

**PIRATE ACCESSORY LIABILITY: DEVELOPING A MODERN
LEGAL REGIME GOVERNING INCITEMENT AND
INTENTIONAL FACILITATION OF MARITIME PIRACY**

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| | | |
|------|---|-----|
| I. | INTRODUCTION | 272 |
| II. | CONFRONTING INCITEMENT AND INTENTIONAL FACILITATION OF PIRACY IN U.S. COURTS | 276 |
| | A. <i>United States v. Ali Mohamed Ali</i> | 276 |
| | B. <i>Direct Incorporation of International Law</i> | 279 |
| III. | HISTORICAL DEVELOPMENT OF JURIDICAL CONCEPTS OF PIRACY | 279 |
| | A. <i>UNCLOS Definition</i> | 280 |
| | B. <i>Sources of International Law</i> | 281 |
| | C. <i>Piracy as an International Crime</i> | 282 |
| | D. <i>Principle of Legality</i> — <i>nullum crimen sine lege</i> | 290 |
| IV. | GENERAL DEFINITIONAL QUESTIONS—ARTICLE 101(A) | 293 |
| | A. <i>Actus Reus?—The High-Seas Requirement</i> | 293 |
| | B. <i>Mens Rea?—The Private Ends Requirement</i> | 295 |
| V. | INTERNATIONAL CRIMINAL LAW AS A SOURCE OF MODES OF RESPONSIBILITY | 298 |
| | A. <i>Incitement/Instigation Under International Criminal Law</i> | 298 |
| | 1. <i>Instigation—Basic Contours</i> | 301 |
| | 2. <i>Application of Incitement to Recruitment of Child Pirates</i> | 302 |
| | B. <i>Intentional Facilitation Under International Criminal Law</i> | 305 |
| | 1. <i>Aiding and Abetting—The Basic Contours</i> | 305 |
| | 2. <i>Pirate Negotiators as Aiders and Abettors</i> | 306 |
| | 3. <i>Providing Material Support and Financing Piracy</i> | 307 |

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| | |
|----------------------|-----|
| VI. CONCLUSION..... | 308 |
| VII. POSTSCRIPT..... | 311 |

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 jurisdictions¹ has created an abundance of case law from trial and appellate courts in this niche field. Courts in France,² the Netherlands, Spain, Italy, the United States, 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 states⁷ share is 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., Le Ponant*, Cour D’assises de Paris (2eme section), No. 11/022, Arret Criminel (14 Jun. 2012).

3. *See, e.g., Republic v. Dahir*, [2010] SCSC 86 (26 July 2010), *available at* <http://www.saflii.org/sc/cases/SCSC/2010/86.html>; *see also Republic v. Abdi Ali*, Judgment, Crim. Side No. 14 (2010) – “Intertuna II,” *available at* <http://law.case.edu/saddamtrial/> (last accessed Oct. 3, 2012).

4. *See, e.g., In re Mohamud Mohamed Hashi*, Misc. App. No. 434 of 2009; *see also* European Union Naval Force, Media and Public Information Office, EU Naval Force Welcomes Prosecution of 7 Somali Pirates Convicted of Attacking French Fishing Vessel (Aug. 9, 2012), <http://eunavfor.eu/eu-naval-force-welcomes-prosecution-of-7-somali-pirates-convicted-of-attack-ing-french-fishing-vessel/> (lauding recent conviction of 7 pirates by Kenya court).

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* PRINCETON UNIVERSITY PROGRAM IN LAW AND PUBLIC AFFAIRS, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001), *available at* http://lapa.princeton.edu/hosted/docs/unive_jur.pdf (last visited Oct. 3, 2012).

6. *See, e.g., 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 U.N. General Assembly as is consistent with international public law.

basic definition of piracy adopted in the 1982 U.N. Convention on the Law of the Sea (UNCLOS).⁸ But UNCLOS has left numerous legal *lacunae* that must be 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 international community and the U.S. State Department have focused their attention on pirate financiers and negotiators.¹¹ The modes

8. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS]; see list of ratifications, available at http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg3&lang=en (noting 164 States Parties, including Netherlands, Spain, Italy, Seychelles, Kenya, and Mauritius).

9. 18 U.S.C. § 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.”

10. See, e.g., *United States v. Salad*, 779 F. Supp. 2d 503 (E.D. Va. 2011); *United States v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2010); *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010); Ewen MacAskill, *Somali Pirates Kill Four Americans* (Feb. 22, 2011), available at <http://www.guardian.co.uk/world/2011/feb/22/four-americans-killed-somali-pirates> (last visited Sept. 23, 2012).

11. S.C. Res. 1950, U.N. SCOR, 65th Sess., 6429th Mtg., U.N. Doc. S/RES/1950 (2010), ¶¶ 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, 66th Sess., 6512th Mtg., U.N. Doc. S/RES/1976 (2011), ¶¶ 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 expressing 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, establishing Financial Investigation Units and strengthening forensic capacities, as tools against international criminal networks involved in piracy, 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. 2015, U.N. SCOR, 66th Sess., 6635th Mtg., U.N. Doc. S/RES/2015 (2011), ¶ 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, 66th Sess., 6645th Mtg., U.N. Doc. S/RES/2018 (2011), ¶ 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, 65th Sess., 6663d Mtg., U.N. Doc. S/RES/2020 (2011), pmbl., ¶¶ 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 favorably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, and their facilitators and financiers ashore, consistent with applicable international law including international human rights law); G.A. Res. 66/231, U.N. GAR, 66th Sess., U.N. Doc. A/RES/66/231 (2012), ¶ 85 (encouraging States to ensure effective implementation of international law applicable to combating piracy, as reflected in the Convention, and calling 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, 67th Sess., 6718th Mtg., U.N. Doc. S/RES/2036 (2012), pmbl. (expressing its grave concern at the threat posed by piracy and armed robbery off the coast of Somalia, recognizing that the 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 imprison when duly convicted, pirates and those who illicitly finance, plan, organize, or unlawfully profit from pirate attacks); S.C. Res. 2067, U.N. SCOR, 67th Sess., 6837th Mtg., U.N. Doc. S/RES/2067 (2012), pmbl. & 13 (requesting the Somali authorities, with assistance from the Secretary-General and relevant U.N. entities, to pass a complete set of counter-piracy laws without further delay, including laws to prosecute those who finance, plan, organize, facilitate or profit from pirate attacks); DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 78–79 (2011) (noting the need to effectively target financial flows from piracy, possibly by using approaches similar to the ones we use to target terrorists, including the need for a significant effort to track where pirates get their fuel, supplies, ladders, and outboard motors in Somalia and in other nearby countries and to explore means to disrupt this supply and, most importantly, to focus on pirate leaders and financiers to deny them the means to benefit from ransom proceeds and further noting the need to map and disrupt the financial flows and criminal masterminds behind the business of piracy, noting the need to prosecute pirate leaders or turn them over to other states for prosecution.); *see also* Speech of Thomas P. Kelly, Principal Deputy Assistant Secretary, Bureau of Political-

of participation used by UNCLOS to capture this type of conduct is “intentional facilitation” or “incitement” to piracy, two forms of accessory liability. This is where the United States and other courts have encountered some difficulty. None of the older cases addressed these modes of responsibility.¹² Even in the modern era of piracy, there have been no prosecutions of the bosses who have financed pirate enterprises¹³ and there has been no discussion in the academic literature of these two terms.¹⁴ Piracy will continue, in Somalia or elsewhere, so long as pirate financiers are left to pursue their criminal enterprises with impunity.¹⁵ Therefore, a legal framework for the prosecution of pirate

Military Affairs, The American Petroleum Institute, Biennial Tanker Conference, Orlando, FL, May 21, 2012 (noting the U.S. State department’s focus on pirate networks at the heart of our strategy to disrupt pirate networks and their financial flows and further noting a focus on identifying and apprehending the criminal conspirators who lead, manage, and finance the pirate enterprise, with the objective of bringing them to trial and disrupting pirate business processes), available at <http://www.state.gov/t/pm/rls/rm/191603.htm> (last visited Sept. 30, 2012).

