DOES THE INTERNATIONAL CRIMINAL COURT HAVE JURISDICTION OVER THE RECRUITMENT AND USE OF CHILD PIRATES AND THE INTERFERENCE WITH THE DELIVERY OF HUMANITARIAN AID BY SOMALI PIRATES?

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Maritime piracy is a very unique offence planned on dry land and executed on the high seas, a place falling under the jurisdiction of no state, by men and boys recruited and facilitated by pirate kingpins and financiers.

Moreover, piracy is a crime of universal jurisdiction and Article 105 of the United Nations Convention on the Law of the Sea (UNCLOS) 1982, urges the capturing or flag state of the victim vessel to prosecute the defendants since pirates are enemies to all human kind. This author argues that although the International Criminal Court (ICC) is not a state, it should prosecute pirates given that piracy is a grave offence with serious and far-reaching effects, even for a single incident, which falls under the category of crimes against humanity characterized by murder, torture, detention, serious attacks, and injuries on civilian population, etc., dealt with by the ICC. That being so, the kingpins and financiers who recruit and facilitate pirates with skiffs, weapons, and supplies could be equally prosecuted as aiders and abettors of piracy if they are citizens of states party to the Rome (ICC) Statute. The article also draws an analogy between the Prosecutor vs. Lubanga case judgment (No. ICC -01/04-01/06) and piracy, concluding that the recruitment and use of child pirates under the age of fifteen is similar to enlisting and conscripting child soldiers, which the ICC has already held to be an offence committed at the time of the child joining the group irrespective of the existence of an armed conflict. Finally, it is contended that by intercepting the delivery of humanitarian aid to Somalia, the pirates could be found individually criminally liable for violating international humanitarian law and prosecuted accordingly by the ICC.

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I. INTRODUCTION ........................................................................................................... 279

II. JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT OVER CRIMES AGAINST HUMANITY .................................................................................. 280

III. RECRUITMENT AND USE OF CHILD PIRATES AND THE INTERFERENCE WITH DELIVERY OF HUMANITARIAN AID .......................................................... 281
   A. The Recruitment and Use of Child Pirates .................................................... 281
   B. Interference with the Delivery of Humanitarian Aid by Pirates .................. 282

IV. THE INTERNATIONAL CRIMINAL COURT STATUTE’S DEFINITION OF CRIMES AGAINST HUMANITY ........................................................................ 283
   A. Acts Constituting State or Organizational Policy ....................................... 284
   B. The Elements of Widespread and/or Systematic Attack ......................... 285
      1. Widespread ................................................................................................. 286
      2. Systematic .................................................................................................. 287
      3. Attack .......................................................................................................... 287
      4. Any “Civilian Population” .......................................................................... 288
   C. The Subjective Element ............................................................................... 289
   D. Murder .......................................................................................................... 290
   E. Deportation or Forcible Transfer of Population ......................................... 291
   F. Imprisonment or Other Severe Deprivation of Physical Liberty in Violation of Fundamental Rules of International Law .......................................................... 293
   G. Torture .......................................................................................................... 293
   H. Forced Disappearance .................................................................................. 294
   I. Other Inhumane Acts ................................................................................... 295

V. INTERCEPTION OF THE DELIVERY OF HUMANITARIAN AID AS A VIOLATION OF INTERNATIONAL HUMANITARIAN LAW (IHL) .................... 297

VI. RECRUITMENT OF CHILDREN: DRAWING ANALOGY WITH THE LUBANGA CASE .................................................................................................................. 298
   A. Under the Lubanga Case, Does the Crime of Recruiting and Using Child Soldiers Only Apply to Situations of Armed Conflict Such That it is Not a Good Analogy for Recruiting and Using Child Pirates? ................................................................. 299
   B. Does the Lubanga Case Suggest That the International Criminal Court Can Only Prosecute a Crime Against Humanity If it is Committed by a State? .......................................................... 300
   C. How Can One Prove That a Pirate Kingpin or Financier Had Knowledge of the Widespread and Systematic Use of Child Pirates and Aided and Abetted That Practice? ......................................................... 302
   D. ICC Mens Rea Requirement in Aiding and Abetting Cases ..................... 303

VII. CONCLUSION ............................................................................................................ 304
I. INTRODUCTION

The prosecution of financiers and kingpins of piracy continues to be one of the most elusive things due to happen in the jigsaw puzzle of the fight against maritime piracy. This article analyzes the role played by the kingpins and financiers of piracy, especially in the recruitment and use of child pirates in light of the pertinent provisions of the Rome Statute (used interchangeably with the ICC Statute). It also examines the possibilities of prosecuting the kingpins and financiers of piracy before the ICC, and the pirates for intercepting and capturing the ships delivering humanitarian aid to Somalia. The following two major issues are accordingly discussed: (1) whether the recruitment and use of child pirates by kingpins or financiers of piracy who are nationals of state parties to the Rome Statute could be categorized as crimes against humanity and prosecuted before the ICC; and (2) whether the pirates could be found individually criminally liable for violating international humanitarian law by intercepting the delivery of humanitarian aid to Somalia.

Lately, a growing number of child pirates have been encountered in most of the arrests and prosecutions conducted in the Indian Ocean off of the coast of Somalia. Many of the people in charge of piracy operations are not physically out on the seas, but on shore, in their homes in Somalia, a non-state party to the Rome Statute, or Kenya, which is a state party. The people they actually send out to do the dangerous stuff are young children and youths. Moreover, the ransom money collected is shared by the leaders and financiers with part of it going to the funding of terrorist activities of the Al-Shabaab. Piracy is a well-organized, coordinated, and financed crime that involves a lot of planning, funding, and facilitation before execution. It requires the promoters to assemble a team with a leader, attack skiffs, hooked ladders, weapons, satellite phones, Global Positioning Systems (GPS), and other piratical paraphernalia and supplies.

1. Somali Pirates Sentenced to 10 Years in Seychelles, BBC News (July 26, 2010, 12:05 AM), http://www.bbc.co.uk/news/world-africa-10763605 (last visited Feb. 23, 2013) (stating that the convicted children were part of a group of 11 individuals sentenced to 10 years in prison).

