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LANDLUBBERS AS PIRATES: THE LACK OF “HIGH SEAS” REQUIREMENT FOR THE INCITEMENT AND INTENTIONAL FACILITATION OF PIRACY

*George White**

ABSTRACT

*This commentary seeks to explain and evaluate the reasoning behind the recent finding, in *United States v. Ali Mohamed Ali*, that acts amounting to the intentional facilitation or incitement of piracy can constitute piracy in international law, and are subject to universal jurisdiction, even when those acts occurred within the territorial jurisdiction of a State. It argues that the decision has a sound basis in the orthodox rules of treaty interpretation. Although some have argued that universal jurisdiction can inhere over acts of piracy only where those acts of piracy occur beyond territorial jurisdiction, there is a strong legal and principled basis for the contrary conclusion. The decision invites a wider discussion of the limits of “intentional facilitation,” brief consideration of which suggests that the lack of a high seas requirement is likely to be expedient and unproblematic.*

INTRODUCTION

Suppose Defendant *D*, who remains within the territorial jurisdiction of state *X*, intentionally facilitates acts of piracy, which occur on the high seas, beyond the territorial jurisdiction of any state. *D* then travels to state *Y*. Has *D* committed piracy under international law and, if so, can *Y* invoke universal jurisdiction to prosecute *D* for the acts of facilitation he performed within *X*? The Court of Appeals for the District of Columbia (D.C. Circuit) in *United States v. Ali Mohamed Ali* recently answered both questions in the affirmative: Acts amounting to the intentional facilitation or incitement of piracy can constitute piracy in international law and are subject to universal jurisdiction, even when those acts occurred within the territorial jurisdiction of a state.¹

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¹ *United States v. Ali*, 718 F.3d 929, 942 (D.C. Cir. 2013).

This ruling runs contrary to numerous academic and judicial proclamations that piracy is necessarily committed beyond the territorial jurisdiction of any state,² but the conclusion ultimately should be welcomed. It arose from application of the orthodox rules of treaty interpretation and is supported by a principled rationale. The case also has wider implications. Brief consideration of the problem before the court will facilitate an evaluation of the reasoning in *Ali*, followed by consideration of the broader relevance of that decision.

Piracy is defined in Article 101 of the U.N. Convention on the Law of the Sea 1982 (UNCLOS).³ Article 101 establishes three ways in which piracy can be committed. First, under Article 101(a), *D* commits piracy for the following:

[A]ny illegal acts of violence or detention . . . committed for private ends by the crew or passengers of a private ship and directed:

(i) on the high seas, against another ship or aircraft . . . or

(ii) against a ship, aircraft, persons in a place outside the jurisdiction of any State.⁴

Second, under Article 101(b), *D* commits piracy by “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.”⁵

Third, and most significantly for present purposes, *D* commits piracy under Article 101(c) by “any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”⁶

The court in *Ali* was required to determine whether the acts of facilitation in Article 101(c) could occur within the territorial jurisdiction of a state.⁷ The facts giving rise to that question require a brief clarification.

² See, e.g., *United States v. Yousef*, 327 F.3d 56, 104 (2d Cir. 2003); *United States v. Hasan*, 747 F. Supp. 2d 599, 602 (E.D. Va. 2010); *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 4, 37 (Feb. 14) (separate opinion of President Guillaume); *Id.* at 55 (declaration of Judge Ranjeva); *Id.* at 79 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal); *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10, at 26 (Sept. 7); Lucas Bento, *Toward an International Law of Piracy Sui Generis*, 29 BERKELEY J. INT’L L. 399, 418–19 (2011); Barry H. Dubner, *On the Definition of the Crime of Sea Piracy Revisited*, 42 J. MAR. L. & COM. 71, 76 (2011); Yvonne M. Dutton, *Maritime Piracy and the Impunity Gap*, 86 TUL. L. REV. 1112, 1124 (2011).

³ United Nations Convention on the Law of the Sea, art. 101, Dec. 10, 1982, 1833 U.N.T.S. 3 [hereinafter UNCLOS].

⁴ *Id.* art. 101(a). The wording of Article 101(a) also extends to other conduct, which is irrelevant for present purposes.

⁵ *Id.* art. 101(b).

⁶ *Id.* art. 101(c).