12. See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161, 5 L. Ed. 57 (1820); *In re Piracy Jure Gentium*, [1934] AC 586.

13. 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 available at <http://www.africareview.com/News/Most+wanted+Somali+pirate+seized/-/979180/1383504/-/14bprj/-/> (last visited Oct. 1, 2012) (noting capture of Mohamed Garad by Iranian navy in operation to free Chinese fishermen from Somali hijackers); see also Presidential Documents, *Blocking Property of Certain Persons Contributing to the Conflict in Somalia*, 75 FED. REG. 19869 (Apr. 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 Garaad).

14. ROBIN GEISS & ANNA PETRIG, *PIRACY AND ARMED ROBBERY AT SEA - THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN* 65 (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, 912–13 (2011) [hereinafter Guilfoyle, *Book Review*]. The only discussion on these modes of responsibility appears to be in the blogosphere, see Douglas Guilfoyle, *Committing Piracy on Dry Land: Liability for Facilitating Piracy*, EJIL TALK (July 26, 2012) [hereinafter Guilfoyle, *Committing Piracy on Dry Land*], <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).

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.

financiers is essential to putting a stop to this scourge.

Two legal questions are made paramount by ongoing prosecutions in the United States: (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).¹⁶ 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 sources of international law 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

A. United States v. Ali Mohamed Ali

The case of *United States v. Ali Mohamed Ali* brings into relief a central issue regarding pirate accessory liability.¹⁷ On November 7, 2008, pirates attacked and seized the *M/V CEC Future* in the Gulf of Aden.¹⁸ A few days later, the defendant boarded the ship, utilizing his English-language skills to negotiate a ransom from the ship owners for

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).

16. The latter issue is currently the subject of a petition for certiorari. *See* Roger L. Phillips, *Negotiator Sentenced to Multiple Life Terms – SCOTUS on the Horizon* (Aug. 15, 2012), <http://piracy-law.com/2012/08/15/negotiator-sentenced-to-multiple-life-terms-scotus-on-the-horizon/>.

17. *United States v. Ali*, 885 F. Supp. 2d 17 (D.D.C. 2012).

18. *Id.*

its release.¹⁹ Ali was arrested more than two years later when federal agents invited him to the United States for an educational conference (allegedly purchasing a round-trip plane ticket for him).²⁰ 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.²¹ 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."²² In other words, if Ali negotiated the ransom from within Somali territorial waters (within 12 nautical miles of Somalia's coastline²³), 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.²⁴ 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.²⁵

19. *Id.*

20. Frederic J. Frommer, *Judge Assails Prosecutors in Somali Pirate Case*, YAHOO FIN. (July 24, 2012), <http://finance.yahoo.com/news/judge-assails-prosecutors-somali-pirate-case-193158953.html> (last visited Sept. 22, 2012).

21. *Ali*, 885 F. Supp. at 37.

22. *Id.* at 38–39.

23. See UNCLOS, *supra* note 8, art. 3.

24. *United States v. Ali*, 2012 U.S. Dist. LEXIS 103112 (D.D.C. 2012).

25. 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*, 2012 U.S. Dist. LEXIS 97921, at 11 (E.D. Va. Apr. 16, 2012). 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*, 2012 U.S. Dist. LEXIS 97920, at 2–3 (E.D. Va. Apr. 16, 2012). 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

A second case, *United States v. Dire* raises an equally fundamental issue. On April 1, 2010, the U.S. naval frigate, the U.S.S. *Nicholas* disguised as a merchant vessel, was attacked by the defendants on the high seas between Somalia and the Seychelles.²⁶ 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.²⁷ 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 *United States v. Smith* was a requisite element of piracy.²⁸ 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*.²⁹ It concluded that the federal piracy law “incorporates a definition of piracy that changes with advancements in the law of nations.”³⁰ 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.³¹

Not only does *United States 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 no case law interpreting these terms. The issues raised in *Ali* and *Dire* will continue to arise in prosecutions in the United States 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

dismiss. Shibin was subsequently found guilty of piracy by a jury. See *Somali Mohammad Shibin Guilty Over Quest Hijacking*, BBC NEWS (Apr. 30, 2012), <http://www.bbc.co.uk/news/world-us-canada-17875710>. He was then sentenced to 12 life-terms of imprisonment. See Brock Vergakis, *U.S. Judge Gives Somali Pirate 12 Life Sentences*, USA TODAY (Aug. 13, 2012), <http://www.usatoday.com/news/nation/story/2012-08-13/somali-pirate-sentencing/57037162/1>.

26. *United States v. Dire*, 680 F.3d 446, 449 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 982 (2013) (denying certiorari on issue of whether piracy is defined by the law of nations as set forth in the UNCLOS from 1982), *available at* <http://www.supremecourt.gov/orders/courtorders/012213zor1bo2.pdf>; *cf.* *Kiobel v. Royal Dutch Shell Petroleum, U.S.*, Apr. 17, 2013, Slip op. at 8 (citing Blackstone’s definition of piracy from the year 1769 that is inconsistent with the definition in UNCLOS).

27. *Id.* at 451.

28. *United States v. Smith*, 18 U.S. 153, 161 (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. See Maggie Gardner, *Piracy Prosecutions in National Courts*, 10 J. INT’L CRIM. JUST. 797–821 (2012).

30. *Dire*, 680 F.3d at 469.

31. *Id.*

justice.

B. Direct Incorporation of International Law

Piracy is defined in the United States purely by reference to international law. In *United States v. Dire* and *United States 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 U.S.C. § 1651) incorporates this definition.³² The Washington D.C. District Court also followed this reasoning and holding in *Ali*.³³ It should be noted that almost all recent piracy cases in the United States have been prosecuted in the 4th Circuit.³⁴ 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 U.S.C. § 1651, U.S. courts must ascertain the status of the customary international law of piracy,³⁵ 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

32. *Id.*; see also *United States v. Said*, 680 F.3d 374, 375 (4th Cir. 2012), *vacating and remanding*, *United States v. Said*, 757 F. Supp. 2d 554, 563–66 (E.D. Va. 2010) (finding that UNCLOS did not set forth the definition of piracy under customary international law); *United States v. Ali*, 2012 U.S. Dist. LEXIS 103112, at 15 (D.D.C. July 25, 2012) (following the 4th Circuit holding in *Dire* and *Hasan* that UNCLOS sets forth the authoritative international law definition of piracy as a universal jurisdiction crime).

33. *Ali*, 2012 U.S. Dist. LEXIS, at 28.

