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# Child Pirates from Somalia: A Call for the International Community to Support the Further Development of Juvenile Justice Systems in Puntland and Somaliland

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## CHILD PIRATES FROM SOMALIA:

### A CALL FOR THE INTERNATIONAL COMMUNITY TO SUPPORT THE FURTHER DEVELOPMENT OF JUVENILE JUSTICE SYSTEMS IN PUNTLAND AND SOMALILAND

*Danielle Fritz\**

*The increased presence of pirates off the coast of Somalia continues to threaten international business and security. States around the world are currently prosecuting pirates in an effort to both bring pirates to justice and create a general deterrent effect. The young age of many pirates, however, is conspicuously absent from the discourse on piracy prosecutions. The fact that many pirates are children should command international attention. This Note explores international standards of juvenile justice and encourages the international community to invest in the development of effective juvenile justice systems within the semi-autonomous regions of Puntland and Somaliland.*

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*“[I]mprisoning them was like trying to use a bailer to drain the ocean: for each pirate captured by the authorities, there were dozens of desperate young men on shore ready to rush in and fill the void”<sup>1</sup>*



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<sup>1</sup> Jay Bahadur, *The Pirates of Somalia: Inside Their Hidden World* 23 (2011).

<sup>2</sup> CIA, *Map of Somalia*, WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/so.html> (last visited June 17, 2012).

## I. INTRODUCTION

States engaging in missions to combat piracy off the coast of Somalia will inevitably apprehend children. In March, 2011, for example, an Indian vessel captured sixty-one pirates, twenty-five of whom were under the age of fifteen and at least four of whom were under the age of eleven at the time of apprehension.<sup>3</sup> Children accused of piracy may face prosecution in the courts of any state in the world, as piracy is a crime of universal jurisdiction.<sup>4</sup> Children suspected of piracy are currently facing trial across the globe in places such as Germany,<sup>5</sup> Kenya,<sup>6</sup> and the Seychelles.<sup>7</sup> As the international community continues to seek a solution to maritime piracy off the coast of Somalia, it is clear that determining how to handle these “child pirates”<sup>8</sup> further complicates the issue.

This Note makes the case that states apprehending suspected pirates should avoid prosecuting child pirates in the states’ domestic courts or in the courts of Kenya or the Seychelles. Instead, this Note encourages states to return these children to semi-autonomous regions<sup>9</sup> within Somalia,

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<sup>3</sup> Rajat Pandit, *25 of 61 Pirates Arrested by Navy at Sea are Children*, TIMES OF INDIA (Mar. 17, 2011), [http://articles.timesofindia.indiatimes.com/2011-03-17/india/29138233\\_1\\_pirates-arabian-sea-piracy](http://articles.timesofindia.indiatimes.com/2011-03-17/india/29138233_1_pirates-arabian-sea-piracy).

<sup>4</sup> See, e.g., Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. AM. L. 43, 54 (2009) (“One of the fairly undisputed aspects of the international law on piracy is that it is subject to universal jurisdiction.”).

<sup>5</sup> See Beate Lakotta, *Torture? Execution? German Justice Through the Eyes of a Somali Pirate*, SPIEGEL ONLINE (Apr. 7, 2011), <http://www.spiegel.de/international/world/0,1518,755340,00.html> (describing the initial challenges a Hamburg court is facing during the trial of Somali pirates, including the difficulty of handling accused children).

<sup>6</sup> Interview with Chief Magistrate Rosemelle Mutoka, in Cleveland, Ohio (Oct. 5, 2011).

<sup>7</sup> See Email from Michael Scharf, John Deaver Drinko-Baker and Hostetler Professor of Law and Dir. of the Frederick K. Cox International Law Center, to Danielle Fritz, J.D. Candidate, Case Western Reserve University School of Law (Feb. 21, 2012, 8:11 EST) [hereinafter Email Correspondence with Michael Scharf] (on file with author) (“So, far, most of the Seychelles cases have involved at least some teenage pirate defendants.”); see also *Somali Pirates Sentenced to 10 Years in Seychelles*, BBC NEWS (July 26, 2010), <http://www.bbc.co.uk/news/world-africa-10763605> (stating four individuals under eighteen were part of a group of eleven convicted pirates sentenced to ten years in prison).

<sup>8</sup> *Child Pirates: A New Child Rights Challenge for Somalia*, INDEPTH AFRICA (Nov. 9, 2010), <http://indepthafrica.com/news/east-africa/child-pirates-a-new-child-rights-challenge-for-Somalia> (“The rise of maritime piracy in Somalia in recent years has presented a new challenge to the child rights agenda: the “child pirate”—similar to the more familiar category of “child soldier.”); see also *Child Pirates*, MAR. SECURITY REV. (Mar. 18, 2011), <http://www.marsecreview.com/2011/03/child-pirates/> (arguing the term “child pirate” is likely to become as common as the term “child soldier”).

<sup>9</sup> There are 18 administrative regions within Somalia. “Puntland” is located in northern Somalia and considers itself as an autonomous state within Somalia. “Somaliland” is located in north-west Somalia and declared independence 1991. “Galmadug” is located in central Somalia and has emerged as another regional entity. U.N. Secretary-General, *Report of the*

specifically Puntland and Somaliland, to face judicial proceedings in the burgeoning juvenile justice systems of these regions. Finally, this Note advocates for increased international support toward the development and maintenance of effective juvenile justice systems within Puntland and Somaliland as part of the overall strategy to combat piracy off the Horn of Africa.<sup>10</sup>

Part II provides an overview of the current state of piracy off the Horn of Africa. Part III argues that apprehending states should not prosecute child pirates in their own domestic courts, drawing from materials relating to the prosecution of child soldiers. Building on this, Part IV explores the current situation of child pirates and how their status and treatment falls short of international standards of juvenile justice. Finally, Part V discusses the current state of juvenile justice within various regions of Somalia and advocates for the further development of such systems in the region of Puntland and Somaliland.

## II. BACKGROUND

Incidents of piracy off the coast of the Horn of Africa are increasing, with ransoms for the release of hostages averaging between \$4 million and \$5 million per case.<sup>11</sup> Naval forces from thirty states have a presence in the area, with three major coalitions currently operating: Task Force 151 (reporting to the Commander of the Naval Forces, U.S. Central Command), Operation Atlanta (led by the European Union Naval Force), and NATO's Operation Ocean Shield.<sup>12</sup> Current estimates from naval forces indicate that there are approximately fifty main pirate leaders, 300 leaders of pirate attack groups, and 2,500 "foot soldiers."<sup>13</sup> Despite hopes that a naval presence in the Gulf of Aden and the Indian Ocean will deter pirates from attacking shipping vessels, acts of piracy are becoming more violent.<sup>14</sup>

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*Secretary-General on the Modalities of the Establishment of Specialized Somali Anti-Piracy Courts*, Annex II ¶ 2, U.N. Doc. S/2011/360 (June 15, 2011).

<sup>10</sup> The "Horn of Africa" is comprised of Eritrea, Djibouti, Ethiopia, and Somalia; it is a peninsula along the southern side of the Gulf of Aden and extends into the Arabian Sea. *Map of the Horn of Africa*, U.N., <http://www.un.org/Depts/Cartographic/map/profile/horne.pdf> (last visited June 17, 2012).

<sup>11</sup> Frank Langfitt, *Inside the Pirate Business: From Booty to Bonuses*, NPR (Apr. 15, 2011), <http://www.npr.org/2011/04/15/135408659/inside-the-pirate-business-from-booty-to-bonuses>; see also Anna Bowden & Shikha Basnet, *The Economic Cost of Somali Piracy, 2011*, at 1 (The One Earth Future Found., Working Paper, 2012), available at [http://oneearthfuture.org/index.php?id=120&pid=37&page=Cost\\_of\\_Piracy](http://oneearthfuture.org/index.php?id=120&pid=37&page=Cost_of_Piracy) ("Overall, 2011 saw an increase in attacks by Somali pirates.")

<sup>12</sup> James Kraska, *Freakonomics of Maritime Piracy*, 16 BROWN J. WORLD AFF. 109, 117 (2010).

<sup>13</sup> U.N. Secretary-General, *supra* note 9, Annex I ¶ 3.

<sup>14</sup> Bowden & Basnet, *supra* note 11, at 36.

The presence of piracy in this region is the result of multiple factors, including weak enforcement and judicial mechanisms within Somalia, the aftermath of a tsunami in 2005 that seriously harmed the Somali coastline, and the harmful economic effects that resulted from foreign states illegally fishing and dumping toxins in Somali territorial waters.<sup>15</sup> While apprehended pirates often claim they acted to protect Somali coastlines from such illegal fishing and dumping of toxins,<sup>16</sup> it is clear that “piracy has in essence become an organized, lucrative and attractive criminal activity undertaken for heinous ends.”<sup>17</sup>

Children, whom the Convention for the Rights of the Child defines as any human under the age of eighteen,<sup>18</sup> are particularly vulnerable to recruitment into piracy.<sup>19</sup> High levels of poverty define the lives of many Somali children who often seek work to support themselves and their families.<sup>20</sup> For example, Youssef M.—aged somewhere between sixteen and nineteen and currently facing trial in a domestic court in Hamburg, Germany—recently described how he became involved in piracy.<sup>21</sup> Around the age of thirteen, he began working as a night watchman for a fishing boat, earning less than one US dollar per night.<sup>22</sup> In 2010, a man approached Youssef

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The number of seafarer deaths has tripled from 8 in 2009 to 24 in 2011 . . . This increasing rate of fatality is a concerning development, which suggests that pirates may be growing more desperate and willing to use force against hostages in order to hijack vessels or force the payment of ransoms.

