



# CHILDREN ACCOUNTABILITY AND JUSTICE: ADVANCING RESTORATIVE JUSTICE FOR CHILD SOLDIERS AND CHILD PIRATES

*By Jacqueline Salomé  
Research Assistant at Indigenous and Northern Affairs Canada*

## INTRODUCTION

The variance in the international community's approach to justice for child soldiers and child pirates is curious – why is it that child pirates are faced with impunity or, alternatively, harsh criminal sentences, sometimes in adult courts and prisons, while child soldiers are offered restorative justice with a focus on rehabilitation and reintegration? There are many commonalities in the role and experience of child soldiers and child pirates, most notably in terms of their indistinct role as victim and perpetrator. Nonetheless, the international conception of these children and the legal and policy responses to their crimes are vastly different. Restorative justice is widely accepted as an appropriate response to cope with child soldiers in post-conflict settings due to its ability to uphold the accountability of the child, prioritize rehabilitation, healing, and reintegration, and act as a prevention mechanism for re-entry into conflict. It seems the same should apply to child pirates – strangely, it does not.

This paper will critically analyze the international community's divergence in the conceptualization of the militarized and criminalized child, and the divergence in justice approaches to child soldiers and child pirates. There is limited academic literature on the experience and international justice response to child piracy. As a result, this paper will explore the literature on child soldiers, focusing on the experience and conception of children involved in armed conflict, and drawing inferences. It will highlight the international community's preferred restorative justice approach to child soldiers in post-conflict settings, elaborating why this approach is most effective to cope with the child soldier's ambiguous role in the victim-perpetrator continuum, as well as how restorative justice can act as a prevention mechanism. Further, it will explain the unsuitability of retributive justice for militarized children, and discuss how the application of restorative justice to child soldiers can be usefully applied to the benefit of child pirates.

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<sup>6</sup>The limited academic literature that exists on the subject of children involved in maritime piracy refers to children as “child pirates” or “juvenile pirates”.

## THE LEGAL SPACE FOR YOUTH CRIMINAL JUSTICE

With certain stipulations, international covenants such as the Convention on the Rights of the Child (CRC), the Beijing Rules, and the African Charter on the Rights and Welfare of Children permit the prosecution of child soldiers. Retributive justice for children is theoretically justifiable as per the Kantian proposition that those who have violated social norms should, simply stated, be punished regardless of the possible benefits or drawbacks of prosecution (Leveau, 2003, p.45). Based on this theory, Leveau (2003) explains, “child soldiers should be prosecuted merely on the basis that they committed crimes” (p.45). Criminal prosecutions can challenge a culture of impunity and deter future criminal activity, and are thus theoretically favourable. Failure to prosecute adolescents may embolden them to commit further atrocities in knowledge that they will not be held accountable in a court of law (Wright, 2010, p. 321).

There have been instances in which child soldiers have been subject to retributive justice. Notable cases include the conviction of 15-year-old Omar Khadr, and the Statute of the Special Court of Sierra Leone (SCSL). The SCSL permitted the prosecution of child soldiers between the ages of 15 and 17 based on the assumption that they are capable of a minimum level of rationality. In essence, older adolescents have a greater degree of mental development and free will, and thus can control their choices and exhibit the necessary mens rea to be held criminally accountable (Cipriani, 2009, p. 5). However, child soldiers did not end up before the SCSL despite the court having authority to try children under 18, nor were children brought before the courts of the International Criminal Tribunals for Yugoslavia or Rwanda. The Rome Statute forbids criminal prosecution of children, defined as those below 18 years of age as per the CRC, before the International Criminal Court (ICC). The reality that very few child soldiers have been brought to justice criminally reflects the international humanitarian and legal community's protectionist attitude towards children, and the wide acceptance of restorative justice as an appropriate mechanism to cope with the child soldier's ambiguous role as victim and perpetrator.

The support for restorative justice as an appropriate mechanism to address child soldiers post-conflict can be linked to conceptions of childhood more broadly. It is necessary to analyze the diverging conceptualizations of the child as both victim and rational actor in order to make evident the necessity of a flexible response that can adequately address the rehabilitation and culpability of the child.

