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Child Pirates: Rehabilitation, Reintegration, and Accountability

Mark A. Drumbl

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A stylized world map in a light blue-grey tone, showing the outlines of continents and major landmasses. It is set against a background of a faint grid of latitude and longitude lines.

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CHILD PIRATES:
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AND ACCOUNTABILITY

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CHILD PIRATES: REHABILITATION, REINTEGRATION, AND ACCOUNTABILITY

Mark A. Drumbl*

Denounced by customary international law and recognized as a breach of jus cogens, maritime piracy also is defined and proscribed by a number of international treaties. Piratical attacks off the coast of Somalia, which peaked several years ago, have triggered considerable international attention. While incidents of Somali piracy are sharply decreasing, attacks persist elsewhere, for example off the Gulf of Guinea in Western Africa.

The U.N. Security Council endorses a criminal justice model in response to acts of piracy. The Security Council thereby promotes a mechanism of judicialization and penalization. So, too, do the U.N. General Assembly, many states, international organizations (such as the International Maritime Organization), trade groups, and the shippers lobby. In the recent past, many detained pirates were perfunctorily captured and released. With the spread of the criminal justice model, however, pirates are increasingly facing prosecution in national courts, mainly in Kenya, Seychelles, and Maldives, but also in Germany, the U.S., India, France, Spain, Japan, and Somalia—among others.

It has been estimated that approximately one-third of captured pirates are minors, that is, persons under the age of eighteen. This article explores issues of accountability, reintegration, deterrence and rehabilitation in the context of child pirates. It recommends modalities of restorative and reintegrative justice for child pirates that avoid the careless superficiality of immediate release and the retributive heavy-handedness of criminal trials. Regrettably, prevailing imagery that cloaks juveniles enmeshed in international crimes, for example child soldiers, does not favor this middle ground. Instead, this narrative imagery facilitates either perfunctory release (the faultless passive victim image) or criminal trials regardless of age (the demon and bandit image). Unlike the case

* Class of 1975 Alumni Professor of Law and Director, Transnational Law Institute, Washington and Lee University School of Law. I thank Cody Phillips for research assistance. Several paragraphs herein are drawn from MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 12–14, 103–104, 130, and 178–180 (2012).

with child soldiers, however, the position of U.N. entities when it comes to child pirates tends toward greater punitiveness—assuredly, a concerning development. In response, and after examining why juveniles may end up in pirate gangs, this article proposes a new path, namely one that leads toward restorative justice initiatives.

As [his lawyer] is leaving, Abdiwali [a juvenile pirate criminally prosecuted in Germany] says to him: ‘You are father and brother to me. Your rule of law is a miracle on earth. All the expense, and two lawyers fighting just for me, and I don’t have to pay any money at all! I have rights—I didn’t know that. I am grateful that I have the chance to learn this. It all seems like a fairy tale to me.’

And then he says to the interpreter: ‘But one thing is still a mystery to me: What do they get out of it?’¹

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I. INTRODUCTION

Maritime piracy is among the original universal jurisdiction crimes.² Persons “committing thefts on the high seas, inhibiting trade, and endangering maritime communication are considered by sovereign states to be *hostis humani generis* (enemies of humanity).”³

1. Beate Lakotta, *Torture? Execution? German Justice Through the Eyes of a Pirate*, SPIEGEL (Apr. 7, 2011), <http://www.spiegel.de/international/world/torture-execution-german-justice-through-the-eyes-of-a-somali-pirate-a-755340.html>.
2. See Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, 38 (Feb. 14) (separate opinion of President Guillaume) (“[U]niversal jurisdiction is accepted in cases of piracy because piracy is carried out on the high seas, outside all State territory.”); see also *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 812 (9th Cir. 2011) (“One of the three violations of the law of nations laid down by Blackstone . . . was piracy.”); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).
3. Republic v. Mohamed Sayid et al., Judgment, Crim. Side No. 19 of 2010 [37] (Supreme Ct. Sey. 2011).

Denounced by customary international law and recognized as a breach of *jus cogens*, piracy also is defined and proscribed by a number of international treaties, notably, the 1982 U.N. Convention on the Law of the Sea (UNCLOS), as follows:

- (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;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).⁴

UNCLOS, which calls upon all states to cooperate to the fullest extent possible in the repression of piracy, provides a jurisdictional basis for the prosecution of acts of piracy.⁵ Resolutions of the U.N. Security Council and of the U.N. General Assembly, codes of conduct, and recommended best practices additionally round out the international regime applicable to piracy. The adoption of a number of these instruments was prompted by the frequency of piratical activity off the coast of Somalia in the late 2000s; (these particular instruments, moreover, remain limited in effect to the Somali situation).

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- 4. See U.N. Convention on the Law of the Sea art. 101, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]; see also Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 3, *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 1992 (entered into force Mar. 1, 1992) [hereinafter 1988 SUA Convention] (enumerating specific offenses that constitute piracy with its definition being used in certain domestic proceedings); Convention on the High Seas art. 15, *opened for signature* Apr. 29, 1958, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) (defining and proscribing piracy in a manner virtually identical to UNCLOS). Generally speaking, the UNCLOS definition of piracy matches the definition operative under customary international law.
 - 5. UNCLOS, *supra* note 4, art. 100, 1833 U.N.T.S. at 436.

Many states have domesticated piracy, including at times with explicit reference to international law,⁶ although not always in language identical to the UNCLOS definition.⁷ Other states have not

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6. In the case of the U.S., see 18 U.S.C. § 1651 (2013) (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”). This statutory language traces to An Act to Protect the Commerce of the United States, and Punish the Crime of Piracy, ch. 77, § 5, 3 Stat. 510, 513–14 (1819) (which required death as a mandatory sentence). Piracy, to be clear, was initially defined by the First Congress in 1790 albeit in different language. *See* Crimes Act of 1790, ch. 9, §§ 8, 9, 1 Stat. 112, 113–14 (1790). For an insightful argument that application of 18 U.S.C. § 1651 to minors would be unconstitutional in light of its mandatory sentence of life imprisonment without parole and the unconstitutionality of such sentences, pursuant to the Eighth Amendment prohibition on cruel and unusual punishment, see Lauren Hahn, Note, *Juvenile Justice and Piracy: Prosecutions of Juvenile Pirates in the United States*, 20 GEO. MASON L. REV. 241, 242, 260–68 (2012). Hahn relies on the U.S. Supreme Court opinion in *Graham v. Florida*, 560 U.S. 48 (2010). Hahn’s unconstitutionality argument is strengthened by the 2012 U.S. Supreme Court opinion, *Miller v. Alabama*, 132 S. Ct. 2455 (2012), which likely postdated publication of her piece. The Court held that imposing a sentence of life imprisonment without the possibility of parole upon a minor for homicide offenses violated the Eighth Amendment. For Hahn, the unconstitutionality of the U.S. piracy statute in the case of juvenile pirates means that juvenile piracy suspects would have to be charged under other applicable federal statutes. *See* Hahn, *supra* note 6, at 268.
7. For example, see Section 65(1) of the Seychelles Penal Code as amended in 2010 which reads as follows: “Any person who commits any act of piracy within Seychelles or elsewhere is guilty of an offence and liable to imprisonment for 30 years and a fine of R1 million.” *See* Republic v. Abdugar Ahmed & Five Others, Judgment, Crim. Side No. 21 of 2011 [2] (Supreme Ct. Sey. 2011) (citing to Section 65(1) of the Penal Code). Section 65(4) of the Penal Code defines piracy as:
- (a) Any illegal act of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or aircraft and directed-
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such a ship or aircraft
 - (ii) against a ship or an aircraft or a person or property in a place, outside the jurisdiction of any State
 - (b) Any act of voluntary participation in the operation of a ship or an aircraft with knowledge of facts making it a pirate ship or a pirate aircraft; or
 - (c) Any act described in paragraph (a) or (b) which, except for the fact that it was committed within a maritime zone of Seychelles, would have been an act of piracy under either of those paragraphs.

domesticated piracy *per se* or have done so in a manner that may not apply to certain categories of offenders (i.e., juveniles). In these jurisdictions, conduct tantamount to piracy could be prosecuted as cognately related ordinary crimes. On rare occasion, states have invoked universal jurisdiction under UNCLOS as a basis for piracy prosecutions.⁸

Modern maritime piracy is much more than just a financial crime. In addition to the force they deploy to subdue the ship, pirates have in some instances traumatized their captives through mock (or actual) executions, psychological torture, sexual assault, and the use of crewmembers as human shields or slaves.⁹ In recent hijackings and attacks in West Africa, pirates based in the Niger delta inflicted harm directly on crewmembers.¹⁰ That said, the gravity of piracy typically is not comparable to the atrociousness of other international crimes such as genocide, crimes against humanity, and widespread war crimes.¹¹ Piracy's "defining characteristic," after all, "is not its

See Republic v. Liban Mohamed Dahir & Twelve Others, Judgment, Crim. Side No. 7 of 2012 [4] (Supreme Ct. Sey. 2012) (citing to Section 65(4) of the Penal Code). This section was enacted in response to jurisdictional challenges that had previously been brought.

8. Hahn, *supra* note 6, at 247–48 & n.65.
9. Rich Miller, *Some Progress Noted in Deterring Pirates, but Mistreatment of Mariners Persists*, PROF'L MARINER (Sept. 27, 2011), <http://www.professionalmariner.com/October-November-2011/Some-progress-noted-in-deterring-pirates-but-mistreatment-of-mariners-persists/>.
10. Piracy, including hijackings, in the Gulf of Guinea affects Bénin, Cameroon, Côte d'Ivoire, Ghana, Guinea, Togo, Gabon, and, most directly, Nigeria. *See* Ryan Cummings, *The Rise and Rise of Piracy in the Gulf of Guinea*, THINK AFR. PRESS (July 18, 2013), <http://thinkafricapress.com/politics/gulf-guinea-africas-new-piracy-hotspot>. The International Maritime Organization has suggested that the frequency of pirate attacks in the Gulf of Guinea is about fifty per year, though it indicates this is a conservative estimate. *Id.*
11. Sohail Choudhury, *Mysterious World of Somali Pirates*, SOMALI THINK TANK (Aug. 27, 2011), <http://somalithinktank.org/mysterious-world-of-somali-pirates/> ("In most of the hijackings, the bandits have not harmed their prisoners."). *But see* Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, Annex Report to the Letter dated Jan. 24, 2011 from the Secretary-General to the President of the Security Council, ¶ 30, U.N. Doc. S/2011/30 (Jan. 25, 2011) (by Jack Lang) [hereinafter Lang Report] (noting that growing pressure by instigators of piracy, the remoteness of areas of operation, and the increase in ransoms sought tend to augment the level of violence of pirate attacks and extend the duration of periods of hostage detention).

heinousness, but that it occurs outside any nation's sovereign territory."¹²

In recent years, anti-piracy patrols have reportedly released over 90 percent of captured suspects.¹³ This means that, upon capture, the vast majority of pirates never come to face any official process of accountability for their alleged conduct. For those suspects who are not summarily released, however, the central impulse among international lawyers and policymakers is to pursue criminal prosecutions. The U.N. Security Council endorses a criminal justice model as a responsive mechanism to acts of piracy connected to the situation in Somalia.¹⁴ The Security Council thereby promotes a model of judicialization and penalization. So, too, has the U.N. General Assembly, which in Resolution 66/231 generally calls for the apprehension and prosecution of persons alleged to have committed

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12. *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 813 (9th Cir. 2011).
13. Lang Report, *supra* note 11, ¶ 14. There is some indication that, among captured pirates, the percentage of those summarily released is declining over time with a corresponding increase in the percentage of those who face criminal process. The U.N. Security Council has criticized capture and release practices in the case of Somalia. *See, e.g.*, S.C. Res. 1950, pmb., U.N. Doc. S/RES/1950 (Nov. 23, 2010) (“*Noting* with concern that the continuing limited capacity and domestic legislation to facilitate the custody and prosecution of suspected pirates after their capture has hindered more robust international action against the pirates off the coast of Somalia, and in some cases has led to pirates being released without facing justice, regardless of whether there is sufficient evidence to support prosecution”); S.C. Res. 1976, pmb., U.N. Doc. S/RES/1976 (Apr. 11, 2011) (“*Further expressing concern* over a large number of persons suspected of piracy having to be released without facing justice, *reaffirming* that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community”); S.C. Res. 1918, para. 1, U.N. Doc. S/RES/1918 (Apr. 27, 2010) (“*Affirms* that the failure to prosecute persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia undermines anti-piracy efforts of the international community.”).
14. *See, e.g.*, S.C. Res. 1950, *supra* note 13, ¶¶ 11, 13 (calling on “Member States to assist Somalia . . . to bring to justice those who are using Somali territory to plan, facilitate, or undertake criminal acts of piracy” and to “criminalize piracy under their domestic law”); S.C. Res. 1976, *supra* note 13, ¶ 14 (calling on states “to favorably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia”); *see also* S.C. Res. 1816, para. 11, U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res. 1846, para. 14, U.N. Doc. S/RES/1846 (Dec. 2, 2008); S.C. Res. 1851, para. 3, U.N. Doc. S/RES/1851 (Dec. 16, 2008); S.C. Res. 1897, para. 6, U.N. Doc. S/RES/1897 (Nov. 30, 2009); S.C. Res. 1918, *supra* note 13, ¶ 2; S.C. Res. 2015, para. 5, U.N. Doc. S/RES/2015 (Oct. 24, 2011).

acts of piracy.¹⁵ Since the International Criminal Court (ICC) and all other international criminal tribunals lack jurisdiction over piracy, these criminal prosecutions are to be conducted nationally, either in the accused's state of nationality or extraterritorially (i.e., in a state with connection to the victims, in a state that has agreed to hear piracy cases, or in the vessel's flag state).¹⁶ The criminalization model also has been explicitly propounded by the 2009 Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden. Pursuant to this regional instrument, conducted under the aegis of the International Maritime Organization (IMO), signatories agree to cooperate in the investigation, arrest, and prosecution of piracy suspects and also to ensure that there are domestic laws in place to criminalize piracy.¹⁷ Twenty of the twenty-one eligible states in the region have signed the Djibouti Code of Conduct.¹⁸ The IMO also propounds a prosecutorial model in various resolutions it has adopted.¹⁹ This push has led to the adoption of agreements between states with the military capacity to capture pirates (for example, the U.K. and members of the EU) and certain states that have developed piracy courts to receive these defendants (notably, Seychelles, Kenya,²⁰ and Mauritius).