*Id.*

<sup>15</sup> Special Adviser to the Secretary-General, *Report of the Special Adviser to the Secretary-General on the Legal Issues Related to Piracy off the Coast of Somalia, Annex to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council*, Sec. B(1) ¶ 12–13, U.N. Doc. S/2011/30 (Jan. 15, 2011) [hereinafter *Report on the Legal Issues Related to Piracy*].

<sup>16</sup> *E.g.*, Republic v. Mohamed Ahmed Dahir, Crim. Side No. 51, ¶ 18 (Sey.) (July 26, 2010) (“[The accused] claimed that they are fisherman and use lines and hooks to fish. Further, that on the day of their arrest they were peacefully fishing when the Seychelles coast guard (“Topaz”) forcefully attacked them. They never initiated any violence.”)

<sup>17</sup> *Report on Legal Issues Related to Piracy*, *supra* note 15, ¶ 13.

<sup>18</sup> Convention on the Rights of the Child, art. 1, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>19</sup> *See, e.g.*, BAHADUR, *supra* note 1, at 36 (“For the masses of unemployed and resentful local youth, piracy was a quick way to achieve the respect and standard of living that the circumstances of their birth denied them.”).

<sup>20</sup> *See, e.g.*, *Somalia: Poverty Pushes Bosasso Children on to Streets*, IRIN AFRICA (Mar. 8, 2010), <http://www.irinnews.org/report.aspx?reportid=88351> (explaining that in Bossasso, the capital of Puntland, droughts, unemployment, and high food prices have led to a large presence of street children).

<sup>21</sup> *A Precedent or a Farce? Court Faces Daunting Hurdles in Hamburg Pirate Trial*, SPIEGAL ONLINE (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> [hereinafter *A Precedent of a Farce?*].

<sup>22</sup> *Id.*

and offered him two to three US dollars a day to pilot a boat.<sup>23</sup> The man later offered Youssef 500 US dollars for a larger operation, a piracy attack against a German cargo ship, the *MV Taipan*.<sup>24</sup> According to Youssef:

It was only on board . . . that I realized we were supposed to hijack a cargo ship . . . No one mentioned in my presence that there was a possibility of getting arrested by an international naval coalition. I did not think very hard about whether I should participate . . . [n]evertheless it seemed as if everything had been planned ahead of time and I had no choice. However, I was never threatened by anyone.<sup>25</sup>

Regardless of the circumstances surrounding a child's engagement in piracy, states are currently free to prosecute child pirates without breaching existing international law regarding juvenile justice.<sup>26</sup> Most judicial systems throughout the world have established a Minimum Age of Criminal Responsibility (MACR)—an age at which an individual is deemed capable of forming the requisite intent to commit a crime. Internationally, MACRs range from age seven to eighteen.<sup>27</sup> Such inconsistent state practice precludes the emergence of a rule of customary international law on this issue.<sup>28</sup>

Some commentators argue that the internationally agreed upon prohibition against conscripting children under the age of fifteen into armed forces implies that if a child is too young to fight, then he or she is too young to be held criminally responsible for his or her actions.<sup>29</sup> Despite the

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See Nienke Grossman, *Rehabilitation or Revenge: Prosecuting Child Soldiers for Human Rights Violations*, 38 GEO. J. INT'L L. 323, 323 (2007) (explaining there are no explicit guidelines in international law that establish at what age children can face prosecution for the commission of serious international crimes).

<sup>27</sup> Paola Konge, *International Crimes & Child Soldiers*, 16 SW. J. INT'L L. 41, 47 (2010).

<sup>28</sup> *Id.*

In many states neither the MACR nor the age of adulthood is static; youths being prosecuted and subject to adult offenses and the rebuttable presumption of *doli incapax* (incapable of committing a crime) are examples. Because state practice varies so significantly, no *opinio juris* or custom of law can emerge.

*Id.* at 47–48.

<sup>29</sup> See Grossman, *supra* note 26, at 341 (“[I]nterpretation of the CRC in light of the Vienna Convention on the Law of Treaties may point to a legal obligation to refrain from prosecuting at least children under fifteen for serious crimes arising from armed conflict.”). *But see* Matthew Happold, *The Age of Criminal Responsibility in International Criminal Law* 3 (2006), available at SSRN: <http://ssrn.com/abstract=934567>.

It has occasionally been argued that Article 77(2) itself fixes the minimum age of criminal responsibility for war crimes at fifteen. Such a reading of the provision is based on the idea that if a child under fifteen is too young to fight (s)he should also

prohibition on *conscripting* children under the age of fifteen, no consensus exists in international law as to the *criminal responsibility* of children who commit grave violations of international humanitarian and human rights law.<sup>30</sup> The court in the U.S. Office of Military Commissions against Omar Khadr recognized this distinction, holding that “neither customary international law nor international treaties binding upon the United States prohibit the trial of a person for alleged violations of the law of nations committed when he was fifteen years of age.”<sup>31</sup>

Scholars disagree as to what the MACR should be.<sup>32</sup> Some argue that an emerging trend sets the MACR somewhere in the mid-teens (thirteen to fifteen years old),<sup>33</sup> while others claim that international instruments such as the Rome Statute and the Convention on the Rights of the Child set the MACR somewhere between fifteen and eighteen years old.<sup>34</sup> A conservative reading of what scholars claim regarding an international MACR suggests that there is a consensus against prosecuting children aged twelve or less.

While child pirates do not participate in armed forces as part of a military structure, they do engage in organized activities that expose them to harm, such as brandishing grenade launchers.<sup>35</sup> As such, the customary international rule proscribing the conscription of children into armed forces may extend to the recruitment of child pirates under the age of fifteen, depending on the interpretation of the term “armed forces.” However, just as child soldiers may be accountable for commission of crimes,<sup>36</sup> any such prohibition against recruiting child pirates would have no bearing on the

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be considered to be too young to be held criminally responsible for his or her actions. Such a reading of Article 77(2) is, however, unwarranted. It is unsupported by the text itself, which makes no reference to child soldiers’ criminal responsibility.

*Id.*

<sup>30</sup> Grossman, *supra* note 26, at 323.

<sup>31</sup> Kongs, *supra* note 27, at 46–47 (citing Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier, ¶ 18, U.S. v. Khadr, (No. D-022) (Apr. 30, 2008)).

<sup>32</sup> See Happold, *supra* note 29, at 9 (“[T]here may be a trend to standardising the minimum age of criminal responsibility somewhere in the mid-teens (thirteen, fourteen, fifteen).”). *But see* Grossman, *supra* note 26, at 342 (“The Rome Statute and the Optional Protocol to the CRC arguably demonstrate an emerging consensus that children aged fifteen to eighteen should also be shielded from criminal liability.”).

<sup>33</sup> Happold, *supra* note 29, at 9.

<sup>34</sup> Grossman, *supra* note 26, at 342.

<sup>35</sup> See Anita Snow, *UN Envoy: Rehabilitate Child Pirates*, ARAB NEWS (Nov. 9, 2010), <http://www.arabnews.com/node/360064> (quoting Radhika Coomaraswamy, who said older pirates send younger pirates, including children, to engage in dangerous work and fierce fighting); Lakotta, *supra* note 5 (describing pirate tactics and tools).

<sup>36</sup> See Grossman, *supra* note 26, at 323.



criminal responsibility of these children. All that is certain regarding an international MACR is that too low of a MACR will breach international law, though what that age is remains uncertain. Without a clear guideline, domestic and international courts are free to prosecute children for committing acts of piracy subject to the court's own established MACR.

### III. THE CURRENT STATUS OF SOMALI CHILD PIRATES

#### A. *Piracy Prosecutions, Generally*

Until recently, apprehending states frequently handed captured piracy suspects to courts in Kenya; currently, the Seychelles is receiving a large number of piracy suspects due to Kenya's refusal to take on additional cases.<sup>37</sup> Criticisms of the Kenyan courts, in particular, have included inadequate resources and laws to conduct effective piracy trials, a foundering criminal justice system, and an overall judicial system that fails to meet the minimum standards necessary to protect piracy suspects.<sup>38</sup> Common complaints from piracy suspects detained in Kenya include ill treatment at the hands of prison guards and other prisoners, lack of food and medical attention, and overcrowding.<sup>39</sup> Further, minors are incarcerated with adults and the backlog of cases leads to long periods of pretrial detention.<sup>40</sup>

The United Nations Office on Drugs and Crime ("UNODC") cured some of these defects by providing support to the courts, the prosecution, the police, and the prison system to ensure these trials pass international scrutiny.<sup>41</sup> However, defense counsel for piracy suspects complain that the windfall of the UNODC program went entirely to the prosecutors, the prisons, and the attorney general's office.<sup>42</sup> Despite these concerns, some

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<sup>37</sup> See, e.g., Deborah Osiro, *Somali Pirates Have Rights Too: Judicial Consequences and Human Rights Concerns 1* (Inst. for Security Stud. Paper No. 244, 2011), available at <http://www.iss.co.za/uploads/Paper224SomaliPirates.pdf> ("Kenya and the Seychelles have accepted the bulk of these suspects for prosecution, as well the responsibility for the imprisonment of convicted pirates."). See generally James Thuo Gathii, *Kenya's Piracy Prosecutions*, 104 AM. J. INT'L L. 416 (2010) (examining how Kenyan courts have applied international law in piracy proceedings and analyzing the fairness of such proceedings); *Kenya Ends Co-operation in Hosting Somali Pirate Trials*, BBC NEWS (Oct. 1, 2010), <http://www.bbc.co.uk/news/world-africa-11454762>.

