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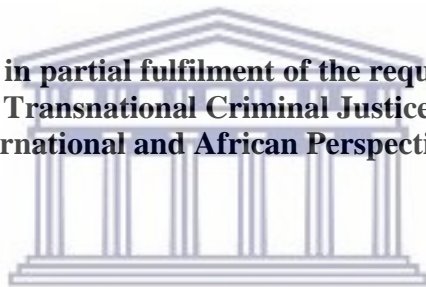
**FACULTY OF LAW**



**UNIVERSITY *of the*  
WESTERN CAPE**

**Recruitment and Use of Juvenile Pirates as Crimes against Humanity**

**Research Paper submitted in partial fulfilment of the requirements for the degree of  
Masters of Laws (LL.M) in Transnational Criminal Justice and Crime Prevention-An  
International and African Perspectives**



by

**Sarah Mutseo Ngachi**  
**Student Number: 3875451**

**Supervisor: Professor Werle**

**December 2018**

**Declaration**

I **Sarah Mutseo Ngachi**, declare that **Recruitment and use of juvenile pirates as crimes against humanity** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

**Student: Sarah Mutseo Ngachi**

Signature: ..... Date: .....

**Supervisor: Professor Gerhard Werle**

Signature: ..... Date: .....



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## Dedication

To my beloved parents, Vincent Ngachi and Rhoda Nduku Mdachi, thank you for your love and support.



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## Acknowledgements

I would like to thank God for the gift of life and the ability to write this research paper. His Grace has been sufficient for me.

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**KEY WORDS**

Child pirates

Child soldiers

Crimes against humanity

Enslavement

International Criminal Court

Other inhumane acts

Piracy

Recruitment of child pirates

Rome Statute

Use of child pirates



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## LIST OF ABBREVIATIONS

AC	Appeals Chamber
ACRWC	African Charter on the Rights and Welfare of the Child
CAH	Crimes against humanity
Eds	Edition
ICC	International Criminal Court
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
ICTY	International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
ICJ	International Court of Justice
ILC	International Law Commission
MACR	Minimum age of criminal responsibility
P/PP.	Pages/ Page
Para/Paras	Paragraph
PCIJ	Permanent Court of International Justice
PTC	Pre-Trial Chamber
Rome Statute	Rome Statute of the International Criminal Court



SCSL	Special Court of Sierra Leone
SUA Convention	Convention for the Suppression of Unlawful acts of Violence against the Safety of Maritime Navigation
TC	Trial Chamber
TFG	Transitional Government of Somalia
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNTS	United Nations treaty series



## CHAPTER ONE

### THE PIRACY MENACE IN SOMALIA AND THE USE OF JUVENILE PIRATES

#### 1. Introduction

Piracy attacks off the coast of the Horn of Africa have been on the rise in the recent years. According to a report by Ocean without Borders, although no vessels were hijacked by pirates off the coast of Somalia in 2017, 8 seafarers who were captured in 2016 were still being held in captivity. So far, 545 seafarers have been subjected to piracy attacks.<sup>1</sup> The west coast of Africa has also experienced its fair share of piracy attacks. There has been an increase in piracy attacks off the coast of West Africa, two thirds of these attacks occurred off the coast of Nigeria.<sup>2</sup> The law governing maritime piracy is founded in the United Nations Convention on the law of the sea (UNCLOS).<sup>3</sup> Article 101 of the Convention defines 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:

- 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;

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<sup>1</sup> Ocean without borders The state of maritime piracy assessing the economic and human cost (2016) Executive Summary <https://oceansbeyondpiracy.org/reports/sop/summary> (accessed 19 March 2018).

<sup>2</sup> Messaoudi S, Child pirates: a key issue for respecting child's rights and halting piracy (23 October 2012). <https://piracy-law.com/2012/10/23/child-pirates-a-key-issue-for-respecting-childs-rights-and-halting-piracy/> (accessed 19 March 2018).

<sup>3</sup> United Nations convention on the law of the sea (10 December 1982) 1833 UNTS 397.

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

In addition to the UNCLOS, the Convention for the Suppression of Unlawful acts of Violence against the Safety of Maritime Navigation (herein after referred to as SUA Convention) also criminalises acts related to maritime piracy but which hinder the safe navigation of ships.<sup>4</sup> The determining factor for crimes under the SUA Convention is whether the offence is a threat to the safe navigation or is likely to endanger the safe navigation of ships.<sup>5</sup> The SUA Convention, however, differs from the UNCLOS in several aspects. First, the Convention does not require that the offence be committed for private ends. Second, the two ships requirement under Article 101 (a) of the UNCLOS is not applicable in the SUA Convention. The offences created in Article 3 of the SUA Convention imply that they may be committed by a perpetrator who is in the same ship with the victim. The SUA Convention does not provide for application of the principle of universal jurisdiction, a State can only exercise jurisdiction over the crimes if it is a party to it.<sup>6</sup> Both the SUA Convention<sup>7</sup> and the UNCLOS<sup>8</sup> provide that the offence must be committed outside a State's territorial waters. Article 4 of the SUA Convention however further limits the application of the Convention. The Convention does not apply to instances where the ship was not scheduled to navigate out of the territorial waters of the State. This limitation is not applicable under the UNCLOS. This paper relies on the crime of piracy as defined under Article 101 of the UNCLOS.

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<sup>4</sup> *Convention for the suppression of unlawful acts of violence against the safety of maritime navigation (SUA convention)* (10 March 1988) No.29004.

<sup>5</sup>Boister N *An Introduction to Transitional Criminal Law* (2012) pp 32.

<sup>6</sup>Hodgkinson S 'The governing International law on maritime piracy' in Scharf M, Newton M and Sterio M *Prosecuting maritime piracy: domestic solutions to international crimes* (2015) pp 27.

<sup>7</sup> Article 4 of the SUA Convention.

<sup>8</sup> Article 101 of the UNCLOS defines piracy as illegal acts of violence committed by the crew or passengers of a private ship against the crew or passengers of another ship in the high seas. Article 1 of the Convention on the High Seas (1958) UNTS vol.450, p.11 p.82 defines high seas as all parts of the land that is not part of the territorial sea or internal waters of a State.

The piracy situation in Somalia has been a subject of lengthy debates both in the UN General Assembly (UNGA) and the UN Security Council (the Security Council). In Resolution 1950, the Security Council remarked that piracy activities off the coast of Somalia hindered delivery of humanitarian aid to Somalia. The Security Council also noted that piracy endangered the lives of seafarers and interfered with international maritime and economic routes. Despite these resolutions, piracy off the coast of Somalia has evolved into a criminal syndicate involving the use of children as foot soldiers, the use of pirate negotiators and gang leaders<sup>9</sup> and use of sophisticated weaponry.

According to statistics from international navies, there are approximately 50 main pirate leaders, 300 leaders of pirate attack groups and 2,500 pirate foot soldiers.<sup>10</sup> Whereas piratical activities are often carried out by adults, there is an emerging trend of using juvenile pirates. This is evident from the number of children being tried for participating in piratical activities in countries such as Seychelles and Kenya.<sup>11</sup> The use of children in piracy activities was condemned by the Security Council in Resolution 1950.<sup>12</sup> In its recent Resolution in 2017,<sup>13</sup> the Security Council also urged States to investigate and prosecute those who plan, organise or illicitly finance or profit from piracy attacks off the coast of

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<sup>9</sup>The case of *United States v. Ali* (2012) U.S. Dist. LEXIS 103112 (D.D.C. 2012) is a classic example of an attempt to prosecute piracy negotiators. The issue for determination was whether the accused, who had merely acted as an interpreter for ransom negotiations could be charged as an accessory to the piracy attack. The court strictly defined the crime of piracy and noted that he could only be charged if the negotiations occurred in the high seas and not in the territorial waters of Somalia.

<sup>10</sup>Maan A Recruitment and use of Children as an act of Piracy; Legal memorandum (November 2012) Public International Law and Policy Group pp 2.

<sup>11</sup>Gasagwa D, 'Does the International Criminal Court have the jurisdiction over the recruitment and use of Child pirates and the interference with the delivery of humanitarian aid by Somali pirates?' (2013) 19 *ILSA Journal of International and Comparative Law* 277 279. In his article, Gasagwa notes that several juvenile pirates have been tried in Seychelles for their involvement in piracy. This is evident from the decision of the Supreme Court of Seychelles in *Republic v Liban Mohammed Dahir and 12 others* criminal side number 7 of 2012, 43. The 13 accused persons were charged with the offence of piracy contrary to section 65 (4) (a) of the Penal code of Seychelles. The Court noted that 5 of the accused persons claimed to be minors but only acquitted one on the grounds that he had proved that he was 11 years only and incapable of being criminally liable for piracy as the age of criminal liability was 12 years. See para. 6 of the judgment.

<sup>12</sup>United Nations Security Council, Resolution 1950 (2010) para 3.

<sup>13</sup>United Nations Security Council, Resolution 2383 (2017) S/RES/2383 para 7.

Somalia. The recruitment and use of juvenile pirates has been termed as a means of aiding piracy attacks. No State has however prosecuted recruiters of juvenile pirates. International navies manning the coast of Somalia have employed the capture-and-release method while dealing with juvenile pirates. Some countries such as Germany have however exercised criminal jurisdiction over juvenile pirates.

This selective mode of prosecution allows the masterminds behind the crime to avoid criminal liability as they are often not at the scene of the crime.<sup>14</sup> States are not barred from prosecuting financiers and facilitators of piracy. Such prosecutions, however, give rise to jurisdictional challenges in apply the provisions of the UNLCOS especially when the masterminds behind the piracy attacks are within the territory of Somalia. Continued prosecution of low level skiff pirates allows the vicious cycle of piracy to continue.

The use of juveniles in piratical activities is contrary to the International Labour Convention on the Worst form of Child Labour (ILO Convention)<sup>15</sup> and the Convention of the Rights of the Child. Both conventions prohibit the use of children in illegal activities. Article 3 of the ILO Convention defines worst form of child labour to include 'the use, procuring or offering of a child for illicit activities'. Worst form of child labour extends to 'work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children'.<sup>16</sup>

This paper is premised on the hypothesis that recruitment and use of juvenile pirates should be categorised as crimes against humanity (CAH).<sup>17</sup> Although piracy as a crime entails

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<sup>14</sup> Scott K *Prosecuting pirates, lessons learned and continuing challenges* (14 May 2014) Oceans beyond Piracy working paper.

<sup>15</sup> International Labour Convention No. 182 Worst Forms of Child Labour Convention (1999).

<sup>16</sup> Article 3(d) of the ILO Convention.

<sup>17</sup> For the purpose of this paper, a child is any person under the age of 18 as defined under Article 2 of the African Charter on the rights and welfare of the child (11 July 1990), CAB/LEG/24.9/49 and Article 1 of the

individual criminal responsibility, is not recognised as a discrete crime under the Rome Statute. Consequently, the recruitment and use of juvenile pirates, unlike conscription and enlistment of child soldiers, is not regarded as a crime under international law. The recruitment and use of juvenile pirates constitutes CAH if committed within the context of a widespread or systematic attack directed against a civilian population.

### 1.1 Problem Statement

Article 7 of the Rome Statute enumerates the acts which constitute crimes against humanity when committed as part of a widespread or systematic attack against a civilian population. The elements of CAH include: widespread or systematic attack, directed against a civilian population, pursuant to a State or organizational policy, existence nexus between the individual act and the attack and the perpetrator's knowledge of the attack.<sup>18</sup> The rationale of CAH is to criminalize conduct that violates fundamental rights of a civilian population.

