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PEACE NEGOTIATIONS
POST-CONFLICT CONSTITUTIONS
WAR CRIMES PROSECUTION

RECRUITMENT AND USE OF CHILDREN AS AN ACT OF PIRACY

Legal Memorandum

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Public International Law & Policy Group

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Confidential

Introduction

The recruitment and use of children in piracy is an increasingly troubling problem. Since the collapse of the central government in Somalia in 1991, the country has faced one of the most significant humanitarian crises in the world today. Youth are faced with little or no opportunities. Many are recruited by the militant forces or the pirates, with little alternatives. Many of the pirates apprehended by authorities are 14-15 years old, mirroring the prevalence of child soldiers in this part of the world.¹ In November 2010, the Security Council expressed concern for the first time about the use of children as pirates.²

There is no reliable reporting system for criminal acts of piracy, and thus data on child pirates is limited and under reported.³ Naval forces estimate that there are approximately fifty main pirate leaders, 300 leaders of pirate attack groups, and 2,500 pirate “foot soldiers.”⁴

Some sources have reported that about one-third of pirate foot soldiers in the horn of Africa are children, some as young as 10 or 11 years of age.⁵ Shedding light on the prevalence of children involved in piracy is the example of a 2011 arrest, where the Indian Navy captured 61 suspected pirates, 25 of which were suspected to be under 15 years of age.⁶

Question Presented

Does the crime of piracy, which is subject to Universal Jurisdiction, include the recruitment and use of children as pirates?

¹ Romeo Dallaire, “Child Pirate’s are Everybody’s Problem”, The Globe and Mail, February 10, 2012.

² See UN SC/10092, November 23 2010.

³ “The Human Cost of Somali Piracy”, Oceans Beyond Piracy (2011) at 26.

⁴ U.N. Secretary-General, Report of the Secretary-General on the Modalities of the Establishment of Specialized Somali Anti-Piracy Courts, Annex II ¶ 3, U.N. Doc. S/2011/360 (June 15, 2011).

⁵ See “International piracy experts meet in Halifax”, CBC News, July 24, 2012, available at: <http://www.cbc.ca/news/canada/nova-scotia/story/2012/07/24/ns-piracy-conference.html>.

⁶ “The Human Cost of Somali Piracy”, *supra* at note 3 (citing “25 of 61 Pirates Arrested by Navy at Sea are Children Below 15 yrs”, Times of India, March 17, 2011).

Short Answer

Recruiting and using children as pirates could be considered an act of piracy. Under Article 101(a) and Article 101(b) of UNCLOS, using a child for piracy may be considered an act of violence for private ends on the high seas or participation in the operation of a pirate vessel, accordingly, under the doctrine of command responsibility. Under Article 101(c), recruiting and using a child for piracy will be considered an act of piracy if the pirate committed an act of “inciting or intentionally facilitating” a child to either commit illegal acts of violence for private ends on the high seas or outside the jurisdiction of any state, or to voluntarily participate in the operation of a pirate ship. The child pirate must have committed one of the two substantive violations above. Additionally, in order to be subject to universal jurisdiction, the incitement or intentional facilitation must have been committed on the high seas or outside the jurisdiction of any state.

Discussion

I. WHAT IS PIRACY?

A. PIRACY DEFINED

Piracy is the original international crime subject to universal jurisdiction.⁷ The United Nations Convention on the Law of Seas of 1982 (UNCLOS) codified the definition of piracy in UNCLOS Article 101. Article 101 contains a three-part definition of piracy, which defines an act of piracy as:

(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:

⁷ Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, ASIL INSIGHT, Volume 13, Issue 2 (Feb. 6, 2009).

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

The UNCLOS three-part definition of piracy creates three separate criteria for an act of piracy. First, Article 101(a) lays out the traditional definition of piracy: violent acts committed for private gain against a ship on the high seas. This definition contains a geographic component, requiring the acts to take place either *on the high seas*⁸ or *outside the jurisdiction* of any state.⁹ This is consistent with customary international law. Second, Article 101(b) provides that knowing participation in the operation of a pirate ship is an act of piracy. Third, Article 101(c) provides the broadest definition of piracy in that any act of “inciting or intentionally facilitating” an act in either 101(a) or (b) is also considered an act of piracy. This definition of piracy is the most relevant to the discussion at hand, so will be considered in the most depth.

B. GEOGRAPHICAL RESTRICTIONS OF PIRACY UNDER ARTICLE 101(B) AND (C)

There is disagreement in the scholarly community regarding whether Article 101(c) applies to acts of inciting and facilitating piracy on both the high seas and dry land. Unfortunately, the *travaux preparatoires* of the 1982 UNCLOS Convention (and its precursor 1958 LOS Convention) do not shed light on the reach of the “inciting and intentionally

⁸ UNCLOS, Article 101(a)(i).

⁹ UNCLOS, Article 101(a)(ii).

facilitating” provisions.¹⁰ This will largely be an issue of statutory interpretation of the treaty document and state practice.

Under Article 101(a), acts of piracy must have been committed on the high seas or in a place outside the jurisdiction of any state.¹¹ Article 101(a) explicitly includes “on the high seas” as a geographical qualifier for the acts it defines. However, Article 101(b) and (c)’s definitions of piracy do not explicitly state a geographical component for the acts to be committed on the high seas.¹² Thus the plain meaning of the text seems to imply that any acts of “voluntary participating in the operation of a [pirate] ship” or any acts of “inciting or intentionally facilitating” piracy, would constitute an act of piracy itself under UNCLOS Article 101(c), regardless of whether committed on dry land or the high seas.¹³ It can also be argued that, if the drafters of the UNCLOS intended 101(b) and (c) to include this qualifier, it would have been explicit in the text of the treaty. The focus of this discussion will be on Article 101(c)’s geographical limitations since it is the provision of UNCLOS most relevant to our decision.