<sup>38</sup> Osiro, *supra* note 37, at 1; see also BAHADUR, *supra* note 1, at 167–68 (providing a defense counsel's account of the failures of piracy trials).

<sup>39</sup> Osiro, *supra* note 37, at 8, 14.

<sup>40</sup> *Id.* at 14.

<sup>41</sup> James Thuo Gathii, *The Use of Force, Freedom of Commerce, and Double Standards in Prosecuting Pirates in Kenya*, 59 AM. U. L. REV. 1321, 1361 (2010); BAHADUR, *supra* note 1, at 164 ("[T]he United Nations Office on Drugs and Crime (UNODC) stepped in with a \$12 million EU-funded counter-piracy program aimed at strengthening the country's overburdened justice system.").

<sup>42</sup> BAHADUR, *supra* note 1, at 165.

scholars argue that Kenya is capable of administering justice to pirates in a fair manner.<sup>43</sup> Jack Lang, Special Advisor to the U.N. Secretary-General, reports Kenya and the Seychelles “have agreed to take the lead with regard to some of the jurisdictional component of the fight against piracy . . . Those two States have played an exemplary leadership role in the region.”<sup>44</sup>

In the Seychelles, courts have conducted seven piracy trials to date, with new trials beginning about every two months.<sup>45</sup> Support from the United Nations led to the creation of a state-of-the-art prison that meets international standards, while additional international support provided courtrooms in the Seychelles with high-tech video equipment.<sup>46</sup> Using this equipment, the prosecutor is able to show videos taken by spotter planes and drones of pirate attacks and bring in testimony of witnesses located throughout the world.<sup>47</sup>

*B. Prosecution of Child Pirates in Kenya and the Seychelles.*

*1. Kenya*

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.<sup>48</sup> Lawyers handled the cases of entire groups of pirates but no one specifically represented minors.<sup>49</sup> Defense lawyers were unable to address the specific needs of individual pirates,<sup>50</sup> not to mention the unique needs of children.<sup>51</sup>

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<sup>43</sup> Michael Davey, Note, A Pirate Looks at the Twenty-First Century: The Legal Status of Somali Pirates in an Age of Sovereign Seas and Human Rights, 85 NOTRE DAME L. REV. 1197, 1224 (2010).

<sup>44</sup> *Report on the Legal Issues Related to Piracy*, *supra* note 15, sect. I(B) ¶ 65.

<sup>45</sup> Email Correspondence with Michael Scharf, *supra* note 7. The Seychelles passed domestic legislation granting its courts universal jurisdiction to prosecute pirates brought to the Seychelles by other countries. Cameron MacLeod, *Piracy Prosecutions in the Seychelles*, GROTIAN MOMENT: THE INTERNATIONAL WAR CRIMES TRIAL BLOG (Feb. 10, 2012), <http://law.case.edu/saddamtrial/index.asp?t=5>.

<sup>46</sup> Email Correspondence with Michael Scharf, *supra* note 7.

<sup>47</sup> *Id.*

<sup>48</sup> Konge, *supra* note 26, at 55 (explaining there are no clear international requirements to ensure that children receive different treatment than adults).

<sup>49</sup> Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 6.

<sup>50</sup> *See* BAHADUR, *supra* note 1, at 165 (describing the limitations on a pirate defense lawyer’s representation and violations of pirate rights while awaiting and during trial).

<sup>51</sup> Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 6. During trial, a court must maintain procedural safeguards for children—such as presumption of innocence, knowledge of charges against him or her, and rights of privacy and appeal—that protect the child’s right and consider the child’s well being throughout the process. Grossman, *supra* note 26, at 343–46. The CRC mandates that in all actions concerning children in courts of

Further, even though there are separate justice systems for adults and juveniles in Kenya, when a minor commits a crime with an adult (most often the case with child pirates), that child goes to trial in an adult court.<sup>52</sup> For purposes of rights and sentencing, however, the courts always apply juvenile law in cases involving children.<sup>53</sup>

Finding suitable living arrangements for these children while they await and undergo trial posed another problem for the Kenyan Courts that belies a simple solution. A court should only impose pre-trial detention upon a child as a measure of last resort and for the minimum amount of time necessary.<sup>54</sup> However, these children had no place to stay while awaiting trial and posed a potential flight risk.<sup>55</sup> Chief Magistrate Mutoka believes the children's remand homes, established under the Children Act of 2001,<sup>56</sup> were not appropriate facilities, as these homes are mainly for young children accused of minor crimes, not for children suspected of committing serious breaches of international law.<sup>57</sup> Minors awaiting trial often expressed resistance to the suggestion of going to a remand home, preferring

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law: "the best interests of the child shall be a primary consideration." Convention on the Rights of the Child, *supra* note 18, art. 3 ¶ 1. A child should:

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.

*Id.* art. 40 ¶ 1.

<sup>52</sup> Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 6.

<sup>53</sup> *Id.*

<sup>54</sup> U.N. Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), G.A. Res. 40/33, art. 13.1–13.2, U.N. Doc. A/Res/40/33 (Nov. 29, 1985) [hereinafter The Beijing Rules] ("13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time. 13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home."). The U.N. Rules for the Protection of Juveniles Deprived of their Liberty states "[d]etention before trial shall be avoided to the extent possible and limited to exceptional circumstances . . . [J]uvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention . . ." U.N. Rules for the Protection of Juveniles Deprived of their Liberty, G.A. Res. 45/113, art. 17, U.N. Doc. A/RES/45/113 (Dec. 14, 1990). The CRC includes a similar provision that states "[t]he arrest, detention or imprisonment of a child . . . shall be used only as a measure of last resort and for the shortest appropriate period of time." Convention on the Rights of the Child, *supra* note 18, art. 37(b).

<sup>55</sup> Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 6.

<sup>56</sup> The Children Act, 2001, No 8 of 2001, art. 50, Kenya (2001), available at <http://www.aclr.info/index.php/national-legislation/legislation-acts/487-childrens-act-no-8-kenya.html>.

<sup>57</sup> Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 6.

instead to stay with members of their clan.<sup>58</sup> Currently, suspected child pirates still remain in pre-trial detention in the same prison facilities as the adults with whom they allegedly committed piracy,<sup>59</sup> even though international legal principles mandate that children and adults be kept in separate facilities while awaiting trial.<sup>60</sup>

International standards of juvenile justice further require, in the absence of exceptional circumstances, the parents or guardians of detained child receive notification of their child's situation.<sup>61</sup> Employees of the courts in Mombasa attempt to contact any members of the child's family who live in Kenya,<sup>62</sup> but contacting the child's parents or guardians in Somalia is a nearly impossible task.<sup>63</sup> The difficulty associated with contacting the child's family members in Somalia may fall within the type of "exceptional circumstance" contemplated in the Convention on the Rights of the Child.<sup>64</sup>

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<sup>58</sup> Chief Magistrate Rosemelle Mutoka, Discussion on Piracy at Case Western Reserve University (Nov. 18, 2011) [hereinafter Chief Magistrate Rosemelle Mutoka Discussion].

<sup>59</sup> Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 6; Osiro, *supra* note 37, at 14 ("Most minors are incarcerated together with adults.").

<sup>60</sup> See, e.g., The Beijing Rules, *supra* note 54, art. 13.4 cmt. (explaining the risks for housing juvenile and adult offenders together).

<sup>61</sup> See, e.g., Convention on the Rights of the Child, *supra* note 18, art. 37(c) ("[E]very child deprived of liberty . . . shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.").

<sup>62</sup> See BAHADUR, *supra* note 1, at 163–164.

Although the Kenyan authorities lacked the ability to notify most of the prisoners' relatives of their situation (or even locate them), the populous Somali community in Kenya ensured that the pirates received visits from their countrymen every weekend, though not always from members of their own family . . . Through this close-knit network, [the prison warden] figured that her prisoners were able to send messages that would eventually find their way back to their relatives in Somalia.

*Id.*; see also Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 6.

<sup>63</sup> Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 6. See BAHADUR, *supra* note 18, at 163–164.

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*Id.*

<sup>64</sup> Convention on the Rights of the Child, *supra* note 18, art. 37(c) ("[E]very child deprived of liberty . . . shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances."). That these children may not be able to locate their homes on a map or know how to contact their parents may evidence an exceptional circumstance.

Lack of international and domestic interest in assisting child pirates compounds the above-mentioned problems.<sup>65</sup> Kenyan human rights and child welfare groups remain inactive on this issue. Chief Magistrate Mutoka views this as hypocrisy on the part of local child rights groups that refuse to see Somali children as victims.<sup>66</sup> While the Kenyan courts have not yet dealt with sentencing convicted child pirates, it is likely that if piracy trials resume, then courts will find some, if not many, of these children guilty.<sup>67</sup> The above-mentioned problems reveal the Kenyan judicial system is currently unable to meet the international standards for juvenile justice.