One of the challenges in prosecuting recruitment and use of juvenile pirates as a CAH is the need to establish an attack which involves multiple commission of acts of violence enumerated in Article 7.<sup>19</sup> A widespread attack connotes large scale action on violation of rights directed against multiple victims it also refers to the number of victims and may involve a series of inhumane acts or a single effect of an inhumane act.<sup>20</sup> Systematic means a planned and organized attack carried out in series and is based on an ideology to persecute a civilian population.<sup>21</sup> Half of the population in Somalia comprises of youth

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Convention on the Rights of a Child (20 November 1989) UNTS vol. 1577 3.

<sup>18</sup> *Situation in the Republic of Cote D' Ivoire* ICC-PTC 02/11(3rd October 2011) 29.

<sup>19</sup> Werle G and Jessberger F. *Principles of international criminal law*(2014) 338. In the ICTR Trial Chamber noted that an attack might be violent or non-violent in nature. See *Prosecutor v Jean-Paul Akayesu* ICTR-96-4-T (1998) at para 581.

<sup>20</sup> *Situation in the Republic of Kenya*, ICC-01/09 95 (2010).

<sup>21</sup> Kittichaisaree K (2001).

under the age of 18, majority of the pirates captured are between the ages of 15-17 years whereas those who coordinate piracy activities are not usually at sea.<sup>22</sup>

In 2010, four child pirates were convicted in Seychelles<sup>23</sup> whereas in 2011, 61 pirates were arrested by the Indian navy, 25 of them were children under the age of 15.<sup>24</sup> Although only a handful of child pirates have been tried in national courts, it does not negate the fact that the mass recruitment of child pirates may still constitute a CAH.

There are no clear guidelines to determine the MACR for child pirates. This is because most juvenile pirates are tried in national courts that have different laws on MACR. In Kenya, the MACR is 12 years.<sup>25</sup> The Rome Statute only provides for the MACR for conscription and enlistment of child soldiers. The essence of a set MACR is to determine whether at the time of recruitment the victims constituted 'juveniles protected under law' or whether they could be held individually liable for their actions. Further, recruitment and use of juvenile pirates must fall within the enumerated CAH, it may be prosecuted as enslavement or other inhumane acts. In most circumstances, the juvenile pirates become a property of those who organise piratical activities and are not involved in deciding the extent of their engagement.<sup>26</sup> This exercise of power ownership over a person can constitute enslavement.

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<sup>22</sup>Whitman S., Williamson H, Sloan M & Fanning L. *Children and Youth in Marine Piracy: Causes, Consequences and the Way Forward*. (2012) Dalhousie marine piracy project.

<sup>23</sup>Somali pirates sentenced to 10years in Seychelles(26 June 2010) BBC News <http://www.bbc.com/news/world-africa-10763605> (accessed on 29 March 2018).

<sup>24</sup>Pandit R., 25 of 61 pirates arrested by Navy at sea are children below 15 years, (17 March 2011) the Times of India <https://timesofindia.indiatimes.com/india/25-of-61-pirates-arrested-by-Navy-at-sea-are-children-below-15-yrs/articleshow/7723224.cms?referral=PM> (accessed on 29 March 2018). Several pirates under the age of 18 have been subjected to prosecution. In Hamburg, 16 year old Youssef M was tried for piracy despite being the age of 16, see a precedent or a farce? Court faces daunting hurdles in Hamburg pirate trial, SPIEGEL ONLINE Staff (18 January 2011) <http://www.spiegel.de/international/world/a-precedent-or-a-farce-court-faces-daunting-hurdles-in-hamburg-pirate-trial-a-740122.html> (accessed on 10 April 2018).

<sup>25</sup> Section 14 of the Penal Code of Kenya cap 63.

<sup>26</sup> This is evident in the testimonies of the juvenile accused and the report of Ocean without borders. See also *a precedent or a farce? Court faces daunting hurdles in Hamburg pirate trial*.

<sup>27</sup> The facts surrounding the gravity of piratical acts on the mental or physical health of the juveniles may fulfil the conditions for the crime of other inhuman acts.<sup>28</sup>

## 1.2 Objectives of the Study

The general objective of this paper is to establish that the recruitment of juvenile pirates can be prosecuted as a CAH under the Rome Statute.

More concretely, the study aims to:

- a. Establish that recruitment of juvenile pirates constitutes CAH as enslavement or 'other inhumane acts'.
- b. Differentiate recruitment of juvenile pirates as a CAH from recruitment of child soldiers as a war crime; and
- c. Analyse the prosecution of the crime of recruitment of juvenile pirates under the Rome Statute and its impact on the principle of legality.

## 1.3 Research Questions

This research seeks to answer the following questions;

- a. Can the recruitment of juvenile pirates be tried as a CAH under the Rome Statute?
- b. What is the similarity between recruitment of juvenile pirates and recruitment of child soldiers?
- c. Does the prosecution of recruitment of juvenile pirates under the Rome Statute violate the principle of legality?

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<sup>27</sup> De Than C. and Shorts E. *International criminal law and human rights* (2003) pp 98. See also *Prosecutor v Kunarac*(2001) IT-96-23-T& IT-96-23/1-T 539.

<sup>28</sup> See the TC reasoning on the crime of other inhumane acts in *Situation in the Democratic Republic of the Congo* ICC-01/04-01/07(2008).

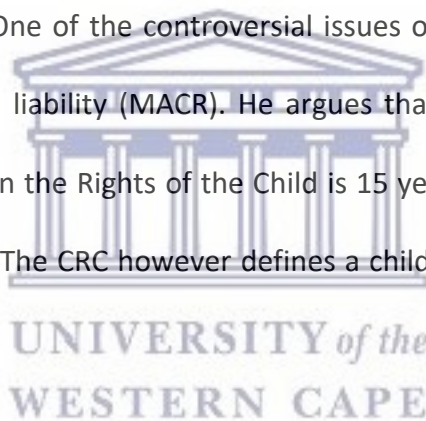


## 1.4 Research Hypothesis

This research is guided by the hypothesis that recruitment of juvenile pirates constitutes a CAH and can be tried as the crime of enslavement or other inhumane acts. Modern maritime piracy involves planning and execution by an organised group and the mass recruitment of juveniles constitutes a CAH as it fulfils the elements of an attack against a civilian population.

## 1.5 Literature Review

There is scanty literature on recruitment and use of child pirates. Gasagwa addresses this issue in a different context i.e. recruitment and use of child pirates and interference with humanitarian aid delivery.<sup>29</sup> One of the controversial issues on prosecuting child pirates is the minimum age of criminal liability (MACR). He argues that the age of criminal liability pursuant to the Convention on the Rights of the Child is 15 years and thus child pirates are persons under the age of 15. The CRC however defines a child as being a person under the age of 18 years.<sup>30</sup>



The Rome Statute provides for the MACR for war crimes of recruiting child soldiers as 15 years,<sup>31</sup> persons under the age of 18 cannot however be prosecuted.<sup>32</sup> The basis of the article by Gasagwa is not that recruitment of child pirates constitutes a CAH but rather that the acts which the child pirates engage in constitute CAH. He argues that the civilian population connotes the victims of piracy attacks and not the children who are recruited.<sup>33</sup>

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<sup>29</sup>Gasagwa D , 'Does the International Criminal Court have the jurisdiction over the recruitment and use of child pirates and the interference with the delivery of humanitarian aid by Somali pirates?'(2013) pp.288.

<sup>30</sup> Article 1 of the CRC defines a child as any person under the age of 18 years whereas Article 38 provides that States shall ensure that children under the age of 15 do not take active participation in hostilities.

<sup>31</sup> Article 8 (2) (b) (xxvi) of the Rome Statute. This is however applicable only to conscription or enlisting child soldiers.

<sup>32</sup> Article 26 of the Rome Statute.

<sup>33</sup>Gasagwa D (2013) pp.288.

His arguments differ from the main focus of this paper which is that the recruitment and use of child pirates constitute CAH because the children are the victims of a widespread and systematic attack.

Drumbl<sup>34</sup> and Fritz<sup>35</sup> address the issue of child pirates from the perspective of prosecuting juveniles for the crime of piracy. They both agree that there is not specific law that addresses the MACR for child pirates and States apply various limits according to their legislation to the detriment of the accused juveniles.<sup>36</sup> They however do not state whether recruitment and use of child pirates constitutes a CAH. The Public International Law and Policy Group (PILPG) has addressed the issue of recruitment and use of child pirates as an act of piracy but not as a CAH.<sup>37</sup>

The PILPG in its memorandum notes that recruitment and use of child pirates constitutes an act of piracy under Article 101 of the UNCLOS as it may be categorised as incitement or intentionally facilitating piracy. Using a child pirate can also be considered an act of violence for private ends under the doctrine of command responsibility. In order for one to be charged for recruiting a child pirate, the child pirate must have committed the acts of violence encapsulated under Article 101 of the UNCLOS and the incitement or intentional facilitation must have been done in the high seas. The second requirement of the crime is problematic as piracy is a crime organised on land but carried out in the high seas.

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<sup>34</sup>Drumbl M.A. *Child Pirates: Rehabilitation, Reintegration, and Accountability*(2015) (2015) 46 *Case W. Res. J. Int'l L.*

<sup>35</sup> Fritz D, *Child Pirates from Somalia: A Call for the International Community to Support the Further Development of Juvenile Justice Systems in Puntland and Somaliland*, (2012)44 *Case W. Res. J. Int'l L.* 891.

<sup>36</sup> Fritz D (2012) 896.

<sup>37</sup> Public International Law and Policy Group legal memorandum, *Recruitment and use of children as an act of piracy* (2012).

Recruitment and use of child pirates cannot be confined to the geographical scope in which it takes place.

### **1.6 Research Methodology**

This research will rely on primary and secondary sources. Primary sources will include conventions, treaties, UN resolutions and legislations of different countries. Secondary sources shall include books, journal articles, reports from international NGOs and online materials.

### **1.7 Significance of the Study**

This research is intended to add knowledge on piracy law. Currently, laws on piracy focus mainly on punishment of pirates captured at sea. There is scanty information on prosecuting organisers of piracy activities especially those who recruit child pirates. The study is aimed at highlighting the contextual elements of the crime and the avenues in which it may be tried in the ICC.

### **1.8 Chapter Outline**

Chapter One- Introduction

This chapter will provide a background study on the recruitment of juvenile pirates off the coast of Somalia and Nigeria. The chapter will also focus on the challenges of prosecuting juvenile pirates by States. It will also outline the objectives, research questions, research methodology and significance of the study.

Chapter Two- Piracy and its exclusion from the Rome Statute.

This chapter will focus on the law relating to piracy with a key focus on the United Nations Convention on the Law of the Sea. It will also focus on the exclusion of piracy from the



Rome Statute and the challenges in prosecuting piracy in national jurisdictions. The chapter will also include the prospects of prosecuting piracy under the Malabo Protocol.

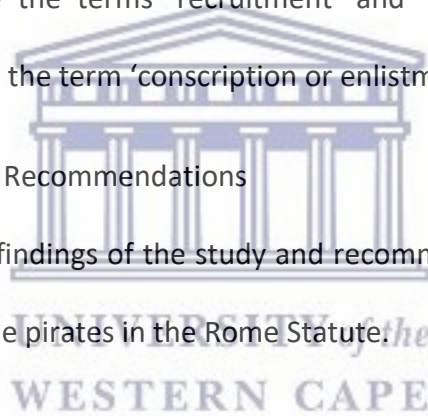
#### Chapter Three-Recruitment and use of Juvenile Pirates as Crimes against Humanity.