I. THE FACTS OF *ALI*

The defendant, Ali, was a politician in the self-proclaimed Republic of Somaliland, situated within Somalia.⁸ He received an email purporting to invite him to a conference in North Carolina but was arrested on arrival in the United States.⁹ Prosecutors alleged that Ali, while in Somali territory, negotiated ransom payments on behalf of individuals who had seized a vessel on the high seas.¹⁰ That seizure would unquestionably constitute piracy under UNCLOS Article 101(a). Ali was also alleged to have acted as an interpreter between the captors and the captured crew while on board the ship.¹¹ There was a period of only “minutes” when Ali was on board the ship while it was traversing the high seas, but a lack of evidence rendered it “very difficult” to determine precisely when Ali was and was not within the territorial jurisdiction of Somalia.¹²

Ali had been charged with committing piracy under the law of nations, amongst other offenses,¹³ on the basis that he aided and abetted piracy.¹⁴ The trial court noted that Congress would arguably have violated international law if 18 U.S.C. § 1651, incorporating “the crime of piracy as defined by the law of nations”¹⁵ into U.S. law, were to “[proscribe] non-high seas conduct.”¹⁶ As a result of the rebuttable presumption that Congress legislates in accordance with international law,¹⁷ the charge of aiding and abetting piracy was restricted to acts of aiding and abetting committed beyond the territorial jurisdiction of a state.¹⁸ Conversely, the D.C. Circuit decided that the international law of piracy encompassed acts of incitement and intentional facilitation committed within state territory, permitting an expansive interpretation of § 1651.¹⁹

⁷ United States v. Ali, 718 F.3d 929, 937 (D.C. Cir. 2013).

⁸ *Id.* at 933.

⁹ *Id.*

¹⁰ *Id.* at 932.

¹¹ *Id.* at 933.

¹² United States v. Ali, 885 F.Supp.2d 55, 58 (D.D.C. 2012).

¹³ Those offenses were conspiracy to commit piracy, conspiracy to commit hostage taking, and aiding and abetting hostage taking. *Id.* at 56.

¹⁴ *Ali*, 718 F.3d at 936.

¹⁵ 18 U.S.C. § 1651 (2012).

¹⁶ *Ali*, 885 F.Supp.2d at 32.

¹⁷ *See id.* at 24 (citing *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 114 (1804)).

¹⁸ *Ali*, 885 F.Supp.2d at 31–32.

¹⁹ *Ali*, 718 F.3d at 941.

II. THE STARTING-POINT OF THE D.C. CIRCUIT

The D.C. Circuit began its analysis by examining the text of UNCLOS according to treaty interpretation standards of the 1969 Vienna Convention on the Law of Treaties (VCLT).²⁰ Article 31 of the VCLT states: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²¹

Unlike UNCLOS Article 101(a), Article 101(c) makes no reference to the location of the *actus reus*: “[A]ny act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)” suffices.²² Indeed, the United Nations Division for Ocean Affairs and the Law of the Sea has also observed that Article 101(c) “does not explicitly set forth any particular geographic scope.”²³ One might well expect express inclusion of any such requirement, given its inclusion in Article 101(a).

Jonathan Bellish has rejected that interpretation, arguing that it is based on the false premise that there is a discrepancy between paragraphs (a) and (c).²⁴ Bellish observes that the “high seas” requirement in (a) relates only to the location of the victim, not of the perpetrator.²⁵ If there is no express “high seas” requirement in (a), yet still a general consensus that the acts referred to in (a) cannot be committed within the territorial jurisdiction of any state, then the lack of express “high seas” requirement in (c) is equally unproblematic.²⁶

That argument is unpersuasive, however. Although it raises legitimate questions relating to common interpretations of Article 101(a), it does not address the fundamental fact that the language of Article 101(c) is expansive, containing no geographical qualification: “[A]ny act of . . . intentional

²⁰ *Id.* at 937.

²¹ Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

²² UNCLOS, *supra* note 3, art. 101(c).

²³ *Id.* at 4 n.15.

²⁴ Jonathan Bellish, *A High Seas Requirement for Inciters and Intentional Facilitators of Piracy Jure Gentium and Its (Lack of) Implications for Impunity* 11–12 (One Earth Future – Oceans Beyond Piracy Project, Working Paper, Feb. 2013), available at <http://ssrn.com/abstract=2226030>.