34. See *Dire*, 680 F.3d at 460; *Said*, 680 F.3d at 374; *United States v. Hasan*, 747 F. Supp. 2d 599, 642 (E.D. Va. 2010); *United States v. Salad*, 779 F. Supp. 2d 503, 508 (E.D. Va. 2011).

35. *Dire*, 680 F.3d at 460; *Hasan*, 747 F. Supp. 2d at 623.

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.

Id.; *Ali*, 2012 U.S. Dist. LEXIS, at 25 (“The court must decide how the law of nations defines piracy.”).

has been the formulation of a general definition accepted by the international community. The Harvard Review of International Law formulated the definition in 1932 based upon a comprehensive review of customary international law at that time.³⁶ That definition formed the basis of the 1958 Law of the Sea Convention provisions on piracy to which the United States is a party.³⁷ Finally, in 1982, UNCLOS came into force with an almost identical definition of piracy.³⁸ There are 164 States Parties to UNCLOS and nearly universal recognition that the definition of piracy in UNCLOS is customary.³⁹ Although the United States is not a state party to UNCLOS, the United States has accepted the definition of piracy in UNCLOS as customary international law for the last four presidencies.⁴⁰

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

36. Harvard Research on International Law, *Piracy*, 26 AM. J. INT'L L. SUP. 739, 760 (1932) [hereinafter Harvard Draft].

37. DOUGLAS GUILFOYLE, SHIPPING INTERDICTION AND THE LAW OF THE SEA 30 (2009).

38. UNCLOS, *supra* note 8, art. 101.

39. *Id.*; see also S.C. Res. 2020, pmb. U.N. SCOR, 65th Sess., 6663d Mtg., U.N. Doc. S/RES/2020 (Nov. 22, 2011) (“*Further reaffirming* that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (‘The Convention’), sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities”); G.A. Res. 66/231, U.N. GAOR, 66th Sess., U.N. Doc. A/RES/66/231, at ¶ 85 (Apr. 5, 2012) (“*Encourag[ing]* States to ensure effective implementation of international law applicable to combating piracy, as reflected in [UNCLOS]).

40. DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 110–15 (2010).

described in subparagraph (a) or (b).⁴¹

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 which 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.⁴² 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*.⁴³ Judicial decisions and the teachings of “the most highly qualified publicists” are also considered subsidiary means for determining rules of law.⁴⁴

The International Court of Justice has declared that the substance of customary international law derives from the actual practice of states and *opinio juris*.⁴⁵ A customary rule must be in accordance with a constant and uniform usage practiced by the states in question.⁴⁶ State practice must be both extensive and virtually uniform in the sense of the provision invoked.⁴⁷ However, it is not necessary that the practice in question be in absolute conformity with the purported customary rule.⁴⁸

41. UNCLOS, *supra* note 8, art. 101.

42. Statute of the International Court of Justice, art. 38(a), (b), (c), June 26, 1945, Stat. 1055, 33 U.N.T.S. 993.

43. MALCOLM N. SHAW, INTERNATIONAL LAW 93 (Cambridge 5th ed. 2003).

44. *Supra* text accompanying note 39.

45. North Sea Continental Shelf Cases, Federal Republic of Germany/Netherlands, 1967 I.C.J. 44 (Feb. 20), ¶ 77 (“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”).

46. Asylum Case (Colombia/Peru), 1950 I.C.J. 276 (Nov. 20).

47. North Sea Continental Shelf Cases, *supra* note 45, ¶ 74.

State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked;--- and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

Id.

48. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. United

Sources of custom might include multilateral and bilateral treaties and *travaux préparatoires* of these treaties, U.N. General Assembly resolutions, and Security Council resolutions. Absolute consensus is not required and the contrary views of several states cannot overrule an established customary international law rule.⁴⁹ However, custom must exhibit qualities of constancy and uniformity to be considered established in international law.⁵⁰

The U.S. Supreme Court endorsed a similar conception of customary international law since *The Paquete Habana* holding in 1900:

[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.⁵¹

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

C. Piracy as an International Crime

Before relying on international criminal law as a source of the substantive law to fill the lacunae unexplained by UNCLOS, it must

States), 1986 I.C.J. 98, ¶ 186 (June 27).

The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.

Id.

49. SHAW, *supra* note 43, at 86.

50. *Asylum Case*, 1950 I.C.J. 276 (Nov. 20).

51. *The Paquete Habana*, 175 U.S. 677, 700 (1900); *see also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) (quoting *The Paquete Habana*, 175 U.S. at 700).

first be determined whether 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.⁵² In other words, it is representative of an agreement to endeavor to suppress acts of piracy and permits states to exercise jurisdiction over acts of piracy pursuant to municipal law.⁵³ 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.⁵⁴ UNCLOS merely 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.”⁵⁵ In short, it is asserted that piracy is not an international crime and UNCLOS does not set forth substantive law.⁵⁶

The origins of this line of reasoning can perhaps be traced to Professor Rubin in his piracy treatise originally published in 1988.⁵⁷ 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

52. GEISS & PETRIG, *supra* note 14; Alfred P. Rubin, *The Law of Piracy*, 63 U.S. NAVAL WAR COLLEGE INT’L L. STUDS. 344–45 (1988).

53. Rubin, *supra* note 52.

54. Even if this is accepted, with each municipal jurisdiction that passes legislation incorporating the UNCLOS definition as the law of piracy, and courts subsequently interpreting 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.

55. Harvard Draft, *supra* note 36, art. 14(2).

56. In further support of this argument, it is asserted: (1) The sources of law considered by the 1932 Harvard Draft considered 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; (4) Finally, that certain states definitions of piracy under municipal law may expand the definition within UNCLOS Article 101. See GEISS & PETRIG, *supra* note 14, at 139–42.

57. Rubin, *supra* note 52, at 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.”).

and punish piracy as such.⁵⁸ He also asserts that giving piracy the status of an international crime would violate the principle of *nullum crimen sine lege* because there is no statute binding upon a tribunal in which piracy is defined.⁵⁹

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.⁶⁰ At the time, Schwarzenberger concluded that international criminal law did not exist as a branch of law.⁶¹ 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 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 *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 crimes by any specific treaty.⁶² In order to respect the principle of legality, the *ad hoc* tribunals have relied on the definitions of these crimes established by customary international

58. Rubin, *supra* note 52, at 338–39.

59. *Id.* at 343.

60. Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBS. 263 (1950).

61. *Id.*

62. GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE *AD HOC* TRIBUNALS 8–9 (2005).

[W]ith 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.”

Id.; see also M. CHERIF BASSOIUNI, CRIMES AGAINST HUMANITY – HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 20 (2011); Guilfoyle, *Book Review*, *supra* note 14, at 912–13 (noting that 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).

law.⁶³ 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 offenses.⁶⁴ Anthony Cassese makes this 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.⁶⁵ 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 “[g]ravely 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.”⁶⁶

63. METTRAUX, *supra* note 62, at 9; KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL COMPARATIVE CRIMINAL LAW 374 (2009) (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 [. . .]”).

64. Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. J. INT’L L. 183 (2004) (arguing the legality of privateering, which essentially amounts to piracy authorized by a state, undercuts the gravity of the offense of piracy). *But see* GEISS & PETRIG, *supra* note 14, at 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).

65. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 10–12 (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. *Id.*; *but see* OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 455 (Antonio Cassese ed., 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* text accompanying note 63.

66. *See, e.g.*, S.C. Res. 1816, pmb. 62d Sess., 5902d Mtg., U.N. Doc. S/RES/1816 (June 2, 2008).

[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

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.⁶⁷ 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.⁶⁸ 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.⁶⁹ Insofar as the need to transport goods in international commerce over the high seas is an interest of all states,⁷⁰

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 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.

Id. 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.

67. Ruth Lapidoth, *Freedom of Navigation – Its Legal History and Its Normative Basis*, 6 J. MAR. L. & COM. 271 (1974–1975); GUILFOYLE, *supra* note 37, at 28–29.

68. *See generally* DANIEL HELLER-ROAZEN, *THE ENEMY OF ALL, PIRACY AND THE LAW OF NATIONS* 119–31 (2009).

69. Lapidoth, *supra* note 67, at 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 68, at 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. Fenwick, 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 tranquility. 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.

Id.

70. Harvard Draft, *supra* note 36, at 797:

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 of piracy is grave in the sense of other international crimes, not for the criminal base (*i.e.*, the murder, theft). 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.⁷¹ 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 crime 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 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 maintains that the theoretical justification of piracy as an international crime cannot be based upon its gravity. He notes that UNCLOS prohibits universal jurisdiction to prosecute acts of armed robbery in territorial waters and asks how the same crime, if committed within twelve nautical miles of shore is somehow stripped of its gravity by passing this invisible line. This, he states, undercuts the absolute gravity of the offense of piracy.⁷² However, the dichotomy

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.

71. See *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Judgment, ¶ 285 (June 17, 2004); *Kunarac v. Prosecutor*, Case No. IT-96-23/1-A, Judgment, ¶ 150 (June 12, 2002); see also *Rukundo v. Prosecutor*, Case No. ICTR-2001-70-A, Judgment (Oct. 20, 2010) (reversing conviction for genocide based an act of sexual assault based upon the particular circumstances of that case).

72. GUILFOYLE, *supra* note 37, 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.

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 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. 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, and Yemen and Norway, among others.⁷³

Moreover, 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 U.N. General Assembly in 1948.⁷⁴ By comparison, Cicero recognized piracy as an offense in 44 B.C.⁷⁵ In

INT'L CRIM. JUST. 767, 774–75 (2012) [hereinafter Guilfoyle, *Prosecuting Somali Pirates*] (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).

73. See Roger L. Phillips, *Language, Capacity Issues Plague Indian Prosecutions of Somali Pirates*, COMMUNIS HOSTIS OMNIUM: NAVIGATING THE MURKY LEGAL WATERS OF MARITIME PIRACY, available at <http://piracy-law.com/?s=india>; see also Douglas Guilfoyle, *Shooting Fishermen Mistaken for Pirates: Jurisdiction, Immunity and State Responsibility*, EJIL TALK (Mar. 2, 2012), <http://www.ejiltalk.org/shooting-fishermen-mistaken-for-pirates-jurisdiction-immunity-and-state-responsibility/> (noting incident in which Italian marines, embarked aboard an oil tanker to protect it, appear to have killed two Indian fishermen mistaking them for pirates and a dispute as to whether jurisdiction resides with Italy or India). Alan Katz, *Fighting Piracy Goes Awry with Killings of Fishermen*, BLOOMBERG NEWS (Sept. 17, 2012), <http://www.bloomberg.com/news/2012-09-16/fighting-piracy-goes-awry-with-killings-of-fishermen.html> (noting mistaken shooting of Yemeni fishermen thought to be pirates by Norwegian soldiers and resultant tension between the states).

74. Prosecutor v. Tadic, Case No. IT-94-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ¶¶ 86–89, 138 (Int'l Crim. Trib. for the Former Yugoslavia, Oct. 2, 1995).

75. HELLER-ROAZEN, *supra* note 68, at 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 if 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

addition the modern conception of piracy has changed little since the 1932 Harvard Draft ascertained the customary legal basis for an offense of piracy.⁷⁶ Likewise, 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 that “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.”⁷⁷ Like the Geneva Conventions, UNCLOS and its predecessor, the 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.⁷⁸

It is also true that universal jurisdiction over piracy was a practically necessary measure because an enforcement gap is otherwise maintained on the high seas where no state has criminal jurisdiction. Prior to widespread air travel, it would be truly burdensome to require the prosecution of a pirate in his home country when captured on the high seas, thereby requiring merchants or foreign navies to travel vast distances to repatriate the pirate. Therefore, piracy was also punished

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.

Id.

76. M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 149 (2003).

77. *Tadic*, Case No. IT-94-I, ¶¶ 128, 134 (quoting The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, pt. 22, at 447 (1950)).

78. A separate, but related question is whether the international law of piracy may have direct application in municipal systems. See Roger L. Phillips, *Direct Application of the International Law of Piracy in Municipal Systems*, COMMUNIS HOSTIS OMNIUM: NAVIGATING THE MURKY LEGAL WATERS OF MARITIME PIRACY (Mar. 22, 2012), <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 favorably consider the prosecution, in appropriate cases of suspected pirates). With regard to piracy, whether or not it may apply directly would appear to hinge on a number of factors, including the gravity of the offense, 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 generally W.N. FERDINANDUSSE, DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS (2006).

universally for more pragmatic reasons. This justification for the criminalization of piracy as a universal jurisdiction crime is not, however, mutually exclusive with the gravity justification.

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.⁷⁹ 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 *ad hoc* tribunals.⁸⁰

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.⁸¹ 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.⁸² 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

79. M. CHERIF BASSIUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 122, 149 (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 64, 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.”).

80. DAVID SCHEFFER, *ALL THE MISSING SOULS* 12 (2012) (“The inevitable nuances [of the *ad hoc* tribunals] would have to be sorted out by the judges in their reasoned judgments.”); BASSIUNI, *supra* note 62, at 20 (concluding that municipal and international crimes share common underlying criminal conduct (*e.g.*, murder) the legal elements of war crimes, including the *actus reas*, *mens rea*, and causation, can be adduced from “general principles of law.”).

81. GUILFOYLE, *supra* note 37, at 32; *see also* Gardner, *supra* note 29, at 813 (concluding “Article 101 sets the minimum extent to which national courts can apply universal jurisdiction.”).

82. 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.” UNCLOS, *supra* note 8, art. 105.

with which the accused is charged were committed and which was sufficiently foreseeable and accessible.⁸³ In international criminal law this principle is referred to as *nullum crimen sine lege*, or the principle of legality.⁸⁴ This principle is also enshrined in the U.S. Constitution as the prohibition against *ex post facto* laws and the requirement of due process.⁸⁵

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.⁸⁶

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 attempted to board.⁸⁷ 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 could violate the principle of legality.

In *Hasan, Dire, and Ali*, courts addressed a similar argument under

83. Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 220 (Sept. 17, 2003).

84. ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 17–20 (2d ed. 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.

Id.

85. U.S. CONST. art. I, §§ 9, 10.

86. *Cf.* CASSESE, *supra* note 65, at 221; Gardner, *supra* note 29, at 817.