This chapter will focus on prosecution of recruitment and use of juvenile pirates as the crime of enslavement under Article 7 (1) (c) or the crime of other inhumane acts under Article 7 (1) (k). It will also outline the contextual and material elements of the crimes of other inhumane acts and enslavement and the nexus between recruitment and use of juvenile pirates and these crimes.

The chapter will also define the terms 'recruitment' and 'use' of juvenile pirates and differentiate these terms with the term 'conscripted or enlistment of child soldiers'.

#### Chapter Four- Conclusion and Recommendations

This chapter will provide the findings of the study and recommendations on prosecution of recruitment and use of juvenile pirates in the Rome Statute.



## CHAPTER TWO

### EXCLUSION OF PIRACY FROM THE ROME STATUTE AND APPLICATION OF THE PRINCIPLE OF UNIVERSAL JURISDICTION

#### 2. Exercise of Criminal Jurisdiction by States

International law recognises two types of jurisdiction, that is, prescriptive and enforcement jurisdiction.<sup>38</sup> Prescriptive jurisdiction is often defined as legislative jurisdiction. It is the power of a State to apply its substantive law to a particular situation and to persons who have violated the law. Enforcement jurisdiction is concerned with the executive power of a State to apply its prescriptive jurisdiction. Unlike prescriptive jurisdiction, enforcement jurisdiction is only applied within the territory of a State. A State has jurisdiction to try its national for a crime committed in another country but it cannot enforce penal sanctions if the person is not within the State's borders. The State must request for extradition of the accused person to stand trial in its domestic courts.<sup>39</sup> Enforcement jurisdiction can only be exercised once the accused is within the territorial limits of a State claiming jurisdiction.

Prescriptive jurisdiction is founded on various bases (instances in which a State can exercise jurisdiction). These include nationality, territoriality, passive personality, universality and the protective principle. Prescriptive jurisdiction can be exercised territorially or extraterritorially. Territorial jurisdiction allows States to prosecute offences which occur within the boundaries of the State<sup>40</sup> and aboard ships or aircrafts registered by the State.<sup>41</sup> Extraterritorial jurisdiction extends the powers of a State to criminalise acts committed

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<sup>38</sup>Clark SR 'Treaty crimes' in Schabas AW *The Cambridge companion to international criminal law* (2016) at pp 218.

<sup>39</sup> Shaw M *International Law* (2008) pp 646.

<sup>40</sup> Shaw M *International Law* (2008) pp 652.

<sup>41</sup>Clark SR 'Treaty crimes' in Schabas AW *The Cambridge companion to international criminal law* (2016) pp 218. According to Clark, ships and aircrafts are treated as moving parts of the State.

outside its boundaries upon satisfaction of certain requirements. Application of extraterritorial jurisdiction is not always straightforward. It gives rise to a conflict of jurisdiction between two or more States over the same crime.

In order to resolve this conflict, a State can exercise extraterritorial jurisdiction where there exists a clear nexus between the State and the crime, thus granting the State superior rights, over other States, to punish the offender.<sup>42</sup> The nexus requirement is fulfilled if the perpetrator is a national of the State, if the victim is a national or if the State invokes the protective principle (the State exercises jurisdiction over an offence committed abroad but is prejudicial to the security or interest of the State).<sup>43</sup> A State can also exercise universal jurisdiction over crimes. The universality principle grants a State criminal jurisdiction in instances where the accused or victim is not a national of the State, the conduct did not occur within the territory of the State and its effects were not felt in the State and where the interests of the State are not involved.<sup>44</sup> Criminal jurisdiction over piracy stems from the universality principle. This section will discuss on prosecution of piracy under the universal jurisdiction principle and prosecution of piracy as an international crime.

## **2.1 Prosecution of Piracy under the Principle of Universal Jurisdiction**

Maritime piracy is regarded as one of the oldest crimes in history. Piracy is an exception to the concept of freedom of the high seas propounded by Hugo Grotius in his book *Mare Liberum* (the free sea).<sup>45</sup> The concept of *mare liberum* was later adopted in Article 87 of UNCLOS which extended the freedom of navigation and trade in the high seas to coastal and

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<sup>42</sup>Than C and Shorts E *International criminal law and human rights* (2003) pp 36.

<sup>43</sup> Shaw M *International Law* (2008) 654-657.

<sup>44</sup>Nanda V, 'Exercising universal jurisdiction over piracy' in Scharf M, Newton M and Sterio M *Prosecuting maritime piracy: Domestic solutions to international crimes* (2015) pp 55.

<sup>45</sup> Grotius H, Feenstra R, and Vervliet J, *Mare liberum: 1609-2009* (2009).

land-locked States.<sup>46</sup> Freedom of the high seas gave rise to exercise of jurisdiction by flag States over ships.

The right to navigate the high seas and to exercise jurisdiction by flag States is however limited with regard to the crime of piracy.<sup>47</sup> Piracy is considered a crime of universal jurisdiction thereby allowing any State which seizes a pirate ship to exercise criminal jurisdiction.

Piracy was first prosecuted pursuant to customary international law before the codification of customs into treaties.<sup>48</sup> Blackstone, in his commentary on the laws of England, describes piracy as an offence against the universal laws of society.<sup>49</sup> He terms a pirate as a *hostis humani generis*, an enemy of mankind, who has renounced all benefits of society. The society therefore has a right to punish him in accordance to its rules. In the *Lotus case*<sup>50</sup> the PCIJ referred to the scene of the crime of piracy as a justification for universal jurisdiction. The Court noted that piracy take place in the high seas where no State has laid claim. The pirate therefore has denied himself the protection of the State as is treated as an outcast whom any State can capture and punish.

There is a universal consensus on the application of universal jurisdiction over piracy.<sup>51</sup> This consensus is based on the fact that a pirate is deemed a *hostis humani generis*, piracy is a heinous crime which threatens the existence of nations<sup>52</sup> and that it occurs in the high seas where no State has jurisdiction thus any State may prosecute pirates.<sup>53</sup> In the *Eichmann*

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<sup>46</sup>Article 87 of UNCLOS.

<sup>47</sup>Shaw M *International Law* (2008) 615.

<sup>48</sup>Cassese A, Acquaviva G, Fan M & Whiting A *International Criminal Law: Cases and commentary* (2011) pp 312.

<sup>49</sup>Blackstone W *Commentaries on the law of England in four books 2* (1753) The Online library of liberty <https://oll.libertyfund.org> 331.

<sup>50</sup>*The Lotus case* (1927) PCIJ Report series A No.10, para 236.

<sup>51</sup>*Re piracy jure gentium* (1934) AC 586.

<sup>52</sup>Dixon M *International Law* (2007) 148.

<sup>53</sup>Nanda V (2015) 57.

case<sup>54</sup>the Supreme Court noted that the rationale for prosecuting piracy is to ensure safety of commerce in the high seas. Prosecution of piracy ensures protection of the vital interests of the international community. The State which prosecutes therefore acts as an agent of the international community.<sup>55</sup>

The rationale for prosecuting piracy based on the principle of universal jurisdiction has been challenged by Kontorovich and Goodwin. Kontorovich argues that universal jurisdiction usurps State sovereignty and creates a conflict among countries.<sup>56</sup> According to him, application of universal jurisdiction to piracy should not be based on the heinousness of the crime as piracy was never regarded as a heinous crime in the early centuries.<sup>57</sup> The use of the piracy analogy, that is, arguing that other crimes of similar gravity to piracy may be prosecuted under the universal jurisdiction umbrella, is misleading. Goodwin criticizes the consensus that an individual or a ship loses its nationality by engaging in piracy.<sup>58</sup> Article 104 of the UNCLOS does not address this issue. It provides that the question on whether a pirate ship or aircraft loses or retains its nationality is best answered by the State from which such nationality was derived.<sup>59</sup> The UNCLOS only addresses the issue of nationality of the pirate ship or aircraft, it does not address the issue of nationality of the pirate. The question of nationality of the pirate seems to have been overlooked although there seems to be an agreement that a pirate loses his nationality and can be subjected to the laws of any State.

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<sup>54</sup>*Attorney General v Eichmann* Criminal appeal No. 336/61 (1962) Supreme Court of Israel.

<sup>55</sup>*Attorney General v Eichmann* (1962) para B.

<sup>56</sup>Kontorovich E 'The piracy analogy: Modern universal jurisdiction's hollow foundation' (2004) 45:1 *Harvard International Law Journal* pp 184.

<sup>57</sup>Kontorovich (2004) pp185.

<sup>58</sup>Goodwin MJ 'Universal jurisdiction and the pirate: Time for an old couple to part' (2006) 39 *Vanderbilt Journal of Transnational Law* 988.

<sup>59</sup>Article 104 of the UNCLOS.



Goodwin also questions the characterisation of piracy as a heinous crime.<sup>60</sup> He argues that early English cases were not concerned with the heinousness of piracy but with its effects on sea trade. He uses an objective approach of determining the degree of heinousness based on the punishment imposed and concludes that piracy is not a heinous crime as it does not attract the highest penalty. Goodwin, however, limits the effects of piracy to robbery at sea. Piracy has far-reaching consequences. It affects major sea routes and leads to death of seafarers. Modern day piracy entails the use of juvenile pirates and leads to money laundering and illicit trafficking of arms between Somalia and Yemen.<sup>61</sup> To assert that piracy is not a heinous crime is tantamount to turning a blind eye to the consequences of piracy to the State and human lives.

Clark defines two jurisdictional regimes over piracy; universal jurisdiction and transferred jurisdiction. He argues that Article 105 of the UNLCOS which allows any State to seize a pirate ship and decide upon penalties to be applied is a manifestation of transferred jurisdiction.<sup>62</sup> Under transferred jurisdiction, a State assigns its right to enforce its prescriptive jurisdiction to other State through a treaty or mutual agreements. In the case of piracy, the assigned State acquires the right to enforce its own prescriptive laws on the suspected pirates. Transferred jurisdiction is not a novel concept, the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances<sup>63</sup> contains provisions on this. Article 17 of the Convention allows a flag State to request the assistance of another State party to board and search a vessel in the high seas believed to be transporting

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<sup>60</sup>Goodwin MJ (2006) 996.

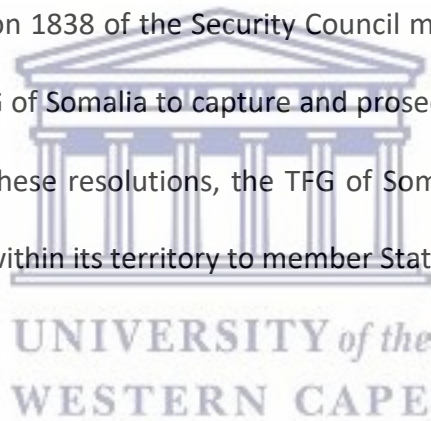
<sup>61</sup>Scott K *Prosecuting pirates: Lessons learned and continuing challenges* (2014) One earth future and oceans Beyond Pirates research report.

<sup>62</sup>Clark SR 'Treaty crimes' in Schabas AW *The Cambridge companion to international criminal law* (2016) pp 225.

<sup>63</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (20 December 1988) (1990) 1582 UNTS 95.

narcotics; and take appropriate measures against the vessel if it is involved in illicit traffic. The Convention allows States Parties to enter into agreements and treaties to suppress illicit traffic by sea.

