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Protocol Additional to the Geneva Conventions of 12 Aug. 1948, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 86(2), 8 June 1977.


Updated Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 7(3), Sept. 2009.

Updated Statute of the International Criminal Tribunal for Rwanda, art. 6(3), Jan. 2010.

CASE LAW


Prosecutor v. Milosevic, Case No. IT-98-29/1-T (12 Dec. 2007).


**BOOKS & ARTICLES**


KRIANGSAK KITTICHAINSAREE, *INTERNATIONAL CRIMINAL LAW* (Oxford University Press, 2001)


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**MISCELLANEOUS**


Kurt Amend, Principal Deputy Ass’t Sec’t, Bureau of Political-Military Affairs, US State Dep’t, Testimony Before Sub-Committee on Coast Guard and Maritime Transportation, Hearing on *Assuring the Freedom of Americans on the High Seas: The United States Response to Piracy,*” March 15, 2011.


I. Introduction and Summary of Conclusions

Maritime piracy is a significant threat to global economic security, yet existing legal structures are failing to prosecute the lawbreakers. As plans to develop an international piracy tribunal unfold, it is important to consider what legal arguments will be effective in prosecuting – and deterring – pirate activities. This memo considers how the legal doctrine of command responsibility, which has been employed with mixed success in international tribunals in the former Yugoslavia and Rwanda, could be applied in the context of maritime piracy.

First, this memo discusses the operations and structures of the most sophisticated modern pirate gangs. This memo then discusses the doctrine of command responsibility. Specifically, the objectives, general contours, history, language used in recent international treaties, and limitations of the command responsibility theory are addressed. Finally, this memo considers challenges and opportunities to establishing liability under command responsibility to piracy.

Summary of Conclusions

To establish command responsibility for the crime of a subordinate, the superior must generally have had effective control over the subordinate, failed to prevent the criminal acts of the subordinate, and had knowledge (or reason to know) that a crime was about to occur. So long as an international piracy tribunal can establish these elements, pirate leaders should be susceptible to prosecution under the command responsibility theory.

Including a form of command responsibility liability in a piracy tribunal statute would allow that court to use the doctrine without accusations of court-made law. Because court proceedings would likely look to precedent from past cases, the language should mimic that found in previous international tribunal statutes. Considering that the International Criminal

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1 ISSUE: To what extent are maritime pirates susceptible to prosecution under traditional notions of command responsibility in an international tribunal with universal jurisdiction?
Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) statutes included command responsibility provisions that did not distinguish between military and civilian commanders, and that a piracy court will likely struggle to identify many of the defendants as part of a military hierarchy rather than civilian leadership, it is advisable that a future statute attempting to organize and operate an international tribunal adopt a command responsibility provision similar to the ICTY and ICTR standard.

While prosecuting pirates under a command responsibility theory is challenging, the doctrine should nonetheless be available as one of many tools to prosecute violators of international law and deter future crimes. Given the unique political situation of Somalia’s failed state, the decentralized and informal nature of pirate operations, and the fact that land-based chiefs have been known to moonlight as pirate commanders, prosecuting pirates under a command responsibility theory will be more difficult than in previous international tribunals. The doctrine will not be useful in all cases, and should not be habitually engaged because of its mixed success rate in previous international tribunals. Nonetheless, it is sometimes possible to properly identify the planners and organizers of pirate activities. Accordingly, command responsibility should be an available tool to prosecutors in an international piracy tribunal. As pirate command structures and operations are inconsistent and fluid, prudent use of the doctrine will depend on the facts and circumstances of each case.

II. **Factual Background**

Piracy is a serious international threat that has eluded current legal structures designed to deter crime. In addition to challenging global economic security, piracy is hurting East African stability, as countries are hesitant to do business in the neighborhood and humanitarian food aid

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is being intercepted.⁴ There were 142 reported pirate attacks worldwide in the first quarter of 2011 (nearly 70 percent of which occurred off the coast of Somalia), though many attacks go unreported due to the high costs of investigation and the risk of increased insurance premiums.⁴ The lack of an effective Somali government and extreme poverty in the region are key reasons that piracy has exploded in the Gulf of Aden.⁵

This memo will not delve into the question of what is (and is not) piracy. Suffice to say, international treaties and customary law have exhausted that discussion and outlined a broad, well-understood concept. Any alleged pirate commander brought before an international piracy tribunal would likely be connected to some crime that would easily qualify as piracy. Further, piracy crimes have been subject to universal jurisdiction for centuries, both as a matter of customary international law and pursuant to international conventions. Although universal jurisdiction allows piracy crimes to be tried anywhere, there is a practical need for consolidation. This memo presumes that an international piracy tribunal will have the legitimate right to prosecute those accused of piratical criminal acts.