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15. G.A. Res. 66/231, ¶¶ 81, 84–85, U.N. Doc. A/RES/66/231 (Apr. 5, 2012) (encouraging “States to ensure effective implementation of international law applicable to combating piracy, as reflected in the Convention, and calls upon States to take appropriate steps under their national law to facilitate, in accordance with international law, the apprehension and prosecution of those who are alleged to have committed acts of piracy”).
 16. The prospect of establishing a new international piracy tribunal is most unlikely, in part because of the prevalence of tribunal fatigue and also because of the political complexities such a process would entail. See Lang Report, *supra* note 11, ¶ 78.
 17. Int’l Maritime Org. [IMO], *Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and the Gulf of Aden*, Djibouti Meeting Res. 1, arts. 2(1)(c), 4, 11 (Jan. 29, 2009) [hereinafter *Djibouti Code of Conduct*], available at <http://www.imo.org/OurWork/Security/PIU/Documents/DCoC%20English.pdf>.
 18. *Djibouti Code of Conduct*, IMO, www.imo.org/OurWork/Security/PIU/Pages/DCoC.aspx (visited on Feb. 14, 2014).
 19. See, e.g., Int’l Maritime Organization [IMO], *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia*, IMO Assemb. Res. A. 1044 (27), at 4, 7 (Nov. 30, 2011) (supporting legal regimes and arrangements between states that facilitate piracy prosecutions).
 20. Kenya prosecuted several piracy cases in 2008 and 2009. It did so pursuant to agreements it had signed with a small number of states and the EU to receive captured pirates. In 2010, however, Kenyan

Although much of the recent flurry of international legal activity on the subject of piracy is expressly limited to the situation in Somalia,²¹ the international law and policy community's endorsement of penal law, criminal prosecutions, and imprisonment for offenders is of a much broader cadence. U.N. Resolution 66/231, for example, is general in scope in its discussion of prosecutions; treaties such as UNCLOS are obviously of general application as well. Part of the motivation of limiting the effect of certain Security Council resolutions only to the Somali situation, moreover, derives from the fact that these resolutions, adopted under Chapter VII of the U.N. Charter, call upon states to use all necessary means, such as deploying naval vessels and military aircraft, to repress acts of piracy.²²

authorities complained about the international community's failure to adequately support these often costly prosecutions. Furthermore, in 2010 the Mombasa High Court ruled that Kenyan courts lacked the jurisdiction to prosecute pirates unless the act of piracy occurred within Kenya's territorial waters. This decision nixed Kenya's ability to prosecute any cases involving Somalis. The transfer programs, then, were effectively gutted. In 2012, however, a specially created entity in the Kenyan Court of Appeals overturned this decision, determining that Kenya would have universal jurisdiction over piracy. The Kenyan courts, therefore, would once again be able to adjudicate piracy cases involving Somalis on the high seas. *See* C W Lupao, *Courts Can Try Piracy Offences on the High Seas*, THE STAR (Oct. 18, 2012), <http://www.the-star.co.ke/news/article-93302/courts-can-try-piracy-offences-high-seas> (summarizing the legal decisions and debate regarding the jurisdiction of Kenyan courts in piracy cases). To date 115 pirates have been convicted in Kenya. *See* Sulakshna Beekarry, Chief of Piracy Prosecutions in Mauritius, Comments made at End Game! An International Conference on Combating Maritime Piracy at Case Western Reserve University School of Law (Sept. 6, 2013), *available at* <http://www.youtube.com/watch?v=tlx8y06-k4> (noting also that 112 pirates have been convicted to date in Seychelles).

21. *See, e.g.*, S.C. Res. 1950, *supra* note 13, ¶ 8 (affirming “that the authorizations renewed in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations, under [UNCLOS], with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law”). Restrictions as to the instrument's effect only to the Somali situation also emerge in other Security Council resolutions. *See* G.A. Res. 66/231, *supra* note 15, ¶ 90; Djibouti Code of Conduct, *supra* note 17, art. 2(2) (“The Participants intend this Code of conduct to be applicable in relation to piracy and armed robbery in the Western Indian Ocean and the Gulf of Aden.”).
22. *See, e.g.*, S.C. Res. 1816, *supra* note 14, ¶ 2; S.C. Res. 1838, para. 2, U.N. Doc. S/RES/1838 (Oct. 7, 2008), S.C. Res. 2020, para. 7, U.N. Doc. S/RES/2020 (Nov. 22, 2011). Resolution 1816, however, also makes a general statement reaffirming guiding principles in the repression of piracy on the high seas including “apprehending persons

Essentially, regardless of where piratical activity originates, punitive justice measures would very likely inform the best practices that the international community would envision as suitable to combat such activity. The Security Council sees a link between criminal prosecutions and deterrence of piratical conduct in the Somali situation, as does the IMO, and there is no reason to believe that either would see things differently in other situations.²³ Tellingly, the prosecutorial model infuses the newly drafted Code of Conduct adopted at the maritime conference held in Yaoundé, Cameroon.²⁴

In this article, within the context of child²⁵ pirates (who I define as pirates under the age of eighteen),²⁶ I recommend a new path,

engaged in such acts with a view to such persons being prosecuted.” S.C. Res. 1816, *supra* note 14, pmbl.

23. See S.C. Res. 1918, *supra* note 13, ¶ 1; Int’l Maritime Org. [IMO], *Guidelines to Assist in the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*, Annex, at 1, MSC.1/Circ.1404 (May 23, 2011) (“The capture, prosecution and sentencing of pirates and armed robbers is probably the most appropriate deterrent action available to Governments.”).
24. Economic Community of West African States [ECOWAS] et al., *Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa*, arts. 2(1)(c), 4(4) (June 25, 2013) (demonstrating a commitment to national level prosecutions of pirates).
25. In this article I interchangeably use the terms child, juvenile, and minor; I understand each term to cover persons under the age of eighteen at the time of the alleged piratical conduct.
26. My approach accords with the norms of international human rights law, which conceptualize children as persons under the age of eighteen. Convention on the Rights of the Child, G.A. Res. 44/25, Annex art. 1, U.N. Doc. A/RES/44/25 (November 20, 1989) [hereinafter CRC] (including 193 state parties). Child soldiers, and children associated with armed forces and armed groups, as a protected class are understood as being under the age of eighteen. See, e.g., UNICEF, *Cape Town Principles and Best Practices* (Apr. 27–30, 1997), available at [http://www.unicef.org/emerg/files/Cape_Town_Principles\(1\).pdf](http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf) (defining a child soldier as “any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers and anyone accompanying such groups, other than family members”); UNICEF, *The Paris Principles: The Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, ¶ 2.1 (Feb. 2007), available at http://www.child-soldiers.org/childsoldiers/Paris_Principles_March_2007.pdf (defining a child associated with armed forces or armed groups as: “any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.”).

namely, modalities of restorative and reintegrative justice that avoid the careless superficiality of immediate release and the retributive heavy-handedness of criminal trials. I would, moreover, advocate the same recommendation to adults of low-rank in piracy gangs.

Regrettably, prevailing imagery that cloaks juveniles enmeshed in international crimes, such as child soldiers, does not favor this middle ground. Instead, this narrative imagery facilitates either perfunctory release (the faultless passive victim image) or criminal trials regardless of age (the demon and bandit image).²⁷ I have elsewhere argued that, when it comes to the social reintegration of former child soldiers, these sensationalist images belie the nuances of child soldiers' experiences and fail to promote their best interests.²⁸ The fact that a similar dynamic is playing out in the context of child pirates is frustrating. Unlike the case with child soldiers, however, the position of U.N. entities when it comes to child pirates tends toward greater punitive measures. Assuredly, this is a concerning development.

Whether criminal trials for piracy (or extraordinary international crimes more generally) have deterrent effect remains an unsettled question. Other than for the highest level leaders or offenders, I remain a skeptic in this regard; even in these cases, I believe the best justification for international penalty resides in expressivism. My doubts on the deterrent front are even more pointed when it comes to child defendants. On the other hand, perfunctory release is also of negligible deterrent value and, in fact, may simply encourage recidivism on the part of both adult recruiters and child participants.

Detering children from becoming pirates and solidly reintegrating former child pirates into civil society constitute two vastly understudied concerns.²⁹ This is one reason, among many, why buttressing an end-game to piracy is so crucial. Tellingly, a Google search on "child pirates" mostly yields references to Halloween costumes and various ideas for pirate-themed toddler birthday parties. But the unsettling reality is that juvenile piracy is no laughing matter. It poses a unique set of challenges to current legal

27. For detailed treatment of this theme, see MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 6–11 (2012).

28. *Id.* at 11.

29. *Cf.* S. WHITMAN, H. WILLIAMSON, M. SLOAN & L. FANNING, DALHOUSIE MARINE PIRACY PROJECT: CHILDREN AND YOUTH IN MARINE PIRACY – CAUSES, CONSEQUENCES AND THE WAY FORWARD (MARINE AFFAIRS PROGRAM TECHNICAL REPORT #5) 3 (2012), *available at* http://www.dal.ca/content/dam/dalhousie/images/faculty/science/marine-affairs-program/Technical_series/MAP%20Technical%20Report%20%235.pdf (noting that “many who are involved in studying or addressing marine piracy have failed to pose questions regarding the involvement of children and youth”).

frameworks; prosecuting countries should reconsider their laws, sentencing guidelines, and notions of retributive justice.

Part II of this article sets out data on piracy generally and also addresses some specifics regarding juvenile involvement. Part III summarizes current efforts to criminally prosecute child pirates in instances where capture and release policies are not implemented. Part IV explores why juveniles may end up in pirate gangs. Part V assesses the deterrent effect of criminal prosecutions of juvenile pirates and proposes a new path, namely, one that leads toward restorative justice. Part VI then concludes.

II. JUVENILE PIRACY: FACTS AND FIGURES

In recent years, the epicenter of pirate attacks has been located in the Gulf of Aden, the Red Sea, and the western Indian Ocean adjacent to the Horn of Africa—specifically, off (often far off) the Somali coast. Initially, Somali pirates operated in relative proximity to the Somali coast, but then broadly extended their activities (through the deployment of “motherships” and skiffs) well beyond the littoral—even up to 1,700 nautical miles from their land bases.³⁰ Many pirates hailed from Puntland, a self-governing region in northeast Somalia.³¹ The U.N. Security Council has recognized that “the incidents of piracy and armed robbery at sea off the coast of Somalia exacerbate the situation in Somalia, which continues to constitute a threat to international peace and security in the region.”³²

It is, however, imprudent to exaggerate the frequency of pirate attacks. Most pirate attacks do not result in a successful hijacking, and pirate attacks occur against only a fraction of the total number of merchant vessels that transit through the Arabian Sea and Indian Ocean. Furthermore, the number of pirate attacks involving Somalis has sharply declined over the past two years.³³ The International

30. See, e.g., IMO, *supra* note 19, at 5.

31. See generally Jonathan R. Beloff, *How Piracy is Affecting Economic Development in Puntland, Somalia*, 6 J. STRATEGIC SECURITY 47 (2013) (exploring the various reasons why piracy has grown in Puntland).

32. S.C. Res. 1950, *supra* note 13, pmbl.

33. See Int’l Chamber of Shipping [ICS], *Lessons Identified from Somali Piracy*, at 1, ICS(13)(37) (July 18, 2013), available at <http://www.ics-shipping.org/icsorange/icscirculars13/allmembers.htm> (“[T]he number of successful attacks against ships by Somali pirates has reached a five-year low.”); see also Choudhury, *supra* note 11 (“By the first half of 2010, these increased policing efforts by Somali government authorities on land and international naval vessels at sea reportedly contributed to a drop in pirate attacks in the Gulf of Aden from 86 a year prior to 33, forcing pirates to shift attention to other areas such as the Somali Basin and wider the Indian Ocean.”).