2. See, e.g., Rep. v. Liban Mohammed Dahir & Twelve Others, Supreme Court, Criminal Side No.7 of 2012 (Seychelles).


4. Id.

to sustain the pirates while at sea. But these pirate kingpins or funders are not yet known since they mostly pay agents to carry out the actual recruitment while the money is sent from abroad by hawala.\(^6\) If known, they have not yet been prosecuted.

So, this research works on the assumption that the pirate kingpins or financiers are known and that some are citizens of states' parties to the Rome Statute while others belong to non-state parties. Also, some of the examples cited in this article are born of the author's personal experiences in adjudicating piracy cases in the Supreme Court of Seychelles where he had almost no precedent, so to speak, to fall on for guidance.

II. JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT OVER CRIMES AGAINST HUMANITY

The ICC enjoys jurisdiction over crimes against humanity, genocide, and war crimes committed by individuals directly, as well as those who may be liable for aiding, abetting, or otherwise assisting in the commission of the crimes.\(^7\)

The Court exercises jurisdiction if the following conditions are met: The accused is a national of a state party; the crime took place on the territory of a state party or a state otherwise accepting the jurisdiction of the Court; or the United Nations Security Council (UNSC) has referred the situation to the Prosecutor, irrespective of the nationality of the accused or the location of the crime.\(^8\)

This means that if the acts of recruiting child pirates and/or financing piracy are found to be crimes against humanity that could be prosecuted by the ICC, it would then be immaterial whether the offence(s) is committed on the soil of a state party to the Rome Statute or a non-state party, provided that the offender is a national of a state party.\(^9\) Piracy is a very unique offence. It occurs on the high seas, beyond the jurisdiction of any state, while the planning and coordination, facilitation, aiding and abetting by way of financing, and recruitment of pirates is done on dry land. Interestingly, piracy *jure gentium* is a crime of universal jurisdiction where a pirate is treated as an “enemy of all mankind—*hostis humani generis,*”\(^10\)

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8. *Id.* arts. 12–14, 25.
9. *Id.* art. 12.
whom any nation may, in the interest of all, capture, prosecute, and punish in line with the United Nations Convention on the Law of the Sea (UNCLOS). In addition, under the Complementarity Principle, the ICC would only be able to exercise jurisdiction over piracy if the state where the pirate kingpin or financier is located is unwilling or unable to prosecute that kingpin/financier under its universal jurisdiction. But just as the ICC can fill the impunity gap for crimes already within its jurisdiction, it can also fill the impunity gap for piracy.

III. RECRUITMENT AND USE OF CHILD PIRATES AND THE INTERFERENCE WITH DELIVERY OF HUMANITARIAN AID

A. The Recruitment and Use of Child Pirates

For purposes of this paper and pursuant to the provisions of the United Nations Convention on the Rights of the Child (CRC) and the Additional Protocol


[That] [i]n the famous case of In re Piracy Jure Gentium, 1934 page 586 the Privy Council held that a person guilty of piracy at the high seas places himself beyond the protection of any state and is considered to be hostis humani generis (enemy of humanity). Therefore, under customary international law, a pirate is subject to universal jurisdiction or justiciable by any state anywhere since the crime of piracy jure gentium is taken to be a contravention of jus cogens (compelling law). Seychelles has since the 17th of March, 2010 amended the relevant law incorporating a detailed definition of piracy, as laid out in the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), and properly prescribing the jurisdiction of its courts as seen from the above provisions. In short, this court has jurisdiction to try any piracy crime committed on the high seas, like the one on hand, or anywhere else, but outside the jurisdiction of any other state. Therefore, the objection by defence counsel regarding lack of jurisdiction to hear this case is dismissed.


13. See Jurisdiction and Admissibility, INTERNATIONAL CRIMINAL COURT (Jan. 26, 2013, 7:13 PM), http://www2.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm (last visited Feb. 23, 2013). In general, a case will be inadmissible if it has been or is being investigated or prosecuted by a State with jurisdiction.

The Court’s jurisdiction is further limited to events taking place since 1 July 2002. In addition, if a State joins the Court after 1 July 2002, the Court only has jurisdiction after the Statute entered into force for that State. Such a State may nonetheless accept the jurisdiction of the Court for the period before the Statute’s entry into force.

Protocol II to the 1949 Geneva Conventions, a child shall be considered any person under the age of fifteen.

In Somalia, children are recruited to engage in the high risk and dangerous crime of piracy because they have a less developed sense of danger. Unfortunately, in the piracy theatre, the children, just like the adults, are exposed to the real danger of hostilities. The children are so vulnerable because they have been abandoned in urban areas; they loiter as street children with no food, housing, parental or family care and support, source of income, or a decent livelihood. The perpetrators take advantage and make money out of this miserable and hopeless situation by easily picking these children off of the streets to be enlisted or recruited as child soldiers with militant groups or child pirates.

B. Interference with the Delivery of Humanitarian Aid by Pirates

Whereas the delivery of United Nations (UN) humanitarian assistance is vital for millions of Somalis who chronically suffer from food shortages and wholly depend on the World Food Program, it is perturbing to find that the money gained, as well as the food or arms stolen, is often transferred to warlords. “Since 2007, different actors, like Canada, the Netherlands, and the North Atlantic Treaty Organization (NATO) (in Operation Allied Provider) have escorted UN/World Food Program ships to Somalia through the unsafe pirate infested areas, until the European Union Naval Force took


15. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 4(3)(c), June 8, 1977, 1125 U.N.T.S. 3 (children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities).


18. JAY BAHA’DUR, THE PIRATES OF SOMALIA: INSIDE THEIR HIDDEN WORLD 36 (2011) (“For the masses of unemployed and resentful youth, piracy was a quick way to achieve the respect and standard of living that the circumstances of their birth denied them.”).

over this task in December 2008.\textsuperscript{20} This problem is real and ongoing. Lately, non-state actors such as pirates, who are not parties to treaties, are increasingly affecting attacks on humanitarian aid workers and sometimes taking them hostage; these actions, depending on the circumstances, are to be treated as piracy, war crimes, or crimes against humanity under international law.\textsuperscript{21}

IV. THE INTERNATIONAL CRIMINAL COURT STATUTE'S DEFINITION OF CRIMES AGAINST HUMANITY

A crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack:

a) Murder;
b) Extermination;
c) Enslavement;
d) Deportation or forcible transfer of population;
e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
f) Torture;
g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, 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;
i) Enforced disappearance of persons;
j) The crime of apartheid;
k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.\textsuperscript{22}

It should be stressed that the above listed crimes are disjunctive and proof of any one of them would suffice. Therefore, only those crimes relevant or connected to the offence of piracy will be discussed.