There is no one-size-fits-all description of a pirate. While most pirate gangs are simply poor opportunists looking for some easy cash or cargo, some are well organized, sophisticated, and controlled by organized criminal enterprises.⁶ Pirate gangs can be broken down into three different groups:

1) ex-fishermen, who are considered the brains of the operation because they know the sea;

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⁵ Id.

2) ex-militiamen, who are considered the muscle and previously fought for various Somali clan warlords; and
3) technical experts, who are the computer geeks and know how to operate the hi-tech equipment needed to operate as a pirate.7

Piracy has also become somewhat socially accepted, and even fashionable, for Somali men between the ages of 20-35. In such a poor country, it is pirates who “have money, have power… wed the most beautiful girls,” build the biggest houses, and have new cars and guns.8

The relatively sophisticated pirate groups (those that an international piracy tribunal would be designed to deter) use hi-tech equipment such as satellite phones and global positioning systems (“GPS”), receiving tips from contacts on land about the location of potential targets.9 They use speedboats with powerful outboard motors – often launched from larger “mother ships” – to approach their targets. Armed with rocket-propelled grenades and AK-47s, the pirates hijack ships by using grappling hooks, irons, ropes, and ladders. Once a ship is secured, pirates will attempt to ransom the boat and hostages, sometimes relying on the chief organizer on shore to do the negotiating. The “commanding officers” – those remaining on shore to communicate by radio to the boat – often have legitimate, respected jobs. These land-based officers are also frequently community leaders, such as a clan leader with close ties to the semi-autonomous region.10 Further, there is presumably one individual boat leader assigned for each mission.11

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8 Id.
10 KLAUS HYMPENDAHL, translated by Martin Sokolinsky, PIRATES ABOARD! (Sheridan House, 2003), at 203.
11 Id.
There have also been reports of hijacked vessels being repainted and given a new identity through false papers.\(^\text{12}\)

Thus, the modus operandi for the more sophisticated pirates suggests some degree of organization, and thus some degree of planning, instigating, and issuing of orders.

III. Legal Discussion

A. Command Responsibility Generally

Liability under command responsibility is considered customary law, such that it is enforceable even if it is not codified.\(^\text{13}\) Commanders have direct liability for the lack of supervision but also indirect liability for the criminal acts of subordinates.\(^\text{14}\) The latter type is more commonly associated with the command responsibility doctrine, as the challenge of collecting direct evidence of an omission makes the culpability more difficult to prove in theory and practice.\(^\text{15}\) Although traditionally applied to military commanders, the principle of command responsibility is also applicable to civilian non-military commanders, such as political leaders and other civilian superiors in positions of authority.\(^\text{16}\) Further, there is a clear understanding that every command responsibility case is to be decided on its own particular set of facts.\(^\text{17}\)


\(^\text{15}\) Allison Marston Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 Cal. L. Rev. 75, 120 -121 (2005). Some opinions suggest that omissions of a commander may also give rise to aiding and abetting liability under ICTY Art. 7(1). See also Prosecutor v. Kordic, Case No. IT-95-14/2-T, Trial Judgment (2001), at para. 371.

\(^\text{16}\) Kriangsak Kittichaisaree, International Criminal Law (Oxford University Press, 2001), at 251. The ICTR, in Prosecutor v. Kayishema & Rutindana, 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.”
Modern case law lists three requirements to establish command responsibility of a superior within an organization:

(i) the existence of a superior-subordinate relationship;
(ii) the superior’s failure to take the necessary and reasonable measures to prevent the criminal acts of his subordinates or punish them for those actions; and
(iii) that the superior knew or had reason to know that a criminal act was about to be committed or had been committed.\(^\text{18}\)

The obvious fourth element is that the subordinate(s) committed the crime in question. Absence of proof of any one of these conditions is sufficient for acquittal.

In other words, a superior who gave an unlawful order is responsible and equally culpable for a subordinate’s resulting crimes that the superior knew or had reason to know were committed by subordinates.\(^\text{19}\) Some directives can be communicated indirectly, but these are generally difficult to prove for punitive actions because of a lack of proof.

The most objective requirement, the “touchstone” of the doctrine that is “inherently linked to the factual situation,” is that the defendant had the actual ability to exercise sufficient control over the subordinates to prevent the crime.\(^\text{20}\) Additionally, the \textit{mens rea} requirement requires that either the superior must have actual knowledge with regard to the crimes or he must be on notice of the risk of such crimes.\(^\text{21}\)


\(^{19}\) Chantal Meloni, \textit{Command Responsibility}, 5-3 J. of Int’l Crim. Justice 619, 628 (July 2007) ([A] “superior’s criminal responsibility flows from the neglect of a specific duty to take the measures that are necessary and reasonable in the given circumstances.”).