Maritime Bureau (IMB) reports eleven Somali-related piracy incidents in 2013, including two hijackings.³⁴

This dramatic reduction is in large part due to defensive and preventative actions taken by international shippers transiting the region. These actions include arming ships with private security forces, deploying military protection, and adopting internationally-endorsed best management practices. The IMO, for example, has supported extensive and detailed guidance that covers everything from lighting, controlling access to the ship's bridge, recommended speeds, and lookouts, to use of constructed dummies and razor wire on board, and many other precautionary measures.³⁵ Military deployments in the region, such as those undertaken by EU Operation Atalanta and NATO's Operations Allied Protector and Ocean Shield, also have helped quell pirate attacks. In the end:

The mass exodus from the piracy trade may have more to do with a broken business model than a sudden change of heart. . . . The decline has been largely attributed to the increased presence of armed-guard detachments on board merchant vessels. It is currently estimated that 30 percent to 40 percent of commercial vessels traveling through the Gulf of Aden employ private security, a response to skyrocketing ransom demands and increasingly lengthy captivity periods for hijacked crews.³⁶

The effect of these measures is likely far greater than that of criminal prosecutions, particularly of low-rank offenders, which in turn suggests a valuable lesson regarding the place of criminal trials in deterring international piracy or international criminality more generally. This is not to deny the salience of the growing muscularity

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34. *Piracy & Armed Robbery News & Figures*, ICC COMMERCIAL CRIME SERVS., <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures/275-piracynewsfigures> (last updated Oct. 22, 2013). See also Joseph Akwiri, *Somali Pirates Sentenced to Seven Years in Prison*, REUTERS (Oct. 23, 2013) (reporting that “[i]n a sign that piracy is still a threat, the European Union Naval Force for Somalia, said last week that a fully loaded crude oil supertanker fought off and repulsed pirates off the Somali coast on October 11”).
35. See Int’l Maritime Org. [IMO], *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia, Best Management Practices for Protection Against Somalia Based Piracy*, Annex 2, MSC.1/Circ.1339 (Sept. 14, 2011) (referring to BMP4: BEST MANAGEMENT PRACTICES FOR PROTECTION AGAINST SOMALI BASED PIRACY 23–30 (2011)).
36. Jay Bahadur, *Somalia Offers Amnesty to Junior Pirates to End Hijackings*, THE DAILY BEAST (Mar. 3, 2013), <http://www.thedailybeast.com/articles/2013/03/03/somalia-offers-amnesty-to-junior-pirates-to-end-hijackings.html>.

of the emergent network to prosecute and incarcerate pirates but, rather, to mindfully contextualize the effects of these legal proceedings within a much broader picture.

A positive shift in the domestic, political, and security situation within Somalia has also helped stanch the frequency of piratical attacks. In January 2013, the U.S. announced recognition of Somalia's government led by President Hassan Sheikh Mohamud, which has been described by Washington as "the first permanent, representative government in Somalia in two decades."³⁷ As will be further discussed *infra*, the Mohamud government has depleted the ranks of pirate gangs through the use of incentive measures, including amnesties in the case of juveniles, and has also succeeded in curbing the influence of the Islamist Al-Shabaab militant group throughout the country. Surely, these changes in the domestic landscape influence the economic and social incentives that may pull some Somalis into piracy. Investment of capital and ideas into dynamic business ventures in Somalia, such as the expansion of Jubba Airways (a Somali airline serving *de facto* as the national carrier), also helps anchor inchoate economic development.³⁸

This is not to say that the threat of pirate attacks off the Somali shores has disappeared. Somalia, after all, remains an extremely fragile place, with recurrent terrorist violence and domestic turmoil.³⁹ Stability is tenuous, and the continued renewal of very expensive international military patrols in the region is not guaranteed. In any event, even at its apex, piracy off the Somali coast did not account for all incidents of global maritime piracy, though Somali pirates operating in an enormous High Risk Area (stretching well off the Somali coast, to the Suez and Strait of Hormuz in the north, west into the Arabian Sea and Indian Ocean, and south into the Mozambique Channel) certainly accounted for a substantial number of the world's pirates.⁴⁰ Of great immediate concern is that piracy is

37. *United States Recognizes Government of Somalia After Two-Decade Hiatus*, 107 AM. J. INT'L L. 436, 436 (John R. Crook ed., 2013).

38. Joshua Hammer, *Somalia's Somewhat Friendly Skies*, N.Y. TIMES (July 12, 2013), <http://www.nytimes.com/2013/07/14/magazine/somalias-somewhat-friendly-skies.html> (but noting also that in 2012, "the Washington-based nonprofit organization Fund for Peace ranked Somalia No. 1 on its Failed States Index for the fifth consecutive year, ahead of Congo, Sudan and Zimbabwe").

39. The U.S. Department of State reports that "[t]oday, Somali pirates hold hostage one ship and approximately 60 mariners." *Press Statement: Sentencing of Somali Pirates Involved in the Attack on the S/V QUEST*, U.S. DEP'T OF STATE (Aug. 7, 2013), <http://www.state.gov/r/pa/prs/ps/2013/08/212809.htm>.

40. The IMB "reported that, in 2011, there were 439 piracy attacks worldwide, 237 of which occurred off the coast of Somalia. In 2010, 445 attacks were reported, and the numbers of crewmembers taken hostage

spiking in West Africa, notably in the Gulf of Guinea (which extends from Gabon to Liberia), which has been taken up by the U.N. Security Council; youths are implicated in these attacks, which affect a large number of littoral states.⁴¹ Piracy also is afflicting Pakistan and South East Asia.⁴² The IMB reports 206 piracy incidents in 2013, including 11 hijackings, 30 of which are Nigeria-related.⁴³ The proportion of Somali-related piracy incidents in 2013 represents only a fraction—under 6 percent of world-wide incidents. Moreover, attacks against fishermen within territorial waters often fail to become reported even though these attacks look a lot like pirate attacks. Hugh Williamson, for example, notes the occurrence of 50 attacks against fishing vessels in one week alone in the Bay of Bengal, which include hostage-taking and violence; he also notes underreporting in the case of attacks off the coast of Guyana.⁴⁴ Classification of an attack as a pirate attack, then, may be under-inclusive.

When it comes to past attacks involving Somalis, moreover, vexing questions persist as to how to approach detainees, including juveniles, accused or convicted of piracy.⁴⁵ On this subject, “[t]he U.N. Office on Drugs and Crime estimates there are . . . an estimated 1,000

significantly increased—from 188 in 2006 to 1,181 in 2010. Similarly, in 2009, there were 406 piracy attacks, 196 of which occurred [in] the Gulf of Aden or off the Somali coast.” Hahn, *supra* note 6, at 243. For more information on the High Risk Area, see IMO, *supra* note 35, at 4, 86–87.

41. See ICS, *supra* note 33, at 1 (noting “a parallel crisis, involving disturbing levels of violence against ships’ crews, is now developing in West Africa”); Cummings, *supra* note 10, at 1 (noting that the Gulf of Guinea “has overtaken the Somali coast as Africa’s main piracy hotspot, and this upward trend looks set to continue”).
42. Rear Admiral Daya Dharmapriya, Countering Maritime Piracy: A South Asian Perspective (Sept. 27–28, 2012) (paper presented at Regional Counter-Piracy Workshop in Colombo, Sri Lanka) (on file with Oceans Beyond Piracy), http://oceansbeyondpiracy.org/sites/default/files/dharmapriyas_paper_formatted.pdf (explaining the expansion of trade in South Asia and nearby regions, and its consequent attraction for Somali pirates).
43. *Piracy & Armed Robbery News & Figures*, *supra* note 34.
44. Hugh Williamson, Dalhousie University, Comments made at End Game! An International Conference on Combating Maritime Piracy at Case Western Reserve University School of Law (Sept. 6, 2013), *available at* <http://www.youtube.com/watch?v=euqcpQsMAIU#t=1657>.
45. One observer found that “many Somali youth linked to piracy are held in foreign jails.” Sonia Messaoudi, *Child Pirates: A Key Issue for Respecting Child’s Rights and Halting Piracy*, COMMUNIS HOSTIS OMNIUM (Oct. 23, 2012), <http://piracy-law.com/2012/10/23/child-pirates-a-key-issue-for-respecting-childs-rights-and-halting-piracy/>.

Somalis in custody for the crime of piracy in about 20 countries.”⁴⁶ Relatedly, efforts are required to ensure that juvenile pirates who have been captured, repatriated, and released do not gravitate toward criminal or anti-social behavior. Furthermore, past attacks still present serious issues of reparative justice for the many victims. Nationals and property of many states have been victimized by pirate attacks, including: Thailand, the Netherlands, Bangladesh, the, U.S., the U.K., China, Ukraine, France, Bulgaria, Greece, the Philippines, Malta, Myanmar, Denmark, Iran, Pakistan, and the Russian Federation. The costs of contemporary piracy—to which juveniles contribute—are steep. When additional patrols, ransom, insurance, and damages are totaled, it has been estimated that piracy costs between \$7 billion and \$12 billion dollars annually.⁴⁷ Other costs not reflected in these sums involve naval support, the rerouting of ships on trajectories that may be slower, and delays in the delivery of humanitarian aid. Loss of life, of course, cannot be so readily quantified.

No comprehensive demographic studies of pirate populations have yet been conducted. Nevertheless, media, academic, and informal sources commonly report that approximately one-third of all captured pirates are children⁴⁸—specifically, under the age of eighteen—particularly in the case of Somalis. Many child pirates are very poor and illiterate.

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46. *Somali Youth Warned Not to Become Pirates*, VOICE OF AM. (Feb. 16, 2012), <http://www.voanews.com/content/somali-kids-in-kenya-warned-not-to-become-pirates-139513578/159616.html>.
47. *Child Pirates: Raising Awareness About a Serious Issue*, RCI (Mar. 20, 2013), http://www.rcinet.ca/english/daily/interviews-2012/14-23_2013-03-20-child-pirates-raising-awareness-about-a-serious-issue/. For a higher estimate, see Choudhury, *supra* note 11 (“Piracy has impeded the delivery of shipments and increased shipping expenses, costing an estimated £10 billion a year in global trade.”).
48. *Child Pirates: Raising Awareness About a Serious Issue*, *supra* note 47 (stating that “almost a third of the pirates are juveniles, or even children as young as 10 or 11 years old”); *see also* Misha Noble-Hearle, *Child Pirates: A World Away From Play*, DALHOUSIE UNIV. (Mar. 20, 2013), <http://www.dal.ca/news/2013/03/20/young-pirates-on-the-high-seas.html> (observing the same); Messaoudi, *supra* note 45 (same); Roméo Dallaire et al., *Child Pirates Are Everybody’s Problem*, THE GLOBE AND MAIL (Feb. 10, 2012), <http://www.theglobeandmail.com/globe-debate/child-pirates-are-everybodys-problem/article544972/> (“The outbreak of piracy in the Horn of Africa highlights the fact that, in that region (as well as in many of the other areas where piracy is a problem), more than half the population is under 18. About a third of the pirates captured recently are reported to be 14 or 15.”). Some media reports define child pirates as being below the age of fifteen years. *See, e.g.*, Rajat Pandit, *25 of 61 Pirates Arrested by Navy at Sea Are Children Below 15 Yrs*, THE TIMES OF INDIA (Mar. 17, 2011). In my opinion, this is an unduly narrow and somewhat archaic definition.

One problem that recurrently surfaces in criminal prosecutions of alleged pirates is that defendants often claim to be minors. These claims, however, are very difficult to verify.⁴⁹ Somalia, for example, lacks a system of birth registration. In light of the problems in establishing precise birth dates through documentary evidence, a turn to testimonial evidence may be required. Yet such evidence may be imprecise, vague, and vacillating.⁵⁰ In response, a number of jurisdictions that have undertaken criminal prosecutions have used forensic testing of bones and dental examinations to assess the veracity of these claims. In some cases, this testing has corroborated the claims. Yet more often the testing disavows the claims of minority. Such testing, moreover, has given rise to disputes whether forensic markers keyed to age determinations among western children are applicable, *mutatis mutandis*, universally. Regardless, even if some claims of minority on the part of captured pirates are unfounded, a substantial number of captured pirates still are minors.