\textsuperscript{20} Id.


\textsuperscript{22} Rome Statute, \textit{supra} note 7, art. 7(1)(a)-(k).
A. Acts Constituting State or Organizational Policy

The ICC, unlike the International Criminal Tribunal for the Former Yugoslavia (ICTY)\(^{23}\) and the International Criminal Tribunal for Rwanda (ICTR)\(^{24}\), specifically provides for and requires proof of the element of "state or organizational" plan in crimes against humanity. It has been held by the ICC in *Prosecutor v. Katanga* that:

> [T]he policy may be: made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly defined by the organizational group. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion... [and that]... there was sufficient evidence demonstrating a “common policy and an organized common plan,” due to the fact that violence directed against a civilian village by members of a militarized ethnic group (the *Forces de Resistance Patriotiques en Ituri*) was part of a “larger campaign of reprisals” specifically directed against a different ethnic group, which was intended to fragment ethnic alliances and secure control and access to transit through the area.\(^{25}\)

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Such a policy may be made either by groups of persons who govern a specific territory or by any organization with the capability to commit a widespread or systematic attack against a civilian population. The policy need not be explicitly
It has been resolved that acts of piracy may satisfy the definition of an organizational policy set forth in *Katanga*. While lacking the ethnic component present in *Katanga*, the victims of piracy would, nonetheless, typically satisfy the requirement that they be civilians. Of course, while the specific facts of any particular case will inform the legal analysis of the nature of the alleged crime, it could be argued that Somali pirates “govern [or, at least, exercise effective control over] a specific territory” and that, even if there is no codified policy, their attacks against civilians passing through an ever-expanding area off the coast of eastern Africa are “planned, directed or organized”\(^{26}\) pursuant to internal organizational policy.\(^{27}\)

### B. The Elements of Widespread and/or Systematic Attack

The long-standing elements in the phrase “widespread or systematic attack”\(^{28}\) transform domestic crimes into a subject of international concern and jurisdiction, and into attacks against humanity rather than isolated defined by the organizational group. Indeed, an attack which is planned, directed or organized—as opposed to spontaneous or isolated acts of violence—will satisfy this criterion.


27. See sources cited supra note 26, at 15. Stating that:

A number of commentators have noted that the language of the Rome Statute should be read broadly to include non-state actors (i.e. criminal groups, terrorist groups and other organized non-state actors), and that the reference to state or organizational plan or policy in Article 7(2) should probably be construed broadly to encompass entities that act like States, even if they are not formally recognized as such.


All of the State negotiators agreed that inhumane acts had to pass a certain threshold to become a crime against humanity in the international setting. Criminalization of murder, for instance, was not the issue. Instead, the issue was determining at what point the international community had the right and the obligation to step in and prosecute murders committed by an actor. One group of States initially argued for the approach taken by the International Criminal Tribunal for the Former Yugoslavia, which had no statutory jurisdictional threshold. However, the delegates eventually agreed that the threshold test should incorporate terms used in previous jurisprudence and commentary, namely “widespread” and “systematic.”

violations of the rights of particular individuals.\textsuperscript{29} As seen from the jurisprudence of the international criminal adjudicating bodies, starting with the ICTY and ICTR\textsuperscript{30} to the ICC,\textsuperscript{31} the two elements convey a different though somewhat related meaning, and customary law requires that the act be part of a widespread or systematic attack and need not be a part of both.

1. Widespread

The element or term “widespread” in Article 7 of the Rome Statute connotes the number of victims or the magnitude of the acts. It can also be viewed as a massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.\textsuperscript{32} However, the ICTY\textsuperscript{33} has held the word to mean the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.\textsuperscript{34} There is no doubt that repetitive piracy

\textsuperscript{29} Badar, supra note 28, at 109 (“One of the distinguishing features of ‘crimes against humanity’ is their pattern of occurrence. The ‘widespread or systematic’ requirement is fundamental in distinguishing crimes against humanity from common crimes, which do not rise to the level of crimes under international law.”).

\textsuperscript{30} Margaret M. deGuzman, The Road from Rome: The Developing Law of Crimes Against Humanity, 22 HUM. RTS. Q. 335, 364 (2000) (stating that the ICTR was the first binding international legal instrument to include the language “widespread or systematic attack” in its definition).

\textsuperscript{31} Id.; see also Rome Statute, supra note 7, art. 7(1).


“The second alternative requires that the inhumane acts be committed “on a large scale” meaning that the acts are directed against a multiplicity of victims . . . . Nonetheless the Nuremberg Tribunal further emphasized that the policy of terror was “certainly carried out on a vast scale” in its consideration of inhumane acts as possible crimes against humanity . . . . This term was replaced by the term “large scale” which is sufficiently broad to cover various situations involving multiplicity of victims, for example, as a result of the cumulative effect of a series of inhumane acts or the singular effect of an inhumane act of extraordinary magnitude.


\textsuperscript{34} Rome Statute, supra note 7, art. 7(2)(a) (referring to a course of conduct involving the multiple commission of such acts); Badar, supra note 28, at 110 (stating that while the Rome Statute requires the commission of multiple acts, customary international law does not. As an example, the execution by Soviet authorities of Hungarian leader Imre Nagy was a crime against humanity despite the fact that there was only one victim. Even though the inhumane act was not on a “vast scale,” the fact that it was a political leader meant that the goal was to injure an entire population.).
attacks, even a single incident, could have such grave effects on humanity, whether directly or indirectly, resulting in murder in extreme cases.

2. Systematic

Badar defines the “systematic” element as a pattern of conduct or methodical plan. The implementation of the preconceived plan or policy could result in the repeated or continuous commission of inhumane acts, which, according to the Nuremberg Tribunal, were committed as a part of the policy of terror. It was said by the ICTY that the term “systematic” requires the offender to be thoroughly organized, following a regular pattern on the basis of a common policy involving substantial public or private resources. Piracy is a well-orchestrated and privately sponsored offence committed in particular areas of the high seas, especially shipping lanes/corridors, during that season of the year when the sea is calm. The method of the attacks employed is systematic.