²⁵ *Id.*

²⁶ *Id.*

facilitation” suffices.²⁷ As a result, the court was no doubt correct to start from the premise that Article 101(c) entails no “high seas” requirement.²⁸

The D.C. Circuit, unlike the lower court,²⁹ did not consider the numerous academic and judicial opinions to the effect that piracy is necessarily committed on the high seas.³⁰ That approach is entirely appropriate because “interpretation must be based above all upon the text of the treaty.”³¹ As the International Court of Justice (ICJ) explained in *Libya/Chad*: “By entering into the Treaty, the parties recognized the frontiers to which the text of the Treaty referred; the task of the Court is thus to determine the exact content of the undertaking entered into.”³²

Despite the ICJ’s holding, Ali raised three challenges to the court’s textual interpretation.³³ All three were justifiably rejected.³⁴

III. ALI’S CONTEXTUAL ARGUMENT

Ali’s first argument was contextual. UNCLOS Article 86 clarifies that Part VII of UNCLOS, including Article 101, applies “to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State.”³⁵ Because VCLT Article 31 requires the terms of a treaty to be given their “ordinary meaning . . . in their context,” it could be argued plausibly that such a “high seas” requirement should be imputed into UNCLOS Article 101(c).³⁶ On this basis, the District Court had “agree[d] with Ali that the language of Article 101 cannot override Article 86’s forceful statement,”³⁷ with the result that the prosecution was required to demonstrate that “Ali intentionally facilitated acts of piracy while he was on the high seas.”³⁸

²⁷ UNCLOS, *supra* note 3, art. 101 (emphasis added).

²⁸ *United States v. Ali*, 718 F.3d 929, 942 (D.C. Cir. 2013).

²⁹ *United States v. Ali*, 885 F.Supp.2d 17, 31–33 (D.D.C. 2012).

³⁰ *See generally* *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003); *United States v. Hasan*, 747 F. Supp. 2d 599 (E.D. Va. 2010); *Arrest Warrant of 11 April 2000* (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 4 (Feb. 14).

³¹ *Territorial Dispute (Libya/Chad)*, 1994 I.C.J. 6, 22 (Feb. 3).

³² *Id.*

³³ *Ali*, 718 F.3d at 935.

³⁴ *Id.* at 946.

³⁵ UNCLOS, *supra* note 3, art. 86.

³⁶ VCLT, *supra* note 21, art. 31.

³⁷ *Ali*, 885 F.Supp.2d at 32 n.20; *see also* *Bellish*, *supra* note 24, at 15.

³⁸ *Ali*, 885 F.Supp.2d at 32.

The D.C. Circuit was no doubt correct to reject that argument on the basis that such an interpretation would cause “numerous redundancies.”³⁹ Although the court justified that interpretative approach with reference municipal precedent,⁴⁰ international law similarly requires a treaty to be interpreted so that words are not deprived of their effect: “It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.”⁴¹

As the D.C. Circuit noted, express references to “the high seas” in other provisions would be utterly without effect if Article 86 imputed a general “high seas” requirement for every provision within Part VII.⁴² Furthermore, certain provisions within Part VII simply cannot be restricted to the high seas. For instance, the court drew attention to Article 92(1), prohibiting flag-changing in a port of call, and to Article 100, concerning “the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.”⁴³

According to the D.C. Circuit, Article 86 merely explicates “the term ‘high seas’ for that portion of the treaty most directly discussing such issues.”⁴⁴ This interpretation conforms with UNCLOS Article 2, the first provision of UNCLOS Part II, which clarifies the meaning and status of the “territorial sea.”⁴⁵ Article 34, introducing Part III, similarly clarifies the extent and status of internationally navigable straits: the waters to which Part III relates.⁴⁶ A properly contextual reading of UNCLOS, recognizing this pattern, suggests that Article 38 “makes the most sense as an introduction to Part IV . . . and not as a limit on jurisdictional scope.”⁴⁷ The Court of Appeals for the Fourth Circuit has since arrived at the same conclusion.⁴⁸

³⁹ *United States v. Ali*, 718 F.3d 929, 937 (D.C. Cir. 2013).