\(^{20}\) See \textit{Kayishema and Ruzindana, supra} note 16, at para. 229.

\(^{21}\) See \textit{Ambos, supra} note 14, at 162.
Professor Gary Solis summarizes and simplifies liability for commanders by breaking down the ways a commander can be prosecuted into seven distinct routes, though these variations are more appropriately consolidated into four possible routes to prosecution.

1. A commander is liable for armed conflict and international law violations that he personally commits. Status as a commander or subordinate is irrelevant.

2. A commander is responsible for his subordinate’s violations that he ordered or instigated. Specifically, a commander is responsible for violations:
   - that he orders subordinates to commit,
   - that his subordinates commit pursuant to manifestly illegal orders that he passes on to those subordinates, or
   - that he incites.

3. A commander is responsible for violations that he failed to control when he had effective control. Specifically, a commander is responsible for violations:
   - that his subordinates commit and he fails to control, or
   - that his subordinates commit and he permits or acquiesces in the violation.

4. A commander is responsible for disregarding violations and taking no action to punish those involved.

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22 See Solis, supra note 13, at 391-395.


24 See Prosecutor v. Milosevic, Case No. IT-98-29/1-T (12 Dec. 2007) (The ICTY sentenced Dragomir Milosevic to 33 years for planning and ordering the shelling and sniping of civilians with intent to spread terror among the population).

25 Trial of Erich Heyer and Six Others, The Essen Lynching Case, British Military Court, I LRTWC 88, 89-90 (Dec. 1945). Nazi Captain Erich Heyer instructed his subordinates to march British prisoners of war through a town at an announced hour and location, and further ordered them to not interfere should the townspeople molest the prisoners. Predictably, an angry mob awaited the British prisoners of war and beat them to death. Heyer was found liable for inciting the murder.

26 See Prosecutor v. Strugar, Case No. IT-01-42-T (31 Jan. 2005) (The ICTY prosecution failed to prove that Lt. Gen. Pavle Strugar ordered the bombing of Dubrovnik when many noncombatants were present, but the prosecution did prove that he failed to stop the bombing when he could have done so).

27 Prosecutor v. Delic, Case No. IT-04-85-T (15 Sept. 2008), para 552 (where the ICTY convicted a commander of failing to punish subordinates known to him to have committed crimes against Serbian prisoners, the Trial Chamber held that the, “superior is bound to take active steps to ensure that the perpetrators of the crimes in question are brought to justice.”).
B. Command Responsibility Historically

Origins of command responsibility in international law can be traced to the Treaty of Versailles’ Article 227, which called for Germany’s senior military officer to be prosecuted.28 After World War II, Japanese General Yamashita, among others, was prosecuted for his failure to control actions of massacring troops when he knew, or must have known, of his troops acts.29

More recently, command responsibility was used extensively after German reunification. As Germany coped with unification, its courts were willing to prosecute both generals and soldiers under command responsibility and respondeat superior cases. There were nearly 300 cases dealing with East German border guards who shot and killed Germans trying to escape to the west during the 1990s. These included the prosecution of former East German “officers who issue[d] an order to shoot… and kill,”30 as well as junior guards who failed in their “duty to disobey the… government’s shoot-to-kill policy”31 and senior political leaders.32 In 2001, the European Court of Human Rights unanimously held that these prosecutions did not violate the principle of “no crime without a law.”33

The 1977 Additional Protocol I, Art. 86.2., an amendment to the Geneva Conventions, addressed the responsibility of commanders who do not take measures to prevent foreseeable violations or take action regarding violations already committed by subordinates. It noted that


29 See Solis, supra note 13, at 385. Despite the “must have known” standard, courts have since acknowledged that commanders cannot know everything, as there have been many acquittals in alleged violations of command responsibility cases.


32 See Solis, supra note 13, at 390.

the fact that the breach of the Conventions (or this Protocol) was committed by a subordinate
does not absolve his superiors from penal responsibility if they knew, or had information which
should have enabled them to conclude in the circumstances at that time, that he was committing
or was going to commit such a breach, and they did not take all feasible measure within their
power to prevent or repress the breach.34

Further, if a superior pleads ignorance of a violation, the court must look to particular
circumstances. These include the location of the commander, statements to others (or
omissions), the state of available communications, whether the subordinate was a member of the
commander’s unit or of an attached unit, and whether there is a repetitive or singular nature of
the breach.35 It further clarifies that commanders are the people who had command
responsibility at the time of the incident, even if those people are only in charge of a few others.