Dominant discourse and international policy has created a universal age demarcation of childhood that has sensationalized images of the child as a vulnerable, incompetent, and dependent being, ultimately incapable of exhibiting the necessary mens rea to be held criminally accountable. As a result, a protectionist view of children as rights-holders and not responsibility-bearers has achieved particular salience. The definition of a child as any individual below the age of 18 forms a parsimonious age demarcation that rests on certain assumed characteristics of childhood that many children do not necessarily exhibit (Hart, 2006, p. 220). This universalist paradigm “forecloses consideration of the possibility that children under 18 may be capable of engaging with political issues”, serving to reify the dominant perception of children as a dependent and vulnerable sector (Hart, 2006, p. 224).

In international law, these depictions reify the idea that child perpetrators are victims of adults who recruited them and thus are not legally culpable (Drumbl, 2012, p. 133). Child soldiers in particular are conceived as a “deviant product of adult abuse”, and thus they cannot be held criminally accountable, as they are assumed to have “no legally relevant agency” (Rosen, 2007, p. 297). The idea that modern warfare is essentially an “adult enterprise” is reflected in the international legal prioritization of applying criminal justice models to the recruiters of child soldiers at the ICC, rather than child soldiers themselves (Rosen, 2007, p. 298). The result is that “pressures for justice are often met with a discourse on dependency”, which serves to justify protectionism that “insulates child soldiers from accountability processes generally” (Rosen, 2007, p. 10, 22). In terms of both domestic and international policy, post-conflict truth commissions and rehabilitative approaches are seen as the most appropriate to respond to the plight of child soldiers, coupled with criminal prosecutions for child soldier recruiters (Rosen, 2007, p. 19). Because child soldiers are not “conflict entrepreneurs or political leaders”, the benefits of criminal justice and incarceration are slim (Drumbl, 2012, p. 22).

The child soldier, as a result, is portrayed as a “faultless and passive victim”, forcefully recruited, dependent and manipulated by adults (Drumbl, 2012, p. 6). While certain elements of this narrative do exhibit the truth, it is also important not to downplay the agency of the child. While numerous children are forcibly recruited into conflict, some children may in fact voluntarily enlist with armed groups as a demonstration of their political agency. Certain children may join of their own volition as influenced by local values, defense of kin, or an essential fulfillment of adult status (Hart, 2006, p. 18). Economic benefits may influence a child’s rational calculation to enlist as well (Hart, 2006, p. 218). According to ethnographic data published by Krijn Peters and Paul Richards who interviewed child combatants in Sierra Leone, children felt a sense of pride in fighting (Rosen, 2007, p. 299). The participating child

soldiers articulated that military activity provided “a chance to make their way in the world”, leading the ethnographers to the conclusion that child soldiers did exhibit levels of rationality and a “surprisingly mature understanding of their predicament” (Rosen, 2007, p. 299).

Drumbl (2012) takes issue with the common two-dimensional conception as victims and witnesses of crime, insisting that it neglects the child soldier’s third role as an agency-boasting perpetrator (p. 21). Adolescents, Drumbl notes, can grasp consequences of their conduct and make amends after the fact (p. 58). He asserts that children have been known to threaten victims to keep quiet about crimes perpetrated by the child soldiers in order to avoid accountability; this illustrates an explicit acknowledgement of their guilt and a rational decision to attempt to avoid consequences of their conduct (Drumbl, 2012, p. 86-88). Contrary to the dominant victim image, “depictions of child soldiers as innocents contrast sharply with the reality that some children, like some adults, learn to enjoy killing” (Drumbl, 2012, p. 89).

The complicated experience of child soldiers can thus be better described as occupying a position within a space that Primo Levi has coined the “gray zone” – a space between victims and perpetrators defined by varying levels of complicity and coerced behavior. Certain legal scholars have created labels for child soldiers that aptly capture their nuanced position within Primo Levi’s “gray zone” of complicity and culpability. Smeulers, for example, has classified most child soldiers as “compromised perpetrators”, implicated in international crimes yet their influence to commit these crimes is shaped by others and their environment (Drumbl, 2012, p. 90). Vaha (2009) labels child soldiers as “coerced moral agents”, suggesting that in a hierarchical armed group, it is difficult to determine individual agency (p. 7). Vaha explains that there are varying levels of responsibility that are dependent on the command structure, and varying levels of complicity and coercion. Typically, children and soldiers in lower ranks hold less responsibility for criminal activity than those in command positions (Vaha, 2009, p. 8; Aptel, 2010, p. 99). These nuanced perspectives avoid reductionism and are thus more comprehensive in their consensus that although children do display agency and are perpetrators of heinous crime, this agency has many context-specific caveats.