Clark's idea on transferred jurisdiction over piracy has not been widely acknowledged. It is however evident in the Resolutions adopted by the UN Security Council on the capture of pirates within the territorial waters of Somalia. In Resolution 1816 of 2008, the Security Council accepted a request by the Transitional Federal Government of Somalia (TFG of Somalia) to send international navies in the territorial waters of Somalia to arrest suspected pirates.<sup>64</sup> Arrested pirates are to be prosecuted pursuant to the laws of the State effecting the arrest. Similarly, Resolution 1838 of the Security Council mandates States Parties to the UN to cooperate with the TFG of Somalia to capture and prosecute suspected pirates within Somalia's territory.<sup>65</sup> Under these resolutions, the TFG of Somalia has assigned its right to prosecute suspected pirates within its territory to member States of the UN.



## 2.2 Prosecution of piracy as an international crime

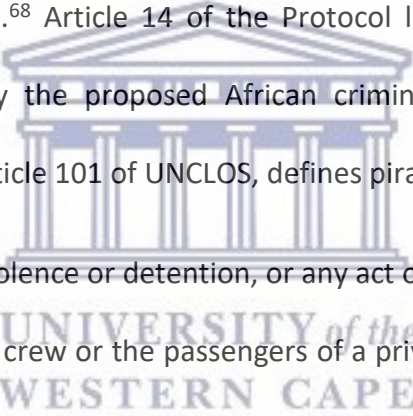
International law draws a distinction between international criminal law *stricto sensu* and transnational criminal law. Similarly, there is a distinction between crimes under international law and international crimes. Crimes under international law directly affect fundamental rights protected by the international community and give rise to individual

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<sup>64</sup>UN Security Council Resolution 1816 (2008) (2 June 2008) S/RES/1816(2008) at para 7.

<sup>65</sup>UN Security Council Resolution 1838 (2008) (7 October 2008) S/RES/1838 at para 4.

criminal responsibility.<sup>66</sup> International crimes, often referred to as treaty-based crimes, are based on suppression conventions which provide for indirect individual criminal responsibility. Prosecution of piracy falls within the ambit of transnational criminal law whereas international criminal law entails the core crimes prohibited in the Rome Statute.<sup>67</sup> UNCLOS classifies piracy as a transnational crime and it operates as a suppression convention. Article 101 of UNCLOS therefore does not give rise to individual criminal responsibility for piracy. Whereas a suspected pirate is deemed to have violated Article 101, the obligation to give effect to Article 101 and prosecute a suspected pirate rests upon States Parties. The proposed Malabo Protocol on the other hand, criminalises piracy as a crime under international law.<sup>68</sup> Article 14 of the Protocol lists piracy as an international crime which is punishable by the proposed African criminal court. Article 28F of the Protocol, which is similar to Article 101 of UNCLOS, defines piracy as:

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- a. any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
    - i. on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

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<sup>66</sup>Werle G and Jessberger F (2014) pp 45.

<sup>67</sup>Clark SR (2016) pp 214.

<sup>68</sup> Protocol on the amendment to the protocol of the statute of the African Court of Justice and Human Rights (Malabo Protocol) (2014) available at

<https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>.

The Malabo Protocol is an amendment to the Protocol on the Statute of the African Court of Justice and Human Rights (Merger Protocol) adopted in 2008 which resulted in the merger of the African Court of Justice and the African Court on Human and People's Rights. Article 14 of the Malabo Protocol amends Article 28 of the Merger Protocol by conferring criminal jurisdiction upon the African Court of Justice and Human Rights (African criminal court).

- 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 Malabo protocol has been criticised for criminalising piracy as a crime under international law and basing such criminalisation on the provisions of the UNCLOS. According to Jeßberger, piracy is a transnational crime and a crime of universal jurisdiction.<sup>69</sup> He argues that criminal responsibility for crimes under international law arise directly under international law whereas criminal responsibility for transnational crimes arises from treaty law.<sup>70</sup> Transnational criminal law therefore involves indirect criminalisation of conduct proscribed under international law, through domestic legislation. Regional or international treaties merely place an obligation on States to prosecute certain conduct in their domestic courts.<sup>71</sup> Transnational crimes are therefore regarded as treaty-based crimes.<sup>72</sup> He however cautions against equating transnational crimes to trans-border crimes.<sup>73</sup> According to him, the term transnational refers to the type of regulation and the trigger for regulating. It does not refer to the nature of the conduct. Certain conducts such as human trafficking can be regarded as transnational but not trans-boundary.

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<sup>69</sup>Jeßberger F 'Piracy (Article 28F), terrorism (Article 28G) and Mercenarism (Article 28H)' in Werle G and Vormbaum M *The African criminal court: A commentary on the Malabo protocol* (2017) 10 International Criminal Justice series.

<sup>70</sup>Jeßberger F (2017) pp 75.

<sup>71</sup>Jeßberger F (2017) pp 75.

<sup>72</sup>Mminde-Silungwe F 'Trafficking in persons (Article 28J) and trafficking in drugs (Article 28K)' in Werle G and Vormbaum M (eds) (2017).

<sup>73</sup>Jeßberger F (2017) pp 75 note 7.

Werle and Jeßberger draw a distinction between crimes under international law and transnational crimes based on their mode of criminalisation and the rationale of prosecution. According to them, treaties which proscribe certain conduct as transnational crimes merely obligate States to criminalize these conducts under their domestic laws.<sup>74</sup> Crimes under international law affect the interests of the international community and warrant prosecution through the international criminal court.<sup>75</sup> These crimes include genocide, crimes against humanity, war crimes and the crime of aggression.<sup>76</sup> Although States may enact domestic legislation to criminalise acts such as genocide<sup>77</sup> and war crimes pursuant to international treaties, this does not lower the status of these crimes to transnational crimes.<sup>78</sup>

Transnational crimes are crimes of international concern but are neither crimes under international law nor domestic crimes.<sup>79</sup> Transnational criminal law creates a horizontal treaty obligation between States parties and a vertical obligation to apply criminal law between a State party and an individual.<sup>80</sup> The treaty from which the transnational criminal obligation arises, is not self-executing and is dependent on a State's domestic regulations. Piracy is therefore viewed as a transnational crime. UNCLOS creates an obligation on States parties to criminalise piracy but prosecution of piracy is based on a State's domestic legislation. Despite these debates, UNCLOS allows States to exercise universal jurisdiction in prosecuting piracy.<sup>81</sup> Article 105 of UNCLOS also implies that such jurisdiction cannot be

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<sup>74</sup>Werle G and Jessberger F (2014) pp 46.

<sup>75</sup>Werle G and Jessberger F (2014) pp 45.

<sup>76</sup>The crime of aggression was included in the Rome Statute pursuant to Resolution RC/Res. 6 (2010).

<sup>77</sup>Convention on the Prevention and Punishment of Genocide (Genocide Convention) (1948) UNTS No. 1021.

<sup>78</sup>Werle G and Jessberger F (2014) pp 45.

<sup>79</sup>Boister N (2012) 13.

<sup>80</sup>Boister N (2012) 13.

<sup>81</sup>Article 105 of the UNCLOS.

exercised in absentia, the State must have the pirate in custody. International law does not provide for exercise of universal jurisdiction in absentia.<sup>82</sup>

### **2.3 Application of the Principle of Universal Jurisdiction over the Crime of Recruitment and Use of Juvenile Pirates**

Recruitment and use of children as pirates entails two separate conducts. The first conduct is the act of 'recruiting' the juveniles whereas the second conduct entails the 'use' of the juveniles in piratical activities. Whereas the recruitment of juvenile pirates may be done on land or within the territorial waters of Somalia, the second conduct, that is, the use of juveniles for piratical activities, is often carried out on the high seas. The principle of universal jurisdiction is applicable to the use of juvenile pirates in the high seas. Recruitment of juvenile pirates however may be difficult to categorise as piracy due to the geographical limitation of the crime of piracy.

The use of juvenile pirates constitutes an act of piracy under Article 101 (a). In this case, the juvenile pirates are used to carry out an illegal act of violence in the high seas against another ship for private ends. Pirate leaders who use juvenile pirates are criminally liable as per modes of liability provides under international law.

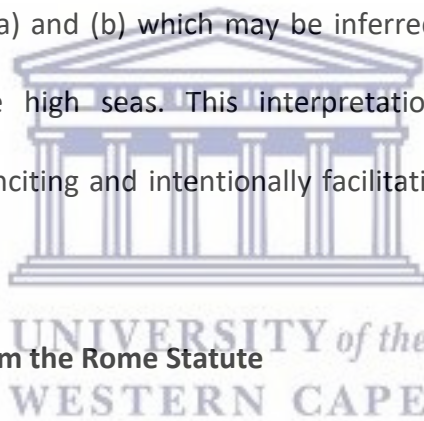
The recruitment and use of juvenile pirates can also be categorised as 'incitement or intentionally facilitating an act of piracy' under Article 101(c) of the UNCLOS. Article 101(c) and the Travaux preparatoires of the UNCLOS do not contain a definition of these terms and as such, recourse may be heard to case law and general principles on these terms. Under common law, incitement is defined as encouraging or persuading another to commit an

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<sup>82</sup>*Arrest warrant of 11 April 2000 (Democratic Republic of Congo v Belgium)* (arrest warrant case) (2002) Separate opinion of Judge Gulliaume I.C.J Reports p.3, para 9.

offence with the knowledge that the crime may be committed.<sup>83</sup> Intentionally facilitating an act of piracy is defined as providing means and opportunity to commit a crime. The *mens rea* of the crime is fulfilled if the perpetrator knew that his actions facilitated the commission of a crime.<sup>84</sup>

Article 101 (c) alludes to the mental element, that is, the intention of the perpetrator. The *actus reus* requirement is fulfilled if the actions of the perpetrator facilitated the commission of a crime. Article 101 (c) does not contain a clause on its geographical scope. It can be argued that inciting or intentionally facilitating acts of piracy constitutes the crime of piracy when committed both on land and on the high seas. Article 101 (c), however, makes reference to subparagraphs (a) and (b) which may be inferred as limiting acts of piracy to the use of violence in the high seas. This interpretation is contrary to the plain understanding of the terms inciting and intentionally facilitating which may be carried out on land or on the high seas.



#### **2.4 Exclusion of Piracy from the Rome Statute**

The debate on jurisdiction of an international criminal tribunal over crimes began after the adoption of the Genocide Convention. The UN General Assembly adopted a resolution inviting the International Law Commission (ILC) to 'study the possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions'.<sup>85</sup>

The General Assembly proposed for the creation of a criminal chamber of the International Court of Justice (ICJ). The ILC recommended establishing an international judicial organ but

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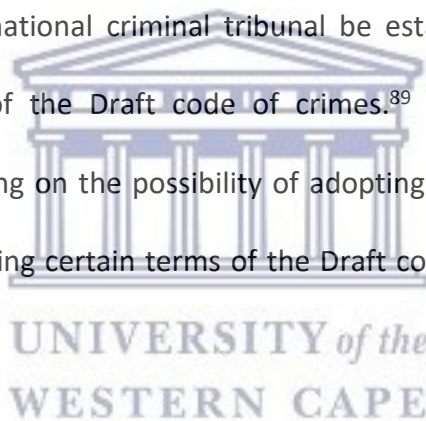
<sup>83</sup>MaanA (2012) pp 13.

<sup>84</sup>MaanA (2012) pp 14.