Despite the plain meaning interpretation of the treaty text, some scholars have pointed to Article 86 of the UNCLOS, which governs the application of the provisions in Part VII of the treaty. The Vienna Convention on the Law of Treaties lays out the rules governing the interpretation of a section of the law. The context of a given legislative provision is defined by the particular sub-section of the law read as a whole in conjunction with the section of an

¹⁰ Roger L. Phillips, “Piracy Convictions Set Stage for 4th Circuit Appeal”, *Communis Hostis Omnium*, April 28, 2012: <http://piracy-law.com/2012/04/28/piracy-conviction-sets-stage-for-4th-circuit-appeal/>

¹¹ See UNCLOS, Article 101(a)

¹² See UNCLOS, Article 101(c)

¹³ Roger L. Phillips, “Intentional Facilitation and Commission of Piracy as part of a Joint Criminal Enterprise”, *Communis Hostis Omnium*, July 26, 2012: <http://piracy-law.com/2012/07/26/intentional-facilitation-and-commission-of-piracy-as-part-of-a-joint-criminal-enterprise/>. See Also Douglas Guilfoyle, “Committing Piracy on Dry Land: Liability for Facilitating Piracy,” *Blog of the European Journal of International Law*, July 26, 2012.

enactment in its entirety¹⁴. Article 86 maintains that the provisions in Part VII, the Part including the piracy articles, apply only to the high seas.¹⁵ This Article then governs even Article 101(c)'s reach. The treaty document must be read as a whole, and Article 86 explicitly limits the reach of the treaty, including acts of "inciting and facilitating" piracy under Article 101(c), to the high seas. Moreover, because the definition of piracy under customary international law has traditionally limited acts of piracy to the high seas,¹⁶ interpreting Article 101(c) to reach beyond the high seas would be expanding the definition of piracy under international law.

It is likely that state courts will express discomfort or simply refuse to stretch the definition of piracy in Article 101(c). Recent state practice in the United States has taken both approaches.

In April 2012, a federal jury of the Eastern District Court of Virginia convicted Mohammed Saali Shibin, a mid-level pirate negotiator, of two counts of piracy under the law of nations.¹⁷ His acts included serving as a negotiator of ransoms for hijacked vessels off the coast of Somalia. The Court applied the UNCLOS definition of piracy; however, Shibin's acts took place in Somali territorial waters, not the high seas.¹⁸ The case is in the process of appeals and the geographical component of his acts will likely be addressed on appeal.

In July 2012, the District Court of the District of Columbia in United States v. Ali addressed a motion to dismiss by the defendant who was accused of aiding and abetting piracy. The Court applied the UNCLOS definition of piracy and interpreted the reach of Article

¹⁴ Vienna Convention on the Law of Treaties, adopted on 23 May 1969 and entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, Article 31(1).

¹⁵ See UNCLOS, Article 86.

¹⁶ "Intentional Facilitation and Commission of Piracy as part of a Joint Criminal Enterprise", *supra* note 13.

¹⁷ "Somali Hostage Negotiator in S/V Quest Piracy and Pirating of M/V Marida Marguerite Found Guilty of all Counts," United States Attorney's Office, Eastern District of Virginia, April 27, 2012: <http://www.justice.gov/usao/vae/news/2012/04/20120427shibinnr.html>

¹⁸ Id.

101(c).¹⁹ The Court held that the United States had jurisdiction over the case, as long as the defendant's acts of aiding and abetting piracy occurred *on the high seas*.²⁰ The Court stated that applying universal jurisdiction to acts of aiding and abetting piracy that were committed on dry land would be an unwarranted broadening of the definition of piracy in international law.²¹ The prosecution is currently pursuing an interlocutory appeal on the issue of the high seas requirement,²² raising the question of whether the Court will overturn its interpretation that acts of aiding and abetting piracy must have been committed on the high seas to be subject to universal jurisdiction.

These two cases differ in that the U.S. prosecution of Mr. Shibin did not rely on universal jurisdiction. In Shibin, the harm was inflicted on United States citizens and their property. In Ali, the United States lacked any nexus to the attack, and therefore the sole basis of jurisdiction was through universal jurisdiction. This may shed light on why the federal jury convicted Mr. Shibin of piracy even though his acts took place in Somali territorial waters. Therefore, the question of whether acts of inciting or intentionally facilitating piracy committed on dry land are considered acts of piracy under the law of nations has not yet specifically been addressed.

The first issue in analyzing the classification of recruitment and use of child pirates as an act of piracy is whether the acts that comprise such recruitment and use fit within the definition of acts of piracy. This issue will be addressed in Section II. The question of whether these acts are subject to prosecution under Universal Jurisdiction will be considered below in Section III.

¹⁹ United States v. Ali, WL 2870263 at 6 (2012).

²⁰ Id. at 7-8,

²¹ Id. at 8.

²² Id. at 1-2.

II. THE RECRUITMENT AND USE OF CHILDREN AS PIRATES MAY BE AN ACT OF PIRACY

As discussed above, the UNCLOS contains a three-part definition of piracy. The use of children as pirates may be considered an act of piracy under both Article 101(a) and (b).