⁴⁰ *Id.* (citing *Dean v. United States*, 556 U.S. 568, 573 (2009)) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” (internal quotations omitted)).

⁴¹ *Corfu Channel (U.K. v. Alb.)* 1949 I.C.J. 4, 24 (April 9).

⁴² *Ali*, 718 F.3d at 937.

⁴³ *Id.* (citations omitted).

⁴⁴ *Id.* at 938.

⁴⁵ UNCLOS, *supra* note 3, art. 2.

⁴⁶ *Id.* art. 34.

⁴⁷ *Ali*, 718 F.3d at 938.

⁴⁸ *United States v. Shibin*, 722 F.3d 233, 241 (4th Cir. 2013) (“Article 86 serves only as a general introduction It does not purport to limit the more specific structure and texts contained in Article 101.”)

IV. ALI'S JURISDICTIONAL ARGUMENT

Ali's second argument was jurisdictional. He argued that, even if the substantive crime of piracy could be committed by facilitation from within Somalia, UNCLOS Article 105 limits universal jurisdiction over piracy. This Article provides:

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.⁴⁹

Ali argued that jurisdiction conferred by Article 105 was unavailable to the prosecution because Ali was apprehended within U.S. territory.⁵⁰ Ali's assumption that Article 105 displaced any residual bases of territorial or universal jurisdiction might appear warranted by the Security Council's repeated affirmations that "international law, as reflected in [UNCLOS], in particular its [A]rticles 100, 101 and 105, sets out *the* legal framework applicable to countering piracy."⁵¹ Nonetheless, the D.C. Circuit rejected Ali's argument.

Instead, Article 105 was understood to merely illustrate "the broad authority of nations to apprehend pirates even in international waters."⁵² Explaining that interpretation, the court contemplated the absurdity of a situation in which a state lacked jurisdiction to prosecute a known pirate purely because the pirate was found within its territory, rather than outside the territorial jurisdiction of any state.⁵³ Such an argument nonetheless overlooks the controversy surrounding the prosecution of pirates by so-called "third states," which lack any connection to defendant or their arrest.⁵⁴

⁴⁹ UNCLOS, *supra* note 3, art. 105.

⁵⁰ *Ali*, 718 F.3d at 938.

⁵¹ S.C. Res. 2039 ¶ 5, U.N. Doc. S/RES/2039 (February 29, 2012) (emphasis added); S.C. Res. 2018 ¶ 6, U.N. Doc. S/RES/2018 (October 31, 2011); S.C. Res. 2015 ¶ 6, U.N. Doc. S/RES/2015 (October 24, 2011); S.C. Res. 1976 ¶ 8, U.N. Doc. S/RES/1976 (April 11, 2011); S.C. Res. 1918 ¶ 3, U.N. Doc. S/RES/1918 (April 27, 2010).

⁵² *Ali*, 718 F.3d at 938.

⁵³ *Id.*

⁵⁴ See, e.g., James Thuo Gathii, *Jurisdiction to Prosecute Non-National Pirates Captured by Third States under Kenyan and International Law*, 31 LOY. L.A. INT'L & COMP. L. REV. 363 (2009); Eugene Kontorovich, *International Decisions—United States v. Shi*, 103 AM. J. INT'L L. 734, 739 (2009).

Despite such problems, the court's conclusion must be correct. In a Dutch case, not discussed by the D.C. Circuit, the defendant had been apprehended on the high seas by Danish forces.⁵⁵ The Rotterdam District Court convincingly rejected the idea that the jurisdiction provided by Article 105 "would prevent the execution of universal jurisdiction based on the national law of [states other than the apprehending state],"⁵⁶ indicating that Article 105 cannot be an exhaustive statement of circumstances under which pirates may be prosecuted. Such exclusivity, it reasoned, "cannot be concluded from the text of the provision, nor is there any other clue that this would have been intended."⁵⁷ State practice, which consists of the prosecution of pirates other than by the apprehending state and without any jurisdictional nexus to the prosecuting state,⁵⁸ supports that outcome and lends credence to the approach in *Ali*.