<sup>85</sup>UN General Assembly Resolution 216 B (III) *Study by the International Law Commission of the question of an international criminal jurisdiction*.

not as a criminal chamber of the ICJ.<sup>86</sup> The idea of establishing an international criminal tribunal vested with criminal jurisdiction was discussed in different forums by the General Assembly<sup>87</sup> and the Working group responsible for drafting the Apartheid Convention.<sup>88</sup> The Working group on the Apartheid Convention recommended creation of an international penal tribunal for the punishment of the crime of apartheid.

These discussions did not bear any fruits as the international community could not agree on the issue of jurisdiction of the proposed penal tribunal. In 1981, the General Assembly revived the debate on the Draft code of crimes against the peace and security of mankind. The ILC, which was vested with the mandate to review the Draft code of crimes recommended that an international criminal tribunal be established to exercise criminal jurisdiction over violations of the Draft code of crimes.<sup>89</sup> The ILC, through its special rapporteur, began investigating on the possibility of adopting a statute of an international criminal court and incorporating certain terms of the Draft code of crimes in the proposed statute.<sup>90</sup>



Two reports of the ILC Working group on the statute of an international criminal court are of interest with regard to piracy, that is, the 1993 and 1994 reports. Article 22 of the 1993 report of the Working group on the statute of an international criminal court outlined crimes within the jurisdiction of the proposed court.<sup>91</sup> This list did not contain a

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<sup>86</sup>Schabas AW *The International Criminal Court: A commentary on the Rome Statute* (2010) pp 7.

<sup>87</sup>Schabas AW (2010) pp.8.

<sup>88</sup>International Convention for the suppression and punishment of the crime of Apartheid (1976) 1015 UNTS 243.

<sup>89</sup>Schabas AW (2010) pp.9.

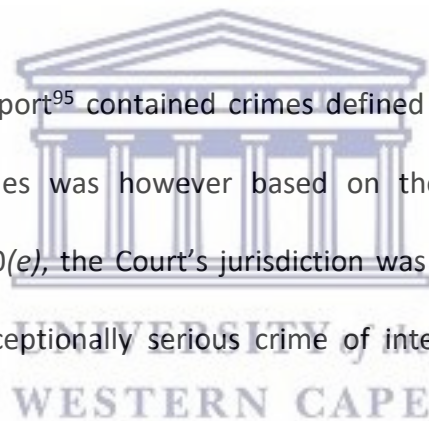
<sup>90</sup>This change was fuelled by a proposal by Trinidad and Tobago over the possibility of establishing an international criminal court with criminal jurisdiction over individuals and entities involved in illicit trafficking of narcotic drugs. See Schabas AW (2010) pp.11-14.

<sup>91</sup> Report of the International Law Commission on the work of its forty-fifth session (3 May -23 July 1993) Official Records of the General Assembly, Forty-eighth session, Supplement No. 10 A/48/10 (ILC Report 1993). Under Article 22, the following crimes were listed within the jurisdiction of the court;



commentary on piracy. The Working group drew a distinction between treaties which define crimes as international crimes and treaties which provided for suppression of conduct which constituted crimes under national laws.<sup>92</sup> Article 22 was limited to treaties which define crimes as international crimes.<sup>93</sup> The Working group reasoned that such crimes were elaborately defined in the treaties in such a way that the international criminal court could apply the treaty in prosecution. The treaties also provided for an establishment of an international criminal tribunal or an option of States to extradite or prosecute offenders within their national courts.<sup>94</sup> Piracy was not considered as an international crime. The UNCLOS was viewed as a suppression treaty obligating States parties to criminalise piracy under their national laws.

Article 20 of the 1994 ILC report<sup>95</sup> contained crimes defined by a list of treaties in force. Jurisdiction over these crimes was however based on the consent of States (ceded jurisdiction). Under Article 20(e), the Court's jurisdiction was extended to treaty crimes if the conduct constituted 'exceptionally serious crime of international concern'.<sup>96</sup> Crimes



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- i. Genocide and related crimes defined under Article II and III of the Convention on the prevention and punishment of the crime of genocide.
  - ii. Grave breaches of the Geneva conventions.
  - iii. unlawful seizure of aircraft
  - iv. Crimes under Article 1 of the Convention for the suppression of unlawful acts against the safety of civil aviation.
  - v. Apartheid.
  - vi. Crimes under Article 2 of the Convention on the prevention and punishment of crimes against internationally protected persons.
  - vii. Hostage taking and related crimes as defined under Article 1 of the Convention against taking of hostages
  - viii. Crimes under Article 3 of the SUA Convention.

<sup>92</sup> ILC Report 1993 pp.107.

<sup>93</sup> Article 5 of the Convention on the suppression and punishment of the crime of apartheid, Article 4 of the Convention for the suppression of unlawful seizure of aircraft (1970) UNTS No 12325 and Article 5 of the Convention for the suppression of unlawful acts against the safety of civil aviation (1971) UNTS No 14118.

<sup>94</sup> ILC Report 1993 pp.107.

<sup>95</sup> Report of the International Law Commission on the work of its forty-sixth session (2 May -22 July 1994) Official Records of the General Assembly, Forty-ninth session, Supplement No.10 A/49/10.

<sup>96</sup> ILC *Draft code of crimes against the peace and security of mankind* (1994) pp.37. Article 20 (e) contains a list of crimes such as grave breaches of the four Geneva Conventions and Additional protocol one to the Geneva

arising from treaties which merely prohibited conduct as between States were not included. Piracy under the Convention on the High Seas and the UNCLOS was not included as a treaty crime under Article 20 (e). The ILC noted that;

Article 14 of the Convention on the High Seas requires cooperation 'to the fullest possible extent in the repression of piracy', defined in Article 15 as consisting of certain 'acts'. Article 19 gives jurisdiction over piracy to any State which seizes a pirate vessel on the high seas or outside the jurisdiction of any State. Articles 100, 101, 105 of the United Nations Convention on the Law of the Sea are identical in substance. These provisions confer jurisdiction only on the seizing State, and they cover a very wide range of acts. On balance the Commission decided not to include piracy as a crime under general international law in Article 20.

Boister attempts to explain the rationale behind the ILC's decision to exclude some treaty crimes from the jurisdiction of the proposed ICC.<sup>97</sup> He argues that treaty crimes arise from contractual agreements among States and could not be linked to the ICC which is also based on a treaty among States. Whereas core crimes such a genocide or crimes against humanity give rise to universal jurisdiction; treaty crimes create legal obligations as between States parties to the treaty. They are considered as international crimes only among the States Parties.<sup>98</sup> The principle of legality under Article 39 (b) of the 1994 ILC draft Statute created another condition to the jurisdiction of treaty crimes. It provided that an accused person is guilty with respect to crimes under Article 20 (e) if the treaty in question was applicable to

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Conventions, crimes against the safety of civil aviation and maritime navigation, apartheid, crimes involving illicit trafficking in narcotic and psychotropic drugs, torture and crimes against internationally protected persons.

<sup>97</sup>Boister N 'Exclusion of treaty crimes from the jurisdiction of the proposed international criminal court: Law, pragmatism, politic' 3:1 (1998) *Journal of conflict and security law* pp.30.

<sup>98</sup>Boister N (1998) pp.30.

the conduct at the time of commission. The principle of legality was therefore linked to ratification of treaties by States. In this case, the jurisdiction of the proposed ICC could not be applied to treaty crimes which were not listed under Article 20 (e).

Clark disagrees with the reasoning of the ILC. He posits that genocide and war crimes (including grave breaches of the Geneva Conventions) are also treaty crimes but were nevertheless considered as international crimes.<sup>99</sup> In order to include treaty crimes as international crimes, the ILC applied a two-pronged criteria; the treaty should provide for establishment of an international tribunal or obligate the State having the accused to prosecute or extradite him. Article 6 of the Genocide Convention obligates States Parties to prosecute persons charged of genocide within a State's domestic court or in an international penal tribunal. Similarly, Article 49 of the first Geneva Convention<sup>100</sup> provides for prosecution or extradition of any person accused of war crimes and grave breaches of the Geneva Conventions. These conventions satisfy the requirements set out by the ILC.

Taking into consideration the views of the ILC on the exclusion of treaty crimes, this paper seeks to adopt a different view of prosecution of recruitment and use of juvenile pirates. First, Article 105 of the UNCLOS, which was relied upon to exclude piracy from the proposed ICC, allows any State Party to arrest suspected pirates in the high seas. It further grants criminal jurisdiction to the seizing State subject to the rights of third States. In practice, criminal jurisdiction over piracy is no longer limited to the seizing State. Countries such as

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<sup>99</sup>Clark SR 'Treaty crimes' in Schabas AW *The Cambridge companion to international criminal law* (2016) pp. 215.

<sup>100</sup>Article 49 of the Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field (12 August 1949). *See also*, Article 50 of the Second Geneva Convention for the amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea, Article 129 of the Third Geneva Convention relative to the treatment of prisoners of war and Article 146 of the Fourth Geneva Convention relative to the protection of civilian persons in time of war.

Kenya and Seychelles which have not been involved in capturing pirates have entered into agreements to prosecute suspected pirates.

Second, the main argument in this paper is not the inclusion of piracy within the jurisdiction of the Rome Statute but inclusion of recruitment and use of juvenile pirates. The basis of this is to protect juvenile pirates from the effects of piracy on their mental and physical health and to put an end to the cycle of piracy. The technique of 'capture and release' which has been adopted by international navies to avoid prosecuting juveniles is not effective. As earlier noted, piracy is now regarded as a vast criminal enterprise involving various actors. It is no longer effective to prosecute low-level pirates. States have to come up with mechanisms to prosecute financiers and facilitators of piracy.

## **2.5 Conclusion**

States exercise criminal jurisdiction over piracy pursuant to the universality principle. Unlike piracy, the crime of recruitment and use of juvenile pirates has not been prosecuted by States. This may be attributed to the geographical scope of Article 101 of the UNCLOS. Recruitment and use of juvenile pirates entails conducts which occurs both in the high seas and within the territory of Somalia, whereas piracy has been traditionally defined as acts of violence committed in the high seas. Application of the universality principle over piracy is also limited to acts committed in the high seas. Nevertheless, recruitment and use of juvenile pirates amounts to an act of piracy under Article 101 (a) and (c). Although piracy does not fall within the subject matter jurisdiction of the Rome Statute, its exclusion does not bar prosecution of recruitment and use of juvenile pirates as a CAH. Recruitment and use of juvenile pirates constitutes a distinct crime which can be classified as CAH if

committed within the context of a widespread or systematic attacks against a civilian population.

## CHAPTER THREE

### RECRUITMENT AND USE OF JUVENILE PIRATES AS CRIMES AGAINST HUMANITY

#### 3. Introduction

The subject matter jurisdiction of the ICC is limited to four core crimes namely genocide, crimes against humanity, war crimes and the crime of aggression.<sup>101</sup> The main focus of this paper is the jurisdiction of the ICC over crimes against humanity under Article 7 of the Statute. The concept of CAH was first recognised in the Saint Petersburg Declaration<sup>102</sup> which provided that employing explosive projectiles under 400 grammes would be contrary to the laws of humanity.

The Hague Convention of 1899 further recognised the concept of CAH. The preamble of the Convention contained the Martens clause which expressed the desire of High Contracting Parties to be bound by laws of humanity in armed conflict.<sup>103</sup> The Martens clause was also included in the preamble of the 1907 Hague Convention.<sup>104</sup> CAH were formally

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<sup>101</sup> Article 5 of the Rome Statute.

<sup>102</sup> Declaration renouncing the use, in time of war, of explosive projectiles under 400 grammes weight (29 November/ 11 December 1868) Saint Petersburg.