C. Command Responsibility Statutory Language

The ICTY and ICTR statutes use essentially identical language in laying out the elements
of command responsibility liability. The ICC differs substantively only in its distinct mens rea
standards for civilian and military commanders. This slight distinction should not overly
concern drafters of an international piracy tribunal, as either standard would be usable. As it is
uniquely challenging to properly classify a pirate superior as a military or civilian commander,
emulating the command responsibility elements in the ICTY and ICTR’s statutes would best
serve an international piracy tribunal because these statutes blur the distinction between civilian
and military commanders.

34 Protocol Additional to the Geneva Conventions of 12 Aug. 1948, and relating to the Protection of Victims of
International Armed Conflicts (Protocol I), art. 86(2), 8 June 1977, available at: http://www.icrc.org/ihl.nsf/7e4d08d9b287a42141256739003e636b/f6c89f9f14a77f1dc125641e0052b079.

35 Pilloud, de Preux, Sandoz, Zimmerman, Eberlin, Junod & Swinarski et al., Commentary on the Additional
Red Cross and Nijhoff; 24 J. OF PEACE RESEARCH 326 (Sept. 1987), available at:
http://jpr.sagepub.com/content/24/3/326.1.citation.
1. Command Responsibility in the ICTY and ICTR Statutes

Articles 7(3)\textsuperscript{36} and 6(3)\textsuperscript{37} of the ICTY and ICTR statutes, respectively, are the relevant command responsibility provisions. The two Articles use nearly identical language in laying out the elements and standards for command responsibility liability. The ICTY’s relevant provision, Article 7(3), states:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The ICTR’s relevant provision, Article 6(3), states:

The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Literally the only two differences in the relevant provisions are that 1) they refer to different articles when discussing relevant crimes that a commander could be liable for, and 2) the ICTY only refers to commanders as “him” while the more recent ICTR uses more gender responsive “his or her” language. Beyond that, they employ the exact same language.

2. Command Responsibility in the Rome Statute


The command responsibility provision for the International Criminal Court ("ICC") statute is found in Article 28. Article 28(a)(i) enables the court to charge commanders if the commander “knew or, owing the circumstances at the time, should have known…” of violations. This “owing to circumstances” standard is broader, and thus easier to prosecute under, than Protocol I’s “had information” standard. The relevant portions of Article 28 the Rome Statute state:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
   (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
   (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
   (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
   (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
   (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.


Although structurally distinct, the ICC’s command responsibility provision significantly mirrors the substantive contours of the relevant ICTY and ICTR provisions. Importantly, they

all use the same “necessary and reasonable measures” terminology to describe the superior’s obligation upon learning of the subordinate’s criminal intent or actions. Also, they share the same “knew of… or should have known,” standard of awareness for military commanders.

However, the ICTY, ICTR, and ICC apply different mens rea standards for military and civilian officers. The ICTY and ICTR statutes do not distinguish between civilian and military superiors. In fact, they expand the notion of command responsibility by holding that it applies in cases of internal as well as international armed conflicts. Conversely, the ICC statute is harder on military commanders, using a “should have known” standard that could be interpreted in a manner more akin to negligence or recklessness than constructive knowledge. For non-military superiors in the ICC statute, however, liability is permitted only where the superior had knowledge or consciously disregarded information clearly indicating that subordinates were committing or about to commit crimes. This actual, or “constructive,” knowledge of the crimes being committed is a slightly more difficult to prove standard than that applied to military commanders. The facts and circumstances of each situation will dictate whether an alleged pirate can be prosecuted as a military commander, or whether prosecution of that particular alleged pirate would need to reach the higher standard for civilian superiors.

This minor substantive inconsistency between the relevant command responsibility provisions of the ICTY, ICTR, and ICC statutes is inadequate to challenge the legitimacy of a future court. The distinction between the military and civilian standard acknowledged the unique facts and circumstances in the former Yugoslavia and Rwanda, and also recognized that formal


40 Id.

41 Id., at 436.
military hierarchies are less relevant in modern warfare. The overall intent and content of the relevant command responsibility statutes should offer a theoretical pirate tribunal an adequate understanding of what must be proven to prosecute superiors, regardless of which statute’s language is applied.

Although the Rome Statute was written more recently, an international piracy tribunal should adopt language that more closely emulates the ICTY and ICTR statute provisions. To prevent accused litigants from seeking relief for procedural inconsistencies, new international tribunal statute provisions should mirror past courts that may offer relevant substantive and procedural law precedents. Further, it will be difficult to properly classify pirates as part of a military hierarchy or civilian criminal group (let alone properly identify superiors and subordinates) because of the inconsistent structures of pirate gangs. In applying the same standard for both military and civilian commanders, the ICTY and ICTR avoided this potential confusion. Due to the decentralized nature of pirate operations and the complete disarray of the Somali government, it is safe to assume that many pirate defendants will be classified as civilians.