However, both the recruitment and use of children as pirates may be considered an act of piracy under Article 101(a). The main focus of this memo will be on whether the recruitment and use of children as pirates is an act of piracy as defined by the third definition in Article 101(c), however all three definitions are considered below.

A. THE RECRUITMENT AND USE OF CHILDREN AS PIRATES MAY BE AN ACT OF PIRACY UNDER ARTICLE 101(A)

The recruitment and use of children as pirates may be an act of piracy as defined in Article 101(a). The recruitment of children as pirates does not occur on the high seas or outside the jurisdiction of any state, nor is it an act of illegal violence directed against another ship or its persons or property.²³ However, the *use* of children as pirates, which does occur on the high seas, may arguably be an act of illegal violence directed against another ship or its persons or property by a pirate leader through the use of a child.²⁴

Pirate leaders may be indirectly liable for using children as pirates under Article 101(a) through theories of vicarious liability. For example, under the doctrine of “command responsibility”, a commander is responsible for the illegal acts of his subordinates.²⁵ Although command responsibility is traditionally applied in military situations, the principle is also applicable to civilian commanders, such as political leaders and other civilian superiors in

²³See UNCLOS, Article 101(a).

²⁴See UNCLOS, Article 101(a).

²⁵Kai Ambos, *Joint Criminal Enterprise and Command Responsibility*, 5 J. OF INT’L CRIM. JUSTICE 159, 176 (2007).

positions of authority during an armed conflict.²⁶ There are four possible routes to prosecution through the theory of command responsibility: (1) The commander is liable for armed conflict and international law violations that he personally commits; (2) A commander is responsible for his subordinate's violations that he ordered or instigated; (3) A commander is responsible for violations that he failed to control when he had effective control; and (4) A commander is responsible for disregarding violations and taking no action to punish those involved.²⁷

Using children to commit violent acts of piracy may be considered an act of piracy under Article 101(a) through indirect liability. A pirate leader hires children to work aboard a pirate ship while he either also boards the ship, or remains on dry land. The ship then hijacks another vessel and takes hostages at gunpoint, which constitute acts of piracy under Article 101(a) of UNCLOS. The pirate leader is committing the act of piracy through his commands of the child pirate foot soldiers. By ordering or instigating violations of international law under UNCLOS 101(a), the pirate leader is vicariously liable for the criminal acts of his employed child pirates through the doctrine of command responsibility.

However, piracy prosecutions to date under Article 101(a) have only addressed direct acts of violence by the pirate defendants. There are no known cases where a pirate has been prosecuted for acts of illegal violence against another ship through vicarious liability or command responsibility theories. In all the cases, the defendant was the actor himself. This may lead to difficulty in prosecuting a case under this theory since pirate leader are not necessarily

²⁶ KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* (Oxford University Press, 2001), at 251. The ICTR, in *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T (21 May 1999), para. 216., held, "The crucial question... was not the civilian status of the accused, but the degrees of authority he exercised over his subordinates. Accordingly, the Chamber accepts the submission made by the Prosecution that a civilian in a position of authority may be liable under the doctrine of command responsibility."

²⁷ Ben Golden, "Memorandum for the High Level Piracy Working Group: The Extent to Which the Command Responsibility Doctrine is Suitable for an International Piracy Tribunal," Public International Law and Policy Group, May 22, 2011 (citing GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* (Cambridge University Press 2010), at 391-95).

commanders and there is little information on how the command structure operates in the piracy context.

Pirate leaders may also be directly or individually liable for using children as pirates under Article 101(a). Under Article 101(a), “any illegal acts of violence or detention, or any act of depredation” for private ends is an act of piracy. A pirate leader who launches an attack on a pirate vessel with his crew, which may include children, is committing an act of violence and depredation against another vessel for private gain. This argument relies on framing the pirate leaders act of “launching an attack” to include the use of child pirates. Since child pirates are used as pirate foot soldiers and members of the pirate ship crew essential to an attack, then their use would absolutely be included in the pirate leaders act of “launching an attack” against a vessel on the high seas. Thus, if it can be shown that a pirate leader was responsible for launching an attack against a vessel on the high seas, with a crew that included child pirates, the pirate leader’s use of children as pirates would be an act of piracy under UNCLOS Article 101(a).

B. THE RECRUITMENT AND USE OF CHILDREN AS PIRATES MAY BE AN ACT OF PIRACY UNDER ARTICLE 101(B)

The recruitment and use of children as pirates may be an act of piracy as defined in Article 101(b). The recruitment of children as is not an act of knowing voluntary participation in the operation of a pirate ship.²⁸ However, the use of children as pirates may be an act of knowing voluntary participation in the operation of a pirate ship.²⁹

As discussed above, pirate leaders may be indirectly liable for the acts of child pirate foot soldiers vicariously. Pirate leaders hire children to participate in the operation of pirate vessels.

²⁸See UNCLOS, Article 101(b).

²⁹See Id.

The children's participation is an act of piracy under UNCLOS Article 101(b). The pirate leader's employment of the child may be considered an act of piracy indirectly since he is ordering the child, his subordinate, to commit the acts which are illegal under Article 101(b) of the UNCLOS.

The use of children on a pirate ship may also be a direct act of knowing participation in the operation of a pirate ship. The pirate leaders employ children to work as the crew of a pirate ship. By hiring a child to operate a pirate vessel, the hiring pirate is participating in the operation of the pirate ship. Given these facts, the pirate leader's use of the child as crew of a pirate ship would constitute a knowing participation in the operation of a pirate ship under Article 101(b).