<sup>103</sup> Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (29 July 1899) The Hague. The Martens clause, which formed part of the Convention read;

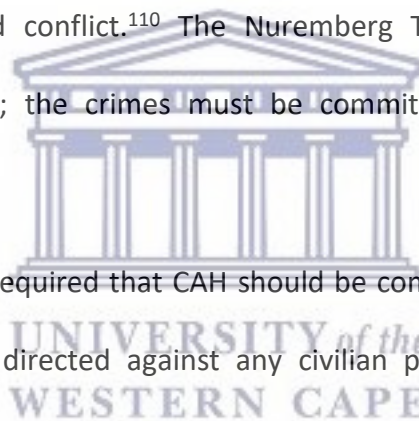
Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.

<sup>104</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (18 October 1907) The Hague.

acknowledged in the Declaration of France, Great Britain and Russia<sup>105</sup> relating to the massacre of Armenians in Turkey by the Ottoman Empire. The Declaration categorised the massacre as ‘crimes against humanity and civilization for which all members of the Turkish government will be held responsible together with its agents implicated in the massacre’.

CAH were also recognised in the Nuremberg Charter,<sup>106</sup> the Tokyo Charter<sup>107</sup> and the Statutes of the ad hoc tribunals of Yugoslavia<sup>108</sup> and Rwanda.<sup>109</sup> Earlier texts on CAH differed extensively. Under the Nuremberg Charter and the Tokyo Charter, CAH were punishable only if they were committed ‘in execution of or in connection with any crime within the jurisdiction of the tribunal’. This requirement meant that CAH must have been committed in the context of an armed conflict.<sup>110</sup> The Nuremberg Tribunal formulated two key contextual elements of CAH; the crimes must be committed on a vast scale and be organised or systematic.<sup>111</sup>

Article 5 of the ICTY Statute required that CAH should be committed in an international or internal armed conflict and directed against any civilian population. In the Tadic case



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<sup>105</sup> Declaration of France, Great Britain and Russia (24 May 1915).

<sup>106</sup> Charter of the International Military Tribunal (1945) 39 AJIL, Suppl. 257 Nuremberg. Article 6(c) of the Charter listed CAH as murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

<sup>107</sup> Charter of the International Military Tribunal for the Far East - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis (London Agreement) (8 August 1945) Available at: <http://www.refworld.org/docid/3ae6b39614.html> (accessed 2 October 2018). Article 5 (c) of the Tokyo Charter mirrored the definition of CAH in the Nuremberg Charter.

<sup>108</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), (25 May 1993) ILM 1159. Article 5 of the ICTY Statute contained a list of 9 acts which constituted CAH namely; Murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, Racial and religious grounds and other inhumane acts.

<sup>109</sup> Statute of the International Criminal Tribunal for Rwanda 33 ILM 1598 (1994). Article 3 of the ICTR Statute Contained a similar list of CAH as in the ICTY Statute.

<sup>110</sup> International military tribunal (Nuremberg) Judgment (1 October 1946). Trial of German major war criminals, proceedings of the international military tribunal sitting at Nuremberg, Germany (Nuremberg judgement).

<sup>111</sup> Nuremberg judgement pp.468.

(Decision on Interlocutory appeal on jurisdiction), the Appeals Chamber of the ICTY noted that 'the nexus between crimes against humanity and either crimes against peace or war crimes, required by the Nuremberg Charter, was peculiar to the jurisdiction of the Nuremberg Tribunal'.<sup>112</sup> Under customary international law, CAH need not be committed within an international armed conflict<sup>113</sup> or an internal armed conflict.<sup>114</sup> Article 3 of the ICTR Statute introduced another element to CAH punishable by the ICTR. Acts constituted CAH if committed 'as part of a widespread or systematic attack against any civilian population on national, political ethnic, racial or religious grounds'. In the Akayesu Appeals judgment the Appeals Chamber stated that:

it is within this context and in light of the nature of events in Rwanda (where a civilian population was actually the target of a discriminatory attack) that the Security Council decided to limit the jurisdiction of the Tribunal over crimes against humanity solely to cases where they were committed on discriminatory grounds.<sup>115</sup>

The Appeals Chamber further noted that 'the Security Council did not depart from international humanitarian law nor did it change the legal ingredients required under international humanitarian law with respect to crimes against humanity'.<sup>116</sup> The additional requirements for CAH under the ICTY and ICTR Statutes were not adopted in the Rome Statute. CAH under the Rome Statute may be committed in time of war or peace and

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<sup>112</sup>*Prosecutor v Dusko Tadic* (Decision on the defence motion for interlocutory appeal on jurisdiction) (2 October 1995) IT-94-1 ICTY Appeals Chamber.

<sup>113</sup>Tadic interlocutory appeal on jurisdiction (1995) para 140-141.

<sup>114</sup> The Defence counsel had raised an objection on the jurisdiction of the Tribunal under Article 5. The Defence argued that pursuant to the Nuremberg Charter, CAH could only be committed in connection to crimes against peace or war crimes and within the context of an international armed conflict. According to the Defence, this requirement formed part of contemporary international law. The Defence further argued that Article 5 which extended jurisdiction of the Tribunal to CAH committed in an international or internal armed conflict constituted an *expose facto* violation of the principle of *nullum crimen sine lege*.

<sup>115</sup>*Prosecutor v Jean-Paul Akayesu*, (23 November 2001) Appeals Chamber Judgement ICTR-96-4-A at para 464-465 (Akayesu 2001 AC judgment).

<sup>116</sup>*Akayesu*(2001) AC judgment para 465.

against any civilian population or people not taking part in hostilities.<sup>117</sup> Article 7(1) of the Rome Statute enumerates individual acts which constitute CAH if committed 'as part of a widespread or systematic attack directed against any civilian population with the knowledge of the attack'.<sup>118</sup>

This chapter will focus on the nexus between the recruitment and use of juvenile pirates and CAH. The act of recruiting or using children as pirates can be categorised as enslavement or other inhumane acts under Article 7 of the Rome Statute if committed as part of a widespread or systematic attack against a civilian population. Most juvenile pirates are often tricked into joining pirate gangs. Those who join voluntarily do so because they have no alternative to survive. Recruiting juveniles into piracy gangs and retaining them against their will amounts to enslavement. Juvenile pirates often work under the control and supervision of the pirate leader and have no freedom to decide which ship to attack. Their sole purpose is to collect ransoms on behalf of the pirate leaders. In order to hold pirate leaders accountable for CAH, it is immaterial whether the juveniles consented to joining the gangs.

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<sup>117</sup> Cassese A and Gaeta P (eds) *Cassese's International Criminal Law* 3ed (2013) pp.91.

<sup>118</sup> Article 7(1) lists the following acts as CAH;

- a. Murder
- b. Murder;
- c. Extermination;
- d. Enslavement;
- e. Deportation or forcible transfer of population;
- f. Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- g. Torture;
- h. Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- i. Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- j. Enforced disappearance of persons;
- k. The crime of apartheid;
- l. Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.



The use of juveniles in piracy acts violates their fundamental right to life. Piracy attacks are often violent activities involving the use of sophisticated weapons. In the Maersk Alabama hijacking, a juvenile pirate aged 16 years was shot during a cross fire between the pirates and international navies.<sup>119</sup> Such incidences are detrimental to the development of children and endanger their lives. The use of juvenile pirates can constitute the crime of enslavement or 'other inhumane acts a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health'.

This chapter will focus on the structure of CAH and the contextual elements of the crimes of enslavement and other inhuman acts and their connection to recruitment and use of juvenile pirates.

### 3.1 Structure of CAH

Article 7(1) of the Rome Statute encompasses the contextual and mental elements of CAH. The contextual element (objective element) requires that the acts must be committed as part of a widespread or systematic attack against any civilian population whereas the mental element (subjective element) requires that the perpetrator must have knowledge of the attack. Article 7 should be read in line with Article 30 which addresses the *mens rea* requirement of the crime. The Elements of Crimes guideline of the ICC lists the contextual elements common to all CAH.<sup>120</sup> These are;

- a. An attack against a civilian population took place;
- b. The attack was widespread or systematic;

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<sup>119</sup>Scot K (2014) pp 5.

<sup>120</sup> Elements of Crimes of the International Criminal Court (2000) ICC-ASP/1/3 at 108, U.N. Doc. PCNICC/2000/1/Add.2.

- c. The attack was committed pursuant to or in furtherance of a State or organisational policy to commit such an attack;
- d. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

### **3.1.1 Existence of an attack against a civilian population**

Article 7(2)(a) of the Rome Statute defines an attack directed against a civilian population as ‘means a course of conduct involving the multiple commission of acts (referred to in Article 7(1)) against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack’. The attack need not be a military attack.<sup>121</sup> In Bemba confirmation of charges decision<sup>122</sup> the Pre-trial Chamber (PTC) defined an attack as ‘a campaign or operation carried out against the civilian population’. In the Akayesu judgment, the Trial Chamber (TC) defined an attack as ‘an unlawful act of the kind enumerated in Article 3 of the Statute of the Tribunal’.<sup>123</sup> The TC further noted that an attack may be non-violent in nature. According to the ICTR, there is no requirement that a separate attack against the same civilian population within which the enumerated acts were committed should be proven. The enumerated acts may occur as part of an ongoing attack or may, independently, constitute an attack.<sup>124</sup>

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<sup>121</sup> Elements of Crime pp.5.

<sup>122</sup> *Prosecutor v Bemba*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (15 June 2009) ICC-01/05-01/08 PTC II para 75.

<sup>123</sup> *Prosecutor v Jean-Paul Akayesu* (1998) TC Judgement ICTR-96-4-T para 581.

<sup>124</sup> Dixon R ‘Article 7, Crimes against Humanity’ in Triffterer (eds) *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (1999) page 174. According to Dixon, it is possible for the acts to constitute an attack. For example, mass murder of civilians may suffice as an attack and it need not be proven that a separate attack existed in which the murders were committed.

### 3.1.2 The attack must be directed against any civilian population

There have been debates on whether pirates should be considered civilians or combatants. According to State practice, pirates are considered civilians who enjoy the right to fair trial once arrested. This means that States cannot employ military tactics such as air strikes to eliminate suspected pirates except in self-defence.<sup>125</sup> They must find alternative means to prevent piracy attacks such as negotiating with the pirates for ransom or capturing suspected pirates before the attack. The debate on whether a pirate is a civilian or a combatant is relevant in determining the extent to which international navies engage with suspected pirates. In determining whether CAH were committed by a pirate leader against a child, it is important to determine the status of the child only in relation to the perpetrator's act.

The legal framework of CAH requires that civilian population must be the subject of the attack and not incidental victims.<sup>126</sup> This does not mean that the entire population within a territory must be subjected to the attack. The population element 'implies crimes of a collective nature and excludes single or isolated acts'.<sup>127</sup> The civilian population may be of any nationality, ethnicity or any other distinguishing feature. A civilian population may be defined as any group of people linked by shared characteristics which makes it a target of an attack. This characteristic may include occupancy of a certain geographical area.<sup>128</sup> The presence of non-civilians does not negate the protection enjoyed by civilians.<sup>129</sup>

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<sup>125</sup>Kontorovich E 'A Guantanamo on the Sea': The Difficulties of Prosecuting Pirates and Terrorists (2010) Faculty Working Papers. Paper 37 pp.258.

<sup>126</sup>*Bemba* confirmation of charges decision (2009) ICC-PTC para 76.

<sup>127</sup>*Tadić* ICTY TC para 644.

<sup>128</sup>Werle G & Jessberger F at pp.334, para 882.

<sup>129</sup>*Tadić* ICTY TC para 638-639.