Including a form of command responsibility liability in the statute would allow a piracy tribunal to use the doctrine without suffering accusations of court-made law. Considering that the ICTY and ICTR statutes include command responsibility provisions that do not distinguish between military and civilian commanders, and that a piracy court will likely struggle to identify many of the defendants as part of a military hierarchy rather than civilian leadership, it is advisable that a future statute attempting to organize and operate an international tribunal adopt a command responsibility provision similar to the ICTY and ICTR standard.
D. Command Responsibility Limitations

Despite past usage of command responsibility theories of liability, concerns about the doctrine persist, requiring further refinement by international courts.

The deterrent impact of command responsibility has been questioned because the tribunals are specially tailored to the political needs of the situation. Namely, these tribunals usually act after the crimes are complete. The doctrine may not best serve the interests of those trying to use international law to bring down an ongoing series of crimes using the law alone.

Also, emerging from ICTY and ICTR case law were concerns that command responsibility could impose strict liability or an ordinary negligence standard. Decisions thus emphasized that command responsibility derives from individual criminal responsibility and such responsibility requires malicious intent, or at least negligence severe enough to be tantamount to malicious intent. The Appeals Chamber of the ICTY definitively rejected the notion that command responsibility was a form of strict liability or vicarious liability in holding that a commander is liable only if “information was available to him which would have put him on notice of offences.” The current state of the doctrine seems well-settled in the ICTY and ICTR, at least to the extent that something greater than ordinary negligence is required to trigger liability.

The ICTY continued to refine liability limits in holding that the requisite knowledge could be shown by direct or circumstantial evidence, and acknowledging the potential that

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46 Danner & Martinez, *supra* note 15, at 129.
superiors may lack information because they failed to properly supervise (or even willfully ignored) their subordinates’ activities.\textsuperscript{47}

Other challenges that international courts tackled include determining a commander’s requisite effective control over subordinates (\textit{de jure} power may be prima facie effective control unless proof to the contrary is produced, indicated by a commander’s ability to prevent or punish)\textsuperscript{48} and defining who may qualify as a commander (the established definition clearly considers a civilian leader an effective superior for purposes of assigning liability under command responsibility).\textsuperscript{49}

Two current cases are grappling with the question of how far down a command chain a court should go in pursuing a prosecution. In response to post-election violence in Kenya, the ICC charged six political leaders with various crimes. The Pre-Trial Chamber found reasonable grounds to believe that some of the accused were criminally responsible as indirect perpetrators and planners of crimes against humanity, murder, rape, and other crimes.\textsuperscript{50} The finding that a network was under responsible command of these political leaders means that the command responsibility doctrine will play a prominent role in these trials. A still disputed concern in Kenya is determining how far down a command chain to pursue prosecutions.\textsuperscript{51}

\textsuperscript{47} See Delalic, supra note 18, at para. 386.

\textsuperscript{48} Prosecutor v. Halilovic, Case No. IT-01-48-A, ICTY Trial Chamber (16 Oct. 2007), at para. 59; See also Delalic, supra note 18, at para. 197.


\textsuperscript{51} Peter Mwaura, ‘Command responsibility’ used but Ocampo failed to go up the chain, DAILY NATION, Op-ed, Dec. 17, 2010, available at: http://www.allvoices.com/s/event-7626997/aHR0cDovL3d3dy53d3dy5uYXRpb24uY28ua2Uvb3BlZC9PcGluaW9uaW9uaW9uLy0vNzQwODAwODY1ZGQ5My00NmIzOTQ5ZDA3NzJjODI1ZjY0LWNlZDE0MWMucG5zL3NpdGUvZl93b3Jrc2VzLzIvMDA1MzUwOTBhZDZjMzQ0ZjIzNDU4NzIwZGM3NTQxZjUwLmpwZw.

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Unlike the ICC’s actions in the Kenya dispute, a separate pending case in the Central Africa Republic (‘CAR’) indicates unwillingness by the ICC to pursue prosecutions against any commanding officer that is not at the top of the command hierarchy. An investigation recently determined that Ange-Felix Patasse, the former president of the CAR, was liable under command responsibility because he had overall command of armed forces that committed atrocities in the country during a 2002-2003 conflict. Patasse had invited former Vice-President Jean-Pierre Bemba’s troops into the country, and Bemba’s troops carried out rapes, killings, and looting. The ICC accused Bemba of failing to stop or punish his troops when he was aware of their misconduct. However, the CAR Prosecutor-General just reported to the ICC that it was Patasse – not Bemba – who had command responsibility over the troops at the time of the offenses. Patasse recently passed away, leaving the ICC’s next step in carrying out justice for the crimes against civilians in 2002-2003 uncertain given the court’s reluctance to assign liability to Bemba under the command responsibility doctrine.