## 2. The Seychelles

Most of the piracy cases in the Seychelles have involved some teenage pirate defendants.<sup>68</sup> Despite how frequently children appear as defendants in these cases, the Seychelles has yet to implement unique approaches to child pirates.<sup>69</sup> In fact, in the majority of the adjudicated piracy cases, the Supreme Court of Seychelles makes no mention of the age of the accused.<sup>70</sup> In the two cases where the Court recognized the young age of the defendants, it failed to adequately address and consider the implication of such recognition.<sup>71</sup>

In a 2010 Supreme Court of Seychelles piracy case, seven of nine of the accused claimed to have been under the age of eighteen at the time of trial; the youngest claimed to have been thirteen.<sup>72</sup> The Supreme Court

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<sup>65</sup> Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 6.

<sup>66</sup> *Id.*

<sup>67</sup> In fact, before she left Mombasa to pursue an advanced legal degree at Case Western Reserve University School of Law, Mutoka was presiding over a case that involved a group of about twenty suspected pirates, seven to eight of whom are minors. *Id.*

<sup>68</sup> Email Correspondence with Michael Scharf, *supra* note 7. Scharf further stated it is likely that in the months to come the courts in Seychelles will be dealing with more child pirates, as the bulk of Somali pirates are teenagers. *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *See* Republic v. Mohamed Ahmed Dahir, Crim. Side No. 51 (July 26, 2010) (Sey.); The Republic v. Mohamed Ahmed Ise, Crim. Side No. 75 (June 30, 2011) (Sey.); The Republic v. Abdugar Ahmed, Crim. Side No. 21 (July 14, 2011) (Sey.); The Republic v. Abdi Ali, Sentencing, Crim. Side No. 14 (Nov. 3, 2010) (Sey.).

<sup>71</sup> *See* Republic v. Mohamed Aweys Sayid, Crim. Side No. 19, ¶ 26, (Dec. 15, 2010) (Sey.) (merely noting the ages of some of the defendants and not addressing whether their ages would have any impact on the case); Republic v. Houssein Mohammed Osman, Crim. Side No. 19, ¶ 12 (Oct. 12, 2011) (Sey.).

<sup>72</sup> Mohamed Aweys Sayid, Crim. Side No. 19, ¶ 26.

The 1st accused, Mohamed Aweys Sayid, stated that he was 16 years old from Mogadishu. The 2nd accused, Ine Mire Muse, stated that he was 15 years old from Garoowe. The 3rd accused, Ali Mohamed Ali, stated that he was 24 years old from Qoryoole. The 4th accused, Abdi Ali Said, stated that he was 22 years old from

ultimately convicted all nine of the accused on three counts of piracy.<sup>73</sup> The Judge writing the Sentencing Brief took note of the ages of the accused, stating he was “satisfied that they all have the requisite mental element for the commission of the offence they have been convicted of.”<sup>74</sup> The Court, however, offered no insight as to why it held that the accused possessed the requisite intent, nor did it explain how, if at all, the age of the accused factored into sentencing.

The maximum penalty the Court is able to impose upon convicted pirates is thirty years imprisonment;<sup>75</sup> each of the accused in the present case received a sentence of twenty-two years,<sup>76</sup> which suggests the age of the accused did not serve as a significant mitigating factor. In determining the sentence of a child convicted of an international crime, states have a duty to seek rehabilitation and reintegration of the child.<sup>77</sup> The lack of discussion on alternate sentencing for convicted minors further suggests the Court did not seriously consider the young age of the accused.

In a more recent piracy case, the Supreme Court noted some of the accused were under the age of eighteen. It further stated that the proceedings had complied with certain requirements of the Seychelles’ Children’s Act, namely that probation officers be present during the recording of each minor’s statement.<sup>78</sup> While the Court paid more attention to the unique needs of accused children than it did in the 2010 case, the Court still failed to address how the age of the accused factored into the judgment and sentencing, ultimately finding all of the accused guilty of two counts of piracy crimes.<sup>79</sup>

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Adado. The 5th accused, Bashir Hassan Ali, stated that he was 15 years old from Gaalcaio. The 6th Accused, Abdi Kadir Hashi Awale, stated that he was 14 years old from Gaalcaio. The 7th accused, Dahir Abdullah Warsame, stated that he was 16 years old from Qarydaro village Gaalcaio. The 8th accused, Abdi Tahlil Hassan, stated that he was 13 years old from Adado and the 9th accused, Salad Mohamed Diriye, stated that he was 16 years old from Gaalcaio.

*Id.*

<sup>73</sup> *Id.* at ¶ 50–52.

<sup>74</sup> Republic v. Mohamed Aweys Sayid, Sentencing Judgment, Crim. Side No. 19, at 2 (Dec. 15, 2010).

<sup>75</sup> *Id.* at 3.

<sup>76</sup> *Id.* at 2–3.

<sup>77</sup> Grossman, *supra* note 26, at 346–47. In pursuit of this goal, for example, the Statute for the Special Court for Sierra Leone precluded imprisonment as a punishment, authorized the use of alternative punishments, and required that the Prosecutor ensure that the rehabilitation of child soldiers not be placed at risk through prosecution. Statute of the Special Court for Sierra Leone, art. 7 ¶ 1, Jan. 16, 2002, 2178 U.N.T.S. 137.

<sup>78</sup> Republic v. Houssein Mohammed Osman, Crim. Side No. 19, ¶ 12 (Oct. 12, 2011) (Sey.).

<sup>79</sup> *Id.* ¶ 34.

#### IV. COURTS OUTSIDE OF SOMALIA SHOULD NOT PROSECUTE CHILD PIRATES

##### A. *Degree of Voluntariness in the Decision to Engage in Piracy*

The circumstances that lead children to engage in piracy raise important questions as to how voluntary these decisions truly are. When discussing child soldiers, commentators frequently remark that a combination of cultural, social, economic, and political pressures often lead a child to volunteer for service.<sup>80</sup> Children also often serve in order to feed themselves and their families or to gain protection during unstable times.<sup>81</sup> Somalia recently faced one of its worst humanitarian crises in decades, resulting in the deaths of approximately 30,000 children, and a third of the remaining children suffering from severe malnutrition.<sup>82</sup> Considering these circumstances, “[f]or the masses of unemployed and resentful local youth, piracy was a quick way to achieve the respect and standard of living that the circumstances of their birth had denied them.”<sup>83</sup>

Somali social structures also highlight how complex it is to assess how truly voluntary a child’s decision is to engage in piracy. In Somalia, the concept of clan identity operates as a “mental grammar” that shapes how a person views the world.<sup>84</sup> The majority of the population falls within one of four major clan-families: the Darod, Dir, Hawiye, and Rahanweyn.<sup>85</sup> From

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<sup>80</sup> MATTHEW HAPPOLD, CHILD SOLDIERS IN INTERNATIONAL LAW 11 (2005) [hereinafter HAPPOLD, CHILD SOLDIERS].

<sup>81</sup> *Id.* Happold further comments:

On the one hand, children are not seen as having sufficient psychological maturity to consent meaningfully to joining an armed force or group. On the other hand, however, there is a tendency to categorise children’s motives for volunteering as permissible or impermissible depending on whether the observer agrees with them or not. It is undoubtedly correct that volunteering, compulsory and forced recruitment forms parts of a continuum rather than being sharply defined and distinct categories . . . *The argument is not so much that children are exposed to pressures which adults are not, but that children are more easily manipulated into making decisions which are not in their own best interests.*

*Id.* at 12 (emphasis added); *see also, supra* text accompanying notes 21–25 (discussing the experiences and motivations of child pirate Yousef M.).

<sup>82</sup> TED DAGNE, CONG. RESEARCH SERV., RL33911, SOMALIA: CURRENT CONDITIONS AND PROSPECTS FOR A LASTING PEACE 1 (2011).

<sup>83</sup> BAHADUR, *supra* note 1, at 36.

<sup>84</sup> *Id.* at 27; *see also* ANDRE LE SAGE, CTR. FOR HUMANITARIAN DIALOGUE, STATELESS JUSTICE IN SOMALIA: FORMAL AND INFORMAL RULE OF LAW INITIATIVES 15 (Jul. 2005) (quoting Bernard Helander, Is There a Civil Society in Somalia?, Summary of Remarks at U.N. Development Office for Somalia, Nairobi (Sept. 1997)) (“[T]he clan structure forms a ‘completely encompassing social grid that organizes every single individual from the time of birth’”).

<sup>85</sup> LE SAGE, *supra* note 84, at 15.

these four major clans, there are subdivisions that descend hierarchically into various sub-clans.<sup>86</sup>

Abidwali, aged somewhere around sixteen and currently facing trial at a domestic court in Hamburg, Germany, explains that he comes from the Tumul clan and as such must obey the orders of the Hawiye, the dominant clan.<sup>87</sup> According to Abidwali, “[a]s a Tumul, you are like a slave . . . I belong to the Hawiye . . . A Hawiye would not use the same dish that I had eaten from because I am unclean, like a dog. A Hawiye would not shake my hand.”<sup>88</sup> The prosecution in Abidwali’s case advocates a different understanding of his capacity to make his own decisions. The prosecution argues that due to the severity of his environment Abidwali matured earlier than usual and that Somalis understand robbery and extortion are serious crimes.<sup>89</sup> Abidwali’s defense attorney convinced the court to allow a pediatric psychiatrist to analyze how Abidwali’s place in the clan system affects his ability to make responsible decisions.<sup>90</sup> The trials in Hamburg highlight how challenging it is to assess the culpability of these children.