Although the D.C. Circuit was consequently correct that Article 105 did not restrict the scope of universal jurisdiction over acts of piracy, some might question its assumption that universal jurisdiction inhered over *Ali*'s conduct in the first place. Judges Buergenthal, Higgins, and Kooijmans of the ICJ have, for instance, observed: "[T]he only clear example of an agreed exercise of universal jurisdiction was in respect of piracy, *outside of any territorial jurisdiction*."⁵⁹ Indeed, there is a wealth of authority to suggest that the "universal jurisdiction" inhering over piracy is premised on the assumption that piracy is necessarily committed beyond any territorial jurisdiction.⁶⁰ These arguments seem to be premised on a distortion of the term "universal

⁵⁵ The "Cygnus" Case (Somali Pirates), 145 I.L.R. 491, 491–92 (Rb. Rotterdam 2010) (Neth.).

⁵⁶ *Id.* at 494.

⁵⁷ *Id.*; see also DOUGLAS GUILFOYLE, SHIPPING INTERDICTION AND THE LAW OF THE SEA 40–41 (2009); Maggie Gardner, *Piracy Prosecutions in National Courts*, 10 J. INT'L CRIM. JUST. 797, 804–05 (2012).

⁵⁸ See *United States v. Shi*, 525 F.3d 709, 721–23 (9th Cir. 2008); *Republic v. Mohamed Ahmed Ise*, Crim. Side No. 75 of 2010, ¶ 22 (S.C.) (Sey.), available at <http://law.case.edu/grotian-moment-blog/documents/CR75-2010-Judgment.pdf>; see also *United States v. Hasan*, 747 F. Supp. 2d 599, 608 (E.D. Va. 2010); *Republic v. Abdugar Ahmed*, Crim. Side No. 21 of 2011, ¶ 3 (S.C.) (Sey.), available at <http://law.case.edu/grotian-moment-blog/documents/CR21-2011-Judgment.pdf>; *Republic v. Mohamed Aweys Sayid*, Crim. Side, No.19 of 2010, ¶ 37, (S.C.) (Sey.), available at <http://law.case.edu/grotian-moment-blog/documents/CR19-2010-Judgment1.pdf>.

⁵⁹ Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 4, 37 (Feb. 14) (separate opinion of Judges Higgins, Buergenthal and Kooijmans) (emphasis added).

⁶⁰ See *supra* text accompanying note 2; see also Harvard Research in Int'l Law, *The Comment to the Draft Convention on Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. (Supp.) 443, 566 (1935). *But see Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666, 1667 (2013) ("Piracy typically occurs on the high seas, beyond the territorial jurisdiction of the United States or any other country." (emphasis added)).

jurisdiction,” which is “an unfortunately misleading label, given the separate meaning that term has since acquired in international criminal law.”⁶¹

Modern references to “universal jurisdiction” generally encapsulate the idea that “a State has jurisdiction to define and prescribe punishment for certain offenses” where another jurisdictional nexus to the forum state is lacking.⁶² In the context of piracy, however, the term is often used in reference to the universal right to *enforce* such prescriptions on the high seas.⁶³ Despite this, that latter right is not truly “universal,” because a state’s “right to seize pirate ships . . . and to have them adjudicated upon by its court . . . cannot be exercised at a place under the jurisdiction of another State.”⁶⁴ Because “[j]urisdiction to prescribe and jurisdiction to enforce are logically independent of each other,”⁶⁵ there is no reason why international law should not uphold the universality of the former while restricting the latter.

A principled rationale for that outcome can be identified. Although some have suggested that universal jurisdiction over piracy is premised on its occurrence on the high seas,⁶⁶ that explanation cannot account for the lack of equivalent regimes governing narcotics trafficking and illegal broadcasting on the high seas, for instance. Furthermore, unlike war crimes and crimes against humanity, the peculiarities of the piracy regime cannot be justified with reference to “heinousness,”⁶⁷ especially given that “malicious acts against

⁶¹ GUILFOYLE *supra* note 57, at 27.

⁶² See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404(a)(1) (1986).