Another pending ICC case is in Sudan, where the prosecution is relying on the legal principle of “perpetration through means” rather than command responsibility. The ICC’s assertion is that Sudanese President Omar al-Bashir controlled the entire political system and committed the crimes as an indirect perpetrator. Observers believe the prosecution is applying a different standard because it is tougher to prove that an individual intended a specific crime when they directed others to commit it on their behalf.

%E2%80%98command-responsibility%E2%80%99/.


The ICC’s reliance on an alternative liability theory in Sudan may be due to the fact that command responsibility is one of the forms of liability least likely to result in successful convictions. Of the 99 accused who faced trial before the ICTY and the ICTR as of early 2007, only 54 were prosecuted on a theory of command responsibility and only 10 were properly convicted. Further, these disappointing statistics were all cases with a traditional military superior-subordinate context, which is not an element that an international piracy tribunal will be able to rely on.

IV. Command Responsibility and Pirates

There are a variety of challenges in applying the command responsibility doctrine that are unique to pirates. Nonetheless, it is sometimes possible to properly identify the superiors in crimes of piracy. Thus, command responsibility should be an available tool to prosecutors in an international piracy tribunal, even though it will only be relevant when certain facts and circumstances are present.

A. Challenges of Applying Command Responsibility to Pirates

International law authorizes and encourages international prosecution of pirates. However, command responsibility may be difficult to apply to pirates for a variety of reasons.

First of all, it is difficult to determine the formal leader of a pirate group (if there even is a leader). Although a few groups of modern pirates wear uniforms, few of the pirates who use civilian ships affix their own distinctive sign or flag even if they were wearing uniforms.

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57 See Passman, supra note 3, at 23.
58 Id., at 24.
Second, based on past experience, captured Somalis are likely to insist in court that they are not pirates, but rather simple fishermen erroneously seized.\(^{59}\) Indeed, many Somali pirates are actually fishermen.\(^{60}\) Establishing the identity of captured individuals will be difficult because they are unlikely to carry identification. This will be important if the piracy international tribunal follows U.S. procedural law, which allows detainees to appear before the court to challenge the factual basis for being classified as a combatant even before the actual trial for their alleged crimes.\(^{61}\) Still, distinguishing between innocent fishermen and potential pirates is not an impossible task, as fishermen and pirates use different tools (there is no reason that a few “fishermen” on a small skiff should have a ladder, grapple hooks, and weapons).

Third, while it is difficult enough to physically detain pirates, the uniqueness of Somalia’s disarray and the lack of political will to follow through with trials further complicates prosecuting the worst offenders and thus holding them accountable. Although piracy is a crime of “universal jurisdiction” (any state can prosecute piratical acts under international law), states lack the legal framework, judicial capacity, and political will to effective action.\(^{62}\) Despite universal jurisdiction for piracy crimes allowing trials to take place anywhere, there remains a practical need to consolidate the cases. An international tribunal would provide the legal

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\(^{62}\) Kurt Amend, Principal Deputy Ass’t Sec’t, Bureau of Political-Military Affairs, US State Dep’t, Testimony Before Sub-Committee on Coast Guard and Maritime Transportation, Hearing on *Assuring the Freedom of Americans on the High Seas: The United States Response to Piracy*, March 15, 2011, available at: http://docs.google.com/viewer?a=v&q=cache:q6hx7iNtWicJ:republicans.transportation.house.gov/Media/file/TestimonyCGMT/2011-03-15 amendment.pdf+Congressional+testimony+on+piracy,+3/15/2011&hl=en&gl=us&pid=bl&srcid=ADGEESj8vMJGdx6XwGNM5sfcpWlgkflXwijuJFj68nQ5MXio4QgRQwmVLOZHN3huStLCimov2AUEjQgnYEWW59ZHz4tg-oNDo_wFiHt5jfOISSb-DUzKKrMPEDIewWeCcXaV3JsR0J&sig=AHIEtbRQINRJn7c9kvmrXLYt0WSuZspzA.
framework and judicial capacity to prosecute pirates, but lacking political motivation could remain a challenge because there may be hesitancy to interfere in communities where piracy thrives (due to the region’s severe poverty and failed government).

Fourth, pirates seem to operate according to their own set of rules. Even though some pirates carry arms openly (at least before warships arrive), pirates do not conduct their operations in accordance with the laws and customs of war, so pirates are generally not part of the armed forces of a state and established rules of armed conflict do not apply. As there is no organized combatant force to command, there is no armed conflict within which breaches of the law of armed conflict can take place. This will make properly classifying superiors as military or civilian commanders all the more difficult.

Fifth, command responsibility may not be the most appealing liability argument, as some scholars argue that the leaders and financiers of criminal pirate syndicates (those who deserve and would likely receive the “pirate commander” title) could be prosecuted under more frequently applied laws.