**C. THE RECRUITMENT AND USE OF CHILDREN AS PIRATES IS AN ACT OF PIRACY
UNDER ARTICLE 101(C)**

As discussed above, Article 101(c) contains the broadest and least interpreted definition of piracy in the UNCLOS. The Article defines any act of "inciting or intentionally facilitating" piracy as an act of piracy itself. The text of the UNCLOS provided little further guidance on the meaning and scope of this definition. The *Travaux Preperatoires* for UNCLOS also provides little to no guidance on the matter. However, this is the only one of the three UNCLOS definitions that may cover the recruitment and use of children as pirates as an act of piracy itself. In order to determine whether recruitment and use of children is an act of piracy under Article 101(c), the meaning of "inciting and intentionally facilitating" is explored below by referring to analogous or similar laws.

Inciting

Several state penal codes in the United States have provisions for "criminal incitement". The Connecticut Penal Code defines incitement of a crime when a person "advocates,

encourages, justifies, praises, incites or solicits” the unlawful behavior.³⁰ The Ohio Penal Code defines incitement to criminal activity as “conduct designed to urge or incite another to commit any offense of violence, when: (1) The conduct takes place under circumstances that create a clear and present danger that any offense of violence will be committed; [or] (2) The conduct proximately results in the commission of any offense of violence.”³¹ The Montana Penal Code defines criminal incitement as “purposely or knowingly advocat[ing] the commission of a criminal offense.”³² The advocacy must be “(a) directed to inciting or producing that imminent unlawful, criminal action; and (b) likely to incite or produce that unlawful, criminal action.”³³ The statute defines imminent as immediate in time, impending, or on the verge of happening.³⁴ Vermont defines incitement to a felony to include incitement when “a felony is not actually committed as a result of such inciting.”³⁵ Moreover, Black’s law dictionary defines incite as: “To provoke or stir up (someone to commit a criminal act, or the criminal act itself).”³⁶

Some courts have found that “incitement to imminent lawless action” does not necessarily mean immediate lawless actions. In State v Leary, the Superior Court of Connecticut held that soliciting someone to make a pipe bomb that will later be used against a police officer is incitement to an imminent lawless action, because the eventual use of the pipe bomb is a lawless action.³⁷ The lawless action need not be immediate, it only needs to be reasonable likely to occur to establish the causal element.³⁸ Courts have also read an intent element into the act of

³⁰ Conn. Gen. Stat. Ann. § 53a-179a (West).

³¹ Ohio Rev. Code Ann. § 2917.01 (West).

³² Mont. Code Ann. § 45-8-105(2).

³³ Id. at § 45-8-105(2).

³⁴ Id. at § 45-8-105(3).

³⁵ Vt. Stat. Ann. tit. 13, § 7 (West). See also State v. Brown, 147 Vt. 324, (1986).

³⁶ Black's Law Dictionary (9th ed. 2009), incite.

³⁷ State v. Leary, 41 Conn. Supp. 525, 535, (Super. Ct. 1989).

³⁸ Id.

inciting a person to violence.³⁹ Any words or conduct of incitement must be intended to cause the lawless action.

These domestic incitement statutes and cases may shed light on interpreting the “incitement” of acts of piracy in UNCLOS Article 101(c). The definitions of incitement above indicate that behavior is considered incitement when it not only encourages or solicits the unlawful acts, but when there is an element of imminence to the unlawful act. This may limit the reach of incitement to acts or behaviors that are the proximate cause of piratical acts. How imminent the eventual criminal acts must be varies even in the three definitions above. The imminence requirements of the criminal acts range from simply being a proximate result of the incitement to being immediate or on the verge of happening. Though the requisite level of imminence is unclear, it is likely an element of incitement.

Intentionally Facilitating

Several state penal codes in the United States also have provisions for “criminal facilitation”. The New York Penal Code defines criminal facilitation as an act of a person who “believes it probable that he is rendering aid” to one who wishes to commit a crime, and he “provides such person with means or opportunity for the commission [of the crime] and which in fact aids such person to commit a crime.”⁴⁰ The Kentucky Penal Code defines criminal facilitation as “acting with knowledge that another person is committing or intends to commit a crime” and “knowingly provid[ing] such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.”⁴¹ The Tennessee Penal Code defines criminal facilitation of a felony as “knowingly furnish[ing] substantial assistance in

³⁹ *Damato v. Murphy*, 641 F.Supp.2d 143 (D. Conn. 2009).

⁴⁰ N.Y. Penal Law § 115.00 (McKinney).

⁴¹ Ky. Rev. Stat. Ann. § 506.080 (West).

the commission of the felony.”⁴² Moreover, Black’s law dictionary defines facilitate as: To make the commission of a crime easier.⁴³

The New York Court of Appeals has held that the definition of criminal facilitation reaches even conduct that is “confined to preparation so attenuated from the final stages that the role of the facilitator is only remotely related as a cause or contributor to the ultimate crime.”⁴⁴ The court explains that some acts that do not constitute abetting can be prosecuted as facilitation. Further, the facilitator's criminal liability is not excused when the person facilitated is not prosecuted for, or is not criminally liable for, the commission of the “underlying felony” because, for example, the person is a child or otherwise has immunity.⁴⁵ Courts have held that criminal facilitation requires no proof of agreement between the parties or specific intent to facilitate, only proof that the defendant had a reasonable belief that he was aiding a person intending to commit a crime.⁴⁶

The elements in domestic “criminal facilitation” statutes and caselaw in the U.S. can shed light on the meaning of “intentionally facilitating” acts of piracy as included in UNCLOS Article 101(c). The definitions above are for the most part the same. Each includes a knowledge requirement for the *mens rea*, as well as an *actus reus* requirement that the actions actually did facilitate an actual crime. The *mens rea* requirement aligns well with the Article 101(c) language, which requires *intentionally* facilitating the crime of piracy. Moreover, it is likely that the *actus reus* requirement will also be read into the UNCLOS text, requiring actual facilitation of a crime that is actually committed. Facilitation itself includes providing *means or opportunity* to commit

⁴² Tenn. Code Ann. § 39-11-403 (West).