87. Dutch Court Tries Somalis for Piracy, AFP (Sept. 4, 2012), *available at* <http://www.news24.com/Africa/News/Dutch-court-tries-Somalis-for-piracy-20120904>.

the rubric of a facial due process challenge alleging that the definition of piracy in 18 U.S.C. § 1651 was unconstitutionally vague because it tracked changes in customary international law.⁸⁸ 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.⁸⁹

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 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 *United States 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.⁹⁰ 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

88. *United States v. Dire*, 680 F.3d 446, 463–64 (4th Cir. 2012); *United States v. Hasan*, 747 F. Supp. 2d 599, 637–39 (E.D. Va. 2010); *Ali*, 2012 WL 2870263 at *63–64.

89. *Hasan*, 747 F. Supp. 2d at 639.

90. *Ali*, 2012 WL 2870263 at *30.

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.⁹¹ Before resorting to any other source to fill the gaps in the definition of piracy, 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, resort should be had to “general principles of law” (*i.e.*, those principles of law shared by a vast majority of states).⁹² 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.⁹³ 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 [. . .]”⁹⁴ 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 U.N. Division for Ocean Affairs and the Law of the

91. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(c), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

92. *Cf.* BASSOIUNI, *supra* note 62, at 20 (concluding that reference to general principles of law that ascertain the *mens rea* and *actus reus* of crimes against humanity does not run afoul of the principle of legality); GALLANT, *supra* note 63, at 374; INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 84, art. 15.

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

94. UNCLOS, *supra* note 8, art. 101(1)(a).

Sea (DOALOS), which has observed that subparagraph (c) “do[es] not explicitly set forth any particular geographic scope.”⁹⁵

Some legal scholars have argued that Article 101(c) must be read in conjunction with Article 105, which limits the permissibility of seizures to the high seas and any other place outside the jurisdiction of any state.⁹⁶ 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.⁹⁷

In the preparatory discussions of the International Law Commission (ILC), there was also some discussion as to whether acts of piracy committed on land should be included in the treaty definition of piracy.⁹⁸ The special rapporteur of the ILC maintained that international piracy should not include acts committed on land.⁹⁹ However, it was not clear that these discussions specifically considered incitement and intentional facilitation and whether these modes of liability would similarly be geographically limited if the underlying criminal act did occur on the high seas. In any event, the ILC discussions prior to the LOS Convention have limited value in ascertaining the intent of delegates to the Convention, especially here, where a number of different views were espoused. Therefore, the ILC discussions in 1955 are not particularly helpful on the point at issue.

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 are “afterwards brought into or found in the United States.”¹⁰⁰ If a defendant has negotiated a ransom from the territory of another state,

95. Int’l Maritime Org. [IMO], *Piracy: Elements of National Legislation Pursuant to the United Nations Convention on the Law of the Sea, 1982*, Legal Committee, IMO Doc LEG 98/8/1, at 4 n.15; see also Guilfoyle, *Committing Piracy on Dry Land*, *supra* note 14; see also Roger L. Phillips, *Intentional Facilitation and Commission of Piracy as Part of a Joint Criminal Enterprise*, COMMUNIS HOSTIS OMNIUM: NAVIGATING THE MURKY LEGAL WATERS OF MARITIME PIRACY (July 26, 2012), <http://piracy-law.com/2012/07/26/intentional-facilitation-and-commission-of-piracy-as-part-of-a-joint-criminal-enterprise/>.

96. Eugene Kontorovich, *Committing Piracy on Dry Land: Liability for Facilitating Piracy*, Comments, EJIL TALK, <http://www.ejiltalk.org/committing-piracy-on-dry-land-liability-for-facilitating-piracy/comment-page-1/#comment-24232>.

97. Guilfoyle, *Committing Piracy on Dry Land*, *supra* note 14.

98. 1 Y.B. INT’L L. COMM’N, May 12, 1955, A/CN.4/79, A/CN.4/L.53, 289th Mtg., at 37–43.

99. *Id.* at 43.

100. 18 U.S.C. § 1651 (2012).

the United States 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.¹⁰¹ 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.¹⁰² 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.¹⁰³ 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.¹⁰⁴

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.¹⁰⁵ 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.’”¹⁰⁶ Under this view, the private ends requirement is an objective element (*actus reus*) and does not form part of the *mens rea* of the offense.

101. Matteo Crippa, *Mauritius Strengthens Its Anti-Piracy Capacity*, COMMUNIS HOSTIS OMNIUM: NAVIGATING THE MURKY LEGAL WATERS OF MARITIME PIRACY (July 25, 2012), <http://piracy-law.com/2012/07/25/mauritius-strengthens-its-anti-piracy-capacity/>.

102. UNCLOS, *supra* note 8, art. 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 72, at 772–73.

103. Gardner, *supra* note 29, 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 ¶ 111 (Feb. 16, 2011) (holding that the customary international law definition of terrorism requires the special intent to spread fear or coerce an authority).

104. U.N. Conference on the Law of the Sea, Geneva, Feb. 24–Apr. 27, 1958, *Official Records, Vol. IV: Second Committee (High Seas: General Regime)*, at 78, ¶ 33, U.N. Doc. A/CONF.13/40 (Vol. IV) [hereinafter UNCLOS, Geneva, *Official Records*]; GUILFOYLE, *supra* note 37, at 36; see also Gardner, *supra* note 29, at 811–12.

105. Gardner, *supra* note 29, at 812; GUILFOYLE, *supra* note 37, at 36–37.

106. GUILFOYLE, *supra* note 37, at 36–42.

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 special cases of offences for which the perpetrators may be punished by an offended state as it sees fit.*¹⁰⁷

Article 16 refers to both the practice of privateering (*i.e.*, state-sanctioned plunder of foreign vessels) and attacks on vessels for political purposes.¹⁰⁸ 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.¹⁰⁹ These comments suggest that the original drafters of the Harvard study likely intended to exclude state-sponsored actions. But they also intended to exclude political acts from the definition of piracy.¹¹⁰

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.¹¹¹ It provides: “By this clause, instigations and facilitations of piratical acts, previously described in the Article are included in the

107. Harvard Draft, *supra* note 36, at 857 (emphasis added).

108. *Id.*

109. *Id.* at 857.

110. The debate as to the *mens rea* requirement of piracy is confused even more by the 1820 case of *United States v. Smith*, recently adopted by the district court in *United States v. Said*, which held that *animus furandi* was a requirement of piracy. *United States v. Said*, 757 F. Supp. 2d 554, 563–66 (E.D. Va. 2010); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161, 5 L. Ed. 57, 161 (1820). If such was ever a requirement for piracy, customary law no longer includes it. See *United States v. Said*, 680 F.3d 374 (4th Cir. 2012) (reversing and remanding district court finding that *animus furandi* is 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. *Id.*

111. Harvard Draft, *supra* note 36, at 822.

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.”¹¹² 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 catchall 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.¹¹³ This is consistent with the dominant theme of respect for state sovereignty and state sovereignty over territorial waters 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 definition of piracy. The Spanish delegation suggested deleting “intentional facilitation” as it amounted to the same thing as “incitement,” and 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.¹¹⁴ 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.”¹¹⁵ The issue was not definitively resolved, but both “incitement” and “intentional facilitation” were included in the treaty.

