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## Prosecuting Child Pirates

Danielle Fritz

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PEACE NEGOTIATIONS  
POST-CONFLICT CONSTITUTIONS  
WAR CRIMES PROSECUTION

# **PROSECUTING CHILD PIRATES**

## **Legal Memorandum**

**Prepared by Danielle Fritz**

**Public International Law & Policy Group**

**November 2011**

**Confidential**

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## **I. INTRODUCTION**

### **A. Scope**

This memorandum discusses the legal issues that arise when a State wishes to prosecute alleged pirates under the age of 15.\* This memorandum explores existing international standards regarding the Minimum Age of Criminal Responsibility (MACR) and juvenile justice, using various international instruments, the treatment of child soldiers in international law, and the current status of juvenile pirate detainees in Kenya to highlight the complexities that prosecuting States face when dealing with “child pirates.”

### **B. Summary of Conclusions**

#### **i. An agreed-upon Minimum Age of Criminal Responsibility does not yet exist in international law.**

Inconsistent state practice has prevented the emergence of an internationally recognized MACR. States are free to prosecute alleged child pirates who are under the age of fifteen; however, emerging customary international law may suggest that the MACR is somewhere in the midteens, meaning between the ages of thirteen and fifteen.

#### **ii. International standards on juvenile justice require a court, at a minimum, to give primary consideration to the child’s wellbeing and to emphasize rehabilitation in any kind of sentence; courts should consider the mitigating factors surrounding a child’s engagement in piracy.**

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\* Analyze the legal issues relating to the fact that many pirates are under 15 years of age, drawing from the domestic and international tribunal precedent regarding prosecuting child soldiers.

The Convention on the Rights of the Child (CRC) mandates that in all actions concerning children in courts of law, “the best interests of the child shall be the primary consideration.”<sup>1</sup> Further, the mitigating factors that courts would consider in cases involving child soldiers—such as widespread poverty and unemployment in the area that the child is from—suggest that a court prosecuting a child pirate should consider the circumstances of the child when issuing any sentence.

**iii. Current practices relating to the treatment of child pirates facing trial in regional courts, specifically Kenya, do not meet international standards of juvenile justice.**

Chief Magistrate Rosemelle Mutoka, who presided over recent piracy cases in Kenya, provided information regarding the status of children accused of piracy and currently facing trial in Kenya. The practical realities of the Kenyan prison system prevent child pirates from receiving the necessary standard of protection.

**iv. Until, if ever, the international community establishes an international piracy tribunal, States that apprehend child pirates may be within their legal right to return the children to semi-autonomous regions of Somalia to face judicial proceedings.**

Sending child suspects of piracy back for prosecution to areas in Somalia that are semi-autonomous, such as Puntland, Somaliland, and perhaps Haradhere, may present apprehending States with a viable means of handing child pirates, so long as the governments of the semi-

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<sup>1</sup> Convention on the Rights of the Child, art. 3.1, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC] [Electronic copy provided in accompanying USB flash drive at Source 4].

autonomous regions guarantee that the children will not face torture or any other internationally unacceptable treatment or punishment.

## II. BACKGROUND

In recent years, incidents of piracy off the coast of the Horn of Africa\* have been increasing, with ransoms averaging between \$4 million and \$5 million and as many as 2,000 pirates operating from Somali shores.<sup>2</sup> Despite hopes that a naval presence in the Gulf of Aden and the Indian Ocean would deter pirates from attacking shipping vessels, acts of piracy are becoming more violent; as of July 2011, Somali pirates had killed at least fifteen crewmembers and hostages.<sup>3</sup>

States engaging in missions to combat piracy off the coast of Somalia will inevitably apprehend children.\* For example, in March, 2011, an Indian vessel apprehended 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>4</sup> Children accused of piracy potentially face

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<sup>2</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> [Electronic copy provided in accompanying USB flash drive at Source 39].

<sup>3</sup> Deborah Osiro, *Somali Pirates Have Rights Too: Judicial Consequences and Human Rights Concerns*, 244 ISS Paper 3 (July 2011) [Electronic copy provided in accompanying USB flash drive at Source 27].

\* The discussion of this memorandum is limited to underage pirates from Somalia.

<sup>4</sup> Rajat Pandit, *25 of 61 Pirates Arrested by Navy at Sea are Children*, THE TIMES OF INDIA (Mar. 7, 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) [Electronic copy provided in accompanying USB flash drive at Source 43].

prosecution in the courts of any State in the world, as piracy is a crime of universal jurisdiction.<sup>5</sup> However, some scholars question whether prosecution by any State other than the apprehending State is permissible under the United Nations Convention on the Law of the Sea (UNCLOS). Article 105 of UNCLOS provides that “every State may seize a pirate ship” on the high seas, but that the prosecution should be by “the courts of the state which carried out the seizure.”<sup>6</sup>

Regardless, children suspected of piracy are currently facing trial throughout the world in places such as Hamburg, Germany<sup>7</sup> and Mombasa, Kenya<sup>8</sup>, while the Supreme Court of Seychelles, in 2010, convicted four children under the age of eighteen for piracy or piracy related crimes.<sup>9</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>10</sup> further complicates the issue.

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<sup>5</sup> Lawrence Azubuike, *International Law Regime Against Piracy*, 15 ANN. SURV. AM. L. 43, 44 (2009) [Electronic copy provided in accompanying USB flash drive at Source 15].

<sup>6</sup> Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, 13 ASIL Insights (Feb. 6, 2009), <http://www.asil.org/insights090206.cfm> [Electronic copy provided in accompanying USB flash drive at Source 37].

