a single band of pirates necessarily threaten the commerce of all states; but piratical attacks and attempts on the high sea or elsewhere beyond territorial jurisdiction are of a sort which justifies suppression by all states to prevent the growth of a menace to international commerce and transportation.”
triggers all of the violations that follow, including any number of war crimes. The danger of piracy is that it violates peace at sea. While technically not an attack on any individual state’s sovereignty, it is an attack on all states’ sovereignty.

Professor Guilfoyle likewise argues that the theoretical justification of piracy as an international crime cannot be based upon its gravity because the UNCLOS prohibits universal jurisdiction to prosecute acts of armed robbery in territorial waters and thereby undercuts the absolute gravity of the offence. However, the dichotomy between armed robbery at sea and international piracy jurisdiction based, respectively, on whether the locus is territorial waters or the high seas, is consistent with these same principles of sovereignty. Permitting universal interdiction of pirates in territorial waters would create significant confusion as to which state has policing authority. Considering the littoral state has an important sovereignty interest in its coastline, creating a small buffer zone in the form of territorial waters protects the principle of state sovereignty and peace at sea. In contrast to a territorial water buffer zone, piracy creates an atmosphere of uncertainty that may inflame tension between states. This danger is illustrated by recent counter-piracy operations that have inadvertently targeted innocent fishermen, creating tensions between states, such as India and Italy, Yemen and Norway, among others.

Furthermore, the customary law basis for an international crime of piracy is at least as well-founded as that for war crimes and crimes against humanity. The origins of war crimes have been traced back to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, the 1947 Statutes of the International Military Tribunal at Nuremberg and for the Far East, and subsequently the Nuremberg Principles adopted by the UN General Assembly in 1948. By comparison, Cicero recognized piracy as an offence in 44 B.C. In addition, the modern conception of piracy has changed little since the 1932 Harvard Draft

---

69 Guilfoyle, Shipping Interdiction, supra note ___ at 29 (“A theory predicated on pirates as hostes humani generis would surely not draw such arbitrary geographical distinctions.”); Id. at 43 (violence committed against territorial or internal waters is not piracy at international law. The geographic scope of piracy is thus unusually limited for a crime subject to universal jurisdiction, and discussing it in the same terms as other universal crimes may not be entirely helpful.”); See also, Douglas Guilfoyle, Prosecuting Somali Pirates: A Critical Evaluation of the Options, 10 J. Int’l Crim. Just. 767, 774-75 (2012)(Guilfoyle exhibits some ambivalence as to whether piracy must be considered an international crime, stating “It has long been accepted that piracy is either an international crime, or at least a special permissive jurisdictional rule, and that in either case ‘international law delegates jurisdiction over it to municipal authorities’ but not resolving the apparent divergence in opinion.)


72 Heller-Roazen, supra note ___ 16 quoting Marcus Tullius Cicero, De Officiis 1.4 (“There are laws of warfare, and it often happens that fidelity to an oath given to an enemy must be kept. For it an oath has been sworn in such a way that the mind grasps that this ought to be done, it should be kept; if not, then there is no perjury if the thing is not done. For example, if an agreement is made with pirates in return for your life, and you do not pay the price, there is no deceit, not even if you swore to do so and did not. For a pirate is not included in the number of lawful enemies, but is the common enemy of all. With him there ought not be any pledged word nor any oath mutually binding.”).
ascertained the customary legal basis for an offence of piracy.\textsuperscript{73} Although the Geneva Conventions were initially considered only to regulate the conduct of states, and not to hold individuals responsible for criminal violations thereof, the International Military Tribunal at Nuremberg famously held “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”\textsuperscript{74} Likewise, crimes against humanity are not codified by an international treaty, but this does not prevent them from being recognized as international crimes.\textsuperscript{75} Like the Geneva Conventions, UNCLOS, and its predecessor 1958 LOS Convention, regulate the conduct of states, not individuals. The Articles of UNCLOS regarding piracy concern the illegal conduct of non-state actors. But this should be no limitation on the proscription of conduct that opposes all of mankind.\textsuperscript{76}

Finally, by its plain terms, Article 101 provides a substantive definition of a crime, including proscribed conduct and modes of responsibility. It unquestionably sets forth the definitional basis for piracy.\textsuperscript{77} There are gaps left by this definition, but this is also true of the definitions of crimes against humanity and war crimes within the statutes of the \textit{ad hoc} tribunals.\textsuperscript{78}

\begin{flushright}
\textsuperscript{73} \textit{Bassiony}, supra note __, 149.
\end{flushright}

\begin{flushright}
\textsuperscript{74} \textit{Tadic}, supra note __, para. 134; \textit{Id.} at para. 128 quoting \textit{The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany}, Part 22, at 447 (1950)(“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”)
\end{flushright}

\begin{flushright}
\textsuperscript{75} \textit{Güenael Mettraux, International Crimes and the \textit{ad hoc} Tribunals 8} (Oxford Univ. Press 2005)(noting that “with the exception of perhaps the Genocide Convention, none of the instruments which [the \textit{ad hoc} tribunals] could apply in relation to their subject-matter jurisdiction may be said to provide for international crimes. First, there is no international treaty which could arguably said to provide for the criminalization of crimes against humanity. Concerning war crimes, it must be noted that neither the Geneva Conventions, nor their Additional Protocols may serve-nor were they ever meant to serve – as a basis for a criminal conviction [...] [B]ut [...] that is not to say that a number of provisions [contained therein] may not have become criminal offences under customary international law as indeed many have.”
\end{flushright}