#### B. *Prosecuting Child Pirates Will Not Decrease Incidents of Piracy*

Incidents of piracy continue to increase,<sup>91</sup> despite efforts to prosecute captured pirates. In pursuit of an effective way to curb piracy off the coast of Somalia, experts advocate economic solutions, arguing potential pirates need more incentive to pursue legitimate means of employment,<sup>92</sup> such as work with port and fishery operations, livestock exports, and the telecommunications sector.<sup>93</sup> Naval attacks and the threat of prosecution may increase the potential costs that pirates incur, but without viable employment alternatives, Somalis, including children, will continue to engage in piracy.<sup>94</sup> In the current Somali environment, where the spoils of piracy

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<sup>86</sup> *Id.* at 16.

<sup>87</sup> Lakotta, *supra* note 5.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Bowden & Basnet, *supra* note 11, at 1.

<sup>92</sup> See BAHADUR, *supra* note 1, at 23 (“At its very core, the solution to piracy lies in basic economic principles: the cost-benefit analysis for these men must be shifted to favour more legitimate pursuits.”).

<sup>93</sup> *Report on the Legal Issues Related to Piracy*, *supra* note 15, at 3.

<sup>94</sup> *Id.*; see also Sarah Percy & Anja Shortland, *The Business of Piracy in Somalia* 45 (DIW Deutsches Institut für Wirtschaftsforschung Berlin 1033, Discussion Paper No. 1033, 2010), available at [http://www.diw.de/documents/publikationen/73/diw\\_01.c.358500.de/dp1033.pdf](http://www.diw.de/documents/publikationen/73/diw_01.c.358500.de/dp1033.pdf) (arguing there is little incentive for local Somalis to end piracy); Kraska, *supra* note 12, at 117–18 (“Somali pirates are operating a business . . . In order to arrest the growth in piracy, the costs and risks of engaging in the crime have to go up and the benefits must go



offer otherwise unavailable opportunities for self and community advancement,<sup>95</sup> there are many young men ready to replace pirates who receive jail sentences.<sup>96</sup>

C. *Prosecuting Child Pirates Wastes Resources of Foreign Courts*

Patrolling forces release over ninety per cent of apprehended pirates without turning them over for prosecution.<sup>97</sup> Given that such a relatively small number of apprehended pirates actually face prosecution, such prosecutions should focus on trying those individuals that bear the greatest responsibility (the “pirate masterminds”<sup>98</sup>) for the development of piracy operations, not children who serve as mere “leg-men.”<sup>99</sup> Just as American efforts to curb narcotics smuggling by prosecuting low-level drug dealers fails to address the root causes of the problem,<sup>100</sup> trials against pirates will continue without end so long as pirate-financiers act with impunity.<sup>101</sup>

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down.”). Additional ways to increase the costs of piracy include localizing enforcement and shifting enforcement from the sea to the shore. *Id.*

<sup>95</sup> See Richard Allen Greene and Zain Verjee, *Pirate Loot Aids Somali Economy, Report Finds*, CNN (Jan. 12, 2012), [http://edition.cnn.com/2012/01/12/world/africa/somalia-pirates/index.html?hpt=hp\\_mid](http://edition.cnn.com/2012/01/12/world/africa/somalia-pirates/index.html?hpt=hp_mid) (“Somali pirates are not building palaces with swimming pools with the ransoms they collect from international shipping companies and hostages, but they are helping the local economy, a new report finds.”).

<sup>96</sup> See BAHADUR, *supra* note 1, at 23 (“Imprisoning them [is] like trying to use a bailer to drain the ocean: for each pirate captured by the authorities, there were dozens of desperate young men on shore ready to rush in and fill the void.”); see also *Report on the Legal Issues Related to Piracy*, *supra* note 15, ¶ 81 (“Eradicating piracy will mean developing economic alternatives so that the ‘piracy economy’ does not corrupt the entire Somali economic system, and giving hope to the young people who too often believe they have no future.”).

<sup>97</sup> *Report on the Legal Issues Related to Piracy*, *supra* note 15, at ¶ 14. Patrolling forces often engage in a catch and release policy, whereby apprehended pirates are simply sent back to shore. See Mike Pflanz, *Royal Navy May Have to Set Pirates Free*, THE TELEGRAPH (Jan. 18, 2012), <http://www.telegraph.co.uk/news/uknews/defence/9023768/Royal-Navy-may-have-to-set-pirates-free.html> (explaining that the courts of Kenya and Seychelles are too busy to accept new cases, leaving only the option of releasing apprehended pirates back to the beaches of Somalia).

<sup>98</sup> Chief Magistrate Rosemelle Mutoka Discussion, *supra* note 58.

<sup>99</sup> *Id.*

<sup>100</sup> See RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, DISTORTED PRIORITIES: DRUG OFFENDERS IN STATE PRISONS 14 (2002) (arguing that treating the “war on drugs” as primarily a criminal justice problem, with two-thirds of federal funds for drug control going to law enforcement and incarceration and over half of those incarcerated for drug offenses being low-level offenders, “has diverted attention and resources from potentially more constructive approaches”).

<sup>101</sup> BAHADUR, *supra* note 1, at 166 (“Are these wretched ones being brought to court the ones receiving the millions? They are arresting the workers, the employees. If the international community were serious, they would go after the pirate lords, the ones financing the

Foreign courts must expend resources in order to determine the ages of detained Somalis who appear to be children,<sup>102</sup> imposing an additional strain on courts already reluctant to carry out piracy prosecutions.<sup>103</sup> Somali children often do not have birth certificates<sup>104</sup> and courts must rely on dental examinations and skeletal X-rays in order to make an age determination.<sup>105</sup> The reliability of these examinations is unclear. The court in Hamburg, wrestling with these issues, spent several days assessing whether growth-plates, found in the bones of children but not of adults, are reliable indicators of age.<sup>106</sup> It is uncertain whether these methods accurately determine the age of people of a different ethnicity who are malnourished and exposed to hard work from an early age.<sup>107</sup>

Failing to make an inquiry into the age of the accused may result in unfair trials.<sup>108</sup> The age of now-convicted Somali pirate, Abduwali Abdiqadir Muse, remained unknown throughout his trial at a federal district

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activities. Otherwise, we'll just continue trying these poor guys and the trials will go on and on." (quoting pirate defense lawyer Oruku Nyawinda)).

<sup>102</sup> *A Precedent or a Farce? Court Faces Daunting Hurdles in Hamburg Pirate Trial*, *supra* note 21.

<sup>103</sup> *See, e.g.,* Bowden & Basnet, *supra* note 11, at 22.

Western countries have generally been reluctant to try and subsequently incarcerate pirates (unless they had a direct connection to the pirate attack) due to concerns about granting asylum to prisoners or legal issues associated with repatriation.

*Id.* (quoting pirate defense lawyer Oruku Nyawinda).

<sup>104</sup> U.S. Bureau of Citizenship and Immigration Services, *Somalia: Birth Certificates*, U.N. HIGH COMM'N ON REFUGEES (May 9, 2000), <http://www.unhcr.org/refworld/docid/3ae6a6a218.html>

A professor at California State University, Chico, states that because there has been no official national government structure in Somalia since the deposition of Barre in 1991, it is difficult to know whether birth certificates are currently issued to the citizens of what was once Somalia, but it is not probable . . . Prior to 1991, birth certificates were only issued in urban areas in Somalia.

*Id.*

<sup>105</sup> *A Precedent or a Farce?*, *supra* note 21; *see also* Mark Schenkel, *Dutch Court Looks at "Child Pirate" Case*, NRC INT'L (May 21, 2010), <http://www.rnw.nl/africa/article/dutch-court-looks-child-pirate-case> (describing how courts use X-rays to determine age).

<sup>106</sup> Lakotta, *supra* note 5.

<sup>107</sup> *Id.*

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.

*Id.*

<sup>108</sup> *See* Osiro, *supra* note 37, at 13.

court in New York.<sup>109</sup> Muse's family claimed that he was varying ages, ranging from fifteen to nineteen.<sup>110</sup> No record existed with which the court could confirm his age, but the judge determined that Muse was at least eighteen years old,<sup>111</sup> perhaps because doing so was simply more convenient.<sup>112</sup>

*D. Difficulties of Rehabilitation and Reintegration into Foreign Societies*

States have a duty to seek the rehabilitation and reintegration of the child when determining the sentence of a child convicted of an international crime.<sup>113</sup> Faced with the challenge of deciding how to handle child soldiers in post-conflict Sierra Leone, the drafters of the Statute for the Special Court for Sierra Leone (SCSL) fulfilled this duty by precluding the imprisonment of convicted child soldiers in favor of alternative punishments and rehabilitative measures.<sup>114</sup> However, early on after the creation of the SCSL, the Prosecutor indicated that he would not prosecute children, stating that the children of Sierra Leone had suffered enough both as victims and perpetrators and that he wanted to focus on prosecuting the people who forced children to commit horrible crimes.<sup>115</sup>

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<sup>109</sup> Jerika Richardson, *Somali Pirate Asks Forgiveness, Sentenced to Nearly 34 Years in Prison*, ABC NEWS (Feb 16, 2011), <http://abcnews.go.com/Blotter/somali-pirate-muse-sentenced-34-years/story?id=12930166>.