For the most part, piracy is not an ideological crime. It is not animated by eliminating or persecuting protected or identifiable groups. It is not terroristic in that it is not intended to coerce or intimidate a civilian population so as to achieve some sort of political goal. Some sociological analysis suggests that certain Somali pirates may justify their actions through a political or corrective justice lens, in light of how they have suffered from the dumping of toxic waste by international ships in offshore waters, illegal fishing, and degassing.⁵¹ But, for the most part, Somali piracy is motivated by private ends such as escaping poverty, pursuing lucre, and securing some financial

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49. See U.N. Secretary-General, *Rep. of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons for Acts of Piracy*, ¶ 46, U.N. Doc. S/2010/394 (July 26, 2010) (“Many suspects apprehended have no identification papers, and sometimes no precise knowledge of their own age. There may be real practical difficulties, therefore, in determining their age with any certainty.”).
50. *But see* United States v. Hasan, 747 F. Supp. 2d 642, 675–76 (E.D. Va. 2010) (recounting that at trial in a U.S. piracy prosecution, a Somali interpreter testified without objection that, while many Somalis may not know their actual birth date, they typically know their birth year).
51. See Lakotta, *supra* note 1 (“The poor on the Somali coast see piracy as compensation for past injustices. For years, foreign fleets depleted their fishing grounds, while others dumped their toxic wastes in their waters. Eventually the fishermen hit upon the idea of getting something back. What began as a politically motivated David-versus-Goliath campaign has grown into a criminal industry that supports entire villages.”). For a more skeptical account on this point, see Lang Report, *supra* note 11, ¶ 13 (“Although the nexus between piracy, on the one hand, and illegal fishing and toxic waste, on the other, continues to be invoked without having been proven to date, piracy has in essence become an organized, lucrative and attractive criminal activity undertaken for heinous ends.”).

gain amid dire conditions and paucity of opportunities.⁵² Similarly, piracy originating in the Niger delta has been linked to “extreme levels of poverty, a high unemployment rate and bureaucratic corruption,” as well as “the environmental damage caused by the oil industry [which has] adversely affected the region’s once lucrative fishing and agricultural industries, thus limiting options for local youths to enter the economy.”⁵³ In comparison to Somali piracy, attacks in the Gulf of Guinea tend not to focus on the acquisition of ransom or extortion (in exchange for release of the ship and crew) but, instead, on theft of cargo following hijacking.⁵⁴

A study conducted by Eugene Kontorovich reveals a global average sentence of just over fourteen years for all piracy convictions involving Somali pirates sentenced outside of Somalia.⁵⁵ According to Kontorovich, however, the data indicates a pronounced variance for substantially similar conduct. Place of prosecution therefore matters considerably in sentence length. European countries sentence Somali pirates more leniently, while the U.S. and Asian states sentence more harshly (note, this study did not include sentences issued in Somalia itself). The Seychelles mean adult sentence is 14.3 years and the Kenyan mean is 10.8.⁵⁶ On the one hand, this variance poses a challenge to consistency in punishing universal crimes. But, on the other hand, these disparities also reflect the pluralistic role of national legal systems in the enforcement of international crimes. Notably, the average sentence of fourteen years for a pirate (who—regardless of exact chronological age—tends to be young, not necessarily a violent or discrimination-fuelled offender, and often an indiscriminate member

52. See Hahn, *supra* note 6, at 244 (“Most academics and piracy experts suggest that purely economic reasons and opportunism motivate pirate attacks”). Another factor that correlates to membership in piratical (and criminal) gangs is the status of the recruit’s clan within Somalia’s hierarchical clan structure. See THE WORLD BANK, THE PIRATES OF SOMALIA: ENDING THE THREAT, REBUILDING A NATION, at xxv, 75 (2013) (exploring the role that the clan and subclan structure plays in recruitment and organization of Somalia based piracy).

53. Cummings, *supra* note 10.

54. *Id.* (“Gulf of Guinea pirates generally sail captured vessels to locations off the coast of the Niger Delta, where oil, cargo and/or fuel reserves are looted and transferred onto the pirate’s barges. The ship and its crew are then usually released.”).

55. Eugene Kontorovich, *The Penalties for Piracy: An Empirical Study of National Punishment for International Crime* 1 (Northwestern Univ. Sch. of Law, Working Paper No. 211, 2012), *available at* <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1210&context=facultyworkingpapers>. Sentences in Kenya have been reduced in light of recognition of the low-rank of many of the convicts within piracy gangs.

56. *Id.* at 14.

of a crew), is identical to that rendered by the International Criminal Court, tasked to prosecute the most serious crimes of concern to the world community, in its first conviction, that of Congolese rebel leader and child soldier recruiter Thomas Lubanga.⁵⁷

III. CRIMINAL PROSECUTIONS OF JUVENILE PIRATES: AN OVERVIEW

The U.N. Security Council, U.N. General Assembly, UNCLOS, IMO, and the Djibouti Code of Conduct endorse the criminalization of piracy and the prosecution and punishment of captured pirates. Although catalyzed by the Somali situation, this endorsement has acquired broader normative traction while interfacing awkwardly with juveniles who may be enmeshed in pirate attacks.

In response to a request by the U.N. Security Council in Resolution 1918, the Secretary-General issued a report identifying seven options for the Security Council to consider so as to “further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia.”⁵⁸ Options ranged from enhancing domestic judicial capacity to creating a regional tribunal, to establishing an international tribunal. This report accorded specific, albeit brief, attention to juvenile pirates, suggesting that the Security Council “would need to consider whether special provision should be made for their treatment.”⁵⁹ Reference was made in this regard to the Statute of the Special Court for Sierra Leone, which limits jurisdiction to alleged offenders over the age of fifteen and stipulates particularized treatment, in accordance with the international rights of the child, for alleged offenders under the age of eighteen.⁶⁰ That said, this Report is an outlier in actually offering specific discussion of juvenile pirates. Other international

57. David Smith, *Thomas Lubanga Sentenced to 14 Years for Congo War Crimes*, THE GUARDIAN (July 10, 2012), <http://www.theguardian.com/law/2012/jul/10/icc-sentences-thomas-lubanga-14-years>.

58. See U.N. Secretary-General, *Report of the Secretary-General on Possible Options to Further the Aim of Prosecuting and Imprisoning Persons Responsible for Acts of Piracy and Armed Robbery at Sea off the Coast of Somalia*, at 1, U.N. Doc. S/2010/394 (July 26, 2010) [hereinafter *Report on Possible Options*]; see also Lang Report, *supra* note 11, at 2, ¶ 104 (focusing on a plan “to prosecute and imprison persons who engage in piracy” and advocating criminal justice paradigms including specifically in Somalia where, at time of the report, the offence of piracy was not in the Somali Criminal Code).

59. *Report on Possible Options*, *supra* note 58, ¶ 46.

60. *Id.*; S.C. Res. 1950, *supra* note 13, pmbl. (expressing “concern about the reported involvement of children in piracy off the coast of Somalia” but failing to address this concern in concrete or operational terms).

interventions do not address juvenile piracy as a separate matter. A report submitted by Jack Lang, Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, to the Secretary-General, focused on criminal response mechanisms. This Report favored the establishment of a specialized piracy court system in Puntland, and extraterritorially in Tanzania, and also lacked reference to any accommodation for accused juveniles.⁶¹ U.N. Security Council Resolution 1976, which praised the Lang Report and urged the establishment of specialized Somali courts and an extraterritorial Somali anti-piracy court to try suspected pirates, contained no reference to juveniles accused.⁶² The Djibouti Code of Conduct is also silent on the subject, as is U.N. General Assembly Resolution 66/231; as are IMO resolutions and best management practices; and as is the 2013 Code of Conduct Concerning the Repression of Piracy, Armed Robbery Against Ships, and Illicit Maritime Activity in West and Central Africa.

Alleged child pirates have come to face trials nationally⁶³ in a number of jurisdictions, including Somalia, Kenya,⁶⁴ Seychelles,⁶⁵ India,⁶⁶ Italy,⁶⁷ France,⁶⁸ Yemen, Germany,⁶⁹ Japan,⁷⁰ Spain,⁷¹

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61. See Lang Report, *supra* note 11, at 3, 4 (recommending also the “immediate construction of two prisons, one in Somaliland and one in Puntland, each with the capacity to hold 500 prisoners”).
62. The Lang Report was met with accolades from the Security Council which, *inter alia*, urged international assistance to “increase prison capacity in Somalia, including by constructing in the short-term additional prisons in Puntland and Somaliland.” S.C. Res. 1976, *supra* note 13, ¶ 22.
63. For surveys of these cases, see Hahn, *supra* note 6, and Danielle Fritz, *Child Pirates from Somalia: A Call for the International Community to Support the Further Development of Juvenile Justice Systems in Puntland and Somaliland*, 44 CASE W. RES. J. INT’L L. 891 (2012).
64. See, e.g., Republic v. Hassan M. Ahmed & Nine Others, (2006) Criminal Case No. 434 (Chief Magistrate Ct.) (Kenya), *aff’d* Hassan M. Ahmed v. Republic, [2009] eKLR (H.C.K.) (Kenya) (rejecting a claim by one of ten defendants that he was a minor at the time of the offense and imposing a seven-year sentence on each of the ten accused).
65. See Fritz, *supra* note 63, at 893 & n.7.
66. Hahn, *supra* note 6, at 259; WHITMAN ET AL., *supra* note 29, at 4 (noting thirty-eight alleged pirates under the age of eighteen as being on trial in India). Somali piracy is of professed concern to India and the Indian Navy: “With the Indian Navy and Coast Guard trying all they can to curb the Somalian pirates that have brought horror to sailors, charging them under rioting, damaging government property and other criminal offenses as well as the Unlawful Activities Prevention Act and Arms Act.” Anita, *Child Soldiers Below 15 Turn Pirates in Somalia*, ONE INDIA NEWS (Mar. 17, 2011, 8:56 IST), <http://news.oneindia.in/2011/03/17/child-soldiers-below-15-turn->

Malaysia,⁷² and the U.S. Some of these prosecutions are ongoing, some were ultimately abandoned, and some have resulted in convictions. In cases where convictions have been entered, in certain cases the child pirates are then summarily released owing to time already served in detention while awaiting trial.

In Hamburg, Germany, beginning in 2010, ten Somali pirate defendants were jointly prosecuted. Charges related to the hijacking of a German cargo ship, the MV *Taipan*, in the Gulf of Aden. Armed with AK-47s, the Somalis had boarded the MV *Taipan*. A nearby Dutch military frigate, the *Tromp*, then intercepted the *Taipan*. After a brief exchange of fire, the Somalis were apprehended and eventually extradited to Germany for prosecution. After several of them claimed to be minors, German officials moved the trial in its entirety to juvenile court (although most of the accused did not claim to be

pirates-in-somalia-aid0113.html. The Indian Penal Code lacks “a specific provision dealing with piracy.” Rajat Pandit, *supra* note 48.

67. Italy prosecuted four Somali minors, pulled from a larger group of defendants, in juvenile court for their involvement in a pirate attack on the *Montecristo*, an Italian cargo vessel. Hahn, *supra* note 6, at 242, 259.
68. WHITMAN ET AL., *supra* note 29, at 4.
69. *Id.*
70. Masami Ito, *Somali Teenager Gets Five to Nine for Piracy*, THE JAPAN TIMES (Feb. 26, 2013), <http://www.japantimes.co.jp/news/2013/02/26/national/somali-teenager-gets-five-to-nine-for-piracy/#.Um3K3PmkosA> (“An 18-year-old Somali was sentenced . . . to five to nine years by the Tokyo District Court for boarding and attempting to hijack a Bahama-registered oil tanker off the east coast of Africa in March 2011. . . . [Presiding judge] Ono . . . said he hesitated to hand down the maximum penalty because of several factors, including that the defendant was believed to be only 16 years old at the time of the attack and that he had grown up in a country torn by an ongoing civil war.”). This defendant was part of a group of four (the trials are being held in a series, and one other defendant is a minor as well), but was the only one who could speak English and, in this regard, the Presiding Judge found that “he was supposed to play a large role in the hijacking by communicating with the hostages.”). *Id.*
71. Spain convicted two pirates for their attacks on the *Alakrana*, a Basque vessel. One claimed to be a minor. The Spanish judge, after investigating the question and ordering tests, determined this defendant to be an adult. Hahn, *supra* note 6, at 241–42, 257–58.
72. Malaysia prosecuted three minors for the piratical hijacking of a chemical tanker. Hahn, *supra* note 6, at 242, 260 (“Malaysian prosecutors have confirmed that the three juveniles will not face execution because they are underage.”).

juveniles). Complexities involving proof of age plagued this trial,⁷³ as did translation issues. At one point, questions arose whether forensic evidence had to be considered in light of the specifics of biological growth in East Africa, as opposed to in comparison with Western children.⁷⁴ All of these complexities—which do reflect an attempt for the proceedings to satisfy due process standards—contributed to the languid pace of the proceedings. The trial lasted nearly two years, rendering it one of Germany’s longest since the Second World War.⁷⁵

On October 19, 2012, the ten accused were convicted of abduction for the purpose of blackmail and conducting an attack on maritime traffic. The court found “claims that the defendants had been coerced into the kidnappings to lack credibility.”⁷⁶ The lead judge, Bernd Steinmetz, said “the pirates had hoped for a ransom payment of at least \$1 million. Looking at the defendants, he said: ‘Each of you had been expecting a share, even if just a small one.’”⁷⁷ Convicts were sentenced to terms ranging from two to seven years’ imprisonment. Juvenile defendants were punished at the lower end of the spectrum, namely two years, which meant that they would simply be freed owing to the extensive time they had already served in pre-trial and trial detention. All sentences were considerably lower than what

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73. See Lakotta, *supra* note 1 (“One pirate stated that he was born under a tree, while another could only say he was born during the rainy season.”).
74. See *id.* (“The court spent several days deliberating over whether so-called growth plates, which are found in the bones of children and adolescents but not of adults, could be considered reliable indicators of age. When an expert on wrist bones from the University Medical Center Hamburg-Eppendorf was called to testify, he projected X-rays onto a screen in the courtroom. He proceeded to deliver a lecture on calcification in the sesamoid bone of the thumb, bone stages and skeleton age, percentile curves, sectional imaging and summation methods, the 20-bone method, point values and diagrams—all based on data obtained from Central Europeans. But does any of this apply to people of a different ethnicity, not to mention people who were malnourished and had to work hard from an early age?”).
75. *Verdict in Somali Hijacking Case: Court Rules in Germany’s First Modern-Day Piracy Trial*, SPIEGEL (Oct. 19, 2012), <http://www.spiegel.de/international/germany/hamburg-court-hands-down-somali-pirate-sentences-a-862350.html>; Beate Lakotta, *An Expensive Farce: Germany’s Somali Pirate Trial Is Pointless*, SPIEGEL (Sept. 12, 2012), <http://www.spiegel.de/international/germany/german-trial-of-somali-pirates-turns-into-pointless-and-expensive-farce-a-855252.html> (“[In April 2012], the court had to release the three youngest defendants since they had already been held in custody for two years. They are now attending school.”).
76. *Court Rules in Germany’s First Modern-Day Piracy Trial*, *supra* note 75.
77. *Id.*

prosecutors had requested. One observer explained: “[T]he court stressed especially the danger of the act, the heavy weaponry used, the damage dealt to the vessel and the high criminal energy, but also the situation in Somalia under which the accused grew up, the fact that there were no complaints against the accused during this detention and the short duration of the abduction.”⁷⁸ In light of the apparent ban on deportations from Germany to Somalia, it is unclear whether the convicts would be returned to Somalia. The juvenile convicts, in fact, have been learning German and are in school.