3. Attack

The term “attack” has been described as a course of conduct involving the commission of acts of violence. However, under the context of crimes against humanity, the ICTY took the view that the term should not be limited to conduct of hostilities only. Listing murder and extermination as examples of unlawful attacks, the ICTR further observed that an attack

36. ILC Report, supra note 32, art. 18, cmt. (4).
39. Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 416 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001), http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf (last visited Feb. 23, 2013) (Stating that it may also include situations of mistreatment of persons taking no active part in hostilities, such as someone in detention. However, both terms are based on a similar assumption, namely that war should be a matter between armed forces or armed groups and that the civilian population cannot be a legitimate target.).
40. Akayesu, Case. No. ICTR-96-4-T, ¶ 581. Stating that:

The concept of attack may be defined as an unlawful act of the kind enumerated in Article 3(a) to (f) of the Statute, like murder, extermination, enslavement etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid
may also be non-violent in nature. Piracy attacks are characterized by violence against the victims aimed at not only instilling fear, but also coercing them into total submission.

4. Any "Civilian Population"

According to the ICC Statute, the attack in a crime against humanity should be directed against any "civilian population," whether stateless, or of a different or same nationality as the perpetrators. As opined by the ICTR and ICTY, the term must be broadly rather than narrowly interpreted to encompass different categories of victims and all nationalities since pirates do not discriminate but launch attacks against any civilian voyagers. Further, save for the situation in Rep. v. Mohamed A. Dahir.

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41. Rome Statute, supra note 7, art. 7(1).
42. Akayesu, Case. No. ICTR-96-4-T, ¶ 582. Stating that: The Chamber considers that an act must be directed against the civilian population if it is to constitute a crime against humanity. Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed hors de combat by sickness, wounds, detention or any other cause. Where there are certain individuals within the civilian population who do not come within the definition of civilians, this does not deprive the population of its civilian character.
44. Badar, supra note 28, at 102 (citing Prosecutor v. Mile Maksic, Miroslav Radic, and Veselin Sljivancanin, Case No. IT-95-13-R 61, Review of the Indictment Pursuant to Rule 61 of the Rules and Procedure and Evidence, ¶ 29 (Apr. 3, 1996) (Stating that although crimes against humanity must target a civilian population, individuals who at one time performed acts of resistance may in certain circumstances be victims of crimes against humanity.).
45. Rep. v. Mohamed Ahmed Dahir & Ten Others, Supreme Court, Criminal Side No.51 of 2009, ¶ 42 (Seychelles). Per Judge Gaswaga: Like I have already stated intention can be inferred from the facts and surrounding circumstances. However, I see no pertinent concrete facts to base such requisite logical and irresistible inference here. This decision is fortified by the evidence on record. Both parties accept that pirates hijack ships for a financial ransom. On the fateful day they were on the high seas waiting to chance on any ship that came by and not in particular the "Topaz". No evidence on record tends to suggest that "Topaz" or the government of Seychelles was being targeted. "Topaz" was not even expected in that area at the time of the incident, it had been called upon and directed there by the maritime aircraft. The Captain of "Topaz", Major Simon Laurencin’s testimony is pertinent in strengthening this
where a war ship "Topaz" was mistaken for a cargo vessel because of its lights, pirates only target civilian vessels and crew. They have nothing to do with navy or coastguard vessels and the officers on board, whether or not they are armed. While their actions have far-reaching effects on human kind, pirates are not combatants but more of sea brigands, pursuing a common purpose of seizing vessels, cargo, and crew for a ransom using force and arms to subdue their victims.

Unsuspecting captains and crews of various nationalities plying the international shipping lanes on the high seas, which are heavily infested with pirates, are the primary victims of piracy as they go about their innocent business. At this point the vessels are more vulnerable, and the pirates, who are well organized and systematic in the manner they carry out their savage attacks, will strategically lie in wait for their prey. They operate in groups, covering a wide area and applying a similar pattern to launch attacks continuously, which the international community has, until now, failed to contain. The foregoing satisfies the legal requirement of any "civilian population."

C. The Subjective Element

The requirement of a subjective element, mens rea, is mandatory for all the offences in Article 7 of the Rome Statute. It requires proof that the position. He stated that unless one is close and well informed about ships, it's difficult to tell at night whether "Topaz" is a war ship or passenger ship especially when the lights are on. According to him, had the accused known that "Topaz" was a war ship they would not have attacked it.

46. Rep. v. Mohamed Ahmed Ise & Four Others, Supreme Court, Criminal Side No.76 of 2010, ¶ 29 (Seychelles). Per Judge Gaswaga:

The above arrangement, size and number of skiffs fits the classic make up and description of a typical piracy attack group. That is why the witnesses opined that it had all the relevant characteristics. Witnesses herein, consisting of sailors and experts have stated that a PAG usually consists of the mother skiff, two smaller attack skiffs, and at times, a mother ship especially if they have already captured one. Rossignol said that the mother skiff carries fuel, food and other supplies on which all the group depends. That it has an inboard engine and usually travels at a speed of around 10 knots. It tows the attack skiffs with a rope and frees them when going to attack, as it holds off at a safe distance. It was also Rossignol’s testimony that attack skiffs have an outboard engine and are pretty fast with a speed of between 20 and 25 knots. The occupants of the attack skiffs execute the actual attack and carry weapons including automatic rifles and RPG’s, ladders with hooks used to climb on the ship, fuel cans etc. A PAG would consist of usually a minimum of ten people who travel on the mother skiff and only maneuver the attack skiffs at the time of attack. Each attack skiff would have four armed persons, as was seen in the case at hand, and the rest remain on the mother skiff. Case law clearly demonstrates this arrangement.
perpetrator acted with knowledge that the offence in question was part of a widespread or systematic attack against a "civilian population."