As can be seen from the *travaux*, the particular acts that were prohibited by Article 101(c) are not 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

112. *Id.*

113. See Jon Bellish, *Breaking News from 1932: Pirate Facilitators Must Be Physically Present on the High Seas*, EJIL TALK, (Sept. 19, 2012), available at <http://www.ejiltalk.org/breaking-news-from-1932-pirate-facilitators-must-be-physically-present-on-the-high-seas/>; but see *id.* comments of Douglas Guilfoyle.

114. UNCLOS, Geneva, *Official Records*, *supra* note 104, at 108, ¶¶ 22–26.

115. *Id.* at 78.

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) interpreting and 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 adduced from “general principles of law.”¹¹⁶ 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.¹¹⁷ Considering piracy is an international crime, resorting to general principles of law to fill *lacunae* regarding applicable modes of responsibility is also appropriate.

A. *Incitement or 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 equivalent.¹¹⁸ 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

116. BASSIOUNI, *supra* note 62, at 20.

117. Prosecutor v. Blagojevic & Jokic, Case No. IT-02-60-T, Judgment, ¶ 776 (Jan. 17, 2005) (finding “complicity is a form of criminal participation governed by the general principles of criminal law”); Prosecutor v. Brdjanin, Case No. IT-99-36-T, Judgment, ¶¶ 724, 730 (Sept. 1, 2004); Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T, Judgment, ¶ 367 (Feb. 26, 2001) (interpreting superior responsibility as guided by general principles of accessory liability); *cf.* Prosecutor v. Erdemovic, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald & Judge Vohrah, ¶¶ 55, 66, 72, 75, 88 (Oct. 7, 1997) (finding customary international law does not clarify whether duress is a defense 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).

118. GEISS & PETRIG, *supra* note 14, at 140 (noting only definition of piracy in the Harvard Draft was adopted by LOS and subsequently UNCLOS “without substantial changes”).

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 the planning of genocide.¹¹⁹ It was then incorporated into the statutes of the *ad hoc* tribunals, where the International Criminal Tribunal for Rwanda (ICTR) has had a number of occasions to assess the crime.¹²⁰ 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.¹²¹ The ICTR Appeals Chamber 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.¹²²

Examples of direct and public incitement include the making of speeches in public or on the radio.¹²³ 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.¹²⁴

119. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 273 (2d ed. 2009).

120. Updated Statute of the Int'l Crim. Trib. for the Former Yugoslavia, art. 4(3)(c).

121. Nahimana, Barayagwiza & Ngeze v. Prosecutor, Case No. ICTR-99-52-A, Judgment, ¶¶ 678–79 (Nov. 28, 2007).

122. *Id.*

123. *Id.* ¶¶ 1016–39; SCHABAS, *supra* note 119, at 267.

124. Some have confusingly referred to aiding and abetting as an inchoate crime. United

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.¹²⁵ 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 aware of the specific use of “incitement” in the Genocide Convention as it was adopted only 10 years before LOS.¹²⁶ 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.¹²⁷ 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.¹²⁸ Such does not appear in the *travaux*. Likewise, although the Harvard Draft suggested that attempts to commit piracy were proscribed by customary international law,¹²⁹ the definition in the LOS Convention did not include the inchoate crime of attempt.¹³⁰

States v. Ali, 885 F. Supp. 2d 17, 29 (2012). However, aiding and abetting is a form of accessory liability, not an inchoate crime. GIDEON BOAS ET AL., INTERNATIONAL CRIMINAL LAW PRACTITIONER, VOL. 1 – FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW 282–85 (2007); MODEL PENAL CODE § 5.01–.05 (defining inchoate crimes as including conspiracy, solicitation and attempt); BLACK’S LAW DICTIONARY 1879 (9th ed. 2009) (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.).

125. SCHABAS, *supra* note 119, at 273.

126. Convention on the Prevention and Punishment of the Crime of Genocide, art. 3(c), Dec. 9, 1948, 78 U.N.T.S. 277, 102 Stat. 3045, *enforced* Jan. 12, 1951.

127. THE STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, art. 6(1), Nov. 8, 1994, 33 I.L.M. 1598 (1994); THE STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, art. 7(1), May 25, 1993, 32 I.L.M. 1192 (1993); LAW OF THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA, art. 29; AGREEMENT BETWEEN THE UNITED NATIONS AND THE GOVERNMENT OF SIERRA LEONE, art. 6(1), Jan. 16, 2002, U.N. Doc. S.2002.915 (2002).

128. Indeed, the inchoate act of incitement was limited to acts that are direct and public, thereby circumscribing the offense as it otherwise might include an ambiguously expansive range of conduct. SCHABAS, *supra* note 119, at 267.

129. Harvard Draft, *supra* note 36, at 773.

130. 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 (2011). Arguably, criminal membership is not an inchoate offense as it requires proof of a completed criminal act. See Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Judgment 67 (14 Nov. 1945–1 Oct. 1946). 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 is cruising with the intent to commit acts of piracy. See Guilfoyle, *Prosecuting Somali Pirates*, *supra* note 72, at 770, 772.

Furthermore, the Harvard Draft does not at any time discuss the use of speeches or media to incite piracy as a customary law offense.¹³¹ 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

Instigation requires that one person, through either an act or omission, prompt another person to commit a crime.¹³² The instigation must be a substantially contributing factor to the criminal conduct that was later perpetrated.¹³³ 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.¹³⁴

In contrast to ordering and superior responsibility, instigating does not require that the accused have any authority over the perpetrator.¹³⁵ Further, the accused does not need to be actually present when the instigated crime is committed.¹³⁶ However, instigating requires more than merely facilitating the commission of crime, which may otherwise suffice for its aiding and abetting.¹³⁷ It is not necessary to prove that the crime would not have been perpetrated without the involvement of the

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 behavior will fall far short of proof “beyond reasonable doubt.” This is especially so when many legitimate fishermen in the region carry guns.

Id.

131. See Harvard Draft, *supra* note 36, at 773–80 (discussing acts of piracy historically recognized).

132. Nahimana, Barayagwiza & Ngeze v. Prosecutor, Case No. ICTR-99-52-A, Judgment, ¶ 480 (Nov. 28, 2007); Prosecutor v. Kordic and Cerkez, Case No. IT-95-14/2-T, Judgment, ¶¶ 27, 32 (Feb. 26, 2001).

133. Karera v. Prosecutor, Case No. ICTR-01-74-A, Judgment, ¶ 317 (Feb. 2, 2009); *Kordic & Cerkez*, Case No. IT-95-14/2-T, ¶ 27; *Nahimana*, Case No. ICTR-99-52-A, ¶¶ 595, 660.

134. *Nahimana*, Case No. ICTR-99-52-A, ¶ 480; *Kordic and Cerkez*, Case No. I-95-14/2-T, ¶ 32.

135. Semanza v. Prosecutor, Case No. ICTR-97-20-A, Judgment, ¶ 257 (May 20, 2005).

136. Nahimana, Barayagwiza & Ngeze v. Prosecutor, Case No. ICTR-99-52-A, Judgment, ¶ 660 (Nov. 28, 2007).

137. Prosecutor v. Oric, Case No. IT-03-68-T, Judgment, ¶ 271 (June 30, 2006).

accused; rather, it is sufficient to demonstrate that the instigation was a factor substantially contributing to the conduct of another person committing the crime.¹³⁸

2. Application of Incitement to Recruitment of Child Pirates

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 increasing use of children as pirates is of great concern to the international community.¹³⁹ Reports state that about one third of pirates arrested on the high seas are legal minors aged 14 or 15.¹⁴⁰ International standards of justice, including the U.N. Convention on the Rights of the Child, require that children be treated consonant with their level of development.¹⁴¹ As there is no mechanism set up to prosecute child pirates, they are generally repatriated back to their home country if captured.¹⁴² As noted by Senator Dallaire, one

138. Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A, Judgment, ¶¶ 128–29 (July 7, 2006).