Questions of minority have arisen, albeit tangentially, in U.S. piracy prosecutions. Abduwali Abdukhadir Muse was prosecuted for his involvement in an attack on the *Maersk Alabama*, a U.S.-flagged ship, in April 2009, and the kidnapping of its captain.⁷⁹ Muse was initially charged with piracy, but he entered a guilty plea in May 2010 to lesser charges of hijacking, hostage-taking, kidnapping, and conspiracy. Although Muse lacked birth records, his lawyers alleged he was a minor at the time of the offense. Following a hearing, however, the judge determined Muse to be an adult.⁸⁰ Part of Muse’s plea bargain was a commitment by the defense not to appeal the age question.⁸¹ The defense did, however, raise the age question when it came to its sentencing brief, in which it claimed Muse to be sixteen and provided considerable evidence in this regard.⁸² The judge was not at all swayed by this information and Muse was sentenced to the maximum permissible term in the available range—over thirty years’ imprisonment.⁸³ Muse did not benefit at all from suggestions that he

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78. Roger L. Phillips, *Long Road to Justice – The German Piracy Trial*, COMMUNIS HOSTIS OMNIUM (Oct. 21, 2012), <http://piracy-law.com/2012/10/21/long-road-to-justice-the-german-piracy-trial>.
79. Complaint at 2–3, United States v. Muse, No. 09-mj-01012-UA (S.D.N.Y. Apr. 21, 2009).
80. Hahn, *supra* note 6, at 255 (“Citing the persuasiveness of the detective’s testimony, the conflicting testimony of Muse’s father, and the failure of Muse to testify as to his own age, the district court concluded that Muse was over eighteen and thus subject to trial as an adult.”); *see also* Benjamin Weiser, *Pirate Suspect Charged as Adult in New York*, N.Y. TIMES (Apr. 21, 2009), http://www.nytimes.com/2009/04/22/nyregion/22pirate.html?pagewanted=all&_r=1&.
81. Hahn, *supra* note 6, at 255.
82. *See id.* at 255–56 (describing that the defense offered, *inter alia*, affidavits from family members, ship logs, and dental records).
83. *Id.* at 256 (stating that the district court gave Muse the maximum sentence of thirty-three and a half years). Specifically, Muse was sentenced to 405 months imprisonment together with a restitution order. *Press Release: Somalian Pirate Sentenced in Manhattan Federal Court to 405 Months in Prison for Hijacking Three Ships and for Hostage Taking*, FBI (Feb. 16, 2011), <http://www.fbi.gov/newyork/press-releases/2011/somalian-pirate-sentenced-in-manhattan-federal->

was a misguided lost child, even though his lawyers specifically invoked this imagery on the topic of sentencing, pleading that “like other young Somalis, [Muse] had been driven into piracy by the abysmal conditions in his war-torn country.”⁸⁴ Muse, they submitted, grew up “in desperate poverty and was almost always hungry” and became “caught up in the piracy networks” while a young teenager.⁸⁵ Prosecutors tapped into countervailing imagery and described Muse as extraordinarily depraved, violent, and an undisputed leader. In the end, Muse’s youth proved irrelevant to questions of his culpability and inconsequential to his punishment.

Juvenile status also surfaced in another U.S. piracy case, prosecuted in the Eastern District of Virginia, in which the Fourth Circuit ultimately dispensed with claims of minority by a defendant, Hasan, who had claimed eligibility for juvenile status.⁸⁶ Hasan was among a group of five Somali pirates who in 2010 had unsuccessfully attacked a U.S. Navy frigate, the USS *Nicholas*, which had been engaged in anti-piracy activities. The pirates mistook the USS *Nicholas* for a merchant vessel.⁸⁷ After initiating their attack, all five were quickly captured. Prosecutions were undertaken under domestic U.S. law that *inter alia* criminalized piracy as a violation of the law of nations.⁸⁸ All defendants were convicted and sentenced to life

court-to-405-months-in-prison-for-hijacking-three-ships-and-for-hostage-taking. In another U.S. case, involving the pirating of the civilian yacht S/V *Quest* off the coast of Oman and the killing of four Americans on board, fourteen suspects were captured and brought to the U.S. to face prosecution in federal court in Norfolk Virginia. Corinne Reilly, *Arabian Sea Piracy Suspects Appear in Norfolk Court*, PILOT ONLINE (Mar. 11, 2011), <http://hamptonroads.com/2011/03/arabian-sea-piracy-suspects-appear-norfolk-court>. A fifteenth person, a minor, also had been initially captured, although he had been found to have played a “relatively minor role in the attack.” *Id.* No charges were brought against him; he was released at sea and returned to his family. *Id.* On August 2, 2013, three of the Somali pirates implicated in the S/V *Quest* incident were sentenced to life imprisonment on convictions *inter alia* of piracy and kidnapping resulting in death. Prosecutors had sought the death penalty. The eleven other accused had previously pleaded guilty and had received life sentences. *Press Statement*, *supra* note 39; *Jury Recommends Life for ‘S/V Quest’ Somali Pirates*, BBC (Aug. 2, 2013), <http://www.bbc.com/news/world-us-canada-23556256>.

84. Benjamin Weiser, *Leniency of Sentence for Somali Hijacker Is at Issue*, N.Y. TIMES (Feb. 13, 2011), <http://www.nytimes.com/2011/02/14/nyregion/14pirate.html>.
85. *Id.*
86. United States v. Dire, 680 F.3d 446, 475–76 (4th Cir. 2012); *see also* United States v. Hasan, 747 F. Supp. 2d 642, 672–77 (E.D. Va. 2010).
87. *Dire*, 680 F.3d at 449.
88. *Id.* at 451.

imprisonment plus eighty years. Similar to the *Muse* case, the district court judge ultimately determined that Hasan was not a minor at the time of the offenses. The Fourth Circuit affirmed.⁸⁹ The Fourth Circuit noted that the government had the initial burden of proving Hasan's age and that it had discharged this burden insofar as Hasan himself had told special investigatory agents that he was an adult, only to recant later.⁹⁰

As Hahn notes, in neither of these U.S. cases—unlike the situation in jurisdictions such as Spain, India, and Germany—did the court turn to medical or forensic evidence to help resolve the claims regarding the juvenile status of the defendants, even when defendants faced the possibility of very harsh sentences.⁹¹ U.S. courts relied primarily upon testimonial evidence.

International human rights law does not bar juveniles from facing criminal prosecution, nor does it bar juveniles from ever being prosecuted as adults. The Convention on the Rights of the Child (CRC) permits the “arrest, detention or imprisonment of a child,” but requires that these measures “shall be used only as a . . . last resort and for the shortest appropriate period of time.”⁹² The CRC precludes the death penalty and life imprisonment without parole as sentences for child convicts. Furthermore, the CRC requires that “every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so.”⁹³ The CRC specifies a minimum level of due process protection for children subject to criminal proceedings,⁹⁴ but also encourages the development of enhanced frameworks attuned to their specific needs. The CRC does not favor incarceration. Instead, it prefers rehabilitation and reintegration.

In spite of this preference, the CRC does not bar incarceration. CRC Article 40(3)(a) requires parties to seek to promote the establishment of “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”; however, this article sets no such age. That said, the Committee on the Rights of the Child has considered fourteen as a low age for criminal responsibility and “has welcomed . . . proposals to set the age

89. *Id.* at 449, 475–76.

90. *Id.* at 476.

91. Hahn, *supra* note 6, at 270–71.

92. CRC, *supra* note 26, art. 37(b).

93. *Id.* art. 37(c).

94. *See id.* art. 40 (providing, among other protections, that a child be given notice of the charges and has the right against self-incrimination).

of criminal responsibility at eighteen.”⁹⁵ The national law of virtually all states, which inform the general principles of law applicable internationally, provides for a minimum age below which a child is deemed incapable of criminal responsibility. Most states set this age within the seven to fourteen year range.

Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR), an instrument which predates the CRC, also precludes the imposition of the death penalty on persons under the age of eighteen at the time of committing a crime. The ICCPR also requires accused juveniles to be “separated from adults and brought as speedily as possible for adjudication,” and that juvenile offenders “be segregated from adults and be accorded treatment appropriate to their age and legal status.”⁹⁶

A firm practice, pushed by global civil society and many U.N. actors, has emerged not to prosecute minors before international criminal tribunals on charges of serious international crimes such as genocide, crimes against humanity, and widespread war crimes. This practice is becoming *de lege ferenda*.⁹⁷ Although this practice does not extend to national institutions, where minors have been prosecuted on such charges, it certainly helps sculpt national conversations on questions of transitional justice. It is therefore foreseeable that any international criminal tribunal that might hypothetically be established to deal with piracy as an international crime would be reticent about prosecuting minors. It also seems, however, that this reluctance within the international legal imagination to prosecute juveniles (often child soldiers) under the age of eighteen on charges of genocide, crimes against humanity, and war crimes does not extend as firmly to juveniles accused of piracy or terrorism.

In sum, minors exceptionally can be prosecuted at the national level as adults or in adult venues for serious, ordinary, and international crimes. Criminal prosecutions and jail time are discouraged, to be sure, but remain lawful under particularized conditions. However, there is a requirement that minors be treated differently from adults upon apprehension, and that they be separated from adult accused. Prosecuting juveniles like adults and punishing them like adults is an unusual situation that requires stated justification; proceeding indiscriminately in this regard would infringe

95. Amnesty Int’l, *Child Soldiers: Criminals or Victims?*, at 15, AI Index IOR 50/02/00 (Dec. 2000) This committee helps monitor state compliance with the CRC.

96. International Covenant on Civil and Political Rights arts. 6(5), 10(2)(b), 10(3), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976) [hereinafter ICCPR]; *see also id.* art. 14(4) (requiring in the case of juvenile persons that trial procedure take into account their age and the desirability of promoting their rehabilitation).

97. *See* DRUMBL, *supra* note 27, at 102–03.

international human rights law. State actors must, furthermore, take the best interests of the child into account in all actions involving children.⁹⁸

Although piracy trials involving juvenile accused are to operate in line with international human rights law, it has been noted, disturbingly, that “there are no international legal instruments in place to prescribe the proper handling of child pirates captured at sea, nor are navies or private security firms explicitly trained on how to manage interactions with underage pirates.”⁹⁹ Clarity in this regard is particularly important in light of increased reliance, recognized by best management practices, of private armed guards by international shippers; this clarity ought to encompass both detention practices as well as rules of engagement that concern the use of force. Yet, the IMO’s guidance on the use of private armed security personnel is silent on the question of what to do when a ship is threatened by juvenile pirates.¹⁰⁰

In any event, and unsurprisingly, there does not appear to be a consistent practice of separating child pirates from adult pirates when pirate crews are captured.¹⁰¹ Though these differentiations do happen in some instances, the practice is not predictable.¹⁰² In cases where

98. CRC, *supra* note 26, art. 3(1).

99. Carl Conradi, *The Invisible Phenomenon of Child Piracy*, CANADIAN NAVAL REVIEW (Feb. 6, 2013), <http://www.navalreview.ca/2013/02/the-invisible-phenomenon-of-child-piracy/>.

100. See Int’l Maritime Org. [IMO], *Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area*, MSC.1/Circ.1405/Rev.2 (May 25, 2012), available at <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Guidance/Document s/ MSC.1-Circ.1405-Rev2.pdf>.

101. See *Child Pirates: A New Child Rights Challenge for Somalia*, SOS CHILDREN’S VILLAGES (Nov. 8, 2010), <http://www.soschildrensvillages.ca/child-pirates-new-child-rights-challenge-somalia> (“Child pirates have been detained in Somalia along with adults found guilty of piracy, says UN expert [Radhika Coomaraswamy].”). See also Fritz, *supra* note 63, at 899 (“Kenyan practice regarding the detention and trial of child pirates may violate the implied customary international law requirement for courts to treat children differently than adults in criminal proceedings.”); *id.* at 902 (“Most of the piracy cases in the Seychelles have involved some teenage pirate defendants. Despite how frequently children appear as defendants in these cases, the Seychelles has yet to implement unique approaches to child pirates. In fact, in the majority of the adjudicated piracy cases, the Supreme Court of Seychelles makes no mention of the age of the accused.”).