⁴³ Black's Law Dictionary (9th ed. 2009), facilitate.

⁴⁴ People v. Beaudet, 32 N.Y.2d 371, 377 (1973).

⁴⁵ N.Y. Penal Law § 115.10 (McKinney).

⁴⁶ People v. Chesler, 418 N.Y.S.2d 962, 966 (1979) aff'd, 50 N.Y.2d 203 (1980).

the crime. In framing an act of intentionally facilitating piracy, both these elements should be addressed.

U.S. courts have interpreted the terms similarly in respect to UNCLOS Article 101(c). In United States v. Ali, the United States District Court for the District of Columbia interpreted a domestic piracy statute's provision against aiding and abetting piracy as consistent with international law.⁴⁷ The Court analogized the aiding and abetting count to UNCLOS Article 101(c)'s definition of piracy as acts of "inciting and intentionally facilitating" piracy.⁴⁸ The Court further cited Black's law dictionary's definition of "aiding and abetting" as: "[t]o assist or *facilitate* the commission of a crime, or to promote its accomplishment."⁴⁹ The United States District Court proclaimed that the definition of aiding and abetting liability was "functionally equivalent" to that of inciting and intentionally facilitating.⁵⁰

1. THE RECRUITMENT OF CHILDREN AS PIRATES IS AN ACT OF PIRACY

a. HOW ARE CHILDREN RECRUITED AS PIRATES?

Children are recruited into piracy at what seems to be younger and younger ages. Young boys are faced with little opportunity in war torn Somalia, where piracy serves as a lucrative path. Pirate leaders take advantage of the humanitarian crisis by recruiting children to work for them. Like child soldiers, child pirates who enlist "voluntarily" do so because they see few other options for survival. Many of the well-established pirates who have accumulated wealth through piracy no longer sail out on raids.⁵¹ Instead, they use new recruits, who are young boys and men, to serve as pirate foot soldiers, while they collect the bulk of the earnings.⁵² Young men are

⁴⁷ United States v. Ali, *supra* at 7.

⁴⁸ Id.

⁴⁹ Black's Law Dictionary (9th ed. 2009), aid and abet.

⁵⁰ United States v. Ali, *supra* at 7.

⁵¹ "25 of 61 Pirates Arrested by Navy at Sea are Children Below 15 yrs", Times of India, March 17, 2011

⁵² Id.

promised generous payouts for doing pirate dirty work, or are simply offered a job to work aboard a ship, not knowing it is a pirate ship.

One example is Mr. Abdiwali M., a 16 year old who was recently convicted of piracy in Hamburg Germany. In one of his hearings before the German court, Abdiwali described how he became a pirate.⁵³ He explained to the court that his parents died when he was four. He grew up with his siblings, two of whom were killed in a grenade attack. He began to fend for himself at the age of 10.⁵⁴ He began to work as a night watchman at a harbor for one dollar a day. One day, he was offered \$500 to work aboard a skiff. He did not know the ship was planning to hijack a vessel until he saw weapons being loaded, and by then, he stated, his only motivation was hunger.⁵⁵ Similar stories are heard from other Somali child pirates.⁵⁶

This is similar to the recruitment of child soldiers. The International Criminal Court addressed the issue of recruitment and use of child soldiers in Prosecutor v. Thomas Lubanga Dyilo. Lubanga was convicted of the war crime of "conscripting and enlisting children under the age of fifteen years and using them to participate actively in hostilities", as defined by Article 8(2)(e)(vii) of the Rome Statute.⁵⁷ The statutory elements of the crime also include that the

⁵³ See Beate Lakotta, Torture? Execution? German Justice Through the Eyes of a Somali Pirate, SPIEGEL ONLINE (Apr. 7, 2011), <http://www.spiegel.de/international/world/torture-execution-german-justice-through-the-eyes-of-a-somali-pirate-a-755340.html> (describing the initial challenges a Hamburg court is facing during the trial of Somali pirates, including the difficulty of handling accused children). See also Court Rules in Germany's First Modern Day Piracy Trial, SPIEGEL ONLINE (October 19, 2012), <http://www.spiegel.de/international/germany/hamburg-court-hands-down-somali-pirate-sentences-a-862350.html>

⁵⁴ See Id.

⁵⁵ See Id.

⁵⁶ See "Court Faced Daunting Hurdles in Hamburg Pirate Trial", SPIEGEL ONLINE (January 18, 2011), <http://www.spiegel.de/international/world/a-precident-or-a-farce-court-faces-daunting-hurdles-in-hamburg-pirate-trial-a-740122.html> (Youssef M., a 13 year old boy who was working as a struggling fisherman, was initially recruited as a motorboat taxi driver and later offered \$500 for a 'bigger job' working aboard a pirate ship. He was given no details about the kind of work he would be doing.)