Sixth, procedural concerns would be exacerbated in a court dealing with Somali pirates. Aspects of the trial would also raise serious logistical problems. For instance, transporting evidence and witnesses would be burdensome in a failed state with such extreme poverty. Also, Naval officers in active service around the world would be called upon to testify.

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63 See Passman, supra note 3, at 24.

64 E-mail from Robert McLaughlin, Professor, Australian National University, to author (May 4, 2011, 19:57 PST) (on file with author). The status of the most sophisticated pirate gangs could change if Somali pirates shifted to more organizational arrangements (for instance, al Shabaab could take up pirate planning and organizing).

65 Id.

Moreover, identification by victims would be challenging because so many multinational crews of foreign vessels would have continued on their trip or returned home.

Seventh, as has been the case in piracy cases in Kenya, the defendants may claim torture and denial of religious privileges by their captors. Most Somalis are Muslim, and charges of religious insensitivity could be exploited to incite anti-western sentiment along the lines of the recent Koran burning protests.

Eighth, Somali pirates might claim asylum under human rights laws once on board a Western vessel; this is a real possibility given the risks of repatriating to their home country. Though pirates on the seas, those carrying out the piratical acts (and most likely to be caught) are really just a few thousand illiterate, poorly armed brigands.

Finally, and perhaps most importantly, those most likely to be considered “commanders” are land-based chiefs. These land-based chiefs are unlikely to be taken captive in significant numbers because nations do not appear willing to carry out serious enforcement action on land, especially considering that they are barely even arresting the “small-fish” they do catch at sea. The international community will also be hesitant to pursue prosecutions of land-based chiefs

67 Id.


71 E-mail from Eugene Kontorovich, Professor, Northwestern University School of Law, to Janice Goh (April 26, 2011, 18:13 PST) (on file with author).

72 E-mail from Eugene Kontorovich, Professor, Northwestern University School of Law, to Janice Goh (April 27, 2011, 3:56 PST) (on file with author).
because these chiefs effectively act as the community leader in a state where there is no operative central government.

B. Potential Successful Applications of Command Responsibility to Pirates

In April 2010, President Obama signed Executive Order 13536, which authorized the Secretary of the Treasury to freeze assets and block property of twelve individuals and one organization in Somalia. The Executive Order was attributed to the “deterioration of the security situation and the persistence of violence in Somalia, and acts of piracy and armed robbery at sea off the coast of Somalia.” Five months after the Executive Order, the Department of the Treasury’s Office of Foreign Assets Control published information on the persons listed in the Executive Order. Significantly, two individuals targeted for sanctions are leaders in pirate activities, illuminating details on pirate operations and hierarchy.

One Somali targeted for sanctions is Abshir Abdullahi Boyah, considered a key organizer, recruiter, financier, and commander of a maritime militia consisting of about 500 operating pirates, with responsibility for between 25-60 shipping vessel hijackings.

The other noted Somali with piracy connections is Mohamed Abdi Garaad, a principal organizer and financier of pirate activities. He has acknowledged responsibility for multiple high-profile hijackings, including attacks on vessels carrying humanitarian assistance for

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73 Exec. Order No. 13536, 75 Fed. Reg. 72 (April 12, 2010), Blocking Property of Certain Persons Contributing to the Conflict in Somalia, available at: http://docs.google.com/viewer?a=v&q=cache:QelkDytC-vYI:www.treasury.gov/resource-center/sanctions/Documents/13536.pdf+E.O+13536&hl=en&gl=us&pid=bl&srcid=ADGEESqOBHYPdB1pRh71kPrAMAQT89cQKNKV2s8hMVPn4QOFm18S7xsaLVKEl6Dr8QVQpdfJBe4ljIPoeK2RUuCSwa7u4V-mGag1TzrtgADTsqaN7NZS-7gylkX0iq8wSr65A4lvB3V&sig=AHIEtbRX0P1x76ACjnbXOXsGL-J4rW4bbw.

74 Somalia Sanctions: Information on Persons Listed in the Annex to E.O. 13546 of April 12, 2010, Dep’t of the Treasury: Office of Foreign Assets Control (updated Sept. 22, 2010), available at: http://docs.google.com/viewer?a=v&q=cache:7jhSggGPrAJ:www.treasury.gov/resource-center/sanctions/Programs/Documents/e013536_pr.pdf+Abshir+Abdullahi%22+BOYAH+Hhl=en&gl=us&pid=bl&srcid=ADGEESqASL1VVe-SlgROGcI-0OD1jfTP0tSEKZLfhz-DOG95qv1Lw4dqo2MVJY1WDHobaxO0qvDc_tUpQXOJ4TAEh-c4Dl6Hi3CyEyB3wZVI1gTNWENsGyjQ1ciXpDlnsCsYs4H&sig=AHIEtbT9eOT6ZkLpANbTsHAZg31eETxxw.
Somalia. Garaad boasts that he has direct control over thirteen groups of pirates. Garaad also says that each group has a sub-lieutenant who reports directly to him, and that his subordinates do not make a move without his authorization. Garaad calls himself a “pirate commander,” and that moniker has been applied to him in several newspaper articles.