102. Mauritius has given guarantees that were it to receive any juvenile pirates for prosecution, it would ensure that they be segregated from the general population. See Milena Sterio, *A Report on the Possibility of Future Somali Piracy Prosecutions in Mauritius*, EJIL: TALK! (Dec. 26,

this practice remains unpredictable, or is not adhered to whatsoever, a conflict emerges with the requirements of international human rights law. The result is a confusing hodge-podge in which the rights (and fate) of the detainee hinge upon the locus of detention. Sometimes juvenile pirate suspects are released, while the adults are not; sometimes the children are released following legal process;¹⁰³ while other times the children are released because all the pirates are released immediately following capture (i.e., “catch and release” policies). This latter option seems to be the most common: like with adult pirates, when “international naval forces capture juvenile pirates . . . [they] usually end up simply taking their weapons and releasing them.”¹⁰⁴ This may appear humanitarian, and in line with a view of child pirates as blameless and having been cruelly used, but it is also perfunctory, superficial, and not necessarily supportive of the children’s best interests or conducive to staving off a longer-term recrudescence of criminality. Shelly Whitman and her colleagues aptly describe the de facto realities of capture and release policies as “returning the juveniles to a worst form of child labour.”¹⁰⁵

Barring specific justification in cases of an individual juvenile defendant, prosecuting juveniles like adults would affront settled international human rights law. Many states that elect to prosecute suspected pirates do divert accused minors into separate juvenile proceedings. But others do not. In some cases, a decision not to divert hinges upon some determination that the defendants (often members of the same crew) are to be jointly tried, regardless of their age. But this level of deliberation is not always evident. This deliberation must also take into account the best interests of the child.

Although proceedings in the Seychelles initially were criticized for insufficiently engaging with the age of the suspects,¹⁰⁶ more recent

2012), <http://www.ejiltalk.org/a-report-on-the-possibility-of-future-somali-piracy-prosecutions-in-mauritius/> (recounting that Mauritian prosecutorial staff and the Commissioner of Police stated that “any detained juvenile pirates, should Mauritius accept any such transfer, would be appropriately segregated from the general prison population”).

103. See, e.g., *Captured Child Pirates Sent Back to Somalia*, THE GUARDIAN (Aug. 13, 2012), <http://www.theguardian.com/world/2012/aug/14/somalia-middleeast> (reporting that two Somali children aged twelve and eleven, who were sailing with adult pirates, were captured by Seychelles police; the eleven-year old was acquitted because of his age and the twelve-year old was given a provisional release based upon his being sent back to Somalia).

104. *Child Pirates: Raising Awareness About a Serious Issue*, *supra* note 47.

105. WHITMAN ET AL., *supra* note 29, at 12.

106. See Phillips, *supra* note 78 (“While the court in Hamburg went to great lengths to estimate as precise as possible the age of the accused, in the Seychelles, age has up to now not even been a criterion which lead the

Seychelles prosecutions have demonstrated considerable respect for juvenile rights in accordance with international human rights requirements. In a 2010 case, *Republic v. Sayid*, which involved nine pirates prosecuted in the Seychelles (seven of whom maintained they were minors between the ages of thirteen and sixteen, inclusively), all were prosecuted jointly and convicted of three counts of piracy.¹⁰⁷ All were sentenced jointly and identically—eleven years on the first count and eleven years on the second count to run consecutively, and ten years on the third count to run concurrently.¹⁰⁸ Insofar as each of the offenses carries a maximum sentence of thirty years, the accused could have faced a total maximum sentence of ninety years plus a hefty fine. In the sentencing judgment, Judge Dodin stated: “I have taken note of the stated age of each Accused. I am satisfied that they all have the requisite mental element for the commission of the offence they have been convicted of.”¹⁰⁹ This was the sole reference to minority.

In another case from the Seychelles, *Republic v. Osman & Ten Others*, the Judge Gaswaga noted that some of the accused were below the age of eighteen. In the case of these accused, it was remarked that “two probation officers were always present during the recording of each minor suspect’s statement as required by law, and all the accused (minors and adults) were jointly arraigned before this court pursuant to section 93 of the Children’s Act, Cap28.”¹¹⁰ In this latter judgment, appreciation is extended towards the minor status and compliance is sought with a provision of Seychelles’ law contemplating that minors and adults can be prosecuted jointly under certain circumstances. Each accused ultimately was convicted on two counts.

In light of the above analysis, by 2012 the Seychelles pirate proceedings continued further along a path of domestication of international human rights requirements. In *Republic v. Dahir & Twelve Others*, the Supreme Court of Seychelles faced several minors among a group of otherwise adult accused. While noting that Seychelles law allows for adults and minors to be tried together, the Court also recognized that a probation officer had been “availed” to

courts to distinguish between adults and juveniles with regard to the applicable penalties.”); Fritz, *supra* note 63, at 902.

107. *Republic v. Mohamed Sayid et al.*, Judgment, Crim. Side No. 19 of 2010 [26] (Supreme Ct. Sey. 2011).
108. *Republic v. Mohamed Sayid et al.*, Sentence, Crim. Side No. 19 of 2010 (Supreme Ct. Sey. 2011).
109. *Id.* (noting also that “Somalia is a failed state and that its citizens, including the Accused, are in apparently a permanent state of turmoil”).
110. *Republic v. Houssein Mohammed Osman & Ten Others*, Judgment, Crim. No. 19 of 2011 [12] (Supreme Ct. Sey. 2011).

each of the minor accused while they recorded their statements.¹¹¹ One of the accused was eleven years old.

According to Seychelles penal law, a person at least seven years old but not yet twelve years old cannot be held criminally responsible unless the prosecution proves that the accused “was capable of knowing that he ought not to do the act or make the omission.”¹¹² In this instance, this burden had not been met, so this accused was acquitted and ordered returned to Somalia and reunited with his family.¹¹³ Four other defendants were minors, albeit aged twelve or above twelve, and hence could be convicted—which they were, together with the adults. When it came to sentencing, however, the Supreme Court of Seychelles differentiated on the basis of age. Under Seychelles law, a person under the age of fourteen cannot receive prison time, while persons between fourteen and eighteen can be imprisoned (although the court must first consider and discount other possibilities that are rehabilitative in nature).¹¹⁴ One twelve-year old convict, therefore, was conditionally released and ordered deported immediately to Somalia. The remaining juvenile convicts, those between the ages of fourteen and eighteen, were found to have committed a grave offense warranting a prison sentence despite their youth.¹¹⁵ Each received a prison sentence of two and a half years. The imprisoned minors were ordered to “be kept in a separate place from any adult offender during their incarceration,” as was the twelve-year old during the period pending his deportation.¹¹⁶ The convicted adults in this case each received twelve years; in the process of sentencing them the Supreme Court of Seychelles identified as an aggravating factor “the recruitment of juveniles whom [the adults] ought to have taken care of and guide[d] instead of encouraging them to get involved in criminal activities.”¹¹⁷

111. Republic v. Liban Mohamed Dahir & Twelve Others, Judgment, Crim. Side No. 7 of 2012 [6] (Supreme Ct. Sey. 2012).

112. *Id.* at [41].

113. *Id.* at [41]–[42].

114. Republic v. Liban Mohamed Dahir & Twelve Others, Sentence, Crim. Side No. 7 of 2012 [7]–[9] (Supreme Ct. Sey. 2012).

115. *Id.* at [10], [15]. One problem that arose was that the Court felt constrained not to pursue alternatives to imprisonment, some of which involved family commitments to abide by probationary measures, which the Court felt “cannot reasonably be applied to these convicts who have no family in Seychelles.” *Id.* at [16].

116. *Id.* at [17].

117. *Id.* at [19]. In another Seychelles piracy case from 2012, *Republic v. Mohamed Abdi Jama*, the adult offenders received a sentence of seven years and the one juvenile offender a sentence of two years’ imprisonment respectively. Republic v. Mohamed Abdi Jama & Six

The U.N. Security Council has accorded limited attention to the requirements of differential treatment of minors and adults in the case of piracy. Security Council Resolution 1838, which condemned and deplored all acts of piracy and armed robbery off the coast of Somalia, called on nations with vessels and aircraft in the area to use necessary means to repress acts of piracy.¹¹⁸ This creates a situation in which child pirates might become caught up in military actions and subject to military tribunals, from which several questions arise: What do military forces do when engaging with juvenile pirates? What about private contractors—do they shoot at juveniles if shot at? What sort of training is required to maturely prepare private contractors for such situations? Looking beyond armed engagement, would military prosecutions on a ship that detains pirates be able to deliver the differentiated treatment required under international law in the case of minors? Although Resolution 1950 expresses concern about the involvement of children in piracy off the coast of Somalia, it persists in calling for a criminal justice response thereto at the national level, which does not explicitly exclude child pirates from its purview, although it requires compliance with international human rights law. However, no reference is specifically made to children's rights.¹¹⁹ Experts have suggested that drone attacks could be deployed against the coastal bases of Somali pirates;¹²⁰ in this situation, it would be virtually impossible to ensure that children be treated differentially.

One may chide international law for its simplistic focus on chronology and for its focus on age—emergently, eighteen—as a bright-line. I have certainly done so in my own work, and I have

Others, Sentence, Crim. Side No. 53 of 2011 [6] (Supreme Ct. Sey. 2011).

118. S.C. Res. 1838, *supra* note 22, ¶ 2.

119. See S.C. Res. 1950, *supra* note 13, ¶ 12 (“Calls upon all States . . . to cooperate . . . in the investigation and prosecution of all persons responsible for acts of piracy and armed robbery off the coast of Somalia, including anyone who incites or facilitates an act of piracy, consistent with applicable international law including international human right law to ensure that all pirates handed over to judicial authorities are subject to a judicial process”); *id.* ¶ 13 (“Calls upon all States to criminalize piracy under their domestic law and to favourably consider the prosecution of suspected, and imprisonment of convicted, pirates apprehended off the coast of Somalia, consistent with applicable international law including human rights law.”); *id.* ¶ 19 (“Urges States parties to the Convention and the SUA Convention to fully implement their relevant obligations under these Conventions and customary international law and cooperate with the UNODC, IMO, and other States and other international organizations to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea of the coast of Somalia.”).

120. Choudhury, *supra* note 11.

underscored the shortcomings of making so much hay out of a simple birthday. I have also expressed concern that well-intended protectionism can become fulsome and thereby disable youth, deny their agency, and inhibit the creation of a rigorous culture of juvenile rights. Investing so much in a chronological straight-line, what is more, has a punitive element to it insofar as it means the law comes down very hard on persons just over the benchmark. For example, persons aged eighteen to twenty-five, this being a cohort that is still developing considerable neurobiological and cognitive function, are aggressively punished by the system, while it coddles those immediately below that threshold. Rather than propound categorical benchmarks, I have argued in favor of constructing transitions upon an incremental sliding-scale that actively engages with evolving capacities and recognizes evolving responsibilities.

But, for the moment, chronological watersheds constitute the law, and entities operating under the law cannot blithely ignore it. The official attitude of influential U.N. organs toward child soldiers is much more protectionist (to counterproductive extremes, in fact, in the view that child soldiers are unwitting and faultless) than in the case of child pirates. This problematic paradox in turn reflects the international community's engagement with militarized youth and its reticence towards criminalized youth.

IV. WHY DO JUVENILES JOIN PIRATE GANGS?

Journalistic accounts represent one among a paucity of sources that shed some light upon why juveniles end up in piracy gangs. Media reporting about the Hamburg trial offers some specific glimpses in this regard. One of the defendants, Abdiwali, claimed he was sixteen, so he was recognized as a minor by the court. In an interview with a German magazine, *Der Spiegel*, he stated: "What I did cannot be justified. But the court should know that I wasn't trying to hijack a ship to get rich. I just wanted to survive."¹²¹ What is more, "[h]unger and poverty, he said, had motivated him to commit this crime, and he never asked himself whether he wanted to be part of it—it had all seemed self-evident to him."¹²²

In an earlier article in *Der Spiegel* reporting on the same trial, mention is made of an accused juvenile pirate called Youssef M.¹²³ His

121. Lakotta, *supra* note 1.

122. *Id.*

123. All the references in this paragraph are taken from *A Precedent or a Farce? Court Faces Daunting Hurdles in Hamburg Pirate Trial*, SPIEGEL (Jan. 18, 2011), <http://www.spiegel.de/international/world/a-precedent-or-a-farce-court-faces-daunting-hurdles-in-hamburg-pirate-trial-a-740122.html>.

story greatly parallels that of Abdiwali, and he shares the same lawyer—so it may well be that the two references actually are to the same youth. Regardless, this article also offers pedagogic insights into the complex incrementalism of paths of entry into juvenile piracy. Youssef M. stated he was tricked into joining the pirate gang. Born as the youngest of eight children in Somalia, many of his family members, including his parents, were killed in accidents or war. Beginning at the age of nine or ten, he worked odd jobs in a harbor. He was a night watchman, and later a fisherman at the age of thirteen. He told the German court that he went hungry and slept on the street when he lacked work. He then piloted a small motorboat, for good pay (\$2 to \$3 per day), and subsequently was asked whether he was ready for a very lucrative “bigger job” that would pay a flat fee of \$500. Youssef M. claims he was not told details about what this bigger job would entail, but when on board a fishing *dhow* (itself hijacked) he then realized it meant hijacking a cargo ship. He added: “I did not think very hard about whether I should participate. Nevertheless, it seemed as if everything had been planned ahead of time and I had no choice. However, I was never threatened by anyone.”

Youssef M.’s path to maritime piracy departs from sensationalized and dominant international narratives about children who become caught up in the perpetration of international crimes. These narratives, which circulate ardently in the case of child soldiers, tend to class juveniles either as faultless passive victims—abducted, helpless, and forced into criminal activities—or, on the other hand, as incorrigible demons who commit gruesome criminal acts with zeal and alacrity. I have elsewhere posited the inappropriateness of these images in the case of child soldiers, where the faultless passive victim image dominates international legal and policy discourse.¹²⁴ A disconnect arises between the projected image and the actual lived experiences of child soldiers.