⁵⁷ Situation in the Democratic Republic of the Congo, in the case of the Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012, (hereinafter "Prosecutor v. Thomas Lubanga Dyilo") at 261-62.

recruiter “knew or should have known that such person or persons were under the age of 15 years.”⁵⁸

The Court noted that the crime of conscripting, enlisting, and using children actively in hostilities was not defined in the statute, the rules, or the elements of crimes.⁵⁹ In looking at the definition of enlistment and conscription of child soldiers, the court noted that both are forms of recruitment, in that they refer to the incorporation of a boy or a girl under the age of 15 into an armed group, whether coercively or voluntarily.⁶⁰ The Court further stated that the offense of recruitment occurs the moment that the child is enrolled in or joins the group with or without compulsion.⁶¹

b. THE RECRUITMENT OF CHILDREN AS PIRATES IS INCITING AN ACT OF PIRACY.

Recruiting a child into piracy by offering him a job aboard a pirate vessel or as an arms bearing pirate foot soldier, is intentionally soliciting unlawful behavior.⁶² The underlying act of piracy by the child, whether a violent act of piracy under Article 101(a) or simply assisting in the operation of a pirate vessel under 101(b), is intentionally solicited by the recruiting pirate. The underlying act of piracy is imminent in that the recruitment is the proximate cause of the acts, and is reasonably likely to occur as a result.⁶³ The child’s offer of employment on a pirate vessel or employment as a pirate foot soldier is the proximate cause of his eventual piratical acts. In fact, the underlying acts of piracy by the child, would not have occurred *but for* the recruitment. Thus, the imminence requirement is clearly met.

⁵⁸ Id.

⁵⁹ Id. at 273.

⁶⁰ Id. at 278.

⁶¹ Id. at 282.

⁶² See Conn. Gen. Stat. Ann. § 53a-179a (West).

⁶³ See *State v. Leary*, 41 Conn. Supp. 525, 535, 590 A.2d 494, 500 (Super. Ct. 1989); See also Ohio Rev. Code Ann. § 2917.01 (West); Mont. Code Ann. § 45-8-105(2).

**c. THE RECRUITMENT OF CHILDREN AS PIRATES MAY BE
INTENTIONALLY FACILITATING AN ACT OF PIRACY**

Recruiting a child into piracy may also be intentionally facilitating an act of piracy. By recruiting a child to commit an underlying act of piracy under either Article 101(a) or 101(b), the recruiting pirate is providing the child with both the means and opportunity to commit the underlying offenses.⁶⁴ Recruiting a child into piracy fulfils both the *mens rea* and *actus reus* requirements of intentionally facilitating a crime. The recruiting pirate intends to provide this means and opportunity and does so knowingly. Moreover, the child pirate would not have been able to commit the underlying act of piracy had he not been recruited for employment aboard the pirate vessel.

2. THE USE OF CHILDREN AS PIRATES IS AN ACT OF PIRACY

a. HOW ARE CHILDREN USED AS PIRATES?

As mentioned above, well-established pirates and pirate kingpins do not sail out on raids on the high seas but direct or finance pirate activities from dry land.⁶⁵ Often it is the young new recruits who serve as pirate foot soldiers and are sent out on raids or reconnaissance.⁶⁶ Pirate foot soldiers survey the seas for days or weeks on small fishing or speed boats, searching for a vessel to hijack and raid. When a target is established, one or two pirate foot soldiers board the vessel using a ladder and carrying guns. The pirates then take the captain and crew hostage at gunpoint, sometimes returning to domestic waters and sometimes using the vessel as a base to hijack additional ships farther out at sea. The pirates then begin the ransom negotiation process. This process can take up to months and results in multi million dollar ransoms. The pirate foot

⁶⁴ See N.Y. Penal Law § 115.00 (McKinney); Ky. Rev. Stat. Ann. § 506.080 (West); Tenn. Code Ann. § 39-11-403 (West).

⁶⁵ “The Human Cost of Somali Piracy” *supra* at note 3, at 26.

⁶⁶ *Id.*

soldiers, who are generally the younger newly recruited pirates, are the weapon-wielding hijackers and looters. The ransom negotiators tend to be the older pirate leaders and bosses.⁶⁷

The way children are used in piracy, thus, is as the pirate foot soldiers who do most of the criminal grunt work on the high seas. Pirate bosses remain on land either funding and directing activities, or enter the picture during the negotiating process which can take place on the high seas or after the hijacked vessel is brought back into domestic waters. The younger pirates often pay a share of their earnings to their bosses to repay loans for weapons and equipment.⁶⁸ For example, in 2011, the Indian Navy captured an armed pirate vessel surveying the seas for a ship to hijack. Of the 61 suspected pirates captured, 25 were suspected to be under 15 years of age, and four of them under the age of 11.⁶⁹ Additionally, in January 2012, Seychelles police found two Somali children, ages 11 and 12, sailing with 12 other suspected pirates.⁷⁰

This is similar to the use of child soldiers. The Court in Prosecutor v. Thomas Lubanga Dyilo also addressed the use of child soldiers, noting that it was a separate offense to recruiting, and also not defined in the Statute.⁷¹ In looking at the definition of using child soldiers, the Court concluded that “using” children to participate actively in hostilities included the use of children in functions other than participation in combat, but also support roles within military operations, such as, *inter alia*, spying, scouting, serving as decoys.⁷² The statutory elements of the crime also include that the recruiter “knew or should have known that such person or persons were under the age of 15 years.”⁷³

⁶⁷ Id.

⁶⁸ Jeffrey Gettleman, “Money in Piracy Attracts More Somalis,” *New York Times*, November 9, 2010.