A separate, but related question is whether the international law of piracy may have direct application in municipal systems. See Roger L. Phillips, \textit{Direct Application of the International Law of Piracy in Municipal Systems}, Mar. 22, 2012, \url{http://piracy-law.com/2012/03/22/direct-application-of-the-international-law-of-piracy-in-municipal-systems/} Several Security Council Resolutions suggest and presupposition that even if this is permissible, it is preferable to incorporate UNCLOS Article 101 by domestic legislation to avoid any doubt as to its applicability. See e.g., S.C. Res. 1897, U.N. Doc. S/RES/1897 (Nov. 30, 2009) (stressing the need for States to criminalize piracy under their domestic law and to favourably consider the prosecution, in appropriate cases, of suspected pirates, consistent with applicable). With regard to piracy, whether or not it may apply directly would appear to hinge on a number of factors, whether there is a duty to prosecute in international law, whether the applicable treaties are self-executing, and the nature of a municipal system as monist or dualist. See W. N. Ferdinandusse, \textit{Direct Application of International Criminal Law in National Courts} (Cambridge 2006).

\begin{flushright}
\textsuperscript{76} M. Cherif Bassiony, \textit{Introduction to International Criminal Law} 122, 149 (Transnational 2003)(“Piracy has been recognized as an international crime under customary international law since the 1600s, and has continued to be deemed a customary as well as a conventional international crime.”); See also, Kontorovich, supra note __, at 190 (citing to UNCLOS and noting “international law continues to regard piracy as universally cognizable. The legitimacy of universal jurisdiction over piracy throughout the past several hundred years has been recognized by jurists and scholars of every major maritime nation. Indeed it is hard to find any authority challenging the universal principle as applied to piracy.”)
\end{flushright}

\begin{flushright}
\textsuperscript{77} David Schefler, \textit{All the Missing Souls} 12 (Princeton Univ. Press 2012)(“The inevitable nuances of the \textit{ad hoc} tribunals] would have to be sorted out by the judges in their reasoned judgments.”); M. Cherif Bassiony, \textit{Crimes Against Humanity – Historical Evolution and Contemporary Application} 20 (Cambridge Univ. Press 2011)(concluding that municipal and international crimes share common underlying criminal conduct (e.g. murder) the legal elements of war crimes, including the \textit{actus reas, mens rea}, and causation, can be adduced from “general principles of law.”).
\end{flushright}
D. Principle of Legality – *nullum crimen sine lege*

The definition of piracy in the U.S. piracy statute, 18 U.S.C. 1651, is circular. Rather than set forth a substantive definition of piracy, 18 U.S.C. 1651 incorporates the substantive definition of the law of nations (i.e. customary international law). But the law of nations, set forth in UNCLOS, defers to states to define the crime pursuant to municipal law. Professor Guilfoyle suggests that UNCLOS Article 101 should be considered the lowest common denominator of the piracy definition.\(^79\) In other words, piracy must be *no less than* what is set forth in Article 101. But states are free to prohibit more conduct not incompatible with Article 101 and to establish penalties for such criminality.\(^80\) Such an interpretation creates potential problems of uncertainty and foreseeability of the law.

As stated by the ICTY Appeals Chamber, “[A] conviction can only be based on an offence that existed at the time the acts or omissions with which the accused is charged were committed and which was sufficiently foreseeable and accessible.”\(^81\) In international criminal law this principle is called *nullum crimen sine lege*, or the principle of legality.\(^82\) This principle is also enshrined in the U.S. Constitution as the prohibition against *ex post facto* laws and the requirement of due process.\(^83\)

Having established that there is a strong basis for considering piracy to be an international crime, the substantive law set forth explicitly in UNCLOS does not prescribe particular bounds for modes of responsibility, leaving several *lacunae* open for interpretation. The two obvious sources of law to fill these gaps are (1) the municipal law of each prosecuting state; or (2) sources of international law, particularly as interpreted and set forth by international criminal tribunals.\(^84\)

If individual seizing states are permitted to fill these gaps individually, the law of piracy will become increasingly fragmented and the conduct of an individual on the high seas would be subject to a multiplicity of legal regimes. For example, in an on-going trial, Somali defendants are charged with acts of piracy against an Iranian-owned vessel. Rather than being prosecuted in Iran, where both vessel and crew were nationals, or in Somalia, the trial is proceeding in the Netherlands because the Dutch Navy interdicted the pirated vessel. The act of piracy for which they are being prosecuted is the shots fired upon Dutch soldiers as they

\(^79\) DOUGLAS GUILFOYLE, SHIPPING INTERDICTION at 32; See also, Gardner, *supra* note __ at 813 (concluding Article 101 sets the minimum extent to which national courts can apply universal jurisdiction).

\(^80\) This is made clear by UNCLOS Article 105 which provides: “The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.”

\(^81\) Krnojelac v. Prosecutor, Case No. IT-97-25-A, Judgment (September 17, 2003), para. 220.

\(^82\) ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 17-20 (2nd Ed. Cambridge 2010); see also, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171, Art 15 (“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. […][However] Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”)

\(^83\) CONSTITUTION OF THE UNITED STATES OF AMERICA, Art. I, Sec. 9, 10.

\(^84\) Cf. CASSESE, INTERNATIONAL CRIMINAL LAW, *supra* note __, 221; Gardner, *supra* note __ at 817.
attempted to board. Considering the number of nationalities represented by ships, seafarers and navies, a defendant could not know which law might apply in any given circumstance. Significant variations in application by diverse municipal regimes might violate the principle of legality.