There are two conflicting opinions on who constitutes a civilian population.<sup>130</sup> This paper adopts a broad definition of civilian population propounded in the Blaskic trial judgment.<sup>131</sup> In order to categorise a victim as a civilian for the purposes of CAH, a court should take into account the specific situation of the victim at the time the CAH were committed and not the status of the victim (membership in an armed force or resistance movement). In this regard, CAH include acts committed against civilians and members of the resistance movement and former combatants, who were no longer taking part in hostilities at the time the crimes were committed.

### 3.1.3 The attack must be widespread or systematic

This is a disjunctive test. A widespread or systematic attack will amount to CAH if it fulfils all other requirements. This element distinguishes isolated and random attacks which may constitute crimes under national laws but do not rise to the level of CAH. A systematic attack is an organised plan in furtherance of a common policy which results in continuous commission of acts.<sup>132</sup> The systematic nature of the attack can be proved from the high degree of planning and organisation involved, resources used in the commission of the crimes and the political objectives to be achieved.<sup>133</sup>

The systematic nature of the attack speaks to the method used in the attack, that is, the presence of a policy which violates the rights of civilians. A widespread attack constitutes of

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<sup>130</sup> In *Prosecutor v Tihomir Blaskic* (29 July 2004) Appeals Chamber IT-95-14-A, the Appeals Chamber defined a civilian population pursuant to Article 50 of Additional Protocol I which defines a civilian population as persons who are not members of the armed force. The chamber rejected the idea that a civilian population should be defined based on the status of the victim at the time the crimes were committed. See para 114 of the judgment.

<sup>131</sup> *Prosecutor v Tihomir Blaskic* (3 March 2000) IT-95-14-T. See also *Akayesu* (1998) ICTY TC para 582; *Tadic* ICTY TC para 639; *Prosecutor v Jean-Pierre Bemba Gombo* (21 March 2016) ICC-01/05-01/08 Trial Chamber at para 152.

<sup>132</sup> *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (30 September 2008) Pre-Trial Chamber I ICC-01/04-01/07 para 397.

<sup>133</sup> Cryer R Friman H (eds) 'An Introduction to International Criminal Law and Procedure' 3ed (2014) at pp 235.

acts committed on a large scale and directed against a multiplicity of victims.<sup>134</sup> It may be carried over a large geographical area or an attack on a small geographical area and directed against a large number of civilians.<sup>135</sup> Only the attack and not the enumerated acts must be widespread or systematic.

The number of victims targeted in a widespread attack gives rise to the numerosity requirement of CAH.<sup>136</sup> There is no numerical figure to the number of victims who must be affected. The numerosity requirement is fulfilled if the attack is directed against a substantial number of victims and not isolated people. According to the jurisprudence of the ICTY, a crime committed against a single victim or a limited number of victims can constitute CAH if the crime was part of a widespread or systematic attack.<sup>137</sup> Similarly, a single act by a perpetrators taken within the context of a systematic attack will still constitute a CAH.<sup>138</sup>

### **3.1.4 The attack must be committed pursuant to or in furtherance of a State or organisational policy**

Under Article 7(2) (a) of the Rome Statute, the attack must be committed pursuant to or in furtherance of a State or organisational policy. According to the ICC Elements of Crimes, a policy in which the civilian population is the object of an attack, may be implemented by a State or organisational action. The policy may be implemented by an action or omission, such as, deliberately failing to take appropriate actions to suppress an attack. Existence of a

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<sup>134</sup> Article 18 of the I.L.C. Draft Code of Crimes Against the Peace and Security of Mankind, *Report of the International Law Commission on the Work of its Forty-eighth session, 6 May - 26 July 1996*, G.A.O.R., 51<sup>st</sup> Sess., Supp. No. 10, 30, U.N. Doc. A/51/10.

<sup>135</sup> *Bemba* confirmation of charges decision (2009) ICC-PTC at para 83.

<sup>136</sup> *Prosecutor v Bosco Ntaganda*, Final written submissions of the Common Legal Representative of the Victims of the Attacks following the confirmation of charges hearing PTC II (7 March 2014) ICC-01/04-02/06 at para 45.

<sup>137</sup> *Tadić* ICTY TC at para 649. See also *Prosecutor v Mrskic et al Decision on the Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence (Vukovar Hospital Rule 61 Decision)* (3 April 1996) IT-95-13-R61 ICTY TC at para 30.

<sup>138</sup> *Tadić* ICTY TC at para 649.

policy however cannot be inferred solely on the basis of an omission by the State or organisation.<sup>139</sup>

The existence of a policy is useful in establishing that the attack was widespread or systematic.<sup>140</sup> It need not be formalized or precisely stipulated, it can be deduced from the way in which the acts occur.<sup>141</sup> In the Kunarac Appeals judgment, the Appeals Chamber noted that whereas the policy requirement may aid in characterising the attack as widespread or systematic, the characterisation of the attack may be achieved by reference to other facts. The existence of a policy may be evidentiary but is not a legal element of the crime.<sup>142</sup> The ICC has, in its recent judgments, debated extensively on the policy element. One of the key issues relating to the policy element, which is relevant to the recruitment and use of juvenile pirates, is the characteristics and capacity of the organisation involved in the commission of CAH.

In the Katanga Trial judgment, the Trial Chamber defined the policy element as referring to the fact that a 'State or organisation intends to carry out an attack against a civilian population whether through action or deliberate failure to take action'.<sup>143</sup> There is no requirement for a pre-existing policy or plan although the existence of a policy may be inferred from the repeated actions occurring in the same pattern.<sup>144</sup> The policy may, in certain circumstances, develop in the course of its implementation. In such circumstances,

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<sup>139</sup> ICC Elements of Crimes at pp. 5, note 6.

<sup>140</sup> *Prosecutor v Kunarac* (12 June 2002) Appeals Chamber IT-96-23& IT-96-23/1-A at para 98.

<sup>141</sup> *Tadić* ICTY TC at para 653.

<sup>142</sup> *Kunarac* (2002) ICTY AC at para 98. This position was adopted in *Blaskić* (2000) ICTY AC at para 120 in which the Appeals Chamber noted that the existence of a plan or policy did not constitute a legal element of CAH.

<sup>143</sup> Situation in the Republic of Congo, *Prosecutor v Germain Katanga* (7 March 2014) ICC-01/04-01/07 para 1108.

<sup>144</sup> *Katanga* (2014) ICTY TC at para 1109.

the Court has to look at the overall policy and its relation to the operation against the civilian population.

The policy must be linked to the overall attack. The law does not require the existence of a nexus between the course of conduct and the State or organisation or its members. It is also not important to link the policy to the nature of the attack, that is, the widespread or systematic nature.<sup>145</sup> Article 7(2) (a) also requires that the policy must be promoted by a State or organisation. The contention however is whether the organisation must possess state-like characteristics. According to the Elements of Crimes, the organisation must 'actively promote or encourage' the attack against the civilian population. This requirement makes no reference to the capacities of the organisation. In the Katanga case, the Trial Chamber noted that the organisation must possess structures or mechanisms that are sufficiently efficient to carry out an attack against a civilian population.<sup>146</sup> The organisation need not have quasi-state characteristics. The Trial Chamber further stated that, in order to realise the purpose of Article 7, the concept of organisation should not be defined narrowly to exclude non-state entities due to an insufficient hierarchical structure.

In the Kenya decision on authorisation of investigation, the PTC noted that the common policy may also be formulated by a group of persons governing a given territory.<sup>147</sup> The Pre-trial Chamber noted that the focus should be on the group's capacity to infringe basic human rights and not its formal nature of a group and the level of its organisation.<sup>148</sup> The

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<sup>145</sup>*Katanga* (2014) ICTY TCat para 1115.

<sup>146</sup>*Katanga* (2014) ICTY TC at para 1119.

<sup>147</sup>*Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* (31 March 2009) ICC-01/09 PTC para 84. See also, *Bemba* confirmation of charges decision (2009) ICC-PTC at para 81.

<sup>148</sup>*Situation in Kenya* (2009) ICC-PTC at para 90. In his dissenting opinion, Judge Hans-Peter Kaul argued that Article 7(2) (a) presupposes the existence of an organisation with state-like characteristics.

These characteristics include; a collectivity of persons which was established for a common purpose over a prolonged period of time and is under a responsible command or has some degree of hierarchical

determination on whether a group qualifies as an organisation should be done on a case by case basis taking into consideration various factors such as whether the group is under a responsible command, whether it has the means to carry out a widespread or systematic attack, whether the group has criminal activities as its sole purpose or articulates an intention to carry out attacks against a civilian population or whether the group has control over a territory. These considerations do not however, form part of the legal elements of the crime.<sup>149</sup>

This paper adopts the views of the Trial Chamber in the Katanga judgment and the majority view of the Pre-trial Chamber in the Kenyan decision on authorisation of investigation. As earlier noted, the policy element gives rise to two requirements; first, the existence of a group capable of formulating a policy whose primary objective is to attack a civilian population. Second, the nature and characterisation of the policy. The latter requirement is straight forward, the existence of a policy can be determined from the systematic nature of the attack. The first requirement is prone to misinterpretations. The possibility that private entities and organisations may commit crimes amounting to CAH was discussed in the 1991 ILC Draft Code of Crimes against Mankind.

The determining factor however was the widespread and systematic nature of the attack against a civilian population. A narrow interpretation which requires that the organisation exhibit state-like characteristics will be contrary to the purpose of Article 7. A broad interpretation will rise to a debate on whether terrorist organisations and slavery rings can constitute organisations capable of committing CAH. Despite this, piracy crews and facilitators of piracy constitute an organisation and thus the act of recruitment and use of

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structure. The group must have the capacity to carry out a widespread or systematic attack against a civilian population. See para 51 of the dissenting opinion.

<sup>149</sup>*Situation in Kenya* (2009) ICC-PTC at para 93.



juvenile pirates amounts to a CAH. Pirate gangs can be linked to armed groups such as Al Shabaab. Juveniles who join piracy gangs are former child soldiers in the Al Shabaab. The link between Al Shabaab and piracy gangs may be due to the money earned from piracy attacks which can be used to fuel wars.<sup>150</sup> Pirate gangs which wage non-violent attacks against juveniles for economic purposes fulfil the requirement of organised groups as they have the means to conduct such attacks. Pirate gangs affiliated to Al Shabaab conduct politically motivated attacks against juveniles. Their main purpose is to gain control over a large area of Somalia.

### **3.2 The nexus between recruitment and use of juvenile pirates and CAH**

As noted in section 3.1.1 above, the enumerated acts can independently constitute an attack. The act of recruiting and using juvenile pirates constitutes an attack against a civilian population. The widespread nature of the attack can be inferred from the number of juveniles recruited to participate in piracy attacks as outlined in Chapter one. It can also be inferred from the control exercised by piracy gangs in Somalia's Puntland area.