*Primo Levi has coined the phrase the “gray zone” to refer to a space peopled with those not easily classified as victims or perpetrators, embodying various forms of complicity and ambiguous involvement in crime or systematic atrocities. Rather than viewing child soldiers, for example, as victim or perpetrator, it is more appropriate to view them as occupying a space in between. Bronwyn Leebaw has suggested that restorative justice embodies the flexibility necessary to address “the gray zone” and various levels of culpability (Leebaw, 2011, p. 3, 14, 123).*



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*For child soldiers who occupy an ambiguous middle position between perpetrator, victim, and witness, restorative justice is preferable to retributive justice that black-boxes the child into the offender category.*

#### RETRIBUTIVE JUSTICE

For child soldiers who occupy an ambiguous middle position between perpetrator, victim, and witness, restorative justice is preferable to retributive justice that black-boxes the child into the offender category. Many legal scholars underscore the added harm that children can face under retributive justice, which is not conducive to their victimhood. Nagle (2011) argues that trials are less likely to uphold the best interests of the child or provide societal reintegration as effectively as alternative rehabilitative measures. As such, the attainment of justice should be redirected toward reintegration, rehabilitation, and reunification with family and the community (Nagle, 2011, p. 41-42). Grossman (2007) adds that trials may actually threaten a child's psychological healing by making them relive trauma, delaying a return to 'normalcy' and making societal reintegration more difficult (p. 351). As such, trials are more likely to aggravate distress rather than promote healing in accordance with the CRC (Grossman, 2007, p. 351). For these reasons, Nagle (2011) suggests measures of long-term counselling and monitoring, vocational training, restitution, and reconciliation as preferred alternatives to criminal justice (p. 42). Echoing these sentiments, Aptel (2010) writes that a "free and willing acknowledgement of the crimes committed and a full explanation of the circumstances is often in the best interests of the children concerned" (p. 109). This process, she furthers, maximizes opportunities for rehabilitation and reintegration back into families and communities, and is more in line with restorative justice (Aptel, 2010, p. 109).

Ronald Flowers (1986) contributes the view that incarcerated youth are actually likely to be victims of the institution in which they are incarcerated, which offsets any benefits of serving time and may actually spur future criminal or military activity rather than contributing to prevention. He points to five key reasons for his argument. Firstly, children in detention centres often acquire negative behavioural characteristics due to criminal surroundings. Secondly, juvenile victimization is rampant as youth are prone to attack, violations and other self-esteem limiting events. Thirdly, juvenile inmates have a tendency to associate with gangs or groups for survival; these groups are often associated with delinquent behaviour that exacerbates the child's acquisition of learned negative behavioural traits. Fourthly, Flowers notes that overcrowding

and unsavoury conditions in detention centres cause a tense atmosphere that "only contributes to the very problems for which the juvenile is incarcerated". Lastly, he points to a lack of educational programs and studies that show that being initiated into the juvenile justice system actually makes juveniles more susceptible to crime. For these reasons, Flowers suggests that retributive justice for juveniles more broadly should be a last resort, as administering justice can be done more effectively outside of the courts (Flowers, 1986, p. 179, 195).

#### RESTORATIVE JUSTICE: A PREFERRED APPROACH

To reconcile the child soldier's existence within "the gray zone" of the victim-perpetrator continuum, scholars have generally conceded that furthering the agenda of restorative rather than retributive justice is a more appropriate justice mechanism for juvenile ex-combatants in post-conflict settings. Restorative justice has been defined as a "process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future", or "every action that is primarily oriented toward doing justice by repairing the harm that has been caused by crime" (Daly, 2002, p. 57-58). Common features among the restorative justice literature include an emphasis on the role and experience of victims in the criminal process, involvement of all relevant parties (i.e. victims, offenders, supporters and witnesses) to discuss the offense and what should be done to repair the harm, and decision-making carried out by both lay and legal actors (Daly, 2002, p. 57-58). Although restorative justice is commonly viewed as opposite to retributive justice, criminologist Kathleen Daly (2002) points out that this is a misconception; in actuality, restorative justice seeks a middle ground between reparation, restoration and reintegration (p. 59). Ideally, restorative justice intends to uphold accountability of the offender, by allowing a space for dialogue in which the offender can explain the circumstances leading to their criminal behaviour, ask for forgiveness, and take direct responsibility for the crime by repairing damage and confronting victims.