In Hasan, Dire and Ali, courts addressed a similar argument under the rubric of a facial due process challenge alleging the definition of piracy in 18 USC 1651 was unconstitutionally vague because it tracked changes in customary international law. The district court in Hasan rejected the challenge holding:

[I]n order for a definition of piracy to fall within the scope of § 1651, the definition must […] be sufficiently established to become customary international law. Importantly, the high hurdle for establishing customary international law, namely the recognition of a general and consistent practice among the overwhelming majority of the international community, necessarily imputes to Defendants fair warning of what conduct is forbidden under § 1651. Such general and consistent practice is certainly reflected by the fact that an overwhelming majority of countries have ratified UNCLOS, which reflects the modern definition of general piracy. Just as the Supreme Court found in Smith that the definition of piracy was readily ascertainable, it is apparent today that UNCLOS (to which Somalia acceded in 1989, over twenty years ago) reflects the definitive modern definition of general piracy under customary international law. In fact, while the Court recognizes the difference between imputed and actual notice for due process purposes, it is far more likely that the Defendants, who claim to be Somali nationals, would be aware of the piracy provisions contained in UNCLOS, to which Somalia is a party, than of Smith, a nearly two hundred year-old case written by a court in another country literally half a world away.

There is consensus in the U.S. courts on this point as both the 4th circuit and the court in Ali adopted this position. It is because the definition of piracy appears in a widely-adopted treaty and that such definition has not changed for decades that notice of this proscription can be imputed to them. But this argument no longer holds if and when a court must stray outside the bounds of the definition in Article 101. For example, in U.S. v. Ali the court made reference to domestic law to clarify the forms of responsibility in Article 101 since incitement and intentional facilitation had no parallel in the U.S. criminal code. In other words, defendants have clear notice of the basic attributes of the crime of piracy set forth in Article 101. But if a court deviates from the script, the widely-accepted nature of UNCLOS no longer guarantees notice of the applicable law. This is contrary to the purpose and intent of UNCLOS, which was to create a uniform legal regime governing conduct, inter alia, on the high seas.

A preferable alternative is to seek to create a consistent application of international law based on general principles of law. Before resorting to any other source, UNCLOS must be examined in depth, including its travaux, to ascertain the common understanding of states as to the conceptual bounds of piracy. Where this first analysis leads to an ambiguous result,

---

86 Dire, 680 F.3d at 463-64; Hasan, 747 F. Supp. 2d at 637-39; Ali, ___ F. Appx. ____, Slip opinion at 63-64.
87 Hasan, 747 F. Supp. 2d at 639.
resort should be had to ‘general principles of law’ (i.e. those principles of law shared by a vast majority of states). The ad hoc international tribunals have conducted extensive surveys of the customary basis for international crimes and, in the absence of custom, have canvassed the general principles of law applicable to modes of responsibility, including the forms of accessory liability at issue here. The case law from these tribunals therefore provides a rich source of interpretive guidance on the bounds and limitations of pirate accessory liability. But before venturing into the jurisprudence of the ad hoc tribunals, UNCLOS and its travaux should be thoroughly examined.

IV. General Definitional Questions – Article 101(a)

A. Actus reus - the high-seas requirement

A plain language interpretation of UNCLOS Article 101 indicates that accessory liability of piracy does not require the actus reus of incitement or intentional facilitation to occur on the high seas. Article 101(1)(a) of UNCLOS defines piracy as “any illegal acts of violence or detention, or any act of depredation, committed for private ends [...] on the high seas [...]” Intentional facilitation of such an act of piracy appears in subsection (c) of Article 101 which does not include the requirement that the act occur on the high seas. In other words, the illegal act of violence or detention must occur on the high seas, but the facilitation need not occur there. This plain language interpretation has support from the United Nations Division for Ocean Affairs and the Law of the Sea (DOALOS), which has observed that subparagraph (c) “does not explicitly set forth any particular geographic scope.”

Some legal scholars have argued that Article 101(c) must be read in conjunction with Article 105, which limits the permissibility of seizure to the high seas and any other place outside the jurisdiction of any state. By this view, permitting any state jurisdiction to prosecute individuals on foreign territory would be inconsistent with Article 105. However, this provision only prevents seizures by unauthorized states and does not preclude extradition. Therefore, Article 105 does not limit juridical jurisdiction to prosecute though it does limit enforcement jurisdiction within territorial waters.

Furthermore, restricting intentional facilitation of piracy to crimes perpetrated wholly on the high seas is not necessary to protect the sovereignty of states where pirate negotiators or financiers may reside. The piracy statute only provides personal jurisdiction over those who

---


91 See e.g., Krstic v. Prosecutor, Case No. IT-98-33-A, Judgment (April 19, 2004), para. 141 (discussing the general principle of mens rea for aiding and abetting).


94 Guilfoyle, Committing Piracy on Dry Land, supra note ___.

18
are “afterwards brought into or found in the United States.” If a defendant has negotiated a ransom from the territory of another state, the U.S. must request extradition through the usual means prescribed by international law. It is for this reason that the United Nations has encouraged states to enter into extradition agreements with Somalia, to permit the repatriation of pirates convicted elsewhere to serve sentences in Somalia. Therefore, the high seas requirement for acts of piracy does not apply to incitement or intentional facilitation of piracy.

B. Mens Rea? - the private ends requirement

There is also some debate in the academic literature as to the nature of the “private ends” requirement of piracy. One line of argument suggests that the private ends requirement serves to distinguish piracy from terrorism in that the latter requires that the act be committed for a political purpose. By this line of argument, private ends would require a subjective intent to commit an act of piracy for personal objectives such as personal enrichment. This is supported to some extent by the travaux. During the negotiations of the LOS treaty, the Czech delegate asserted that the International Law Commission’s definition of piracy was severely lacking because it failed to incorporate piracy committed for political reasons.

The opposing view is that “private ends” merely denotes that the conduct was not supported by a sovereign state. In other words, private must be contrasted with public ends. In this regard, Professor Guilfoyle states that “the test for piracy lies not in the pirate’s subjective motivation, but in the lack of public sanction for his or her acts” and, “all acts of violence that lack state sanction are acts undertaken ‘for private ends.’” Under this view, the private ends requirement is an objective element (actus reus) and does not form part of the mens rea of the offence.