D. Murder

Murder has been defined under the ICC elements of crime to include:

[That] the victim must have died; that his/her death must be caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility; and the act was done, or the omission was made, with an intention to kill or to inflict serious injury in reckless disregard of human life.\(^47\)

The act of murder is clearly understood and prohibited in every national law.\(^48\)

After citing the definition of piracy as enshrined in Article 15 of the Convention on the High Seas (CHS), it was concluded that "by any measure, murder falls within the definition of any illegal acts of violence."\(^49\)

The said definition reads thus:

Piracy consists of any of the following acts:

1) Any illegal acts of violence, 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:
   a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

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47. ELIAS BANTEKAS & SUSAN NASH, INTERNATIONAL CRIMINAL LAW 129 n.16 (New York: Routledge-Cavendish, 3rd ed. 2007).
48. *Akayesu*, Case. No. ICTR-96-4-T, ¶¶587–88. Stating that:
   The Chamber considers that murder is a crime against humanity, pursuant to Article 3 (a) of the Statute. The International Law Commission discussed the inhumane act of murder in the context of the definition of crimes against humanity and concluded that the crime of murder is clearly understood and defined in the national law of every state and therefore there is no need to further explain this prohibited act. The Chamber notes that article 3(a) of the English version of the Statute refers to "Murder", whilst the French version of the Statute refers to "Assassinat". Customary International Law dictates that it is the act of "Murder" that constitutes a crime against humanity and not "Assassinat". There are therefore sufficient reasons to assume that the French version of the Statute suffers from an error in translation.
2) 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;
3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article . . .

. . . [i]f during the course of committing piracy, a murder was committed by a pirate with the knowledge that their conduct was intended to be part of a widespread or systematic attack against a civilian population, the crime would arguably fall within the ambit of murder in the context of crimes against humanity. 50

E. Deportation or Forcible Transfer of Population

“‘Deportation or forcible transfer of population’ means forced displacement of the concerned parties by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.” 51

The crime requires the following elements:

[T]he perpetrator deported or forcibly transferred, without grounds permitted under international law, one or more persons to another state or location, by expulsion or other coercive acts; such person or persons were lawfully present in the area from which they were so deported or transferred; the perpetrator was aware of the factual circumstances that established the lawfulness of such presence; the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and 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. 52

A definition has been assigned to the term “forcibly” as to include “threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power . . . or by taking advantage of a coercive environment; this definition is not necessarily restricted to physical force.” 53

“Deported or forcibly transferred,” which is interchangeably used with “forcibly displaced” is, “the act or an instance of removing a person to

50. Id. at 31–32.
51. Rome Statute, supra note 7, art. 7(2)(d).
53. Id. at 33.
another country; especially the expulsion or transfer of an alien from a country. 54

An argument was made that Article 7(1)(d) requires a transfer of an individual from his place of residence to another place of residence; yet piracy does not result in the transfer of the victim's residence. Further, if this were the case, acts of piracy would likely not constitute Deportation or Forcible Transfer of Population under Article 7(1)(d). On the other hand, acts of piracy often involve the forcible transfer of persons to another location by coercive acts. The victims are lawfully present in the area from which they are being transferred and the pirates are aware that the victims are lawfully in the area. Thus, there is an argument that acts of piracy could be characterized as Deportation or Forcible Transfer of Population. 55

Piracy attacks, by their very nature, satisfy the requirements of Article 7(1)(d) of the Rome Statute since they involve the use of coercive means, direct and indirect force or threats, which create fear in the concerned population, thereby compelling them to leave the area against their will. Sometimes, this involves chasing after the victim's vessel with speedboats while firing rifles, which may result in death or serious injury if the victims do not flee in time. 56 Moreover, the pirates know that their victims are in these locations lawfully, fishing or transporting merchandise. That is why they know exactly when, where, and who to attack.

54. BLACK'S LAW DICTIONARY 504 (9th ed. 2009).
56. Ise, Supreme Court, Criminal Side No.76 of 2010, ¶¶ 26–27 (Seychelles). Per Judge Gaswaga:

It does not appear to be in dispute that on the 17th there was an attack on the Cap Ste Marie and the Talenduic by two skiffs with four men on each. The eye witnesses; Geniez, Fantino, Marrec, Charier and Kostrazwa narrated how the skiffs attacked, from the same direction, moving at the same speed, side by side close to each other and separating at some point when they approached the Talenduic, one going on the left and the other on the right side of the Talenduic, and thereafter advancing towards the Cap Ste Marie. More planning and coordination of the whole exercise is exhibited not only in the manner in which they retreated after defeat in the first attempt but also when they regrouped at some distance, spoke to each other for a short time before speeding off for a second attack on both vessels. This was a concerted effort. Again, common intention of the assailants is reflected in the fact that they had fired at the same time and object, ceased the attack at once and left the scene together in the same direction. None of them returned. This was at about 06:17 GMT and shortly thereafter, at 07:14 GMT, the maritime patrol aircraft spotted a mother skiff towing, as already established, the two attack skiffs that had just finished attacking the Talenduic and Cap Ste Marie. Photograph No. 9 of Report 1 shows attack skiffs pulled closer and some men getting off and boarding the mother skiff.
F. Imprisonment or Other Severe Deprivation of Physical Liberty in Violation of Fundamental Rules of International Law

This crime concerns deprivation of physical liberty without legal justification, including an act or omission that results in arbitrary deprivation of physical liberty, or that is reasonably likely to affect that result.57 Directly flowing from the foregoing, it should be noted that once an attack is successful, fishermen and crews are locked up in the cabins and together with their vessels forcefully taken to Somalia and illegally held until a ransom is paid for their release.

G. Torture

Article 7(2)(e) of the ICC defines torture as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions."58 The elements of the crime of torture are as follows:

1) That the perpetrator inflicted severe physical or mental pain or suffering on a person;
2) Such person was in the custody or under the control of the perpetrator; and
3) Such pain and suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions.

The offence could be committed by both state and non-state actors,59 like pirates. The point was aptly captured in the case of Rep. v. Nur Mohamed Aden,60 where the pirates locked up the victims in different cabins for days

57. WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA, AND SIERRA LEONE 205 (Cambridge University Press, 2006). See also Kordić, Case No. IT-95-142-T, ¶ 302 (The Chamber has confirmed that the crime against humanity of imprisonment “should be understood as contemplating arbitrary imprisonment, that is to say, the deprivation of liberty of the individual without due process of law, as part of a widespread or systematic attack directed against a civilian population.”).
58. Rome Statute, supra note 7, art. 7(2)(e).
59. THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 90 (Roy S. Lee et al. eds., 2001).
60. Aden, Supreme Court, Criminal Side No. 75 of 2010, ¶ 28 (Seychelles). Per Judge Gaswaga:
   I am convinced beyond doubt that upon boarding the Faith the accused harassed and assaulted the crew, shouted and threatened them with guns until they were subdued. They instilled fear in the crew, took complete control of the Faith and
and harassed and tormented them with death threats if their government did not pay the ransom money. In *Rep. v. Abdukar Ahamed*, a gun was placed on the head of the victim and then fired. The victims were also used as human shields and exposed to live fire. These acts squarely fit in the aforementioned definition of torture.