Upholding the accountability of child soldiers is important as acknowledgement of guilt accompanied by some form of punishment is commonly accepted as a deterrent to crime. Allowing blanket immunity in accordance with the prescribed victim imagery of the child soldier that, while well intentioned, may be an extreme position to take as it insinuates that all below the age of 18 are above the law (Rosen, 2009, p. 117). As Drumbl (2012) asserts, "declaring non-responsibility may come to be seen as legitimating irresponsibility" (p. 40). Legitimizing irresponsibility is counterintuitive to the goals of upholding the accountability of the child, who exhibits rational agency, and the goal of preventing children from engaging in military activity in the future. The goal of prevention is thus inextricably linked to accountability. Juvenile ex-combatants cannot be viewed as equal rights-holders if they are not answerable to their crimes, and thus they must be held variably accountable as appropriate on a case-by-case basis. Now, one might argue that retributive justice is specifically designed to uphold accountability and punish offenders. However, unlike retributive justice, the benefit of the accountability mechanisms of restorative justice is that they do not black-box the child

into the perpetrator category. Dialogical processes allow for the realization and understanding of the child's simultaneous role as victim as well as perpetrator. Moreover, the child is able to exercise agency in the control of the process of upholding their own accountability, through dialogue with victims and having a more direct role in repairing damage. Additionally, restorative justice does not have to answer to precedents and has more flexibility to uniquely address individual cases as a result.

Restorative justice is additionally useful as it attempts to understand the broader context within which given act was committed; where criminal justice simply distinguishes right from wrong at an individual level, restorative justice seeks to respond to crime at the micro level by giving priority to victim reparation, and at the macro level by addressing the need to build safer communities and create an agenda for development (Cipriani, 2009, p. 13). The criminal scheme is individualist by nature, and does not consider external factors such as social control and economic opportunities in a context of deprivation that influence a child's choice to participate in military activity (Cipriani, 2009, p. 14). Oftentimes, the core issue is beyond the individual and stems from general societal problems "for which there is a burden of collective responsibility" that a comprehensive and inclusive dialogical process of restorative justice is better suited to address (Cipriani, 2009, p. 15). Additionally, by addressing these macro societal issues, the structure in which the child acts will be less amenable to crime, further asserting the strength of restorative justice as an adequate prevention mechanism.

Restorative justice embodies rehabilitative elements that are necessary to cope with the negative psychological effects of soldiering that are often asymmetrically experienced by juvenile ex-combatants. Common psychosocial issues include anxiety, fear, anger, stress, depression, post-

traumatic stress disorder, and isolation (Marx, 2012, p. 13). These issues must be addressed if ex- child soldiers are to successfully reintegrate into communities and experience a level of rehabilitation that will ensure their effective functionality in an alternative non-criminal lifestyle, ultimately contributing to personal development more generally. A focus on rehabilitation is thus additionally imperative for deterrence and prevention of a child's future criminal involvement. Proper treatment and provision of post-traumatic coping mechanisms should ideally contribute to a child's success in this alternative lifestyle.

## RESTORATIVE JUSTICE IN PRACTICE

Restorative justice has been implemented in post-conflict Sierra Leone and Northern Uganda to successfully advance the rehabilitation and community reintegration of former child soldiers while simultaneously upholding their accountability. These case studies demonstrate the usefulness of restorative justice to address militarized children. An analysis of the strengths and drawbacks of restorative justice in practice can provide insightful lessons learned to guide future restorative justice processes for both militarized and criminalized children.