Although this latter interpretation may be better from a policy perspective, it is not clear this was the intent of the original drafters. The commentary to Article 16 of the Harvard Draft provides:

This Article [16] covers inter alia the troublesome matter of illegal forcible acts for political ends against foreign commerce, committed on the high sea by unrecognized organizations. [...] Some writers assert that such illegal attacks on foreign commerce by unrecognized revolutionaries are piracies in the international law sense; and there is even judicial authority to this effect. It is the better view, however, that these are not cases falling under the common jurisdiction of all states as piracy by the traditional law, but are

---

95 18 USC 1651.
97 UNCLOS, Article 101(a) “any illegal acts of violence or detention, or any act of depredation, committed for private ends” (emphasis added); Guilfoyle, Prosecuting Somali Pirates, supra note ___ at 772-73.
98 Gardner, supra note ___, at 813 n. 94; See also, In re Hariri, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging (February 16 2011), para. 111 (holding the customary international law definition of terrorism requires the special intent to spread fear or coerce an authority).
100 Gardner, supra note ___, at 812; Guilfoyle, SHIPPING INTERDICTION, supra note ___ 36-37.
101 Guilfoyle, SHIPPING INTERDICTION, supra note ___ 36-42.
special cases of offences for which the perpetrators may be punished by an offended state as it sees fit. (emphasis added).\textsuperscript{102}

Article 16 refers to both the practice of privateering (i.e. state-sanctioned plunder of foreign vessels) and attacks on vessels for political purposes. The rationale for retaining municipal jurisdiction for these offenses (as opposed to universal jurisdiction) is that “these cases often involve serious political considerations” for the offended state. These comments suggest the original drafters of the Harvard study intended to exclude political acts from the definition of piracy. But they also likely intended to exclude state-sponsored actions.\textsuperscript{103}

C. Instigation and Intentional facilitation in the Harvard Draft

Insofar as the Harvard Review served as the basis for the definition appearing in the 1958 convention which was subsequently incorporated into UNCLOS, it is helpful to examine the intent of the original authors. Unlike supporting commentary for other articles within the draft convention, the section in support of “instigation and intentional facilitation” was quite limited and did not cite any supporting authorities. It provides:

By this clause, instigations and facilitations of piratical acts, previously described in the Article are included in the definition of piracy. Obviously, convenience is served by this drafting device. The act of instigation or facilitation is not subjected to the common jurisdiction unless it takes place outside territorial jurisdiction.\textsuperscript{104}

Two points bear mentioning here. First, this subsection was added in a rather cavalier fashion. As noted in the commentary, the addition of these forms of responsibility was to serve as a catch-all provision for “convenience” sake. Therefore, the specific definition and application of the provision was not explored nor was support sought in the usual sources of customary international law to which the Harvard survey so scrupulously adhered throughout the rest of its text. Second, it is also remarkable that the commentators would assert without equivocation that acts of instigation or facilitation must occur on the high seas in order to be the subject of universal jurisdiction.\textsuperscript{105} This is consistent with the dominant theme of respect for state sovereignty running throughout the Harvard Draft. However, this particular provision does not cite any supporting material. Therefore, this commentary regarding instigation and intentional facilitation should be seen as the drafters’ suggestions for a comprehensive treaty, rather than a summary of customary law at the time.

The ambiguity of these provisions is highlighted by the discussions leading up to the signing of the LOS treaty. Delegates to the 1958 Convention had several complaints about the

\textsuperscript{102} Harvard Draft, supra note __, at 857.

\textsuperscript{103} The debate as to the mens rea requirement of piracy is confused even more by the 1820 case of U.S. v. Smith, recently adopted by the district court in U.S. v. Said, which held that animus furandi was a requirement of piracy. U.S. v. Said, 757 F. Supp. 2d 554, 563-566 (E.D. Va. 2010); Smith, 18 U.S.at 161. If such was ever a requirement for piracy, customary law no longer includes it. See U.S. v. Said, ___ F. 3d ___ (4th Cir. 2012)(reversing and remanding district court finding that animus furandi required). Although animus furandi is sufficient to establish the private ends of an act of piracy, it is no longer a necessary condition by U.S. or customary international law.

\textsuperscript{104} Harvard Draft, supra note __ at 822.

definition of piracy. The Spanish delegation suggested deleting “intentional facilitation” as it amounted to the same thing as “incitement.” In response, the Mexican delegation argued that the two terms were not necessarily synonymous and the Portuguese delegation suggested that "inciting" had a moral connotation whereas "intentional facilitation” had a purely physical connotation.106 As to this section overall, the response of the British delegation was that it should be deleted because the words were “imprecise and would unacceptably widen the definition.”107 The issue was not definitively resolved, but both incitement and intentional facilitation ended up in the treaty.

As can be seen from the travaux, the particular acts that were prohibited by Article 101(c) are not spelled out or clearly defined. These forms of responsibility were added to the Harvard Draft for their convenience and to broaden the conduct prohibited. Nonetheless, if it is accepted that the definition of the law of nations is an evolving concept, later developments in the field of international criminal law are helpful in ascertaining the separate forms of incitement and intentional facilitation, especially considering the paucity of judgements (international or municipal) applying these forms of responsibility.

V. International Criminal Law as a source of modes of responsibility

In a related context, Professor Bassiouni has noted that some formulations of Crimes against Humanity in the statutes of the ad hoc tribunals lack general part elements and that such elements may be added from “general principles of law.”108 This is particularly true with regard to modes of responsibility. In this regard, where the applicable statute and customary international law are ambiguous, the ad hoc tribunals have consistently referred to general principles of law to ascertain the bounds of modes of criminal responsibility at international law.109 Considering piracy is an international crime, resort to general principles of law to fill lacunae regarding applicable modes of responsibility is also appropriate.