<sup>110</sup> Osiro, *supra* note 37, at 13 ("It was simply more convenient for the court to treat him as an adult, although the absence of accurate records makes the trial incomplete because such records assist the court in determining an appropriate sentence.").

<sup>111</sup> Richardson, *supra* note 109.

<sup>112</sup> Osiro, *supra* note 37, at 13.

<sup>113</sup> See Konge, *supra* note 27, at 56 (discussing the range of approaches to youth justice, from pure welfare to pure criminal justice); see also Grossman, *supra* note 26, at 346 ("[S]tates have affirmative obligations to seek to rehabilitate and reintegrate former child soldiers into society.").

<sup>114</sup> Statute of the Special Court for Sierra Leone, *supra* note 77, art. 7 ¶ 1.

Should any person who was at the time of the alleged commission of the the crime between 15 and 18 years of age come before this court, he or she shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society, and in accordance with international human rights, in particular the rights of the child.

*Id.*; see also Michael Custer, *Punishing Child Soldiers: The Special Court for Sierra Leone and the Lessons to be Learned from the United States' Juvenile System*, 19 TEMP. INT'L & COMP. L.J. 449, 458 (2005) ("[T]he preclusion of imprisonment of alternative punishments for juvenile offenders survived revision and was included in the final statute.").

<sup>115</sup> Konge, *supra* note 27, at 53.

Such emphasis on rehabilitation is congruent with studies that have shown children possess a less sophisticated understanding of the consequences of their actions than adults.<sup>116</sup> Because the brain of a child is still maturing, juvenile offenders are more amenable than adults to rehabilitative measures.<sup>117</sup> Just as the drafters of the Statute for the SCSL considered the extremity of the situation in Sierra Leone and its effects on the culpability of children before concluding that children should only face rehabilitative sentences aimed at ultimate reintegration into society,<sup>118</sup> courts that prosecute child pirates must also focus on the rehabilitation and reintegration of convicted children.

Foreign courts that convict child pirates will struggle to fulfill these children's right to rehabilitation and reintegration.<sup>119</sup> In Hamburg, Germany, for instance, the sentencing judge will have to decide how best to integrate the child into German society, as German law prevents the courts from deporting individuals to Somalia.<sup>120</sup> The prosecuting state must develop an effective rehabilitation program.<sup>121</sup> Given the distinct cultural and linguistic backgrounds of these children, developing such a program will prove challenging.

While customary international law does not strictly proscribe the prosecution of child pirates, such prosecutions are hardly desirable. Judicial proceedings against children should always be a measure of last resort,<sup>122</sup> with a preference for remedies involving diversion.<sup>123</sup> "Diversion" is the

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<sup>116</sup> See Custer, *supra* note 114, at 469–70 ("Biological and psychological studies have shown that adolescents process information differently than adults, and therefore, have a less sophisticated understanding of the consequences of their actions.").

<sup>117</sup> *Id.* at 470 ("[T]his lack of full biological maturity also argues for their amenability to rehabilitation. A juvenile offender . . . can be reconditioned and rehabilitated while the brain completes its maturation process, giving the juvenile a higher likelihood for success than an adult who has already reached full maturity.").

<sup>118</sup> *Id.* at 474.

<sup>119</sup> See generally Lakotta, *supra* note 5 (describing the daunting problems a Hamburg court faces as it continues to try children for alleged acts of piracy).

<sup>120</sup> *Id.*

<sup>121</sup> See Konge, *supra* note 27, at 56 (describing the tensions between criminal justice and psychological support that face states that prosecute child soldiers); see also Grossman, *supra* note 26, at 346 (suggesting it is important to show child defendants forgiveness, not vengeance).

<sup>122</sup> Convention on the Rights of the Child, *supra* note 18, art. 40 ¶ 3(b) ("Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings . . ."); see also The Beijing Rules, *supra* note 54, art. 11.1 ("Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial . . .").

<sup>123</sup> Convention on the Rights of the Child, *supra* note 18, art. 40 ¶ 4.

A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and oth-

removal of a case from criminal justice processing in favor of redirection to community support services; courts may use diversion at any point of decision-making.<sup>124</sup> Prosecution of child pirates in foreign courts flies in the face of the findings that (1) child pirates from Somalia often engage in piracy as a means of survival and clan structures may preclude children from choosing whether or not to engage in piracy;<sup>125</sup> (2) prosecuting children will not create a general deterrent effect;<sup>126</sup> (3) scarce judicial resources should focus on prosecuting individuals who bear greater responsibility for the commission of piracy than children;<sup>127</sup> and (4) foreign states will struggle to adequately meet the child's right to rehabilitation and reintegration.<sup>128</sup>

#### V. RETURNING CHILD PIRATES TO SOMALIA TO FACE JUDICIAL PROCEEDINGS

Sending children to Kenya, Seychelles, or courts in the West will not provide a lasting solution for the problem of child pirates.<sup>129</sup> As piracy prosecutions move forward, courts and policy makers must look for alternate ways to handle child pirates. The possibility of returning these children to semi-autonomous regions in Somalia may serve the dual function of holding children accountable for their actions while emphasizing rehabilitation and reintegration into their home society as the ultimate goal.

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er alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence.

*Id.*; The Beijing Rules, *supra* note 54, arts. 11.2, 11.3.

[11.2] "The police, the prosecution or other agencies dealing with juvenile justice cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.

[11.3] Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.

*Id.*

<sup>124</sup> The Beijing Rules, *supra* note 54, art. 11 cmt.

<sup>125</sup> See, e.g., *A Precedent or a Farce?*, *supra* note 21.

<sup>126</sup> See BAHADUR, *supra* note 1, at 23 (noting the myriad and complex reasons Somalis turn to piracy).

<sup>127</sup> See Chief Magistrate Rosemelle Mutoka Discussion, *supra* note 58.

<sup>128</sup> See Grossman, *supra* note 26, at 347–48 (discussing the nuances in child psychology that are imperative to understanding child defendants); Lakotta, *supra* note 5 (detailing the trial of one Somali child pirate in Hamburg and the many problems the court faced).

<sup>129</sup> See discussion in Part III(B) and Part IV.

A. *Justice Systems within Somalia*

Four types of justice systems exist within Somalia: 1) formal judiciary structures in the regional administrations of Somaliland and Puntland, and regions under control of the Transitional Federal Government; 2) traditional, clan-based law known as *xeer*; 3) shari'a courts; and 4) civil society initiatives and ad hoc mechanisms in areas under the control of Somali militia factions.<sup>130</sup> These formal systems all face the same general limitations: lack of qualified legal professionals, centralization of courts in regional capitals (making the judicial system inaccessible to rural populations), interference in judicial matters by politicians, wealthy individuals, and influential clan members, lack of resources for existing offices and courts, and poor conditions in correctional services.<sup>131</sup> Despite these shortcomings, the judicial systems of Somaliland and Puntland should be lauded; human rights violations are neither systematic nor widespread.<sup>132</sup>

As part of the overall scheme to reduce piracy in the region, the UNODC and the U.N. Development Program (UNDP) are currently planning to further develop the justice systems within Somalia so accused pirates may face trial there.<sup>133</sup> In order to advance this scheme, a three-prong approach is necessary: (1) an “economic component . . . aimed at developing activities that cannot thrive in an environment of piracy;” (2) a “security component [that] help[s] to build the capacity of Somali authorities to secure their territory using their sovereign forces;” and (3) a “jurisdictional and correctional component” that “favours the establishment . . . of a court system comprising a specialized court in Puntland, a specialized court in Somaliland and a specialized extraterritorial Somali court.”<sup>134</sup> Somali authorities, in partnership with the international community, must develop a Somali body of law governing acts of piracy that complies with international human rights standards and international support must continue to provide for the improvement of Somali judicial capacities and correctional facilities.<sup>135</sup>

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<sup>130</sup> Le Sage, *supra* note 84, at 14–15. The United Nations, on the other hand, recognizes three levels to Somali law: customary law (*xeer*), sharia law, and laws that are left over from British and Italian colonization. *Report on the Legal Issues Related to Piracy*, *supra* note 15, ¶ 102.

<sup>131</sup> Le Sage, *supra* note 84, at 31–33.

<sup>132</sup> *Id.* at 31 (explaining that the most common human rights violations committed within the judicial system include arrests without warrant and the detention of government critics, human rights activists, and journalists without trial).

<sup>133</sup> *Report on the Legal Issues Related to Piracy*, *supra* note 15, ¶ 1; U.N. Secretary-General, *supra* note 9, ¶ 1.

<sup>134</sup> *Report on the Legal Issues Related to Piracy*, *supra* note 15, at 3 (emphasis added).

<sup>135</sup> *Id.* ¶ 101.