### Sierra Leone

In Sierra Leone, children were heavily involved in over a decade of brutal civil war between the Revolutionary United Front and Charles Taylor's National Patriotic Front, and the Sierra Leonean government. Children were recruited, often forcibly, by both parties to commit atrocities and human rights abuses, while subject to sexual exploitation and forced labour. In the aftermath of civil conflict, local restorative justice practices were employed to assist former child soldiers to enter constructive civilian roles in their northern Sierra Leone villages and rebuild positive relations with their communities. In one local justice mechanism, parents of former child soldiers approached local chiefs to explain their children's involvement in and experience with conflict. The chief would speak to the child, having the child lie at his feet holding his ankle and explain his story. The chief would then compare the child's story to information gleaned from community members, assess his remorse, and decide if the child can return to the community. If the chief permits the child to return, the chief would assign the boy to complete a job to assist the community and connect the child to a community member as a mentor for guidance and support (Wessells, 2006, p. 222). The child's job would be determined based on the extent of the wrongdoing, and could include community service such as cleaning common areas or repairing buildings.

According to Michael Wessells (2006), this approach to restorative justice "resembles some of the best practices Western social services have devised" (p. 222). The approach collects evidence from the child and community members, which is then used to make decisions regarding remorse and the likelihood of rehabilitation. The child's position laying down



signals “complete submission to local authority and his willingness to obey local rules”, and is also a “ritual through which the child breaks from past roles as a child soldier and reformulates his position as part of the civilian community” (Wessells, 2006, p. 223). The child then engages in reparation to the village via community service. This community service develops positive relations between former child soldiers and the community, and its publicity ensures that villagers can witness the child’s desire to help the village which ideally contributes to the community’s willingness to accept the child without stigmatization or isolation. Finally, the child’s entry into the mentoring process signals his commitment to civic values and his redefinition as a civilian (Wessells, 2006, p. 223).

### Northern Uganda

During two decades of internal conflict between the Lord’s Resistance Army (LRA) and the Uganda People’s Defence Forces, children were recruited or kidnapped as combatants and forced to perform atrocities and human rights abuses against civilians. Following the conflict, the Acholi of Northern Uganda employed the traditional justice mechanism of *mato oput* to reintegrate the former child soldiers and uphold their accountability, while rehabilitating both the child and community. *Mato oput* is a tool of accountability used to generate acknowledgement of atrocities and promote long-term reconciliation (Acirokop, 2010, p. 277). Core features include apology, compensation, and forgiveness. The process commences with a voluntary confession by a former child soldier. Negotiations and mediation take place between elders on the basis of the information obtained from the offender. The involvement of elders and the community at large helps to “eliminate any doubts about fair justice” and teaches rehabilitation to the village as well as the offender (Acirokop, 2010, p. 280). Acirokop (2010) suggests that “the *mato oput* mechanism deals collectively with questions of accountability through compensation and restoration and helps prevent juvenile crime” (p. 284). The negotiation process and the final ritual are open to the community, with the process itself acting as a deterrent. The final agreement recommends reconciliation, and “with the sanction of the entire community and clan, it is accepted without question and implemented to the satisfaction of both the victim’s and the offender’s communities” (Acirokop, 2010, p. 284). Acirokop argues that this process has been helpful in restoring the psychological well-being of many children and in reconciling communities. However, she also notes its limitations in that former LRA youth may avoid the ceremony, hiding their identities for fear of being identified by family members of their victims (p. 280).

### Lessons Learned

The case studies of Sierra Leone and Northern Uganda demonstrate that in practice, restorative justice has successfully upheld the accountability of former child soldiers, advanced community and child rehabilitation, ensured community reparations, and facilitated the reintegration of the child into families, villages, and civilian life. Most importantly, the restorative justice mechanisms used in Sierra Leone and northern Uganda have embodied the flexibility necessary to account for the child soldier’s convoluted role along the victim-perpetrator continuum, recognizing the need to uphold accountability while furthering reconciliation,

rehabilitation, and reintegration. Despite the benefits of these restorative justice practices, these approaches have not been flawless. Barriers such as fear of retribution or security concerns prevent some children from participating in restorative justice mechanisms. There are also concerns about the capacity of villages to administer restorative justice as traditional systems may have broken down during conflict, or infrastructure may not exist to facilitate these processes (Acirokop, 2010, p. 282). In addition, restorative justice approaches may not successfully include girls or address their nuanced experience in conflict and thus their unique needs. The successes and limitations of the implementation of restorative justice mechanisms in post-conflict Sierra Leone and Northern Uganda are useful lessons learned to shape future restorative justice processes involving child soldiers as well as child pirates.