A. Incitement/Instigation under International Criminal Law

A small, but potentially significant, change occurred between the publication of the Harvard Draft in 1932 and the adoption of the 1958 LOS Convention. The word “instigation” was changed to “incitement.” The travaux do not elucidate why this drafting change occurred. One interpretation is that it was merely a stylistic change and that the two words are

106 United Nations Conference on the Law of the Sea, Official Records, Vol. IV: Second Committee (High Seas: General Regime), UN Doc. A/ CONF.13/ C.2/L.152, p. 108 (comments of Mr. Galan (Spain), Mr. Cardona (Mexico) and Mr. Cardoso (Portugal)).
108 BASSIOUNI supra note __, 20.
109 Prosecutor v. Blagojevic and Jokic, Case No. IT-02-60-T, Judgment (January 17, 2005), para. 776 (finding complicity is a form of criminal participation governed by the general principles of criminal law); Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment (September 1, 2004), para. 724, 730 (same); Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T, Judgment (February 26, 2001), para. 367 (interpreting superior responsibility as guided by general principles of accessory liability); cf. Erdemovic v. Prosecutor, Case No. IT-96-22-A, Judgment (Oct. 7, 1997), Joint Separate Opinion of Judge McDonald and Judge Vohrah, October 7, 1997, paras. 55, 66, 72, 75, 88 (finding customary international law does not clarify whether duress is a defence and, in light of conflict between principle legal systems of the world, there is equally no general principle of law recognizing it as a defence to the killing of innocent persons).
somehow equivalent. However, there is now in international criminal law a significant distinction between them.

Article 3(c) of the Convention on the Prevention and Punishment of the Crime of Genocide sets forth the crime of Direct and Public Incitement to commit Genocide. This crime was included in the Convention because of the critical role incitement plays in planning of genocide. It was then incorporated into the statutes of the ad hoc tribunals, where the ICTR has had a number of occasions to assess the crime. In this regard, the ICTR Appeals Chamber has emphasized that “incitement” is an inchoate substantive crime as opposed to “instigation” which is merely a mode of liability and requires the completion of an act of genocide. It held:

[I]nstigation under Article 6(1) of the Statute is a mode of responsibility; an accused will incur criminal responsibility only if the instigation in fact substantially contributed to the commission of one of the crimes under Articles 2 to 4 of the Statute. By contrast, direct and public incitement to commit genocide under Article 2(3)(c) is itself a crime, and it is not necessary to demonstrate that it in fact substantially contributed to the commission of acts of genocide. In other words, the crime of direct and public incitement to commit genocide is an inchoate offence, punishable even if no act of genocide has resulted therefrom. This is confirmed by the travaux préparatoires to the Genocide Convention, from which it can be concluded that the drafters of the Convention intended to punish direct and public incitement to commit genocide, even if no act of genocide was committed, the aim being to forestall the occurrence of such acts.

Examples of direct and public incitement include the making of speeches in public or on the radio. In contrast, instigation only occurs where the statements of the Accused actually led to killing or other acts of genocide. This is where the distinction between the terms becomes significant. If applied to the crime of piracy, instigation (as the term appears in the Harvard Draft) would require a completed act of violence, detention, or depredation; whereas incitement (as it appears in LOS and UNCLOS) would only require public statements encouraging others to partake in acts of piracy.

It must be acknowledged that Direct and Public Incitement to Genocide was exceptionally created because of the potentially devastating consequences of such speech in the targeting and killing of an entire race of people. The drafters of the 1958 LOS likely did not have in mind the same dangers of public speech about piratical acts, although they should have been

---

110 GEISS AND PETRIG, supra note __, at 140 (noting only definition of piracy in the Harvard Draft was adopted by LOS and subsequently UNCLOS “without substantial changes.”)
112 ICTY Statute, Article 4(3)(c).
114 Nahimana, supra note __, paras. 678-79.
115 See e.g., Nahimana, supra note __,1016-1039; SCHABAS, supra note __, 267.
116 Some have confusingly referred to aiding and abetting as an inchoate crime. Ali, supra note __, at 29. However, aiding and abetting is a form of accessory liability, not an inchoate crime. GIDEON BOAS, JAMES L. BISCHOFF & NATALIE L. REID, INTERNATIONAL CRIMINAL LAW PRACTITIONER, Vol. 1 – FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 282-85 (Cambridge Univ. Press 2007); Model Penal Code § 5.01-5.05 (defining inchoate crimes as including conspiracy, solicitation and attempt); Black’s Law Dictionary 9th ed. P. 1879 (defining inchoate offense as a step toward the commission of another crime, the step in itself being serious enough to merit punishment. The three inchoate offenses are attempt, conspiracy, and solicitation.)
117 SCHABAS, supra note __ at 273.
aware of the specific use of “incitement” in the Genocide Convention as it was adopted only 10 years before LOS.\textsuperscript{118} Nonetheless, the better interpretation is that the term “incitement” as it appears in Article 101(c) of UNCLOS is equivalent to the usage of the term “instigation” in the statutes of the ad hoc and hybrid-tribunals.\textsuperscript{119} If the drafters of LOS had intended to expand the proscription of piracy to include inchoate acts such as incitement, one would expect to have found a rationale for such expansion.\textsuperscript{120} Such does not exist in the travaux. Likewise, although the Harvard Draft suggested that attempts to commit piracy were proscribed by customary international law,\textsuperscript{121} the definition in the LOS Convention did not include this inchoate crime.\textsuperscript{122} Furthermore, the Harvard Draft does not at any time discuss the use of speeches or media to incite piracy as a customary law offence.\textsuperscript{123} Therefore, the change from instigation to incitement in Article 101(c) was merely stylistic. It follows that the interpretation of instigation by the chambers of these international courts may assist in the understanding of incitement as used in Article 101(c) of UNCLOS. The basic elements are set forth below before examining how this would guide prosecutions regarding pirate accessory liability.