H. Forced Disappearance

Forced disappearance is defined as follows:

[T]he arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

The basic elements of the crime of forced disappearance are the following:

commandeered it. There is ample evidence to show that during the four days only the accused determined the direction and destination of the Faith, when to let the crew walk around the vessel, have meals, go to the bathroom and when to lock them up in the sleeping quarters. All this was against the witnesses' will. They were not free men at all. Not even the Stephan Barbe who was maneuvering the Faith.

61. *Id.*

62. *Id.*

63. *Rome Statute, supra note 7, art. 7(2)(i).*
1) That the perpetrator arrested, detained or abducted a person;
2) That such deprivation of liberty was followed by a refusal to acknowledge that deprivation of liberty or give information about the whereabouts of such person;
3) That the perpetrator was aware that such deprivation of liberty would be followed by a refusal to acknowledge that deprivation of liberty or give information about the whereabouts of such person;
4) Such deprivation of liberty was "carried out by, or with the authorization, support, or acquiescence of a State or political organization;"
5) That the refusal to acknowledge that deprivation of liberty or give information about the whereabouts of such person was carried out by, or with the authorization, support, or acquiescence of a state or political organization; and
6) The perpetrator intended to remove such person from the protection of the law for a prolonged period of time.\footnote{Clearly, pirates can neither be categorized as state agents nor political organs. Moreover, their aim is to acknowledge the deprivation of the victim’s liberty and provide information regarding the whereabouts of the pertinent persons available to negotiate a ransom.\footnote{However, their activities seem to satisfy most of the ingredients of forced disappearance outlined above. It has been opined that “provided it can be argued that pirates are a qualifying ‘State or political organization,’ the acts committed by pirates would likely be available for prosecution under the Rome Statute.”\footnote{I. \textit{Other Inhumane Acts}}

The Rome Statute provides that “other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” fall within the category of crimes against humanity.\footnote{64. THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, supra note 59, at 98.
65. See Aden, Supreme Court, Criminal Side No. 75 of 2010, ¶ 28 (Seychelles).
67. Rome Statute, supra note 7, art. 7(1)(k).}}
The required elements of this crime is as follows:

[T]he perpetrator inflicted great suffering or serious injury to body or to mental or physical health, by means of an inhumane act; such act was of a character similar to any other act referred to in article 7 paragraph 1 of the Statute; the perpetrator was aware of the factual circumstances that established the character of the act; the conduct was committed as part of a widespread or systematic attack directed against a civilian population; and 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.

This provision is a catchall clause, which has been criticized for its generality and lack of precision and for being contrary to the “specificity” of criminal law. There is a view expressed that if piracy fell under this category of crimes, it should have been listed as such since it has been in existence for thousands of years. On the other hand, piracy results in murder, kidnapping, theft, and other atrocities on a widespread basis. Besides, the time of the drafting of the Rome Statute, piracy attacks had almost disappeared. Moreover, Somali pirates are only active when the sea is calm, which reduces the visibility of their acts on the global scene year round.

On whole, given the serious nature of the crime of piracy and its far-reaching effects on humanity, it is opined that it could satisfy the requirements of the catchall provision. In addition, modern piracy involves most of the aforementioned violent and cruel acts like murder, kidnapping,
and hostage-taking that are used to commit genocide, crimes against humanity, and war crimes over which the ICC has jurisdiction. The prosecution is duty bound to prove all the pertinent elements required for a crime against humanity, to wit: Acts of murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; enforced disappearance of persons; or other inhumane acts of a similar character were committed as a widespread or systematic attack directed against any civilian population with knowledge of that attack.

Piracy action groups have an internal organizational policy and their attacks are well planned and directed towards a civilian population that is lawfully fishing or transporting merchandise on the high seas. Though small, the groups are many and launch systematic, well-orchestrated, violent, and persistent attacks that forcefully displace a civilian population in fear of capture, possible torture, and illegal detention from a large territory. At times, the attacks result in murder or serious injuries and the effects, even for a single incident, are far-reaching. Piracy incidents have been widely publicized and the perpetrators have knowledge on how lucrative the venture is.

V. INTERCEPTION OF THE DELIVERY OF HUMANITARIAN AID AS A VIOLATION OF INTERNATIONAL HUMANITARIAN LAW (IHL)

During the Somali conflict in the early 1990s, the United Nations Operation in Somalia (UNOSOM) was set up to facilitate humanitarian aid to people trapped by civil war and famine. As the hostilities intensified, UNOSOM provided strong military escort and security to deter attacks on personnel and relief supply convoys from the seaports and airports of Mogadishu to the four and a half million people who were threatened with starvation, severe malnutrition, and related diseases. The UNSC unanimously adopted Resolution 794, operational paragraph 5 that reads:

[The UN] strongly condemns all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population, and affirms that those who commit or order the commission of such acts will be held individually responsible in respect of such acts.71

The magnitude of human tragedy caused by the conflict in Somalia further exacerbated by the obstacles being created to the distribution of humanitarian assistance by the warlords constituted a threat to international peace and security.

Though at sea, the pirates intercept and capture ships delivering supplies to Somalia and take humanitarian aid workers hostage for ransom. Therefore, the intentional interference with delivery of foreign humanitarian aid by international agencies contributes to immense human suffering, starvation, death, and contributes to instability in already impoverished and unstable nations like Somalia. Such interferences have been overwhelmingly condemned and unanimously categorized as a violation of humanitarian law by the U.N. Security Council in Somalia between 1992 and 1993. These actions clearly constitute a violation of international humanitarian law and the individual criminal liability element in UNSC Resolution 794 should also apply to the pirates.