#### **3.2.1 Recruitment of juvenile pirates as the crime of enslavement**

Article 7(2) (c) of the Rome Statute defines enslavement as 'the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.' Earlier Statutes of the ad hoc Tribunals and the Nuremberg Charter did not contain a definition of enslavement. The Nuremberg Charter categorised slave labour and enslavement as CAH but did not contain a definition of enslavement. The ad hoc Tribunals considered enslavement

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<sup>150</sup> The Roméo Dallaire Child Soldiers Initiative, Somali Country report: Children and security (31 January 2017).

as a form of slavery.<sup>151</sup> As such, the Tribunals adopted the definition under Article 1(1) of the Slavery Convention<sup>152</sup> which defines slavery as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’. The *actus reus* of the crime is the exercise of any or all of the powers attaching to the right of ownership over a person.<sup>153</sup> The definition of enslavement does not speak to the *mens rea* element, this is addressed under Article 30 which requires that the material elements of the crime should be committed with intent and knowledge.<sup>154</sup>

According to the Elements of Crimes, there are three requirements to the crime of enslavement namely;

- i. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;
- ii. The conduct was committed as part of a widespread or systematic attack directed against a civilian population;
- iii. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The first requirement is the legal definition of enslavement whereas the last two requirements are the contextual elements of CAH. According to the Elements of Crimes, the term ‘similar deprivation of liberty’ includes forced labour, reducing a person to a servile

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<sup>151</sup> See the reasoning of the *Kunarac* (2002) ICTY TC at para 518.

<sup>152</sup> Slavery Convention (25 September 1926) 212 UNTS (1995) 17.

<sup>153</sup> *Kunarac*(2002) ICTY TC at para 540.

<sup>154</sup> Article 30 of the Rome Statute.

status and trafficking in women and children. The crime of enslavement should however not be limited to these acts. The concept of slavery has evolved and encompasses contemporary forms of slavery which are based on the exercise of any or all powers attaching to the right of ownership over a person.<sup>155</sup> Limiting enslavement to the traditional act of chattel slavery will be contract to the aims of criminalising enslavement as a CAH which is to protect the right to dignity.<sup>156</sup> Under contemporary forms of enslavement, the victim may not be treated as a chattel but the exercise of power attaching to the right of ownership over the victim results in destruction of the victim's juridical personality.<sup>157</sup>

In Kunarac Trial Judgment, the Trial Chamber outlined indications of enslavement which included 'elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and, often, the accruing of some gain to the perpetrator'.<sup>158</sup> Lack of consent is not a legal element of the crime.<sup>159</sup> The consent or free will of the victim may be rendered impossible due to 'the threat or use of force or other forms of coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions'.<sup>160</sup> Recruitment of juvenile pirates into piracy gangs constitute the crime of enslavement due to the control and ownership exercised by pirate leaders over juvenile recruits.

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<sup>155</sup>Kunarac ICTY AC at para 117.

<sup>156</sup>Werle G & Jeßberger F (2014) pp 354.

<sup>157</sup>Kunarac ICTY AC at para 117.

<sup>158</sup>Kunarac(2002) ICTY TC para 542.

<sup>159</sup> According to the Appeals chamber in the Kunarac case, the consent of the victim is only relevant in determining whether the prosecutor has discharged his evidentiary burden by establishing the elements of the crime.

<sup>160</sup>Kunarac trial judgment para 542.

The act of recruitment entails the use of force, coercion and voluntary recruitment. Juvenile pirates are deprived of their free will to decide on the extent of their engagement in piracy activities. Consent of juvenile pirates is also rendered impossible due to socio-economic factors which make them vulnerable to piracy gangs. The trial of Adiwali, a juvenile pirate arrested on board MV Taipan in 2010, reveals the socio-economic challenges faced by juveniles in war-torn Somalia and their vulnerability to piracy.<sup>161</sup> These challenges, faced by two-thirds of the population in Somalia, fulfil the requirements of the crime of enslavement.

### **3.2.2 The use of juvenile pirates as the crime of other inhumane acts**

The crime of other inhuman acts is often seen as a catch-all or residual crimes for acts which fulfil the requirements of CAH but do not fall within Article 7(1) (a)-(j).<sup>162</sup> The crime was also initially included in the 1996 Draft Code of Crimes, as it was impossible to list all inhumane acts which amounted to CAH.<sup>163</sup> The notion of other inhumane acts was intended to apply to additional acts of similar gravity to those listed in the preceding paragraphs. The act must have caused actual injury to the physical or mental health of the victim or his human dignity such as mutilation and severe bodily harm.<sup>164</sup> The elements of the crime are that:<sup>165</sup>

- i. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
- ii. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute.<sup>30</sup>;

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<sup>161</sup>Lakotta B Torture? Execution? German Justice Through the Eyes of a Somali Pirate (7 April 2011) Spiegel Online <http://www.spiegel.de/international/world/torture-execution-german-justice-through-the-eyes-of-a-somali-pirate-a-755340.html> (last visited 31 October 2018)

<sup>162</sup>Werle G & Jeßberger F (2014) pp 385.

<sup>163</sup> Article 18 of the ILC Draft Code of Crimes (1996) para 17.

<sup>164</sup> Article 18 of the ILC Draft Code of Crimes (1996).

<sup>165</sup> Article 7(1) (k) Crimes against Humanity in the Elements of Crimes

- iii. The perpetrator was aware of the factual circumstances that established the character of the act;
- iv. The conduct was committed as part of a widespread or systematic attack directed against a civilian population;
- v. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.

The term 'character' as used in the Elements of Crime refers to the 'nature and gravity' of the crime. In the Blaskic Trial judgment,<sup>166</sup> the ICTY Trial chamber defined serious mental and bodily harm according to the legal and factual elements of the offence under national laws. In this regard, the Chamber held that:

- i. the victim must have suffered serious bodily or mental harm;
- ii. the suffering must be the result of an act of the accused or his subordinate;
- iii. when the offence was committed, the accused or his subordinate must have been motivated by the intent to inflict serious bodily or mental harm upon the victim.

In determining whether an offence is of similar gravity to the acts listed in Article 7(1), the Court must take into account all the factual circumstances of the case. These circumstances include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim such as the age, gender and health status and the physical, moral and mental effect of the act or omission.<sup>167</sup> According to the jurisprudence of the Special Court for Sierra Leone (SCSL), a perpetrator may be held liable for indirectly inflicting mental harm to a third party, who witnessed the inhumane

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<sup>166</sup>*Blaskic* ICTY TC at para 243.

<sup>167</sup>*Prosecutor v Issa Hassan Sesay, Moris Kallon & Augustine Gbao* (2 March 2009) Special Court for Sierra Leone, Trial Chamber I Case No. SCSL-04-15-T at para 169.

act being committed against another person.<sup>168</sup> In such circumstances, the perpetrator will be held liable if he intended to inflict mental harm to the third party or had reasonable knowledge that his action would inflict mental harm.<sup>169</sup>

The use of children in piracy attacks exposes them to mental and physical harm. Ideally, a normal piracy operation involves the use of a mother ship which is loaded with supplies to be used by the pirates and skiffs. Attacks are often launched from skiffs loaded with ammunition and rocket propelled grenades. Once they are on board a target ship, pirates engage in mock or actual executions of hostages, torture and use hostages as human shields during rescue operations.<sup>170</sup> Testimonies from juvenile pirates indicate that most of them fear for their lives and do not willingly engage in piracy. Juvenile pirates are also subjected to mental torment during trials which are conducted in unfamiliar legal systems. Those who escape during rescue operations are often executed by militia groups such as Al Shabaab which controls a large territory in Puntland.<sup>171</sup> These facts indicate that piracy affects the right to life and dignity of the child.

### **3.3 Conclusion**

Recruitment and use of juvenile pirates constitute CAH if committed as part of a widespread or systematic attack against a civilian population. The civilian population in this case are the juvenile pirates. They fall within the definition of civilian population under Article 50 of Additional Protocol I and common Article 3 to the Geneva Convention. The act of recruiting and using juveniles constitutes an attack and fulfils the widespread nature of CAH taking

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<sup>168</sup>Sesay(2009) SCSL TC at para 171.

<sup>169</sup>Sesay(2009) SCSL TC at para 171.

<sup>170</sup>Drumbi M (2014) pp. 239.

<sup>171</sup>Lakotta B (7 April 2011).

into account the geographical region control by pirates in Puntland and the number of juveniles. Piracy gangs constitute an organisation with a common aim to instil fear on the civilian population and engage in criminal activities for pirate gains. There is a general consensus that pirate gangs are linked to militia groups such as Al Shabaab. Piracy therefore offers the much need financial support to wage war against the government.

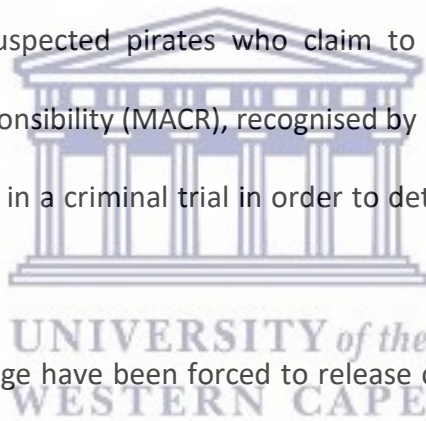


## CHAPTER FOUR

### SUMMARY OF KEY FINDINGS AND RECOMMENDATIONS

#### 4. Summary of Key Findings

This research paper has established that recruitment and use of juvenile pirates amounts to a crime under international law. Earlier efforts by the Security Council and the UNGA focused on eliminating piracy by prosecuting those captured at sea. Suspected pirates were tried in special piracy courts established in host countries such as Kenya and Seychelles. This mode of eliminating piracy has proved ineffective as there are still reports of attempted piracy attacks off the coast of Somalia. One of the reasons for its ineffectiveness is the legal implication of prosecuting suspected pirates who claim to be minors. The principle of minimum age of criminal responsibility (MACR), recognised by most States, require courts to establish the age of a suspect in a criminal trial in order to determine if the suspect is fit to stand trial.



Courts faced with this challenge have been forced to release child pirates and return them to their country of origin. In the recent years, it has been established that pirate leaders use juvenile pirates as they cannot be prosecuted and are readily available. The use of juvenile pirates, coupled with non-prosecution of those who recruit them, has negatively affected the fight against piracy. The UNGA and the Security Council resolutions on the use of juvenile pirates have done little in stopping this practise. Recruitment and use of juvenile pirates is punishable as acts of piracy under Article 101 of the UNLCOS.

Despite this, States are yet to exercise universal jurisdiction over pirate leaders for recruiting and using children in piracy attacks. Recruitment and use of juvenile pirates is a crime against humanity. About half of the population in Puntland consists of minors who are easily



susceptible to criminal activities. The need to survive and fight against illegal fishing in the Somali waters pushes these minors to join piracy gangs. The effect of this is physical harm or loss of lives of seafarers and the juvenile pirates. This harm can be alleviated if States shift their focus from the low-level pirates to the masterminds.

#### **4.1 Recommendations**

States should enforce resolutions against the use of children in piracy. In order to achieve this States should avoid interpreting piracy to acts committed only in the high seas. A broad interpretation of Article 101 (c) of the UNCLOS to encompass the use of juvenile pirates should be adopted. Such an interpretation does not violate the principle of legality as the crime of piracy had already been established under customary international law. Article 101 should be read wholly in order not to defeat its purpose.

There is an urgent need to adopt a comprehensive statute on piracy. Existing provisions under the UNLCOS and SUA Convention are inadequate in addressing key issues such as the use of juvenile pirates and prosecution of financiers of piracy. Although this paper has focused on piracy in Somalia, studies indicate that the use of juvenile pirates is prevalent on the coast of West Africa and the Gulf of Aden.

The crimes of other inhuman acts and enslavement under the Rome Statute should be interpreted to include recruitment and use of juvenile pirates, notwithstanding the exclusion of piracy from the Statute. The aim of criminalising conduct as crimes against humanity is to protect fundamental human rights. The recruitment and use of juvenile pirates can no longer be classified as a State issue. The impact of using juveniles in piracy attacks traverses State borders. Failure by States to acknowledge this will result in an unending cycle of piracy.

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