1. Instigation - Basic Contours

Instigating requires that one person, through either an act or omission, prompt another person to commit a crime.\textsuperscript{124} The instigation must be a substantially contributing factor to the criminal conduct that was later perpetrated.\textsuperscript{125} The mens rea for instigation is the intent to instigate another person to commit a crime or at a minimum the awareness of the substantial likelihood that a crime will be committed in the execution of the act or omission instigated.\textsuperscript{126}

\begin{footnotes}
\footnote{Indeed, the inchoate act of incitement was limited to acts that are direct and public, thereby circumscribing the offence as it otherwise might include an ambiguously expansive range of conduct. SCHABAS, supra note \textsuperscript{267}.}
\footnote{Harvard Draft, \textit{supra} note \textsuperscript{2} at 773.}
\footnote{The Harvard Draft does include voluntary participation in the operation of a pirate ship in its definition of piracy. This is akin to the crime of criminal membership applied by the Nuremberg Tribunal and the so-called “subsequent proceedings” at Nuremberg to criminalize membership in the Nazi organization. See KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 290-94 (Oxford Univ. Press 2011). Arguably, criminal membership is not an inchoate offence as it required proof of a completed criminal act. \textit{See} Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Judgement (14 November 1945-1 October 1946), p. 67. As a practical matter, there have been very few, if any, prosecutions under Article 101(1)(b) because of the difficulty of proving that a ship cruising with the intent to commit acts of piracy. \textit{See} Guiffoyle, \textit{Prosecuting Somali Pirates}, supra note \textsuperscript{23}, at 770, 772 (“It may seem common sense that a group of men in a boat far out in the Gulf of Aden with guns, a lot of fuel and no nets must be pirates. Absent, however, specialized equipment such as boarding ladders (easily tossed into the sea), suspicious behaviour will fall far short of proof ‘beyond reasonable doubt’. This is especially so when many legitimate fishermen in the region carry guns.”)}
\footnote{\textit{Prosecutor} \textit{v.} Karera, Case No. ICTR-01-74-A, Judgment (Feb. 2, 2009), para. 317; \textit{Kordic} \textit{v.} Prosecutor, Case No. IT-95-14/2-A, Judgment (Dec. 17, 2004), para. 27; \textit{Nahimana}, \textit{supra} note \textsuperscript{5}, paras 595, 660; \textit{Nahimana}, \textit{supra} note \textsuperscript{5}, para. 480; \textit{Kordic and Cerkez}, \textit{supra} note \textsuperscript{5}, para. 32.}
\end{footnotes}
In contrast to ordering and superior responsibility, instigating does not require that the accused have any authority over the perpetrator. Further, the accused does not need to be actually present when the instigated crime is committed. However, instigating requires more than merely facilitating the commission of crime, which may otherwise suffice for its aiding and abetting. It is not necessary to prove that the crime would not have been perpetrated without the involvement of the accused; rather, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.

2. Application of Incitement to Recruitment of Child Pirates

As shown above, the term “incitement” as used in UNCLOS is equivalent to the modern usage of “instigation.” Therefore, as the remainder of this section discusses the application of UNCLOS, the term “incitement” will be used. Incitement may be most helpful in the prosecution of those involved in recruiting pirates. The international community has identified the increasing use of children as pirates to be of great concern. It has been reported that up to 30% of pirates arrested on the high seas are legal minors. International standards of justice, including the United Nations Convention on the Rights of the Child, require that children be treated consonant with their level of development. As there is no mechanism set up to prosecute child pirates, they are generally repatriated back to Somalia if captured. As noted by Senator Dallaire, one who is well-acquainted with jus cogens crimes, “[C]hild pirates are plentiful, easily indoctrinated, armed, fearless, cheap and viewed as expendable by the adults that employ them. In addition, it must be remembered that child pirates are often coerced into joining or have very few alternative options for survival.”

127 Semanza, supra note ___, May 20, 2005, para. 257.
128 Nahimana, supra note ___, para. 660.
132 INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 611.4. M. 368 (1967), 999 U.N.T.S. 171, Art. 14 (4) (“In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”); CONVENTION ON THE RIGHTS OF THE CHILD, Nov. 20, 1989, 1577 U.N.T.S. 3, Art. 37 (“The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time [and] Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.”)
133 J. Chivers, Somali Suspects in Hijacking of Iranian Ship Face Piracy Trial in Seychelles, NYtimes, March 6, 2012 (noting “One unresolved issue, he added, was the handling of the 15 Somali suspects who have claimed to be minors. Mr. Shapiro said the Seychelles and the United States would work with the United Nations on their possible repatriation if they were found to be juveniles.”) available at http://www.nytimes.com/2012/03/07/world/africa/somalis-on-iranian-ship-face-piracy-charges-in-seychelles.html (last visited Sept. 23, 2012); Child soldiers below 15 turn pirates in Somalia, One India, March 17, 2011 (noting “The Indian Navy managed to capture pirates who were terrorizing the seas and found that of the 61 men nabbed, 25 were children and that too below 15 years of age) available at http://news.oneindia.in/2011/03/17/child-soldiers-below-15-turn-pirates-in-somalia-aid0113.html (last visited Sept. 23, 2012).
134 Dallaire, Williamson & Whitman, supra note ___.