⁶³ See, e.g., ROBIN GEISS & ANNA PETRIG, PIRACY AND ARMED ROBBERY AT SEA: THE LEGAL FRAMEWORK FOR COUNTER-PIRACY OPERATIONS IN SOMALIA AND THE GULF OF ADEN 143–44 (2011) (“In the *Case Concerning the Arrest Warrant*, Judge Guillaume of the International Court of Justice stated that ‘international law knows only one true case of universal jurisdiction: piracy.’ This statement is potentially misleading, since it is not clear what Judge Guillaume meant Certainly, universal adjudicative jurisdiction exists over other crimes . . . [but] it may well be argued that piracy is an exceptional case, since every State is competent to take enforcement measures against pirate ships.”); Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT’L L. 1, 15 (2007) (“Universal jurisdiction actually solves the problem of enforcement.”); see also ILIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW, 157 (2003) (“[I]t is clear that Article 105 does confer universal jurisdiction on State parties with regard to piracy.”); Bellish, *supra* note 24, at 14 (“[T]he importance of article 105 cannot be overstated, as it is that provision that codifies universal jurisdiction over piracy.”).

⁶⁴ Rep. of the Int’l Law Comm’n, 8th Sess., April 23–July 4, 1956, U.N. Doc. A/3159; GAOR, 11th Sess., Supp. No. 9, reprinted in [1956] 2 Y.B. INT’L L. COMM’N, 253, 289, U.N. Doc. A/CN.4/SER.A/1956/Add.1; see also Roger O’Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT’L CRIM. JUST. 735, 740 (2004).

⁶⁵ O’Keefe, *supra* note 64, at 741.

⁶⁶ See *supra* text accompanying note 2.

⁶⁷ Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, 45 HARV. INT’L L.J., 183, 210–23 (2004).

inanimate objects,” can constitute acts of piracy.⁶⁸ The best explanation of modern universal jurisdiction over piracy seems to be that, because “piracy endangers a common interest of all states (high-seas freedom of navigation), the exclusive jurisdiction of flag states does not obtain.”⁶⁹ The same rationale would justify the exercise by all states of prescriptive and adjudicative jurisdiction over land-based aiding and abetting, which equally jeopardize that same common interest.

V. ALI’S HISTORICAL ARGUMENT

Ali’s third argument was characterized as “eschew[ing] UNCLOS’s text in favor of its drafting history—or, rather, its drafting history’s drafting history.”⁷⁰ The definition of piracy in UNCLOS Article 101 is materially identical to that in Article 15 of the High Seas Convention (HSC) of 1958.⁷¹ This drew heavily on the Harvard Draft Convention on Piracy which the International Law Commission (ILC) was “in general . . . able to endorse,” when preparing the draft articles for use in HSC.⁷² As Ali noted,⁷³ the Harvard research made clear that: “The act of instigation or facilitation is not subjected to the common jurisdiction unless it takes place outside territorial jurisdiction.”⁷⁴

If the Harvard research were accepted as determinative, this would have surely been decisive. Nonetheless, it is surprising that neither Ali nor the court referred to the ILC commentary to what became HSC Article 15, which is somewhat less historically remote than the Harvard research. That commentary emphatically states: “Piracy can be committed only on the high seas or in a place situated outside the territorial jurisdiction of any State, and cannot be committed within the territory of a State or in its territorial area.”⁷⁵

However, no such supplementary materials informed the court’s interpretation. As is well-known, the preparatory work of the treaty and other

⁶⁸ See *Institute of Cetacean v Sea Shepherd*, 708 F.3d 1099, 1102 (9th Cir. 2013).

⁶⁹ GUILFOYLE, *supra* note 57, at 28; see also Clyde H. Crockett, *Toward a Revision of the International Law of Piracy*, 26 DEPAUL L. REV. 81 (1976–77).

⁷⁰ *United States v. Ali*, 718 F.3d 929, 938 (D.C. Cir. 2013).

⁷¹ Convention on the High Seas, art. 15, 29 April 1958, 450 U.N.T.S. 11.

⁷² Rep. of the Int’l Law Comm’n, 25, 10th Sess., May 2–July 8, 1955, U.N. Doc. A/2934; GAOR, 10th Sess., Supp. No. 9, reprinted in [1955] 2 Y.B. INT’L L. COMM’N., 19, U.N. DOC. A/CN.4/SER.A/1955.

⁷³ *Ali*, 718 F.3d at 938.

⁷⁴ Harvard Research in Int’l Law, *Draft Convention on Piracy*, 26 AM. J. INT’L L. (Supp.) 822 (1932).