139. S.C. Res. 1950, U.N. SCOR, 65th Sess., 6429th Mtg., U.N. Doc. S/RES/1950 (Nov. 23, 2010) (expressing concern about the reported involvement of children in piracy off the coast of Somalia); S.C. Res. 2020 U.N. SCOR, 66th Sess., 6663d Mtg., U.N. Doc. S/RES/2020 (Nov. 22, 2011); Roméo Dallaire et al., *Child Pirates are Everybody's Problem*, GLOBE & MAIL (Feb. 10 2012), available at <http://www.theglobeandmail.com/commentary/child-pirates-are-everybodys-problem/article544972/>. See also Danielle Fritz, *Note: A Call for the International Community to Support the Further Development of Juvenile Justice Systems in Puntland and Somaliland*, 44 CASE W. RES. J. INT'L L. 891 (2012).

140. Dallaire et al., *supra* note 139.

141. International Covenant on Civil and Political Rights, Dec. 16, 1966, 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.

Id.

142. C. J. Chivers, *Somali Suspects in Hijacking of Iranian Ship Face Piracy Trial in Seychelles*, N.Y. TIMES (Mar. 6, 2012), http://www.nytimes.com/2012/03/07/world/africa/somalis-on-iranian-ship-face-piracy-charges-in-seychelles.html?_r=0 (noting “[o]ne unresolved

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.”¹⁴³ Dallaire, Williamson, and Whitmanlament note the lack of prosecution mechanisms for recruiters of child pirates.¹⁴⁴ However, Article 101(1)(c) permits the prosecution of child pirates as an act of incitement.

The Special Court for Sierra Leone (SCSL) 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 offense subject to individual responsibility.¹⁴⁵ 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 incitement 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

issue, he added, was the handling 2 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.”); Anita, *Child Soldiers Below 15 Turn Pirates in Somalia*, ONE INDIA (Mar. 17, 2011), available at <http://news.oneindia.in/2011/03/17/child-soldiers-below-15-turn-pirates-in-somalia-aid0113.html> (noting “[t]he Indian Navy managed to capture pirates who were terrorizing the seas and found that of the 61 person nabbed, 25 were children and that too below 15 years of age.”).

143. Dallaire et al., *supra* note 139.

144. *Id.*

145. Prosecutor v. Brima (*AFRC* Case), Case No. SCSL-2204-16-A, Judgment, ¶¶ 298–301, 303–04, 306 (Feb. 22, 2008), <http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/AppealJudgment/tabid/216/Default.aspx> (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 (*RUF* Case), Case No. SCSL-04-15-A, Judgment ¶¶ 924–26 (Oct. 26, 2009), <http://www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/AppealJudgment/tabid/218/Default.aspx> (upholding conviction for planning the use of child soldiers).

initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwampara 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 15.¹⁴⁶

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 apply to piracy except in the rare case where pirates might also be insurgents.¹⁴⁷ 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.¹⁴⁸ 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 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.¹⁴⁹ Although 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).

146. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment, ¶ 21 (Mar. 14, 2012), available at <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf>. 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 of the International Criminal Court, art. 30 [hereinafter Rome Statute].

147. See generally Douglas Guilfoyle, *The Laws of War and the Fight Against Somali Piracy: Combatants or Criminals?*, 11 MELB. J. INT'L L. 1 (2010) [hereinafter Guilfoyle, *The Laws of War and the Fight Against Somali Piracy*]; see also Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, 59 INT'L & COMP. L.Q. 141, 158 (2010).

148. Guilfoyle, *The Laws of War and the Fight Against Somali Piracy*, supra note 147.

149. UNCLOS, supra note 8, pts. VII, arts. 101(a), 101(b).

B. *Intentional Facilitation Under International Criminal Law*

Although not specifically representative of customary law,¹⁵⁰ 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, “[f]or 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.”¹⁵¹ By this definition, facilitation would include “aiding and abetting” and “providing the means for its commission.” This interpretation is also consistent with domestic U.S. law.¹⁵² Again the rich case law 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.¹⁵³

1. Aiding and Abetting—The Basic Contours

The *actus reus* of aiding and abetting requires that the Accused provide practical assistance, encouragement, or moral support to the perpetration of a crime or underlying offense¹⁵⁴ and such practical assistance, encouragement, or moral support had a substantial effect upon the commission of a crime or underlying offense.¹⁵⁵ It need not be proven that the crime or underlying offense would not have been

150. See David Scheffer & 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 BERKELEY J. INT’L L. 334, 348 (2011); Sarei v. Rio Tinto, PLC, 671 F.3d 736, 773 (2011) (Pregerson, J., dissenting) (noting that provisions of the Rome Statute were not all intended to reflect customary international law nor were they intended to supersede, constrain or limit existing customary international law).

151. Rome Statute, *supra* note 146, art. 25.

152. United States v. Ali, 885 F. Supp. 2d 17, 30 (D.D.C. 2012) (citing *Abuelhawa v. United States*, 556 U.S. 816, 821 (2009) for the proposition that “facilitate” is equivalent to the terms “aid and abet”).

153. See, e.g., *Prosecutor v. Ayyesh*, Case No. STL-11-01/I, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, ¶¶ 225–27 (Feb. 16, 2011), available at <http://www.stl-tsl.org/en/the-cases/stl-11-01/rule-176bis/filings/orders-and-decisions/appeals-chamber/f0010>.

154. *Blaškić v. Prosecutor*, Case No. IT-95-14-A, Judgment, ¶ 46 (Jan. 27, 2005); *Prosecutor v. Brima*, Case No. SCSL-04-16-T, Judgment, ¶ 775 (June 20, 2007); *Prosecutor v. Perišić*, Case No. IT-04-08-T, Judgment, ¶ 126 (Sept. 6, 2011); *Vasiljević v. Prosecutor*, Case No. IT-98-32-A, Judgment, ¶ 102 (Feb. 25, 2004); *Prosecutor v. Kvočka*, Case No: IT-98-30/1, Judgment, ¶ 254 (Nov. 2, 2001).