24
Dallaire et al. lament the lack of prosecution mechanisms for recruiters of child pirates. However, Article 101(1)(c) permits the prosecution of child pirates as an act of incitement.

The Special Court for Sierra Leone broke legal ground in the RUF and AFRC cases, finding that the recruitment of child soldiers was a violation of the laws of war and that planning the recruitment of legal minors was an offence subject to individual responsibility. Although the SCSL considered that “planning” was the mode which best encompassed the acts of the Accused in those cases, there are many similarities between planning and instigation. Both of these modes require that an Accused make a substantial contribution to the criminal conduct and that the Accused have the direct intent or the awareness of the substantial likelihood that a crime would be committed. The actus reus of instigation of children to piracy might differ in that it would require acts of direct recruitment. But the ICC Trial Chamber recently confirmed that this conduct is prohibited in the recruitment of child soldiers. In Lubanga, the ICC Trial Chamber noted:

Thomas Lubanga […] played a critical role in providing logistical support, including as regards weapons, ammunition, food, uniforms, military rations and other general supplies for the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwamara camp, he encouraged children, including those under the age of 15 years, to join the army and to provide security for the populace once deployed in the field following their military training. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC members of staff who were below the age of 15.

Therefore, it is both foreseeable and accessible that an Accused would be held individually responsible for inciting children to piracy. This is not to say that incitement to piracy constitutes a war crime as it was applied at the SCSL and the ICC. It has been convincingly argued that international humanitarian law, which overlaps with international criminal law, does not have application to piracy except in the rare case where pirates might also be insurgents. In short, the law of war is not applicable to the situation off the coast of Somalia because Somali pirates are not party to an international or non-international armed conflict. As a consequence the protections afforded to combatants by the Geneva Conventions are inapplicable to Somali pirates. Though the Geneva Conventions are inapplicable to the situation at hand, principles of liability, particularly those grounded in general principles of law, have direct application to piracy. For the crime of incitement to piracy does not originate in the Geneva Conventions, but in customary international law as

---

135 Prosecutor v. Brima, Kamara, & Kanu, Case No. SCSL-2204-16-A, Judgment (Feb. 22, 2008), paras 298-301, 303-304, 306 (upholding conviction for planning conscription and use of children for military purposes because the acts of the Accused substantially contributed to the criminal conduct and he acted with direct intent or with awareness of the substantial likelihood that a crime would be committed); Prosecutor v. Sesay, Kallon & Gbao, Case No. SCSL-04-15-A, Judgment (Oct. 26, 2009), paras 924-26 (upholding conviction for planning the use of child soldiers).

136 Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment (March 14, 2012), 1356; Although the ICC has adopted co-perpetration (as opposed to other modes of responsibility) into its framework, the factual elements in that case would equally have supported a finding of instigation. See Rome Statute, Article 30.


138 Id.
set forth in UNCLOS. This mode of responsibility would encompass acts that encourage a juvenile to attack a vessel on the high seas under Article 101(a). But it would also include the simple act of encouraging a juvenile to join in a pirate enterprise, if the juvenile is found on a pirate ship on the high seas (Article 101(b)). What to do with the large, and potentially increasing, number of child pirates remains in doubt, recruiters of child pirates could be charged with incitement as defined by UNCLOS Article 101(c).

B. Intentional Facilitation under International Criminal Law

Although not specifically representative of customary law, the Statute of the International Criminal Court provides guidance as to the meaning of facilitation under international criminal law. Article 25 of the Rome Statute provides that a person is criminally responsible if he or she, “For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.” By this definition, facilitation would include “aiding and abetting,” and “providing the means for its commission.” Happily, this interpretation is also consistent with domestic U.S. Law. Again the rich caselaw of the ad hoc and hybrid tribunals is helpful in outlining the bounds of intentional facilitation by reference to aiding and abetting under international criminal law.

1. Aiding and abetting – Basic Contours

The actus reus of aiding and abetting requires: the Accused provided practical assistance, encouragement, or moral support to the perpetration of a crime or underlying offence and such practical assistance, encouragement, or moral support had a substantial effect upon the commission of a crime or underlying offence. It need not be proven that the crime or underlying offence would not have been perpetrated but for the Accused’s contribution.

The mens rea of aiding and abetting requires that: the Accused performed an act with the knowledge that such act would assist the commission of a crime or underlying offence, or that he was aware of the substantial likelihood that his acts would assist the commission of

139 Articles 101(a) and (b).
140 See David Scheffer and Caroline Kaeb, The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory, 29 BERK. J. INT’L L. 334, 348 (2011); Sarei et. al. v. Rio Tinto, PLC, ___ F.3d ___ (2011), dissenting opinion of Judge Pregerson (noting that provisions of the Rome Statute were not all intended to reflect customary international law).
145 Blaškić, supra note __, para. 46; Perišić, supra note __, para. 126; Vasiljević supra note __, para. 102; Nahimana, supra note __, paras 672, 966.

2. **Pirate Negotiators as aiders and abettors**

As discussed in Part I, two individuals have been charged with aiding and abetting piracy for the underlying act of negotiating a ransom. In *U.S. v. Ali*, the defendant is alleged to have boarded the pirated vessel after it has been hijacked and initiated discussions between the ship owners and the pirates. Professor Kontorovich has argued that this does not constitute intentional facilitation of piracy because the defendant’s conduct occurred *after* the hijacking and only contributing acts prior to the piratical act may constitute intentional facilitation.\footnote{Eugene Kontorovich, From Prof. Eugene Kontorovich, About Today’s Piracy Decision, The Volokh Conspiracy, July 13, 2012, available at http://www.volokh.com/2012/07/13/from-prof-eugene-kontorovich-about-todays-piracy-decision/ (last visited Oct. 3 2012).} This view is only partially correct.