⁷⁵ Report of the International Law Commission to the General Assembly, *supra* note 64, at 253.

“supplementary means of interpretation” are determinative only when VCLT Article 31 “leaves the meaning ambiguous or obscure” or “leads to a result which is manifestly absurd or unreasonable.”⁷⁶ Having rejected Ali’s contextual and jurisdictional arguments, the court was no doubt correct to conclude that “weighing the relevance of scholarly work that indirectly inspired UNCLOS is not an avenue open to [it].”⁷⁷

As a result, the D.C. Circuit’s starting premise remained intact: Because the language of Article 101(c) is expansive and contains no “high seas” requirement, there is no such requirement in international law. There was no reason to narrow the charges to acts of aiding and abetting occurring beyond the territorial jurisdiction of any state.

VI. WIDER IMPLICATIONS OF THE LACK OF “HIGH SEAS” REQUIREMENT

If the recent decision in *Ali* is followed, the rejection of any “high seas” requirement under Article 101(c) could have a dramatic impact on the suppression of Somali piracy, in addition to further unforeseen and arguably problematic consequences. Nonetheless, consideration of the proper scope of “intentional facilitation” suggests that such fears are unwarranted.

The prosecution of Ali, coupled with the recent prosecution of another pirate negotiator,⁷⁸ seemingly forms part of a strategy to dismantle the organizational and economic structures sustaining piracy.⁷⁹ As observed by the Office of the U.N. Secretary General, the prosecution of the “relatively small number of individuals[,] who provide the leadership and financial management of piracy,” most likely presents one of the more “strategically effective and . . . cost-effective” responses to piracy.⁸⁰ Given that the proliferation of Somali piracy depends on the “effective informal banking sector” which

⁷⁶ VCLT, *supra* note 21, art. 32.

⁷⁷ *Ali*, 718 F.3d at 939.

⁷⁸ See *United States v. Shibin*, Crim. Act. No. 2:11cr33, 2012 WL 8231152 (E.D. Va. April 16, 2012); *United States v. Shibin*, 722 F.3d 233 (4th Cir. 2013).

⁷⁹ See, e.g., *Hearing on Update on Efforts to Combat Piracy Before the Subcomm. on Coast Guard and Maritime Transportation of the H. Comm. on Transportation and Infrastructure*, 113th Cong. (2013) (Statement of Andrew J. Shapiro, Assistant Secretary, Bureau of Political-Military Affairs), available at <http://www.state.gov/t/pm/rls/rm/2013/207361.htm>.

⁸⁰ U.N. Secretary-General, *Report of the Secretary-General on the Modalities for the Establishment of Specialized Somali Anti-Piracy Courts*, ¶ 64, U.N. Doc. S/2011/360 (Jun. 15 2011).

handles the proceeds of ransoms,⁸¹ the use of Article 101(c) to prosecute land-based facilitators has a sound policy rationale.

However, it will be recalled that Ali was only prosecuted because he travelled to the U.S. as “Director General of the Ministry of Education for the Republic of Somaliland,” having been invited to a “sham” education conference in the U.S.⁸² The uncertain meaning of “intentionally facilitate,”⁸³ coupled with the “widely known” political connections of pirate leaders,⁸⁴ could arguably jeopardize international development efforts by deterring other Somali leaders from engaging with future such overseas reconstruction efforts.⁸⁵

More strikingly, the lack of any “high seas” requirement raises the question of whether “paying ransom to pirates could even be regarded as piracy itself” on the basis that such payments have been “proven to facilitate piracy in Somalia.”⁸⁶ In view of the extent to which the shipping, financial and insurance sectors rely on the lawfulness of ransom payments in jurisdictions such as the U.K.,⁸⁷ the effective criminalization of ransom payment as “piracy” could have far-reaching commercial consequences. In addition, the same reasoning threatens to label as “pirates” those who donate to anti-whaling groups, such as Sea Shepherd.⁸⁸ The decision in *Ali* consequently necessitates urgent clarification of the phrase “intentionally facilitate.”

Although the district court held that the municipal definition of “aiding and abetting [is] functionally equivalent” to intentional facilitation under art 101(c),⁸⁹ the precise limits of intentional facilitation in international law have

⁸¹ Douglas Guilfoyle, *Somali Pirates as Agents of Change in International Law-making and Organisation*, 1 CAMBRIDGE J. INT'L. & COMP. L. 81, 88 (2012).