⁶⁹ “The Human Cost of Somali Piracy” *supra* at note 3, at 26 (citing “25 of 61 Pirates Arrested by Navy at Sea are Children Below 15 yrs”, *Times of India*, March 17, 2011).

⁷⁰ “Captured Child Pirates Sent Back to Somalia”, *The Guardian*, August 13, 2012, available at: <http://www.guardian.co.uk/world/2012/aug/14/somalia-middleeast>.

⁷¹ Prosecutor v. Thomas Lubanga Dyilo, *supra* note 58, at 273.

⁷² Id. at 284-85.

⁷³ Id. at 261-62.

**b. THE USE OF CHILDREN AS PIRATES MAY BE INCITING AN ACT OF
PIRACY.**

Using children as pirate foot soldiers may be inciting an act of piracy. As noted previously, the underlying act of piracy may be a violent act of piracy under Article 101(a) or simply assisting in the operation of a pirate vessel under 101(b). Either way, if there is a factual basis in the use of children as pirate foot soldiers to show that a supervising pirate has acted in a way to encourage, or urge the child to commit either underlying piratical act, then such use of a child pirate may be considered inciting an act of piracy under Article 101(c).⁷⁴ Simply employing a child on a pirate vessel may be considered conduct urging or soliciting a child to assist in the operation of a pirate vessel.⁷⁵

Additionally, providing a child weapons during a pirate raid, or ordering him aboard a ship is inciting a child to act violently against another ship and would constitute conduct that urged or encouraged piratical acts.⁷⁶ This would require proof of words or conduct that encouraged the unlawful behavior, which may be difficult absent multiple eyewitnesses.

**c. THE USE OF CHILDREN AS PIRATES IS INTENTIONALLY
FACILITATING AN ACT OF PIRACY**

Using children as pirate foot soldiers is intentionally facilitating an act of piracy. The underlying act of piracy may be a violent act of piracy under Article 101(a) or simply assisting in the operation of a pirate vessel under 101(b). In either case, the supervising pirate has provided the child with the means and opportunity to commit the underlying acts.⁷⁷ In the case of violent acts of piracy under 101(a), the pirate who supplies the weapons and ship and payment is

⁷⁴ See Conn. Gen. Stat. Ann. § 53a-179a (West); Ohio Rev. Code Ann. § 2917.01 (West).

⁷⁵ See *id.*

⁷⁶ See *id.*

⁷⁷ See N.Y. Penal Law § 115.00 (McKinney); Ky. Rev. Stat. Ann. § 506.080 (West); Tenn. Code Ann. § 39-11-403 (West).

providing the child with both means and opportunity to commit the violent acts. In the case of simply assisting in the operation of the pirate vessel under 101(b), the pirate who supplies the vessel and the payment or job, is providing the means and opportunity for the child to commit the unlawful acts.

Recruitment and use of children as pirates thus falls within the third definition of piracy under 101(c). However, the ability to prosecute such crimes in various jurisdictions will depend on whether universal jurisdiction applies to this third definition of piracy.

III. THE RECRUITMENT AND USE OF CHILDREN AS PIRATES IS ONLY SUBJECT TO UNIVERSAL JURISDICTION IF IT IS AN ACT OF PIRACY COMMITTED ON THE HIGH SEAS

Article 105 of the UNCLOS codifies the applicability of universal jurisdiction for piracy prosecutions. Article 105 of the UNCLOS states:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. 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.

The UNCLOS codifies the legality, under international law, for any state to prosecute acts of piracy. The issue arises when an act of piracy is defined by Article 101(c) of the UNCLOS, which does not contain a geographical component.

Before the modern perception of the law of nations, a pirate had always been considered a *hostis humani generis*, or enemy of all mankind, and thus subject to prosecution by any state anywhere.⁷⁸ The doctrine of universal jurisdiction provides that “a state has jurisdiction to define and prescribe punishment for certain offenses *recognized by the community of nations*”⁷⁹ even when there is no other basis for jurisdiction. Piracy can be defined as municipal piracy, piracy defined by a state’s domestic laws, or general piracy, i.e. piracy under the law of nations or the international crime of piracy⁸⁰. A state can only invoke universal jurisdiction for acts that constitute an offense of general piracy, as agreed upon by the community of nations.⁸¹

Until the district court decision in United States v. Ali, no court had interpreted the applicability of universal jurisdiction to Article 101(c) of UNCLOS. In United States v. Ali, the Court dismissed in part and upheld in part charges of piracy against a suspected Somali pirate negotiator. The Court explained that because the United States had no nexus to the acts of piracy, the Court only had jurisdiction to prosecute the acts under universal jurisdiction if they were acts of piracy as defined under international law.⁸² In Ali, the court concluded that an act of piracy under Article 101(c) must be committed on the high seas in order to be an offense recognized by the community of nations. Historically, universal jurisdiction has only been used to prosecute acts of piracy committed on the high seas. Thus, attempting to apply universal jurisdiction to acts of piracy under Article 101(c) committed on dry land will require an argument that the UNCLOS

⁷⁸ United States v. Hasan, 747 F. Supp. 2d. 599, 608-09 (E.D. Va. 2010) *aff’d sub nom. United States v. Dire*, 680 F.3d 446 (4th Cir. 2012) (citing Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 Harv. Int'l L.J. 183, 190 (2004)).

⁷⁹ Restatement (Third) of Foreign Relations Law § 404 (1987) (emphasis added).

⁸⁰ United States v. Hasan, *supra* note 72, at 606 (citing Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 Nw. U.L.Rev. 149, 166 (2009)).