While many child soldiers indeed are brutally kidnapped and forced to commit atrocities in nefarious groups such as the Lord’s Resistance Army, these horrid situations are outliers. Worldwide, approximately two-thirds of child soldiers come forth on their own initiative to serve.¹²⁵ Most child soldiers are neither abducted nor forcibly recruited. International activists and policymakers, nevertheless, heavily emphasize this path to militarization. While exposing this vile situation, this emphasis also leads to limited exploration of youth volunteerism. To be sure, in some instances the

124. DRUMBL, *supra* note 27, at 6–7.

125. See P.W. Singer, *Child Soldiers: The New Faces of War*, AM. FED’N OF TEACHERS, <http://www.aft.org/newspubs/periodicals/ae/winter0506/singer.cfm> (last visited Mar. 19, 2014).

agency of youth is quite narrow and, for all intents and purposes, may be illusory. In other instances, however, many juveniles come forth willingly, independently, and deliberately to serve.¹²⁶ Their motivations are varied and include patriotism, economic goals, desire for training, political activism, and the appeal of militarized life.

Most child soldiers are not young children; most are adolescents, often aged fifteen, sixteen, or seventeen.¹²⁷ Environmental factors and situational constraints certainly influence their decisions to enlist, which include poverty, insecurity, lack of education, socialization into violence, and broken families. Children's engagement with these factors, however, can be more usefully understood as interactive and negotiated processes of negative push and affirmative pull. In joining armed forces or groups, children may simply be pursuing paths of economic and occupational advancement, pursuit of political or ideological reform, and professional development. Children—particularly, older adolescents—are not invariably lost on these paths. They traverse and cross them as best they can. However disturbing to outsiders, this may mean joining armed forces or armed groups.

Moreover, at times, child recruits deceive their parents and other commanders. They conceal their age, travel great distances, and persevere tenaciously in their quest to associate with armed forces or groups. They may join despite community and family exhortations to the contrary. These children, too, count as child soldiers. Although armed groups may seek to undermine legitimate governments through macabre methods, they may also serve as engines of protest against illegitimate rulers, state authoritarianism, and kleptocratic dictatorship. Youth may be drawn to these movements, whether in *apartheid* South Africa, the Occupied Territories, Egypt, Libya, and Jewish resistance in Nazi-occupied Eastern Europe.

Child pirates are not child soldiers, to be clear, unless they operate within the context of armed conflict (whether international or non-international) *and* are members of a gang that constitutes an armed force or armed group. Armed forces are official state militaries, while armed groups are organized non-state entities distinct from those militaries (e.g., rebel militia and dissident factions). Although child soldiering cannot be directly analogized to child piracy, some parallels do exist between these two poignant phenomena, such that it might be instructive to glean some insights from the sociological realities of recruitment and enlistment into child soldiering.¹²⁸ This means accepting that many child pirates are not forcibly recruited, abducted, or compelled to join gangs. In light of the largely

126. See *id.* (finding, for example, that in four African countries, 64 percent of child soldiers joined without any threats of violence).

127. WHITMAN ET AL., *supra* note 29, at 5.

128. *Accord id.*

non-political nature of piracy gangs, economic motivations would likely be more centrifugal to the push and pull of recruitment. Abduction and forcible conscription might be even less prevalent when it comes to membership in piracy gangs than in armed forces or groups. While 40 percent of child soldiers are estimated to be girls, there seem to be far fewer female pirates.¹²⁹ Crucially, when it comes to discussing child piracy, there also is much to be learned about not repeating the tired refrains that dominate conversations about child soldiering. These refrains may have initially directed international attention and denunciation towards child soldiering, but they now have come to stymie and hobble the development of effective preventative and rehabilitative mechanisms.

Unfortunately, however, essentialized language also is emerging in the context of discursive portrayals of child pirates. Unlike the case with child soldiers, these stylized public images impressionistically arch toward the demon and bandit end of the spectrum. On this note, a news article from India is telling:

The perils of the sea are plenty. . . . But who would have thought the threats would come from children who have turned deadly pirates. While Indian authorities are still grappling with the menace, the incidents of abduction and torture are only increasing. Only recently, [t]he Indian Navy managed to capture pirates who were terrorizing the seas and found that of the 61 person[s] nabbed, 25 were children . . . below 15.¹³⁰

Tendentiously imbuing child pirates with characteristics of ignorance, weakness, and vulnerability (which track the tenets of the faultless passive victim model), however, also emerges as a rhetorical device in policy, journalistic, and academic discourse.¹³¹ International activists—as is the case with child soldiers—may downplay, talk over, or repudiate the possibility that any juvenile may volunteer to join a

129. See MICHAEL WESSELLS, *CHILD SOLDIERS: FROM VIOLENCE TO PROTECTION* 9 (2006).

130. Anita, *supra* note 66. This article then quotes from an official who offers a less sensationalist perspective: “It seems younger and younger children in Somalia are being pushed into piracy, which is proving immensely lucrative in the lawless country . . . the established pirates, who have got rich, are no longer sailing out on raids.”

131. See, e.g., Fritz, *supra* note 63, at 918 (“[T]heir young age combined with the social pressures that stem from membership in a particular clan raise serious doubts as to whether a child’s decision to engage in piracy is truly voluntary.”); Dallaire et al., *supra* note 48 (“Like child soldiers, child pirates are plentiful, easily indoctrinated, armed, fearless, cheap and viewed as expendable by the adults who employ them. In addition, it must be remembered that child pirates are often coerced into joining or have very few alternative options for survival.”).

pirate gang. One rhetorical device in this regard is to place the term voluntary (when referring to recruitment or membership) within quotation marks, thereby signaling its implausibility.¹³² Adults who become pirates are not making decisions truly out of free will either, but they do not benefit from the same presumption.

My anecdotal impression is that the child soldier—even the child soldier who may commit terrible acts of atrocity—evokes greater empathy within the international legal imagination than the child pirate. This leads to differential application of metaphoric imagery. In this regard, the child pirate seems to share a similar fate to that of child terrorists or suicide bombers (whether child soldiers or not), who also are exempted from the prevailing “it’s not your fault” evasion of responsibility.¹³³ Child soldiers who commit violence—for example, terrorist attacks—against Western targets are seen less like deluded children and more like menacing adults. Whereas the child perpetrator targeting Africans tends to be held as a mindless captive of purposeless violence, the child perpetrator targeting Westerners tends to be held as an intentional author of purposeful violence. The faultless passive victim image inures much more robustly to the benefit of children implicated in extraordinary international crimes against interests or populations *outside* the centers of global politics than those who target interests or populations *within* those centers. Child piracy, to be clear, affects Western interests. Some of the mariners, captives, and murdered crew members are Western nationals. The financial interests of Western shipping corporations or of ships flagged in Western states also are affected.

An extensive array of legal protections inure to children in armed conflict, including influential instruments addressing children associated with armed forces or armed groups such as the 2007 Paris

132. See, e.g., Conradi, *supra* note 99 (“While many children are forcibly recruited into piratical activity, others may join ‘voluntarily’. Such voluntary enlistment, however, must be understood in terms of the limited choices and circumstances that are available in the child’s country.”); WHITMAN ET AL., *supra* note 29, at 6–7 (“It should be noted that while many children are abducted and forcibly recruited, others may join ‘voluntarily’. . . . In Somalia, which demonstrates the highest involvement of child and youth pirates, it appears as if most young people are joining on a ‘voluntary’ basis.”). The use of quotation marks as a rhetorical device is commonly found in human rights reports and law and policy documents discussing child soldiers.

133. For example, consider the outrageous situation endured by Omar Khadr, a Canadian child soldier detained at Guantánamo Bay as a minor, who had previously associated with Al-Qaeda. See *Omar Ahmed Khadr*, HUMAN RIGHTS WATCH (Oct. 25, 2012), <http://www.hrw.org/news/2012/10/25/omar-ahmed-khadr> (describing the egregious conditions under which he was detained, including incarceration with adults and abusive interrogations).

Principles. The Paris Principles, however, do not cover children associated with entities that fall short of the capacity to engage in armed conflict, such as organized syndicates, sex trafficking rings, drug cartels, and piracy gangs.¹³⁴ The overwhelming focus on *militarized* children thereby diverts attention from the needs of *criminalized* children. A blind-spot emerges within the architecture of international law and policy.

As with child soldiering, some children are duped into joining pirate gangs; they may think they are going to work on a ship only to learn, once at sea, that they are to participate in criminal conduct. Some children end up in piratical activity simply because they are born into families that engage in such activity.¹³⁵ The point nonetheless remains that juveniles also may knowingly come forward on their own to join pirate gangs. Young people have some agency and autonomy, however circumscribed. Piracy, in this vein, is akin to a form of dangerous child labor. These juveniles have limited life options, to be sure, and many are very poor. The overwhelming majority of very poor youth enmeshed in difficult life circumstances in Somalia or the Niger delta, however, do not turn to piracy. Yet some do. For these individuals, piracy becomes a device to socially navigate their way around poverty and make the best out of bad circumstances. This is in large part because of the perceived short-term economic rewards:

[T]he lucrative success of many hijacking operations have drawn a number of young men toward gangs of pirates, whose wealth and strength often make them part of the local social and economic elite. Abdi Farah Juha who lives in Garoowe [100 miles from the sea] told the BBC: “They have money; they have power and they are getting stronger by the day. They wed the most beautiful girls; they are building big houses; they have new cars; new guns.”¹³⁶

134. See *Paris Principles*, *supra* note 26, ¶ 2.3 (defining armed groups as referring to “groups distinct from armed forces as defined by Article 4 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict”). Article 4 of the Optional Protocol does not provide a definition, however. Ostensibly, the fact that the Optional Protocol relates to the involvement of children in armed conflict intimates that armed groups are able to engage in such conflict. See *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* art. 4, May 25, 2000, 2173 U.N.T.S. 222 (entered into force Feb. 12, 2002).

135. WHITMAN ET AL., *supra* note 29, at 4.

136. Choudhury, *supra* note 11.

Whitman also notes that “young and wealthy pirates are challenging the authority of both elders and Islamic teaching.”¹³⁷ One article reported that Somali pirates “earn[ed] up to US\$70,000/year; equating to almost 150 times their country’s national average wage.”¹³⁸ The average ransom payment has been estimated at \$2 million.¹³⁹ In West Africa’s Gulf of Guinea, “most acts of piracy . . . are now perpetrated purely by criminal entities for financial purposes.”¹⁴⁰

In the end, it is glib to assume that juvenile participation in piratical activities hinges entirely upon vulnerable passivity or coercion, as opposed to the exercise of some level of agency, initiative, and action. But it is flatly erroneous to assume that juveniles join piracy networks out of some sort of Clockwork Orange fascination with delinquency and misanthropy. As Youssef M.’s experience indicates, child pirates are far from incorrigible predators.

In sum, comprehensively understanding child piracy—and effectively deterring it—requires coming to terms with the nuanced and diverse experiences of the children, juveniles, and youth who enter piracy gangs, who are *à la fois* victims and victimizers.

V. TOWARD RESTORATIVE JUSTICE

I question the retributive, deterrent, and expressive values of criminal trials—regardless of where they are held, but particularly when they take place in international courts or proceedings sited away from the defendant’s home jurisdiction—for children accused of extraordinary international crimes such as genocide, war crimes, and crimes against humanity.¹⁴¹ I also remain deeply skeptical of the value of sequestered incarceration as punishment in such instances.

The retributive ambitions of international criminal law are vexed by the widespread, grievous, and systematic nature of extraordinary international criminality. Genocide, crimes against humanity, and war crimes may be so grave that it becomes impossible to award a

137. WHITMAN ET AL., *supra* note 29, at 6 (citation omitted).

138. Choudhury, *supra* note 11.

139. Hahn, *supra* note 6, at 244.

140. Cummings, *supra* note 10; WHITMAN ET AL., *supra* note 29, at 7 (“In Nigeria, young unemployed men, in particular, are frequently enticed into the organized pirate gangs operating in the Delta region by ‘promised riches, fancy cars, luxury goods and weapons.’” (citation omitted)).

141. My concerns in this regard extend well beyond juvenile accused. I am skeptical of the ability of the atrocity trial and sequestered incarceration to attain declared penological goals, regardless of the age of the defendant, with the exception of the very highest-level leaders. *See generally* MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007).

perpetrator his or her just deserts while still respecting core human rights principles. Atrocity perpetrators tend to operate within situations of collective connivance. Paradoxically, however, atrocity perpetrators tend to have less autonomy and agency than the typical common criminal, yet their offenses typically are more serious. Assessment of their individual blameworthiness (a key element of the proportionality calculus central to retributive justice) accordingly becomes problematic. The fact that the scope of discretion exercised by many juvenile perpetrators of such crimes (for example, child soldiers), although not evanescent, generally is narrower than that of adults renders the determination of retributive punishment even more tenuous for them.

I am unconvinced that adults primed to undertake acts of atrocity are deterred by the prospect that they might eventually be hauled before an international criminal tribunal or a national court. My doubts derive from multiple sources: the low likelihood of getting caught; the evidentiary difficulties in securing convictions; and selectivity in who actually gets prosecuted. Most foundationally, however, potential perpetrators of extraordinary international crimes may simply not engage in the kind of cost-benefit analysis that encourages them to stay acts of violence in the here and now owing to fears of eventual incarceration in the future. Once again, the narrower—albeit still tangible—scope of discretion typically available to child soldiers suggests that they would be even less deterrable than adults. So, too, does their typically more impetuous cognitive state, not to mention the effects of social pressures, gerontocratic power structures, and ingestion of narcotics in certain cases.