VI. RECRUITMENT OF CHILDREN: DRAWING ANALOGY WITH THE LUBANGA CASE

Thomas Lubanga was a founding member and President of Union des Patriotes Congolais (UPC) created on the fifteenth of September in 2000 in the Democratic Republic of Congo (DRC). The UPC and its military wing, the Force Patriotique pour la Liberation du Congo (FPLC), took power in Ituri in September, 2002. Thomas Lubanga was indicted before the ICC and the charges against him included three distinct criminal acts. The ICC Trial Chamber I (the Chamber) concluded that the crimes of conscription and enlistment are committed at the moment a child under the age of fifteen is enrolled into or joins an armed force or group, with or without compulsion. Further:

The evidence [confirmed beyond a reasonable doubt] that the accused and his co-perpetrators agreed to, and participated in, a common plan to build an army for the purpose of establishing and maintaining political and military control over Ituri, [a province of the DRC, and that] in the ordinary course of events, this resulted in the conscription and enlistment of boys and girls under the age of [fifteen], and their use to participate actively in hostilities.

The facts of the *Lubanga* case concerning the recruitment and use of child soldiers, just like the involvement of children in acts of piracy dealt with children under the age of fifteen who had been conscripted or enlisted into groups that would ultimately expose them to some kind of danger or hostilities.

**A. Under the Lubanga Case, Does the Crime of Recruiting and Using Child Soldiers Only Apply to Situations of Armed Conflict Such That it is Not a Good Analogy for Recruiting and Using Child Pirates?**

Thomas Lubanga was indicted for crimes against humanity, but not war crimes which have to be committed during armed conflict. The ICC Statute does not list armed conflict as a requirement for crimes against humanity. Although in *Lubanga* the facts reveal a connection with armed conflict, it should be stressed that the recruitment and enlisting of child soldiers is a distinct offence that can occur on its own without a war or armed conflict. It has been concluded by the ICC “that the crimes of conscription and enlistment are committed at the moment a child under the age of 15 is enrolled into or joins an armed force or group . . .” One could argue that the offence can occur any time before, during, or even after a war. Therefore, it cannot be said that on this matter the *Lubanga* case is not a good analogy for the situation giving rise to the offence of recruiting and using child pirates. It is also worth mentioning that in regards to the offence of using children under the age of fifteen years to participate actively in hostilities, the ICC concluded the following:

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The accused and at least some of his co-perpetrators were involved in the takeover of Bunia in August 2002. Thomas Lubanga, as the highest authority within the UPC/FPLC, appointed Chief Kahwa, Floribert Kisembo and Bosco Ntaganda to senior positions within the UPC/FPLC. The evidence has established that during this period, the leaders of the UPC/FPLC, including Chief Kahwa, and Bosco Ntaganda, and Hema elders such as Eloy Mafuta, were active in mobilisation drives and recruitment campaigns in order to persuade Hema families to send their children to join the UPC/FPLC. Those children recruited before the formal creation of the FPLC were incorporated into that group and a number of military training camps were added to the original facility at Mandro. The Chamber has concluded that between 1 September 2002 and 13 August 2003, a significant number of high-ranking members of the UPC/FPLC and other personnel conducted a large-scale recruitment exercise directed at young people, including children under the age of 15, on both voluntary and coercive bases.

73. Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, 3 (Can.); see also ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 81–84 (Oxford University Press 2nd ed. 2008).

74. See Rome Statute, *supra* note 7, art. 7.

75. *Dyilo*, Case No. ICC-01/04-01/06, Summary of the Judgment Pursuant to Article 74 of the Statute, ¶ 23.
includes a wide range of activities, from those children on the front line (who participate directly) through the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target.

The theatre in which acts of piracy take place is hostile, involving exchanges of live fire and high speed chases. This environment exposes the actors, most especially the children, to high levels of risk. There are a lot of similarities between child soldiers and child pirates when it comes to dealing with their disadvantaged backgrounds and the manner in which they are recruited to the tasks they are assigned to perform. Following this discourse, it becomes very clear that the recruitment and use of children for purposes of serving as child pirates is criminal, just like in the case of child soldiers, and the perpetrators of this crime, if citizens of a state party to the Rome Statute, could be properly prosecuted by the ICC.

B. Does the Lubanga Case Suggest That the International Criminal Court Can Only Prosecute a Crime Against Humanity if it is Committed by a State?

As already stated, unless soldiers have mutinied and turn against the captain of their vessel, piracy is committed by private individuals and for private ends while crimes against humanity are said to be committed by a

76. Id. ¶ 24.

77. Prosecuting International Crimes in Africa 235 (Chacha Murungu & Japhet Biegon eds., 2011) (stating that “[p]iracy could also be committed by a warship, government ship or government aircraft whose crew has mutinied.”); see also UNCLOS art. 102.

78. Abdukar, Supreme Court, Criminal Side No.21 of 2011, ¶ 21 (Seychelles). Per Judge Gaswaga:

On the second query of the element of 'private ends', we should bear in mind that according to the definition provided in law, one will notice that piracy is a war-like act committed by non-state actors (private parties not affiliated with any government) against other parties at sea. So, in common palance, piracy is generally understood as violence or depredation or detention on the seas for private ends without authorization by public authority. Therefore, such bands of sea brigands commit these atrocities at their own will and for their own ends. This could however be further distinguished from privateering which was common in the 17th and 18th Centuries, but lost international sanction under the Declaration of Paris in 1856. A privateer or corsair used similar methods to a pirate, but acted while in possession of a commission or letter of marque from a government or monarch authorizing the capture of merchant ships belonging to an enemy nation. For instance, the United States’ Constitution of 1787 specifically
government actor or other entities with an organizational policy. But the state or organizational policy, which is admittedly not fully developed as it currently stands in the ICC jurisprudence, must actively promote or encourage such attacks against a civilian population. The said attack need not constitute a military attack. Besides, this study has already observed that an act of piracy is not merely an isolated incident but a crime against many individuals, and each incident forms part of a broader context of the widespread and systematic acts of crimes against humanity targeting a civilian population.