### CHILD PIRATES: DRAWING PARALLELS

The role of children in piracy, most commonly off of the Somali and West African coasts, is a phenomenon that is significantly understudied in academic literature. Despite substantial attention to the plight and response toward child soldiers, there appears to be scant awareness of the existence of child pirates, let alone the creation of comprehensive, nuanced legal and policy responses to cope with their distinct experience.

Global instances of piracy have been declining since 2011 according to the International Maritime Bureau, largely due to defensive and preventative action taken by international



shippers in the region, including arming ships with private security forces, adopting internationally-recognized best management practices, and the international deployment of military protection such as EU Operation Atlanta and NATO's operations Allied Protector and Ocean Shield (Drumbl, 2013, p. 246). These measures have significantly deterred piracy off of the Somali coast in particular. However, the situation in Somalia remains tenuous and piracy is still a concern. Somali pirates have "proven adept at changing their tactics to avoid detection by using smaller boats, travelling further afield, relocat[ing] their operations inland, and launching land-based attacks" (Holland, 2013, p. 178). Pirate attacks are also spiking in areas of West Africa and Southeast Asia, meaning that global piracy remains a prominent international issue (Holland, 2013, 247-248). In addition, the costs of global piracy are steep, costing approximately \$7-12 billion dollars annually (Drumbl, 2013, p. 249). Further, the involvement of children in global piratic activity renders piracy a pressing policy issue, given international obligations relating to the rights and protection of the child.

The number of children involved in maritime piracy remains speculative. International experts on piracy estimated in 2012 that approximately one-third of Somali pirates are youth, most between the ages of 11 and 15 (Holland, 2013, p. 183). As nearly half of the Somali population is below 15, it is likely that a large number of Somali pirates are youth (Holland, 2013, p. 183). Children are both participants and directors of pirate raids, often responsible for some of the most dangerous tasks including boarding vessels, taking hostages, and negotiating ransom payments for leaders of piracy gangs (Holland, 2013, p. 185). Because their roles do not differ distinctively from the roles of adults, prosecutors often do not differentiate between adult and juvenile pirates when they are apprehended and charged, even though the role of the child may be minor (Sterio, 2013, p. 282).



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<sup>8</sup>There is limited academic literature on the topic of juvenile pirates. See Drumbl, M. (2013). *Child pirates: Rehabilitation, reintegration, and accountability*. *Case Western Reserve Journal of International Law*, 46 (1), 1-37; Holland, E. (2013). *Hijacked childhood, under the radar: How the international community can help the youth associated with Somali piracy and why it must*. *UCLA Journal for International Law and Foreign Affairs*, 17; Sterio, M. (2013). *Juvenile pirates: Lost boys or violent criminals?* *Case Western Reserve Journal of International Law*, 46 (1), 279-301. Much of what is known about child piracy (in Somalia in particular) comes from newspaper articles (see for example, an advocacy piece by Romeo Dallaire at <http://www.theglobeandmail.com/opinion/child-pirates-are-everybodys-problem/article544972/>), and references in UN Security Council Resolutions (see <http://www.un.org/press/en/2015/sc12113.doc.htm>).



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There exist many similarities between the experience of child soldiers and child pirates. Despite differences in the military versus criminal nature of their conduct, child soldiers and child pirates still become involved in illegal activity based on a convoluted combination of political and personal agency – pirates are often fighting for the arguably righteous cause of protecting their domestic waters from foreign overfishing or dumping of toxic waste by international ships in offshore waters – within a constrained environment of economic, social, and political deprivation (Drumbl, 2013, p. 250). The child pirate's criminal conduct is likewise marked by personal choice, coercion, indoctrination, and intoxication, making their culpability questionable. More directly, certain child pirates are former child soldiers associated with al-Shabaab, a Somali-based Islamist militant group, as well as the Nigerian rebel Movement for the Emancipation of the Niger Delta (Holland, 2013, p. 205). Drumbl (2012) has explicitly stated that his conclusions regarding child soldiers have broader implications for children involved with transnational organized crime such as sex work, trade in narcotics, dangerous child labour, piracy, and so forth (p. 213).