The governments in Somaliland and Puntland are receptive to developing their respective judiciary's capacity to handle piracy cases. Somaliland recently implemented domestic piracy legislation.<sup>136</sup> While conditions in most prisons in Somaliland are notoriously harsh,<sup>137</sup> the UN completed a new \$1.5 million prison in Hargesia, the capital of Somaliland, which can handle up to 400 inmates and meets the minimum UN standards.<sup>138</sup> The government of Puntland adopted a counter-piracy law in 2010 and continues to send patrol groups to seize pirates.<sup>139</sup> The UNDP and UNODC recently completed the rehabilitation of the regional and appeal courts located in the regional capital of Bosasso and the UNODC plans to complete construction of a new courthouse in Garoowe in early 2012.<sup>140</sup> Training programs aim to enhance the capacities of judges, prosecutors, police investigators and defense counsel in the areas of criminal law, types of piracy offenses, rules of procedure and evidence, transfer arrangements from apprehending states, case management, and judicial ethics.<sup>141</sup> Trials in Puntland should reach international standards in approximately two years.<sup>142</sup> The ultimate goal is to assist Somali courts so prosecutions may take place domestically in a manner that respects international standards of fair trial and due process guarantees.<sup>143</sup>

#### B. *Juvenile Justice Systems within Somalia*

According to national Somali law, children under the age of fifteen cannot face trial for alleged commission of crimes.<sup>144</sup> However, clan law, not national law, typically governs juvenile crime.<sup>145</sup> Recently, Somaliland

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<sup>136</sup> Hussein Ali Noor, *Somali Pirates Want Prisoner Swap for Ship*, REUTERS (March 6, 2012), <http://www.reuters.com/article/2012/03/06/somalia-piracy-idUSL5E8E63PI20120306> ("Somaliland's parliament recently passed new legislation recognising piracy as a crime and allowing pirates convicted abroad to be transferred to the enclave, in a move to signal its commitment to fighting maritime attacks off Somalia's shores.").

<sup>137</sup> See Frank Langfitt, *Somaliland Struggles in Effort to Fight Piracy*, NPR (Apr. 13, 2011), <http://www.npr.org/2011/04/13/135345974/somaliland-struggles-in-effort-to-fight-piracy> (the main prison, located in Berbera, remains largely unchanged from the time it was erected during the Ottoman Empire in 1884).

<sup>138</sup> *Id.*

<sup>139</sup> *Somaliland: Puntland Forces Arrest 9 Pirates*, HALGAN.NET (Nov. 27, 2011), <http://halgan.net/2011/11/27/somalia-puntland-forces-arrest-9-pirates/>.

<sup>140</sup> U.N. Secretary-General, *supra* note 9, ¶ 16.

<sup>141</sup> *Id.* ¶ 17.

<sup>142</sup> *Id.* ¶ 94.

<sup>143</sup> *Id.* ¶ 10.

<sup>144</sup> *Report on the Legal Issues Related to Piracy*, *supra* note 15, ¶ 107 n.55.

<sup>145</sup> Priyadharshini Dias, *Somaliland Launches New Juvenile Law*, UNICEF (Oct. 9, 2008), [http://www.unicef.org/somalia/reallives\\_5434.html](http://www.unicef.org/somalia/reallives_5434.html) ("Presently around 80% of cases involving children are dealt with by traditional elders.").

and Puntland have made efforts to establish separate juvenile justice systems that comply with international standards while respecting the legal principles customary to Somalia, such as sharia law.<sup>146</sup>

#### 1. Somaliland

Somaliland enacted its Juvenile Justice Law in 2007 with the help of the United Nations Children's Fund (UNICEF).<sup>147</sup> This law seeks "to provide a fair justice system aimed at protecting and promoting the physical and mental well-being and personal development of child offenders while fostering the child's sense of dignity and worth."<sup>148</sup> The law further seeks to "harmonise[] the provisions of Secular, Sharia and Somali Customary laws relating to children in conflict with law."<sup>149</sup>

Overall, the Juvenile Justice Law evidences compliance with international standards for juvenile justice. The law, for example, includes provisions mandating that juvenile courts give primary consideration to the child's welfare, discourage pre-trial detention, forbid the imposition of the death penalty and other harsh sentences, and call for the creation of a separate Children Courts staffed with trained experts in juvenile justice.<sup>150</sup> While laudable in its scope and textual compliance with international standards, the government of Somaliland has not fully implemented the law and regional security committees continue to handle matters involving children.<sup>151</sup>

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<sup>146</sup> *Id.* (describing the Juvenile Justice Law in Somaliland); *Somalia: Poverty Pushes Bosasso Children on to Streets*, *supra* note 20 (describing recent efforts to develop a juvenile justice system in Puntland).

<sup>147</sup> Juvenile Justice Law No. 36/2007, Republic of Somaliland (2007).

<sup>148</sup> Dias, *supra* note 145.

<sup>149</sup> *Id.*

<sup>150</sup> *See generally* Juvenile Justice Law No. 36/2007, *supra* note 147. Article 6 provides that "[i]n any action and decision affecting children, the best interest of the child shall be the primary consideration." Article 8 states "[a] child may be deprived of liberty only as a measure of last resort; and only for the minimum necessary period of time." Article 12 forbids the imposition of the death penalty, life imprisonment, corporal punishment, or any punishment exceeding fifteen years. Article 15.1 calls for the establishment of a separate Children Court in every region and district, while Article 18 stipulates that judges should have an "adequate and appropriate training in Children Justice" as well as an "adequate knowledge of the Sharia." Article 30 authorizes the Minister of Justice to establish Child Rehabilitation Centers. Article 67 outlines possible diversions, such as compulsory school attendance order, family time order, good behavior order, a positive peer association order, a reporting order, and a supervision and guidance order. Article 81 provides that "[w]here a child and adult are alleged to have committed the same offence, they are to be tried separately unless it is in the interest of justice." *Id.*

<sup>151</sup> *Inhuman Sentencing of Children in Somalia 2* (Draft Report for Child Rights Information Network, 2011), available at [www.crin.org/docs/Somalia\\_final.doc](http://www.crin.org/docs/Somalia_final.doc).



## 2. Puntland

The Puntland Constitution defines a minor as “any individual below the age of fifteen (15) years” and provides a “minor has a right to life, name, nationality, education and support.”<sup>152</sup> Puntland needs a separate juvenile justice system to safeguard the constitutional rights of children.<sup>153</sup> Further, Somali counter-piracy measures should include laws that cover minors, modeled after the Juvenile Justice Law enacted in Somaliland in 2007<sup>154</sup> and a reintegration program for juvenile offenders, with a special detention follow-up provision.<sup>155</sup>

The UNDP and UNICEF are working to develop a juvenile justice law for Puntland.<sup>156</sup> Meanwhile, local government agencies are actively working to deter children from piracy.<sup>157</sup> The Ministries of Justice & Religious Affairs, Education, Labour, Youth & Sports, Security, and Maritime Transport, Ports & Counter Piracy have launched awareness raising campaigns, with the help of local leaders, that directly address the dangers of engaging in piracy.<sup>158</sup> International discussion regarding the development of Puntland’s judicial system should include more detailed proposals on how to advance UNICEF’s efforts to develop a specialized juvenile justice system.

### C. *Principle of Non-Refoulement*

Governments are reluctant to return accused pirates to Somalia for trial due to the principle of non-refoulement which prohibits states from returning people to a place where they will likely face torture.<sup>159</sup> Article 3 of

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<sup>152</sup> PUNTLAND CONST., art. 31 (2008).

<sup>153</sup> *Somalia: Poverty Pushes Bosasso Children on to Streets*, *supra* note 20 (describing how, currently, children are kept in jail with adults and tried in adult courts).

<sup>154</sup> *Report on the Legal Issues Related to Piracy*, *supra* note 15, ¶ 107.

<sup>155</sup> *Id.* ¶ 114.

<sup>156</sup> *Inhuman Sentencing of Children in Somalia*, *supra* note 151, at 5.

<sup>157</sup> See H.E. Saeed Mohamed Rage, Puntland Minister of Maritime Transport, Ports & Counter Piracy, Puntland: Progress Report on Counter Piracy (Apr. 2010).

<sup>158</sup> *Id.*

Puntland has established an awareness campaign within the Ministries of Justice & Religious Affairs, Education, Labour, Youth & Sports, Security, and Maritime Transport, Ports & Counter Piracy. This is being run with the assistance of traditional leaders to prevent communities from becoming involved in piracy activities and to warn those already involved to withdraw without any prerequisites.

*Id.*

<sup>159</sup> The U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person

the U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) provides:

1. No State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>160</sup>

When potential exists for the torture of the concerned party, it is common for the state holding the concerned party to rely on diplomatic assurances from the receiving state that the receiving state will protect the concerned party from torture.<sup>161</sup>

Scholars and human rights organizations are critical of the efficacy of diplomatic assurances in preventing the commission of torture. These assurances are usually non-binding agreements and include no mechanism for enforcement.<sup>162</sup> In an effort to safeguard individuals from unreliable diplomatic assurances, the European Court of Human Rights (“ECHR”) requires courts to attach great significance to the assuring state’s human rights record, as well as the credibility of the individual making the assurance, the potential to monitor the case following transfer, whether the government of the receiving state has honored the terms of previous transfer assurances, and the particular security concerns that the transferred person may face.<sup>163</sup> Using the standards of the ECHR as a guide, it may seem that a

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information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

<sup>160</sup> *Id.* art. 3.

<sup>161</sup> U.N. High Comm’r on Refugees, *UNHCR Note on Diplomatic Assurances and International Refugee Protection*, ¶ 1 (Aug. 2006) [hereinafter *UNHCR Note*]. In the context of transferring a person from one state to another, the term diplomatic assurances “refers to an undertaking by the receiving State to the effect that the person concerned will be treated in accordance with the conditions set by the sending State or, more generally, in keeping with its human rights obligations under international law.” *Id.*

<sup>162</sup> *Id.* at 3 (further questioning the reliability of such diplomatic assurances).