155. *Blaškić v. Prosecutor*, Case No. IT-95-14-A, Judgment, ¶ 46 (Jan. 27, 2005); *Prosecutor v. Perišić*, Case No. IT-04-08-T, Judgment, ¶ 126 (Sept. 6, 2011); *Vasiljević v. Prosecutor*, Case No. IT-98-32-A, Judgment, ¶ 102 (Feb. 25, 2004); *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Judgment, ¶¶ 672, 966 (Nov. 28, 2007).

perpetrated but for the Accused's contribution.¹⁵⁶

The *mens rea* of aiding and abetting requires that the Accused perform an act with the knowledge that such act would assist the commission of a crime or underlying offense, or that he was aware of the substantial likelihood that his acts would assist the commission of underlying offense and the Accused is aware of the essential elements of the crime committed by the principal offender, including the state of mind of the principal offender.¹⁵⁷

2. Pirate Negotiators as Aiders and Abettors

Two defendants have been charged with aiding and abetting piracy in U.S. courts for the underlying act of negotiating a ransom.¹⁵⁸ In *United States v. Ali*, the defendant is alleged to have boarded the pirated vessel after it had been hijacked and initiated discussions between the ship owners and the pirates.¹⁵⁹ Professor Kontorovich argued that this did 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.¹⁶⁰ 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.¹⁶¹ However, two Trial

156. Blaškić v. Prosecutor, Case No. IT-95-14-A, Judgment, ¶ 48 (Jan. 27, 2005); Prosecutor v. Simić, Case No. IT-95-9-A, Judgment, ¶ 85 (Nov. 28, 2006).

157. Aleksovski v. Prosecutor, Case No. IT-95-14/1-A, Judgment, ¶ 162 (Mar. 24, 2000); Blagojević v. Prosecutor, Case No. IT-02-60-A, ¶ 221 (May 9, 2007); Prosecutor v. Perišić, Case No. IT-04-08-T, Judgment, ¶ 129 (Sept. 6, 2011); Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 486 (May 14, 2012); Blaškić v. Prosecutor, Case No. IT-95-14-A, Judgment, ¶¶ 49–50 (Jan. 27, 2005); Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment (Apr. 19, 2004); Vasiljević v. Prosecutor, Case No. IT-98-32-A, Judgment, ¶ 102 (Feb. 25, 2004); Prosecutor v. Sesay, Case No. SCSL-04-15-T, Judgment, ¶ 280 (Feb. 25, 2009); Simić v. Prosecutor, Case No. IT-95-9-T, Judgment, ¶ 86 (Oct. 7, 2003); Tadić v. Prosecutor, Case No. IT-94-1-A, Judgment, ¶ 229 (July 15, 1999); Seromba v. Prosecutor, Case No. ICTR-2001-66-A, Judgment, ¶ 56 (Mar. 12, 2008); Muhimana v. Prosecutor, Case No. ICTR-95-1B-A, Judgment, ¶ 189 (May 21, 2007); Ntagerura v. Prosecutor, Case No. ICTR-99-46-A, Judgment, ¶ 370 (July 7, 2006).

158. *United States v. Ali*, 885 F. Supp. 2d 17 (D.D.C. 2012); Shibin, 2012 U.S. Dist. LEXIS 97921 (E.D. Va. Apr. 16, 2012).

159. *Ali*, 885 F. Supp. 2d at 17.

160. Eugene Kontorovich, *From Prof. Eugene Kontorovich, About Today's Piracy Decision*, VOLOKH CONSPIRACY (July 13, 2012, 5:50 PM), <http://www.volokh.com/2012/07/13/from-prof-eugene-kontorovich-about-todays-piracy-decision/>.

161. Nahimana v. Prosecutor, Case No. ICTR-99-52-A, Judgment, ¶ 482 (Nov. 28, 2007); Prosecutor v. Brima, Case No. SCSL-04-16-T, Judgment, ¶ 775 (June 20, 2007); Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶ 484 (May 14, 2012); Blaškić v. Prosecutor, Case No. IT-95-14-A, Judgment, ¶ 48 (Jan. 27, 2005); Prosecutor v. Sesay, Case No. SCSL-04-15-A, Judgment, ¶ 278 (Oct. 26, 2009); Prosecutor v. Blagojević, Case No. IT-02-60-A, Judgment, ¶

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.¹⁶² In *Blagojevic*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) Trial Chamber held that the defendants' assistance to a reburial operation to conceal prior murders did not constitute aiding and abetting.¹⁶³ 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).¹⁶⁴

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.¹⁶⁵ Furthermore, the act of facilitation need not occur on the high seas,¹⁶⁵ 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.¹⁶⁶ The conviction of Charles Taylor

127 (May 9, 2007); *Seromba v. Prosecutor*, Case No. ICTR-2001-66-A, Judgment, ¶¶ 57–58 (Mar. 12, 2008).

162. *Blaškić v. Prosecutor*, Case No. IT-95-14-A, Judgment, ¶ 728 (Jan. 27, 2005); *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgment, ¶ 484 (May 14, 2012).

163. *Blagojević v. Prosecutor*, Case No. IT-02-60-A, ¶ 731 (May 9, 2007).

164. *Id.*

165. *See* UNCLOS, *supra* note 8, pt. IV.A.

166. OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 65, at 325 (“the financing of crime has traditionally 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

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. The SCSL Trial Chamber 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.¹⁶⁷

Piracy operations in Somalia are supported by an increasingly sophisticated system of financial backing.¹⁶⁸ Such backing involves providing seed-money for the purchase of boats, weaponry, and communication devices. The difficulty in prosecuting this form of piracy arises from the lack of knowledge of the financial mechanisms used to support pirate operations.¹⁶⁹ 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 consulting general principles of accessory liability ascertained by the *ad hoc* tribunals.

VI. CONCLUSION

Despite the exponential growth of piracy off the coast of Somalia

Convention. See CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION, *adopted* Mar. 10, 1988, 1678 U.N.T.S. 221. The SUA Convention defines as an offense any acts of violence, seizure or destruction of or against any ships. An Accused also commits an offense 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.

167. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶¶ 6901–53 (May 14, 2012).

168. 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, 867–68 (2012).

169. *Id.*

since 2008, there have been no prosecutions of those who have created the criminal organizations and profited most from ransom proceeds—the crime bosses and pirate financiers. The international community has recognized the need to prosecute these individuals but has been faced with great difficulty in 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.

VII. POSTSCRIPT

Since this article was first drafted, and an early version posted on the Social Science Research Network (SSRN) in October 2012, the central cases that framed the analysis have worked their way through their respective Circuit Courts. Both the D.C. Circuit and the 4th Circuit have now reached the conclusion that incitement and intentional facilitation of piracy need not occur on the high seas. First, in *United States v. Ali*, the prosecution filed an interlocutory appeal of the District Court's decision to dismiss the piracy count when it became clear the prosecution could not show the defendant contributed to the alleged criminal acts on the high seas.¹⁷⁰ A panel of the D.C. Circuit rejected Ali's two arguments that the *Charming Betsy* canon and the presumption against extraterritoriality prevent his prosecution for aiding and abetting piracy, concluding, "While the offense he aided and abetted must have involved acts of piracy committed on the high seas, his own criminal liability is not contingent on his having facilitated these acts while in international waters himself."¹⁷¹ The 4th Circuit similarly held in an appeal of the aiding and abetting piracy conviction

170. *United States v. Ali*, 2013 U.S. Cir. LEXIS 103112, at 20 (D.C. Cir. June 11, 2013).

171. *Id.*

in *United States v. Shibin* that “conduct violating Article 101(c) does not have to be carried out on the high seas, but it must incite or intentionally facilitate acts committed against ships, persons, and property on the high seas.”¹⁷² This Article reached the same conclusion in Part IV.A. The only question that remains is whether these cases will eventually reach the highest court in the land.

¹⁷² *United States v. Shibin*, 2013 U.S. Cir. LEXIS 97921, at 17 (4th Cir. July 12, 2013).