Despite evident commonalities, the dominant victimhood image painted for child soldiers and the international community's subsequent reluctance to respond with retributive justice models is not mirrored in international conceptualization or policy responses to child piracy. Responses to child pirates from Somalia in particular have been "invariable and ad hoc", resulting in opposing criminal prosecutions or catch-and-release policies (Holland, 2013, p. 186). The former, Drumbl (2013) states, is more in line with the criminalized 'demon and bandit' image, while the latter more reflective of a 'victim' image within the international legal imagination (p. 7). Child pirates have faced trial nationally in Somalia, Kenya, Seychelles, India, Italy, France, Yemen, Germany, Japan, Malaysia, and the USA (Drumbl, 2013, p. 254). The global average sentence of Somali pirates outside of Somalia is 14 years, which is identical to that rendered by the ICC to prosecute the most serious crimes in the world (Drumbl, 2013, p. 251). The United Nations Office of Drugs and Crime (UNODC) estimates that there are 1,000 Somalis in custody for piracy in about 20 countries globally (Drumbl, 2013, p. 249). To reiterate, given that an estimated one-third of Somali pirates are youth, it is reasonable to deduce that a significant portion of those incarcerated on piracy charges are below the age of 18.

<sup>9</sup>Abduwali Abdukhadir Muse of Somalia was prosecuted for his involvement in a pirate attack on the American Maersk Alabama ship. Muse lacked birth records but his lawyers alleged that he was a minor at the time of offense. Muse was originally charged with piracy

Often, child pirates have been subject to retributive justice in adult courts with little consideration of the CRC's provisions on stipulations for juvenile justice or the best interests of the child. Most children from Somalia do not possess birth documentation to prove their age. As a result, criminal prosecutions have had to rely on forensic testing. Forensic markers, however, are keyed to age determinants among Western children, and thus may not be applicable to children across the African continent (Drumbl, 2013, p. 250). Due to the difficulty in absolutely determining the age of the child, some children have been determined to be adults in Western courts and have been tried accordingly (such as the case of Abduwali Abdukhadir Muse).

When trials do not materialize, it is largely because child pirates have been subject to catch-and-release responses. Catch-and-release policies are most common when international naval forces capture juvenile pirates, confiscating their weapons and releasing them (Drumbl, 2013, p. 261). Some African and Southeast Asian states may lack the capacity or political will to conduct criminal trials and provide adequate due process provisions, making catch-and-release policies more attractive. The resulting impunity is problematic as it may embolden child pirates to continue piratic behaviour, while allowing offenders to shirk accountability and neglect a provision of justice to victims. Child pirates are easily able to resume piratic activity, contrary to the goal of prevention. Even more problematic is Shelly Whitman's assertion that such release policies return juveniles to one of the "worst forms of child labour" in discord with the International Labour Organization's 1999 Convention by the same name (Drumbl, 2013, p. 261).

Drumbl points out that the divergent attitude of protectionism for child soldiers and demonization of child pirates held by influential organizations reflects the "international community's engagement with militarized youth and its reticence toward criminalized youth" (Drumbl, 2013, p. 265). He attributes this divergence to the target of criminal activity; the passive victim image, he asserts, does not reach children in the periphery who commit atrocious acts against Westerners (Drumbl, 2013, p. 269). He elaborates that,

*"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. Child piracy, to be clear, affects Western interests" (Drumbl, 2013, p. 269).*

The attitude toward child pirates can be attributed to political agendas – children implicated in international crime outside of centers of global politics benefit more greatly than those who target interests or populations within these centers. Children involved in terrorism, for example, are often not afforded restorative justice policies, and the juvenile justice protections

<sup>10</sup>but plead guilty to lesser charges of hijacking, hostage-taking, kidnapping, and conspiracy. Part of his plea bargain was a commitment by the defense not to challenge his age. Following a hearing, however, the judge determined Muse to be an adult and sentenced him to the maximum permissible term of over 30 years imprisonment. As noted by Drumbl, "in the end, Muse's youth proved irrelevant to questions of his culpability and inconsequential to his punishment". See Drumbl, 2013, p. 256.



afforded to children under the CRC are often not upheld. Counter-terrorism legislation rarely specifically addresses children, despite their recruitment into terrorist groups such as ISIS and Boko Haram (Brett, 2002, p. 33). In many countries, there are no military courts or judges designated especially for children, nor are they detained separately from adults when detained as terrorist suspects (Brett, 2002, p. 33). Further, in 2015, former Australian Prime Minister Tony Abbott stated that terrorists of all ages will be criminally punished in Australia (McGuirk, 2015).