<sup>163</sup> Alice Izumo, Note, *Diplomatic Assurances Against Torture and Ill Treatment: European Court of Human Rights Jurisprudence*, 42 COLUM. HUM. RTS. L. REV. 233, 233 (2010). The ECHR established the major principles governing diplomatic assurances against torture

state is barred from forcibly returning anyone to Somalia.<sup>164</sup> Somalia has been without a functioning central government since 1991, instead falling under the shifting control of rival warlords and clans.<sup>165</sup> Currently, Islamist revolutionaries, led largely by the group Al-Shabaab, seek to turn Somalia into an Islamic state under their interpretation of Islamic law.<sup>166</sup> However, characterizing Somalia as a country in anarchy without the rule of law does not capture the nuances of the situation; Puntland and Somaliland enjoy much greater stability and development than southern and central Somalia.<sup>167</sup>

The possibility exists that a state may return suspected child pirates to certain areas of Somalia if the state receives diplomatic assurances from persons acting in an official capacity.<sup>168</sup> The above-mentioned criticisms of diplomatic assurances notwithstanding, there are clear guidelines a state can use to assess the reliability of any such assurances.<sup>169</sup> A state may rely on

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in the case *Saadi v. Italy*, ruling that the plaintiff (convicted *in absentia* by a military court in Tunisia for membership in a terrorist organization) had demonstrated a real risk of facing treatment that would violate Article 3 of CAT, despite assurances from the Tunisian government that the plaintiff would be treated appropriately. The Court held that it is the obligation of the Court to examine whether the practical application of diplomatic assurances, in light of current circumstances passes muster in terms of compliance with Article 3. The Court further ruled that existence of domestic laws and accession to international instruments that guarantee fundamental human rights are not, by themselves, sufficient evidence of the adequacy of the diplomatic assurances. *Id.* at 257–58; *see also UNHCR Note, supra* note 161, ¶ 21.

In determining the weight which may be attached to diplomatic assurances, the sending State must consider a number of factors, including the degree and nature of the risk to the individual concerned, the source of the danger for the individual, and whether or not the assurances will be effectively implemented.

*Id.*

<sup>164</sup> Davey, *supra* note 43, at 1224–25.

<sup>165</sup> Le Sage, *supra* note 84, at 21.

<sup>166</sup> Davey, *supra* note 43, at 1224–25.

<sup>167</sup> *See* Le Sage, *supra* note 84, at 22; *see also* Jay Bahadur, *Heroes in a Land of Pirates*, N.Y. TIMES, Jan. 4, 2010, at A21 (“Contrary to the oft-recycled one-liners found in most news reports, Somalia is not a country ruled by anarchy. Indeed, it is a mischaracterization to even speak of Somalia as a uniform entity.”).

<sup>168</sup> Davey, *supra* note 43, at 1225

[T]he U.S. government (and any other country) may, consistent with international law and CAT, return citizens of Somalia to Somalia provided that reasonable diplomatic assurances are made that either torture is not likely to occur in the territory of the particular government or that, given that torture upon return is plausible, persons acting in an official government capacity are acting to suppress such torturous acts.

*Id.*

<sup>169</sup> *UNHCR Note, supra* note 161, ¶ 20 (explaining that numerous international, regional, and national courts as well as human rights treaty bodies and experts mandated by the U.N. Commission on Human Rights have looked into “[t]he conditions under which the sending

diplomatic assurances if, and only if, the assurances are: “(i) a *suitable* means to eliminate the danger to the individual concerned, and (ii) if the sending State may, in good faith, consider them *reliable*.”<sup>170</sup> Human rights organizations or international monitoring groups may be able to assist in assessing the credibility of diplomatic assurances and follow-up with authorities in Puntland and Somaliland to ensure that the child’s rights are respected. If assurances from government officials within semi-autonomous region in Somalia pass this two-prong test (which is likely if the regions continue to develop juvenile justice systems that comply with international law), then apprehending states will be able to return children to these regions without breaching commitments to Article 3 of CAT.

If sending child pirates back to Somaliland or Puntland is to become a viable option, the international community should continue to support efforts to improve the juvenile justice systems in these areas. The governments of both semi-autonomous regions continue to express interest in handling piracy cases.<sup>171</sup> Both governments already passed legislation granting courts jurisdiction over acts of piracy.<sup>172</sup> Further, the law in Puntland expressly grants courts jurisdiction over cases that have no direct connection to Somalia or Puntland.<sup>173</sup> These laws, combined with the government’s interest in accepting pirates from other regions of Somalia,<sup>174</sup> create the opportunity for apprehending states to return suspected child pirates to these regions to face proceedings. Thus, encouraging the development of the nascent juvenile justice system in Puntland and Somaliland should be an international priority. Functioning juvenile justice systems in these regions that comply with international standards would assuage fears of breaching

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State is permitted to remove a person to another country on the basis of diplomatic assurances”—the result of which is the emergence of clear guidelines on the issue).

<sup>170</sup> *Id.*

<sup>171</sup> See Rage, *supra* note 157 (“The Puntland government is keenly appealing for pirates imprisoned elsewhere to be transferred to Puntland with the help of UNODC, and so we can play a role in region-wide efforts to tackle piracy.”); Muhyadin Ahmed Roble, *Somaliland Approves New Piracy Law*, SOMALIA REPORT (Feb. 24, 2012), [http://www.somaliareport.com/index.php/post/2898/Somaliland\\_Approves\\_New\\_Piracy\\_Law](http://www.somaliareport.com/index.php/post/2898/Somaliland_Approves_New_Piracy_Law).

This first anti-piracy law of Somaliland sentences anyone who commits an act of piracy to a prison sentence of between five and 20 years . . . Suspects arrested under the law will stand trial in a Somaliland court, provided the crime was not committed in another country’s territorial waters.

*Id.*

<sup>172</sup> U.N. Secretary-General, *supra* note 9, ¶ 13.

<sup>173</sup> *Id.*

<sup>174</sup> Rage, *supra* note 157 (“The Puntland government is keenly appealing for pirates imprisoned elsewhere to be transferred to Puntland with the help of UNODC, and so we can play a role in region-wide efforts to tackle piracy.”).

Article 3 of CAT.<sup>175</sup> Finally, by basing juvenile trials within a region of Somalia, the courts will be better suited than international courts to address the unique social and cultural characteristics of Somali children.<sup>176</sup>

## VI. CONCLUSION

Until the international community can effectively address the underlying economic factors that promote piracy within the region, young Somalis will continue to engage in piracy in order to provide for themselves and their communities.<sup>177</sup> Investing in economic development will not yield immediate results. In the interim, prosecuting child pirates in foreign courts is proving to be unduly complicated. In Hamburg, Germany, for instance, the children neither understand the proceedings against them nor the culture they now find themselves in.<sup>178</sup> Whatever the disposition of the charges launched against the children, the German legal system will inevitably struggle with devising a way to honor the principles of rehabilitation and reintegration.<sup>179</sup> In Kenya, the courts are unable to adequately meet the needs of the accused children—children receive no special attention or care and they await trial in detention facilities along with their adult counterparts.<sup>180</sup>

Prosecuting children in foreign courts for committing acts of piracy produces little to no deterrent effect among potential pirates and shows a lack of understanding of the dire conditions Somali children experience as daily life. Further, their 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.<sup>181</sup> Finally, courts waste resources on these trials—resources that would be better served in efforts to find and prosecute the financiers and planners of pirate attacks.<sup>182</sup>

There is untapped potential, however, in Puntland and Somaliland. The governments there continually express interest in receiving piracy

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<sup>175</sup> With such a system, diplomatic assurances from Puntland would pass the two prong test articulated earlier in this section: a functioning juvenile justice system would be *reliable* and *suitable* for the unique needs of child defendants. *UNHCR Note*, *supra* note 161, ¶ 20.

<sup>176</sup> *Report on the Legal Issues Related to Piracy*, *supra* note 15, ¶ 109 (“Imprisonment in Somalia would . . . be more conducive to . . . social reintegration.”).

<sup>177</sup> *Id.* ¶ 81 (“Eradicating piracy will mean developing economic alternatives so that the ‘piracy economy’ does not corrupt the entire Somali economic system, and giving hope to the young people who too often believe they have no future.”).

<sup>178</sup> Lakotta, *supra* note 5.

<sup>179</sup> *Id.*

<sup>180</sup> *See, e.g.*, Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 6.

<sup>181</sup> *See* HAPPOLD, *CHILD SOLDIERS*, *supra* note 80, at 11; Le Sage, *supra* note 84, at 15.

<sup>182</sup> Interview with Chief Magistrate Mutoka, *supra* note 6.

suspects and working with the international community to curb piracy.<sup>183</sup> The development of juvenile justice systems should be central to the overall efforts to improve of the judicial systems in Puntland and Somaliland. Localized juvenile courts that integrate principles of Islamic law while respecting the mandates of international law could address a child's right to rehabilitation and reintegration in a manner and location that is familiar to the child. The development of juvenile justice in Puntland and Somaliland should be an international priority rather than an afterthought.

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<sup>183</sup> Rage, *supra* note 157.