In line with the articulation in *Katanga,* where the ICC seemed to be more liberal on that policy, it is submitted that the various groups of pirates situated in the Indian Ocean off the coast of Somalia have made it scary, dangerous, and almost impossible for the crews of fishing and commercial vessels to continue operating their business. In essence, the pirates are in control of this territory with the capability to commit a widespread and systematic attack against the civilian population. In this regard, there is no need for the pirates to explicitly define their policy. Indeed, their *modus operandi,* involving systematic, clearly planned, directed, organized, and concentrated attacks in a particular area (as opposed to spontaneous or isolated acts of violence) no doubt demonstrate an implementation of a common policy and an organized common plan. Hence, a liberal interpretation of Article 7(2) should, as also suggested by some commentators, accommodate acts of piracy as fulfilling the element of organizational policy. The case of *Blaškić* is supportive of this reasoning. In this case, it was stated, “[t]he plan need not be developed at ‘the highest level of the state machinery,’” and that ‘individuals with *de facto* power or organized in criminal gangs’ are just as capable . . . of implementing a large-scale policy of terror and committing mass acts of violence.” In a nutshell, it cannot be said that the ICC can only prosecute a crime against

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81. *Katanga,* Case No. ICC-01/04-01/07, ¶ 396.
83. *See id.*
84. *Blaškić,* Case No. IT-95-14-T, ¶ 205.
85. *Id.*
humanity if it is committed by a state and the holding of *Lubanga* does not suggest this to be the case.

C. How Can One Prove That a Pirate Kingpin or Financier Had Knowledge of the Widespread and Systematic Use of Child Pirates and Aided and Abetted That Practice?

The whole venture of piracy is viewed as a lucrative business by the perpetrators, whereby the financiers assemble a group of pirates (including children under fifteen who are more vulnerable and available due to the breakdown of family and governance systems in Somalia, and also considered to be fearless) and provide facilitation with the aim of coining a profit. It is commonplace that certain parts of the Indian Ocean, especially off the coast of Somalia, are infested with groups of pirates who systematically and persistently continue to launch attacks against innocent sea voyagers. Knowledge is not easy to prove with direct evidence because perpetrators of crimes rarely document or voice their intentions and plans. The common adage goes that “actions speak louder than words;” therefore, such knowledge can only be inferred from their conduct and surrounding circumstances. This is reflected in the testimony of one captured and tried pirate who explained the breakdown of the ransom as he understood it as follows: 20% goes to the bosses of the organization; 20% goes to investment in future missions (guns, fuel, cigarettes, food, etc.); 30% goes to the gun men; and 30% goes to government officials.86 Financiers are aiders and abettors and ought to know what the venture is like and what is likely to happen when they send out pirates, such as murder, capture of human beings, unlawful detention and false imprisonment, torture, kidnapping, stealing/robbery and destruction of property, use of victims as human shields, and a lot of other inhumane treatment.

It has been stated that “the perpetrator’s knowledge may also be inferred from public knowledge based on the extent of media coverage, the scale of the acts of violence, and the general historical and political environment in which the acts occurred,” and that the indicia of knowledge should be assessed as a whole.87

Therefore the financiers of piracy, as facilitators of the whole criminal enterprise, cannot feign ignorance of what is likely to happen at sea after assembling a Pirate Attack Group (PAG) and triggering it into motion to hit the high seas. Moreover, they keep monitoring the activities of the PAG by using mobile communication gadgets and await feedback.

86. Ould-Abdallah, *supra* note 5, at 17 n.4.
It is submitted that a person planning and facilitating the commission of such offence and expecting to get a profit or share of the proceeds of that crime (ransom) should be held criminally responsible for that criminal venture even if they did not participate in the completion of the crime. It is immaterial whether they planned and facilitated the crime from dry land, which was later executed at sea, because their acts are part of the whole attack and were committed with a common intention and purpose.

D. ICC Mens Rea Requirement in Aiding and Abetting Cases

According to Article 25(3)(a) of the Roman Statute:

[A] person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court in accordance with the statute if that person commits such a crime, whether as an individual, jointly with another, or through another person, regardless of whether that person is criminally responsible.88

Kingpins and financiers of piracy clearly fall under this category as well as under Article 25(3)(b) for their role in inducing and soliciting men and children to form a PAG and facilitating their activities. In addition, by assembling and facilitating a PAG, all the persons involved act intentionally and with a common purpose and aim of furthering that criminal activity. Moreover, the person's further contributions in any other way "to the commission or attempted commission of such a crime by a group of persons acting with a common purpose" shall be considered intentional if it "be made with the aim of furthering the criminal activity or criminal purpose of the group . . . or be made in the knowledge of the intention of the group to commit the crime."89 A person will also be responsible for attempts to commit such a crime where they take action that commences its execution by means of a substantial step as depicted in the recruitment, preparation, and facilitation of a PAG.90

This discourse satisfies both the mental elements of intent and knowledge required under Article 30,91 as well as the purpose mens rea under Article 25.92 So long as the person has initiated or contributed to the crime by means of a substantial step, it is immaterial whether the crime is

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88. Rome Statute, supra note 7, art. 25(3)(a).
89. Id. art. 25(d)(i)-(ii).
90. Id. art. 25(3)(b).
91. Id. art. 30.
92. Id. art. 25.
completed or not, unless the crime does not occur because of circumstances independent of that person’s intentions or the person has completely and voluntarily given up the criminal purpose and prevents the completion of the crime.93

VII. CONCLUSION

Children under fifteen are recruited and used as pirates, thereby exposing them to hostilities. Their recruitment, which is unlawful, is done on dry land. The piracy itself, which includes violence, interference, and interception of humanitarian aid, is committed on the high seas—a place falling under the jurisdiction of no state.

Applying the holding in the Lubanga case regarding the enlisting and conscription of child soldiers, the pirate kingpins and financiers could be held equally liable for the crime of recruiting and using child pirates. It is also important to take note of the fact that considering the recruitment of child pirates or piracy generally as a crime against humanity does not necessarily require the existence of an armed conflict because these are offences that are committed at the moment the child under fifteen is recruited and joins the group. The perpetrators have knowledge on how widespread and systematic the problem of recruitment and use of child pirates is. If it is demonstrated that the perpetrator is from a state party to the Rome Statute or its accepted jurisdiction or was referred by the Security Council and/or committed the offence in a state party to the Rome Statute, then the ICC would have jurisdiction to try him as long as the matter is not already under investigation or trial in any state.

93. Rome Statute, supra note 7, art. 25(3)(f).