When Western interests are affected by international crime, as they are in maritime piracy and terrorism, there is greater pressure for justice to be served (Drumbl, 2012, p. 129). The only seemingly protectionist international policy of catch-and-release is not actually a reflection of the victim image but a more pragmatic response to the difficulties of conducting criminal trials. With inconsistent policies, child pirates are not afforded the same opportunities for reparation, reintegration, and rehabilitation.

Drumbl (2013) thus suggests that the international community prioritize a restorative and reintegrative justice model to respond to child piracy, in line with those applied to juvenile ex-combatants. Through the use of traditional reintegrative ceremonies, public inquiries, opportunities for education and occupational development (that provide alternative lifestyles to that of criminal activity), truth commissions, ceremonial and reparative rituals, and community service, a middle ground can be achieved that recognizes the child pirate's simultaneous culpability and victimhood. Holland suggests an eventual DDR program for ex-child pirates



as an appropriate procedure to uphold the child's best interests, acknowledge criminal accountability and prioritize reintegration (Holland, 2013, p. 205). Youth, Drumbl suggests, can become productive and functional community members if given the opportunity for reinsertion, reunification, and to make amends, which ultimately contributes to prevention of re-entering piracy (p. 273). Restorative justice practices are also effective to address group crimes, as piracy is a gang-related activity thus individual culpability is difficult to address (Drumbl, 2013, p. 273). Lastly, such justice mechanisms should result in recognition of macro socioeconomic factors that drive crimes such as piracy and divert attention into broader goals of development necessary to address the root causes of criminal activity. The benefits of restorative justice that are recognized in the context of child soldiers should be replicated in the context of child pirates in order to break down parsimonious constructions of the child pirate as a sole perpetrator, acknowledge their victimhood and ultimately contribute to rehabilitation, reintegration, and prevention of future criminal activity.

## CONCLUSION

Both militarized and criminalized children occupy a vague position on the victim-perpetrator continuum. The role of the child soldier thus cannot be reduced to victimhood, as the dominant international narrative boasts, nor can criminalized children be cast exclusively as perpetrators. Children in both contexts act within a constrained structure of civil conflict, socioeconomic destitution, and arguably a lack of other alternatives for survival. Additionally, their choices are often characterized by adult coercion and manipulation that may lessen their guilt to an extent. Nonetheless, the child's ability and will to make rational decisions, and exhibit personal and political agency, should not be negated.

For these reasons, restorative justice is a practical and appropriate justice response to address children existing within the "gray zone" of the victim-perpetrator continuum. Restorative justice policy responses can act as an appropriate middle ground to recognize the child soldier or pirate's tripartite role as victim, witness, and perpetrator of crime. Restorative justice can simultaneously enforce accountability and responsibility on the behalf of juvenile perpetrators, without negating the expressed political agency and free will of said children. The culmination of upholding accountability alongside rehabilitation and reintegration into alternatives to criminal lifestyles ultimately sees restorative justice as a prevention mechanism as well. The successes and failures of restorative justice practices implemented with regards to former child soldiers, such as those in Sierra Leone and Northern Uganda, should provide useful lessons learned to guide the creation of successful restorative justice programs for children involved in maritime piracy.

Given the commonalities between the experience and roles of child soldiers and child pirates in conflict and crime, it is curious that restorative justice is viewed as appropriate and beneficial for one group and not the other. The international community must extend the application of restorative justice to child pirates – a group of children who are currently disadvantaged by the retributive justice process and will greatly benefit from a nuanced restorative justice approach.

*Jacqueline Salomé holds an MA in International Studies from Simon Fraser University in Vancouver, BC, and a BA in Political Science from Wilfrid Laurier University in Waterloo, ON. Her research interests relate to international security, maritime piracy, and refugee issues. Jacqueline is currently employed as a research assistant with Indigenous and Northern Affairs Canada in Vancouver, BC. This article reflects her views alone and not those of the Government of Canada.*

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