Although the futuristic prospect of individual punishment by international or national criminal courts would likely not deter a child soldier from committing a crime within the vortex of collective violence, ironically, the prospect of criminal prosecution and punishment may inhibit the child soldier from the very different decision to abandon armed factions.¹⁴² Explicitly filling the justice gap with modalities other than retributive criminal trials and imprisonment, however, may pacify anxieties voiced by child soldiers and thereby encourage disarmament and demobilization while still helping prepare the juvenile for civilian life.

The last major penological aspiration of international criminal law is expressivism. This aspiration involves authenticating an historical record and consolidating the value of law. In the case of child

142. Roger Duthie & Irma Specht, *DDR, Transitional Justice, and the Reintegration of Former Child Combatants*, in *DISARMING THE PAST: TRANSITIONAL JUSTICE AND EX-COMBATANTS* 190, 213 (Ana Cutter Patel et al. eds., 2009) (reporting testimony from former child soldiers that they would not leave armed forces or groups were they to face the prospect of criminal trials).

perpetrators of international crimes, the dramaturgical aspect of the criminal trial—geared as it is to binaries of guilt or innocence and victim or perpetrator—is of modest value. Criminal trials for child soldiers, for example, yield superficial explanations of the etiology of mass atrocity. This especially is the case when trials are inspired by demon and bandit imagery that overplays the responsibility of the child.

Penological goals of rehabilitation, restoration, and reintegration do not centrally figure among international criminal law's aspirations. These goals, nonetheless, are very pertinent to juveniles (and low-level adult cadres, as well). Youth who commit extraordinary international crimes can become productive and functional community members. That said, incarceration does not foster reinsertion or reunification. Nor does it readily permit the making of amends. Assessments of duress, coercion, impairment, and the psychological effects of captivity (i.e., the "Stockholm Syndrome") upon moral culpability are necessary in order for retributive punishment to be fair and proportionate. These assessments, however, are of greatly reduced salience when the goal of justice intervention is reintegrative, rehabilitative, or restorative in nature. When the focus of redressability shifts from retribution to rehabilitation, the proportionality between the offender's blameworthiness and the just deserts that he or she deserves is not of central concern.

Finally, the logistics of atrocity trials also inform my circumspection regarding their suitability, particularly in cases of juveniles. Technical procedures, complex evidentiary rules, and the role of counsel constitute key elements upon which the legitimacy of these trials rests. These elements, however, can alienate trial participants, including witnesses and defendants. Victims may find trials for international crimes frustrating in that they exert little to no control over its direction. They may also find such trials downright boring.

What about the potential of criminal proceedings in cases of juveniles accused of piracy? I do not see any reason why such trials would not also entail the same complications and shortcomings as trials for genocide, crimes against humanity, or war crimes.

In terms of retribution, the typically less gruesome nature of piracy (as opposed to, say, genocide) might render the proportionality calculus easier for a court to finesse. On the other hand, this calculus is still imperiled by the collective nature of much of maritime piracy; it is a group-based crime, after all, with pirates operating in gangs. Measuring an individual's moral culpability within this collective nexus therefore remains particularly challenging.

As to the goal of deterrence, criminologists have long shown that it is the likelihood of getting charged, rather than the severity or lenity of the sentence, that most affects *ex ante* decisions whether to partake in criminal activity. Anti-piracy patrols perfunctorily release

most captured suspects.¹⁴³ In some cases where pirates are detained, evidentiary shortcomings and gaps in the jurisdictional framework (states may not wish to pursue prosecutions or may lack the jurisdiction to do so) also contribute to the uncertainty of any given individual's chances of facing criminal process. States may also balk at initiating extraterritorial piracy prosecutions owing to concerns over providing adequate conditions during pre-trial detention, and also concerns that detainees may file refugee claims in the event of an acquittal or after the conclusion of their sentence if convicted. Even in cases when juvenile suspects are brought into custody and prosecuted, however, there is cause to doubt the general deterrent value of such proceedings. On this note, when sentencing the ten Somali convicts, the Hamburg court stressed in its concluding remarks "that the trial was surely not able to prevent piracy or deter future perpetrators."¹⁴⁴ One journalist, in discussing the upshot of the trial, wryly observed that "[t]he battle against piracy off the Horn of Africa won't be won in German courtrooms."¹⁴⁵ Nor do I believe that it would be "won," so to speak, in the courtrooms of the state of nationality of the accused either.¹⁴⁶ Finally, penalization might inhibit youth from leaving pirate gangs, as has been suggested is the case with children associated with armed forces or armed groups.

What about the expressive goals of criminal prosecution and incarceration for juvenile pirates? The German court, sentencing a mixed group of adults and minors at the time of the offense, reportedly underlined "that the trial was necessary with regard to the individual perpetrators and in order to communicate to the victims that the crime committed against them was punished."¹⁴⁷ Even assuming that criminalization supports this expressive goal, however, the fact remains that trials represent a very expensive way to communicate denunciation. In the case of the German trial, it was reported that it "could end up devouring between €7 million and €10

143. See Lang Report, *supra* note 11, ¶ 14.

144. Phillips, *supra* note 78.

145. Lakotta, *supra* note 75 (noting also that: "The prospect of a German prison sentence isn't going to make much of an impression on pirates in Somalia, whose ransom intake rose from \$110 million (€85 million) in 2010 to \$170 million in 2011—in a country with an annual per capita income of \$240.").

146. For a contrary argument, see Fritz, *supra* note 63, at 893–94 (encouraging states to return accused child pirates to semi-autonomous regions within Somalia to face judicial proceedings in the burgeoning juvenile justice systems of these regions).

147. Phillips, *supra* note 78.

million—a sum equal to more than half the annual budget of the U.N.’s anti-piracy program.”¹⁴⁸

In light of these persistent concerns, then, there is much to be said in support of Somalia’s President Hassan Sheikh Mohamud, who was quoted in the media in late February 2013 as stating his intention to “offer partial amnesty to boys involved with pirate groups.”¹⁴⁹ Another media report stated that “Somalia’s federal government is offering amnesty to junior pirates in an attempt to end the hijackings of merchant vessels”¹⁵⁰ It is estimated that the amnesty “will cover 949 young pirates that [the Himan and Heeb] government has persuaded to give up [piracy].”¹⁵¹ These sorts of initiatives and negotiations are to be lauded. That said, if they assume the form of unqualified amnesties in which the implicated youths are forgotten and put out of sight and out of mind, then their overall effectiveness will be limited at best. This well-meaning and apparently compassionate approach may be just as pointless as criminal conventions and as neglectful as immediate capture and release. One foreseeable outcome of blanket amnesties is recidivism, namely, a return to criminal conduct, be it piracy or other offenses, owing to a lack of other occupational and educational options for the amnestied youth.

A productive middle ground can be cultivated. Although juridification plays an important role in the reintegration of child pirates,¹⁵² as well as the delivery of justice to those individuals aggrieved by their criminal conduct, this does not necessarily require the enforcement of law through courtrooms, trials, and jails. An array of restorative, reparative, and rehabilitative justice modalities can instead be considered. These include traditional reintegrative ceremonies, public inquiries, reciprocal commitments to provide and participate in educational and occupational development, truth commissions, ceremonial or reparative rituals, and community service.

148. Lakotta, *supra* note 75.

149. *Somalia’s President Wants Partial Amnesty for Boy Pirates*, CNN (Feb. 28, 2013), <http://www.cnn.com/2013/02/28/world/africa/somalia-boy-pirates-amnesty/>.

150. Bahadur, *supra* note 36.

151. *Id.*

152. See JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION*, VOLUME 2: *LIFEWORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* 357 (Thomas McCarthy trans., Beacon Press 1987) (1981) (discussing how juridification means the tendency for life in modern societies to be characterized by “an increase in formal (or positive, written) law,” which takes the form of both an expansion of law into areas hitherto uncovered by law as well as an increasing density of law in areas traditionally subject to law).

Deployment of these mechanisms promotes Article 40(1) of the CRC, which provides as follows:

States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.¹⁵³

In sum, I recommend that accused juvenile pirates not face criminal prosecution (whether in adult court or in juvenile court) but, instead, participate in restorative justice mechanisms to promote their societal reintegration. This process would include recognizing the harms occasioned by their suspected criminal conduct. States may be uncomfortable deporting children back to Somalia (or other jurisdictions where children enter pirate gangs) in order to face criminal trials. It is quite foreseeable that officials from extraditing states would fear that criminal proceedings conducted in such venues might fall short of international due process standards. Concerns may deflate if the proceedings instead were restorative and rehabilitative in nature.

That said, just as with child soldiers, any honest assessment of what reintegration, redress, and transition actually entails cannot be based on convenient fictions of the helplessness, faultlessness, innocence, and cluelessness of the child pirates or, on the other hand, fictions as to their incorrigibility, pathology, and irredeemability. When child pirates cause harm, it is important not to absolve them or excuse them, but to forgive them through the *quid pro quo* of accountability. Forgiveness in this sense is to be earned. I have strenuously argued in favor of the value of transitional justice mechanisms of this sort in the case of former child soldiers. The phrase transitional justice may not be apposite to all cases of child pirates, insofar as many are not operating in the context of societies that are endeavoring to transcend sustained periods of human rights abuses, though in the case of Somalia (and the Niger delta) this claim can plausibly be made.

Criminal trials, however, could serve a role when it comes to leaders of pirate gangs. In addition to prosecuting leaders for ordering or organizing pirate attacks, consideration could be given to prosecuting them for recruiting, enrolling, admitting, or forcing

153. CRC, *supra* note 26, art. 40(1).

persons into the gangs.¹⁵⁴ Factors to consider as aggravating or mitigating in sentencing could include the voluntary or compelled nature of the recruitment and the age of the recruit. These two factors could be entwined, in that a scale of presumed voluntariness could reference the age of the recruit. This scale would best be a spectrum instead of a bright-line anchored around the age of eighteen, thereby recognizing the sociological and neurobiological realities of older adolescents (sixteen and seventeen-year-olds) and also of young adults aged in their late teens and early twenties.

Assuredly, justice mechanisms—whether restorative in the case of the juveniles or penal in the case of the gang leaders—are not, standing alone, sufficient to deter piracy and deliver justice. The international community needs to be vigilant in resisting the tendency to see the criminal convictions of a handful of recruiters—for example, Thomas Lubanga in the case of child soldiers in the DRC—as signaling that justice has been done.¹⁵⁵ A rigorous pursuit of justice would look far beyond the individual pirate, and even the gang leader, so as to address the catalytic role of clan elders, financiers,¹⁵⁶ weapons dealers,¹⁵⁷ and profiteers (many of whom never leave shore).¹⁵⁸ Finally, when it comes to the policing of piracy and the use of private security forces, the development of best practices regarding the capture and

154. Dallaire et al., *supra* note 48 (proposing to expand the jurisdiction of the International Criminal Court to include the arming of children for use in international criminal activities). However, many jurisdictions already proscribe the use of minors for criminal purposes.

155. For discussion of this case, the limits of criminal trials of recruiters in attaining justice, and the risk that these trials re-victimize former child soldiers by inflating their victimhood, see Mark A. Drumbl, *The Effects of the Lubanga Case on Understanding and Preventing Child Soldiering*, 15 Y.B. INT'L HUMANITARIAN L. 87 (2012).

156. “There is said to be a stock exchange of sorts in the Somali town of Haradheere, a notorious pirate stronghold, for investors in piracy.” Lakotta, *supra* note 1 (also reporting that “[m]illions in ransom money are sent to Nairobi and Dubai, where the pirates’ backers are”). U.N. Security Council Resolution 1950 recognizes the need to address illicit financing of piracy and the laundering of the proceeds of piracy. S.C. Res. 1950, *supra* note 13, ¶ 15.

157. In the context of Somali piracy, weapons dealers who operate through *hawala* in Mogadishu also are key links, as are sales persons in Yemen. Choudhury, *supra* note 11. Somali piracy also allegedly has Al-Qaeda links. *Id.*

158. *Child Pirates: A New Child Rights Challenge for Somalia*, *supra* note 101 (“Many of the people in charge of piracy operations are not out on the seas themselves, but on shore in their homes in Somalia or Kenya. The people they actually send out to ‘do the dangerous stuff are young children and youth, between the ages of 15, 16 and 17,’ confirmed [former U.N. Special Representative] Coomaraswamy.”); Choudhury, *supra* note 11 (implicating members of the Somali diaspora).

detention of juveniles by anti-piracy forces would provide much needed clarity.

VI. CONCLUSION

Understanding child piracy—and deterring it—requires coming to terms with the nuanced and diverse experiences of the children, juveniles, and youth who enter piracy gangs. Child pirates harm others and commit crimes, and they are simultaneously victims and victimizers, but they are also resilient and stakeholders in the future of their societies. Justice for individuals aggrieved by the acts of child pirates should not be voided by the notion that the child pirates are the singular victims. Understanding and deterring child piracy also requires coming to terms with the limits of criminal law and imprisonment of juvenile convicts, on the one hand, and also the limits of blanket amnesty and perfunctory capture and release, on the other. Looking ahead, restorative and rehabilitative justice mechanisms for juvenile pirates may offer a viable path. These mechanisms may provide the most effective balance by promoting the best interests of child pirates, while also recognizing their harmful conduct and, thereby, respecting the needs of all afflicted parties.



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