Further, enough information about Mohammad Saaili Shibin has been released to the media to raise the prospect of a successful application of the command responsibility doctrine against Shibin. He is a recently captured Somali believed to be the highest ranking pirate ever captured, and he was the first suspected pirate to be taken into custody in Somalia on land rather than at sea.\footnote{Brock Vergakis, \textit{Suspected Somali pirate pleads not guilty in U.S.}, A.P., April 28, 2011, \textit{available at \url{http://community.seattletimes.nwsource.com/mobile/?type=story&id=2014888292&st_app=ip_news_lite&st_ver=1.2}} After a team of pirates seized a vessel at sea, Shibin reportedly researched the hostages online to determine how much of a ransom to seek. He then acted as the chief negotiator. Shibin pleaded not guilty, claiming that he instead makes a living as a teacher, social worker, and oil worker.

The descriptions of Boyah, Garaad, and Shibin indicate that they would fit the definition of a commander, and their alleged activities should make them vulnerable to liability for the crimes of others under the command responsibility doctrine. All three seemed to have at least planned, instigated, or ordered crimes. Further, they appear to have had effective control over subordinates who were committing crimes, they knew that the subordinates were committing crimes, and they failed to take reasonable measures to prevent the crimes. Given the information provided by the Department of Treasury on Boyah and Garaad, and the amount of information released to the media regarding Shibin, the elements of command responsibility are easily met for these three “pirate commanders.” However, gathering adequate evidence to establish
narratives for other pirates to the same level of detail as Boyah, Garaad, and Shibin’s stories is usually very difficult.

Despite challenges in applying command responsibility to pirate prosecutions, the doctrine must remain a tool available to international prosecutors. Given the potential application of command responsibility liability to such criminal leaders as Boyah, Garaad, and Shibin, the argument should be available to prosecutors in a theoretical piracy court. Prosecutors should have a variety of available tools to cope with the varied tactics and circumstances of pirate gangs, and the command responsibility doctrine should be among them. Further, potential use of the doctrine serves the interests of transitional justice, as it provides deterrence for future violations and appropriately focuses on senior leadership.76

The doctrine will not always be appropriate in every piracy case – that will depend on the facts and circumstances of each scenario, which could vary significantly given the relative decentralized nature of pirate operations – but a command responsibility line of reasoning should be available in those situations where it could bring justice. Although command responsibility will not be the exclusive tool for finding liability, the doctrine is sometimes applicable and should be made explicitly available to prosecutors.

V. Conclusion

To establish command responsibility for the crime of a subordinate, the superior must generally have had effective control over the subordinate, failed to prevent the criminal acts of the subordinate, and knowledge (or reason to know) that a crime was about to occur. So long as an international piracy tribunal can establish these elements, civilian pirate leaders can be held liable under this theory.

76 See Danner & Martinez, supra note 15, at 151.
To avoid potential disagreements about applicable legal standards and avoid accusations of court-made law, a pirate tribunal statute should include command responsibility provisions that emulate the ICTY and ICTR statutes. Considering that the ICTY and ICTR statutes included command responsibility provisions that did not distinguish between military and civilian commanders, and that a piracy court will likely struggle to identify many of the defendants as part of a military hierarchy rather than civilian leadership, it is advisable that a future statute attempting to organize and operate an international tribunal adopt a command responsibility provision similar to the ICTY and ICTR standard.

While prosecuting pirates under a command responsibility argument is challenging, the doctrine should nonetheless be available as one of many tools to prosecute violators of international law and deter future crimes. Given the unique political situation of Somalia’s failed state, the decentralized and informal nature of pirate operations, and the fact that land-based chiefs are often the equivalent of pirate commanders, prosecuting pirates under a command responsibility theory will be more difficult than in previous international tribunals. The doctrine will not apply in all cases, and should not be habitually engaged because of its mixed success rate in previous international tribunals.

Nonetheless, it is sometimes possible to properly identify the planners and organizers of pirate activities. Accordingly, command responsibility should be an available tool to prosecutors in an international piracy tribunal. As pirate command structures and operations are inconsistent and fluid, prudent use of the doctrine will depend on the facts and circumstances of each case.

Prepared by Ben Golden, May 22, 2011