⁸¹ *See United States v. Hasan*, *supra* (citing Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 Harv. Int'l L.J. 183, 190 (2004)).

⁸² United States v. Ali, *supra* at 6.

not only codified existing customary international law, but also changed it.⁸³ Universal jurisdiction can only be applicable to acts of piracy committed on dry land if such acts were defined as piracy under general piracy, i.e. customary international law, not just municipal piracy.⁸⁴ However, there is no evidence of this.

Customary international law requires both state practice and a sense of pre-existing obligation (*opinio iuris*). “An articulated sense of obligation, without implementing usage, is nothing more than rhetoric. Conversely, state practice, without *opinio iuris*, is just habit.”⁸⁵ In order for general piracy under customary international law to include acts of piracy committed on dry land, there needs to be both a sense of obligation by the community of nations, and implementing usage. Thus far, the United States is the only nation that has even attempted to prosecute an act of piracy under international law committed on dry land, which was unsuccessful since the court found it did not constitute piracy under the law of nations.⁸⁶

There is disagreement among the scholarly community regarding whether acts of piracy under Article 101(c) are subject to universal jurisdiction if they are committed on dry land. Some scholars argue that universal jurisdiction may only apply to acts of piracy, including those defined in Article 101(c), committed on the high seas.⁸⁷ As noted above, the UNCLOS codified universal jurisdiction for the crime of piracy in Article 105. The text of Article 105 states that every state may seize a pirate ship and arrest the pirates “*On the high seas, or in any other place*

⁸³“Committing Piracy on Dry Land: Liability for Facilitating Piracy”, *supra* at note 13.

⁸⁴ See Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 Nw. U.L.Rev. 149, 166 (2009).

⁸⁵ Edward T. Swaine, *Rational Custom*, 52 Duke L.J. 559 (2002).

⁸⁶ See *United States v. Ali*, *supra* at 6.

⁸⁷ See Eugene Kontorovich, “About Today’s Piracy Decision”, *The Volokh Conspiracy*, July 13, 2012: <http://www.volokh.com/2012/07/13/from-prof-eugene-kontorovich-about-todays-piracy-decision/>. See Also Eugene Kontorovich, “Response: New federal piracy case confirms limits on universal jurisdiction”, *SCOTUSBlog*, July 26, 2012.

outside the jurisdiction of any State.”⁸⁸ This geographical component in the text of the universal jurisdiction provision may serve to indicate a limitation on the reach of universal jurisdiction to piracy committed on the high seas.

However, other scholars argue that universal jurisdiction will apply to any act of piracy as defined by Article 101(c), regardless of whether it was committed on the high seas or dry land. This argument rests on the fact that the text of the UNCLOS is clear in defining acts of piracy.⁸⁹ While the first definition of piracy under Article 101(a) includes an explicit geographical component —“on the high seas,”— the third piracy definition under Article 101(c) contains no such language. Using a traditional statutory interpretation then, it would seem that piracy under Article 101(c) can be committed on dry land. In addition to UNCLOS Article 105, which codifies universal jurisdiction against the crime of piracy, many argue, this illustrates that acts of piracy under Article 101(c) committed on dry land or the high seas, are both subject to universal jurisdiction.⁹⁰

The argument that universal jurisdiction applies to acts of piracy under Article 101(c) committed on dry land relies on an uncertain interpretation of this definition of piracy that is not generally accepted. As discussed above, there is no consensus in the international community on whether acts of piracy as defined by Article 101(c) must be committed on the high seas in order to be piracy under international law. Thus, applying universal jurisdiction to such acts would violate the doctrine of universal jurisdiction, which is only applicable to offenses recognized by the community of nations under international law.⁹¹ This does not necessarily mean that an act of

⁸⁸ UNCLOS, Article 105.

⁸⁹ “Committing Piracy on Dry Land: Liability for Facilitating Piracy”, *supra* at note 13.

⁹⁰ *Id.*

⁹¹ See Restatement (Third) of Foreign Relations Law § 404 (1987) (stating that “a state has jurisdiction to define and prescribe punishment for certain offenses *recognized by the community of nations* as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction” is present) (emphasis added).

inciting or intentionally facilitating piracy that was committed on dry land is not an act of piracy under international law. But because there is no state practice indicating consensus among nations recognizing acts of piracy on dry land as piracy under UNCLOS, they should not be subject to universal jurisdiction if not committed on the high seas.

Conclusion

The use of children in piracy may be an act of piracy under Article 101(a) and 101(b) under the doctrine of command responsibility. Under the doctrine of command responsibility, if a pirate can be shown to be a commander of child pirate foot soldiers, and they commit underlying piratical acts under Article 101(a) and (b), then the pirate leader may be liable for those acts of piracy.

Additionally, both the recruitment and use of children as pirates is an act of piracy under Article 101(c) of UNCLOS. Prosecution of pirate recruiters and supervising pirate leaders and bosses under this provision of the UNCLOS is possible by showing that they acted to incite or intentionally facilitate the acts of their pirate foot soldiers. However, state practice is not consistent on whether acts of piracy as defined by Article 101(c) may be committed outside of the high seas. Because of this, it cannot be shown that the community of nations recognizes acts of piracy under Article 101(c) committed on dry land. Thus, such acts will likely not be subject to universal jurisdiction. In order to prosecute the recruitment and use of children as pirates under universal jurisdiction, prosecution must be limited to those acts of inciting or intentionally facilitating piracy committed on the high seas or outside the jurisdiction of any state.