⁸² *Ali*, 718 F.3d at 933.

⁸³ Roger L. Phillips, *Pirate Accessory Liability—Developing a Modern Legal Regime Governing Incitement and Intentional Facilitation of Maritime Piracy*, FL. J. INT'L. L. (forthcoming) (manuscript at 6), available at <http://dx.doi.org/10.2139/ssrn.2158023>.

⁸⁴ U.N. Secretary-General, *supra* note 80, ¶ 64.

⁸⁵ Certain individuals with links to piracy have been issued with diplomatic passports precisely for this reason. *Exclusive: Somali Pirate Kingpins Enjoy “Impunity”—U.N. Experts*, REUTERS, Jul. 17, 2012, available at <http://www.reuters.com/article/2012/07/17/us-somalia-un-piracy-idUSBRE86G0ZN20120717>.

⁸⁶ Andreas S. Kolb, Tim René Salomon, & Judith Udich, *Paying Danegeld to Pirates—Humanitarian Necessity or Financing Jihadists?*, 15 MAX PLANCK Y.B. OF UNITED NATIONS L. 105, 121 n.57 (2011).

⁸⁷ See Michael Peel, *Somali Crackdown Threatens City Ransom Role*, FIN. TIMES (Aug. 8 2010), <http://www.ft.com/cms/s/0/7b63413c-a31a-11df-8cf4-00144feabdc0.html>.

⁸⁸ Sea Shepherd was recently held to have committed acts of piracy. *Institute of Cetacean v Sea Shepherd*, 708 F.3d 1099, 1101 (9th Cir. 2013).

⁸⁹ *Ali*, 885 F.Supp.2d at 30 (citing *Abuelhawa v. United States*, 556 U.S. 816, 821(2009)).

been left undefined. The district court held that U.S. law required an aider and abettor to have “the specific intent to facilitate the commission of a crime,” but no corresponding requirement of *specific* intent is evident from the text of Article 101(c).

When the text of Article 101(c) is read in the context of wider international law, as prescribed by VCLT Article 31(3)(3), it in fact seems likely that the *mens rea* threshold for intentional facilitation is lower. According to the International Criminal Tribunal for the Former Yugoslavia (ICTY): “In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of the specific crime of the principal.”⁹⁰

Assuming the “intentional facilitation” limb of Article 101 corresponds to aiding and abetting,⁹¹ such a low *mens rea* threshold, coupled with the lack of a “high seas” requirement, threatens to create a surprisingly broad definition of piracy.

Nonetheless, recent developments in international criminal law may present another way of preventing ransom payments, or donations to Sea Shepherd, from constituting “intentional facilitation.” The ICTY has recently affirmed that the *actus reus* of aiding and abetting must be “specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime,” rather than merely “in some way” directed towards relevant crimes.⁹² While more detailed consideration of “intentional facilitation” is beyond the scope of this commentary, an analogous threshold would serve to limit the problems arising from applying the law of piracy to land-based aiders and abettors.

⁹⁰ *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Appeals Chamber Judgment, ¶ 102 (Feb. 25, 2004); *see also Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber Judgment, ¶ 49 (Jul. 29, 2004); *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 245 (Dec. 10, 1998); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶ 545 (Sep. 2, 1998).

⁹¹ *Ali*, 885 F.Supp.2d at 30; *Republic v. Mohamed Ahmed Dahir*, Criminal Side No. 51 of 2010, ¶ 63 (S.C.) (Sey.), *available at* <http://law.case.edu/grotian-moment-blog/documents/CR51-2009-Judgment.pdf> (convicting a defendant of aiding and abetting piracy on the basis that “a person abets by aiding, when by any act done either prior to, or at the time of, the commission of an act, he intends to facilitate, *and does in fact facilitate*, the commission thereof” (emphasis added)); *see also* Rome Statute of the International Criminal Court, art. 25(3)(c), July 17 1998, 2187 U.N.T.S. 90.

⁹² *Prosecutor v. Perišić*, IT-04-81-A, Appeals Chamber Judgment, ¶ 26–27 (Feb. 28, 2013).