In general, neither the actus reus nor the mens rea of aiding and abetting need be present prior to the crime.\footnote{Nahimana, supra note ___, para. 482; Brima, Kamara and Kanu, supra note ___, para. 775; Taylor, supra note ___, para. 484; Blaškić, supra note ___, para. 48; Sesay, Kallon and Gbao, supra note ___, para. 278; Prosecutor v. Blagojević and Jokić, Case No. IT-02-60-A, Judgment (9 May 2007), para. 127; Blaškić, supra note ___, para. 48; Taylor, supra, note ___ para. 484; Seromba, supra note ___, paras 57-58.} However two Trial Chambers of the ad hoc tribunals have held that in cases of ex post facto aiding and abetting, the defendant must have the requisite mens rea at the time of the planning, preparation or execution of the crime.\footnote{Blagojević and Jokić, Trial Judgement, para. 728; Taylor Trial Judgement, para. 484.} In *Blagojevic*, the ICTY Trial Chamber held that the defendants’ assistance to a reburial operation to conceal prior murders did not constitute aiding and abetting.\footnote{Id.} It so held because there was no proof of an earlier agreement to plan, prepare or execute the prior crime, which were the murders (not the reburial of the bodies).\footnote{Id.}

Therefore, whether the conduct of a negotiator constitutes intentional facilitation of piracy in the absence of a prior agreement to do so will depend on the specific underlying conduct he is alleged to have facilitated. If the underlying criminal act is an act of violence used to hijack the vessel under Article 101(a), this would not constitute intentional facilitation because he may not have been aware of, let alone had the requisite intent to facilitate, the hijacking. If, however, the underlying conduct is the illegal detention of the vessel under Article 101(a), boarding the craft to negotiate a ransom arguably facilitates the continuing illegal detention of the craft and its crew. The illegal detention is an act of piracy separate and distinct from the hijacking and continues so long as the pirates retain control of the vessel without title. Furthermore, the act of facilitation need not occur on the high seas (see Part IV. A), but the
underlying conduct facilitated by the Accused must occur on the high seas. The underlying conduct must also occur after the facilitator has agreed to assist. If it were otherwise, the Accused would not have the requisite mens rea. Therefore, a negotiator may be convicted of intentional facilitation. But there must be either (1) a prior agreement to assist the pirates or (2) assistance rendered whilst the underlying criminal conduct is on-going.

3. Providing Material Support and Financing Piracy

Providing financial assistance to a criminal act has traditionally been prosecuted as aiding and abetting. The recent conviction of Charles Taylor by the Special Court for Sierra Leone (SCSL) is illustrative of this point. The SCSL Trial Chamber convicted Taylor for aiding and abetting rebel groups in the commission of crimes against humanity by facilitating the shipment of arms and ammunition to the RUF rebel group and providing military personnel to support the rebel group. It further found that providing operational support, taken cumulatively, constituted aiding and abetting:

The Accused provided safe haven for RUF fighters during their retreat from Zogoda and medical support in Liberia for treatment of wounded RUF fighters, as well as provision of goods such as food, clothing, cigarettes, alcohol and other supplies to the RUF. The Accused also sent “herbalists” who marked fighters in Buedu and Kono to “protect” them against bullets and bolster their confidence. Liberian forces also assisted the RUF/AFRC with the capture and return of deserters to Sierra Leone.

Piracy operations in Somalia are supported by an increasingly sophisticated system of financial backing. Such involves providing seed-money for the purchase of boats, weaponry, communication devices, etc. The difficulty in prosecuting this form of piracy arises from the lack of knowledge of the financial mechanisms used to support pirate operations. Nonetheless, prosecutions for providing material support to or financing piracy are clearly encompassed by the definition of piracy under international law. Future prosecutions based on this mode of responsibility would benefit from the general principles of accessory liability ascertained by the ad hoc tribunals.

VI. Conclusion

Despite the exponential growth of piracy off the coast of Somalia since 2008, there have been no prosecutions of those who have created the criminal organizations and profited most from ransom proceeds; that is crime bosses and pirate financiers. The international community has recognized the need to prosecute these individuals but has been faced with great difficulty

---

153 OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, supra note __, 325 (“the financing of crime has traditional been treated as a form of aiding and abetting in criminal law.”); Conceiving of negotiation and financing of piracy as aiding or abetting is also consistent with the more modern conceptions of accessory liability contained in the SUA Convention. See CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION, adopted March 10, 1988, 1678 U.N.T.S. 221. The SUA Convention defines as an offence any acts of violence, seizure or destruction of or against any ships, etc. An Accused also commits an offence if he/she: “abets the commission of any of the offences set forth […] or is otherwise an accessory of a person who commits such an offence.” This description of accessory liability is consistent with modern principles of modes of participation defined by international criminal tribunals.

154 Taylor, supra note ___, paras. 6901-6953.


156 Id.
tracing proceeds and capturing them. Once captured a complete legal framework will be necessary to bring charges against the defendants in a way that will also respect fair trial rights, particularly the principle of legality. As this article has shown, UNCLOS Article 101(1)(c) was added for convenience sake. Therefore, it has left several ambiguities that cannot be dispelled by its plain language or reference to the travaux préparatoires. Leaving municipal jurisdictions to fill these gaps would create a fragmented, and potentially contradictory, legal framework risking problems of foreseeability and accessibility. On the contrary, resort to general principles of law to fill these legal lacunae would create a predictable, and consistent understanding of the law of piracy. Many of the answers as to the bounds of incitement and intentional facilitation have been answered by the ad hoc tribunals. These tools are well-suited to the fight against maritime piracy, particularly those charged with financing pirate organizations or inciting children to participate in pirate enterprises.