<sup>7</sup> 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> [Electronic copy provided in accompanying USB flash drive at Source 38].

<sup>8</sup> Interview with Chief Magistrate Rosemelle Mutoka, in Cleveland, OH (Oct. 5, 2011) [Electronic copy provided in accompanying USB flash drive at Source 1].

<sup>9</sup> *Somali Pirates Sentenced to 10 Years in Seychelles*, BBC NEWS (July 26, 2010, 12:05 AM), <http://www.bbc.co.uk/news/world-africa-10763605> (stating that the convicted children were part of a group of 11 individuals sentenced to 10 years in prison) [Electronic copy provided in accompanying USB flash drive at Source 47].

<sup>10</sup> *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

The challenge of handling child pirates is similar to the challenge that international criminal tribunals, particularly the Special Court for Sierra Leone (SCSL), have faced when deciding how to handle child soldiers. In fact, there are many similarities between child soldiers and child pirates. Child soldiers come from three groups within society: the poor or otherwise disadvantaged, from the population within actual conflict zones, and from those with a disrupted or non-existent family background.<sup>11</sup> Further, high levels of unemployment and poverty are common characteristics of the areas from which child soldiers emerge.<sup>12</sup>

These characteristics, specifically the high levels of poverty and unemployment, also define the lives of many Somali children.<sup>13</sup> In Bossasso, the capital of the semi-autonomous region of Puntland, droughts, unemployment, and high food prices have led to a large presence of street children.<sup>14</sup> According to one child pirate—aged somewhere between sixteen and nineteen and currently facing trial in Hamburg, Germany—“Many times I found work for days

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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.” [Electronic copy provided in accompanying USB flash drive at Source 34]; *see also* Steven Jones, *Child Pirates*, MARITIME SECURITY REVIEW (Mar. 18, 2011), <http://www.marsecreview.com/2011/03/child-pirates/> (arguing that the term “child pirate” is likely to become as common as the term “child soldier”) [Electronic copy provided in accompanying USB flash drive at Source 36].

<sup>11</sup> MATTHEW HAPPOLD, *CHILD SOLDIERS IN INTERNATIONAL LAW* 12 (Manchester University Press 2005) [Electronic copy provided in accompanying USB flash drive at Source 3].

<sup>12</sup> *Id.* at 13.

<sup>13</sup> *See, e.g.*, JAY BAHADUR, *THE PIRATES OF SOMALIA, INSIDE THEIR HIDDEN WORLD* 36 (2011) (“For the masses of unemployed and resentful youth, piracy was a quick way to achieve the respect and standard of living that the circumstances of their birth denied them.”) [Electronic copy provided in accompanying USB flash drive at Source 2].

<sup>14</sup> *Somalia: Poverty Pushes Bosasso Children on to Streets*, IRIN (Mar. 8, 2010), <http://www.irinnews.org/report.aspx?reportid=88351> [Electronic copy provided in accompanying USB flash drive at Source 48].

or even weeks, but sometimes there was no work for days, and I went hungry. When I had work, I could sleep on the boat. Otherwise I slept on the street . . . Overall the situation was very difficult.”<sup>15</sup> Thus, Steven Freeland’s comment that “it is usually the case that extreme circumstance [such as] hunger, poverty, abandonment, the death of parents and family, disease and the lack of basic medical services . . . will leave a child . . . little choice but to offer his/her services to a ‘cause,’”<sup>16</sup> rings equally true for Somali child pirates.

While child pirates do not take part in hostilities in the traditional sense of engaging in armed conflict, they do, in the course of the hijacking, engage in highly dangerous activities that expose them to harm, such as brandishing grenade launchers.<sup>17</sup> Due to the similarities between child soldiers and child pirates, the international community’s judicial response to the criminal liability of child soldiers offers guidance on how courts should now handle cases involving child pirates.

### III. LEGAL DISCUSSION

#### A. Minimum Age of Criminal Responsibility in International Law

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<sup>15</sup> Michael Scott Moore, *A Precedent or a Farce? Court Faces Daunting Hurdles in Hamburg Pirate Trial*, SPIEGAL ONLINE (Jan. 18, 2011), <http://www.spiegel.de/international/world/0,1518,740122,00> [Electronic copy provided in accompanying USB flash drive at Source 42].

<sup>16</sup> Steven Freeland, *Mere Children or Weapons of War—Child Soldiers and International Law*, 29 U. LA VERNE L. REV. 19, 27–28 (2008) [Electronic copy provided in accompanying USB flash drive at Source 18].

<sup>17</sup> Anita Snow, *UN Envoy: Rehabilitate Child Pirates*, ARAB NEWS.COM (Nov. 9, 2010), <http://arabnews.com/world/article184520.ece> (quoting Radhika Coomaraswamy, who said that older pirates send younger pirates, including children, to engage in the dangerous work and that these younger pirates do all of the “fierce fighting.”) [Electronic copy provided in accompanying USB flash drive at Source 46].

The SCSL has held that customary international law, by November 1996, prohibited “[c]onscripting or enlisting children under the age of 15 years into armed forces or groups [or] using them to participate actively in hostilities.”<sup>18</sup> In fact, Article 77(2) of the Protocol Additional (No. I) to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts requires States to ensure that children under the age of fifteen do not directly take part in hostilities,<sup>19</sup> while the Article 38 of the CRC articulates a similar regulation:

2. State parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen do not take a direct part in hostilities.
3. State parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces . . .<sup>20</sup>

Further, drafters included the following language in the Rome Statute’s definition of war crimes:

“[c]onscripting or enlisting children under the age of fifteen years into national armed forces or using them to participate actively in hostilities” in international conflicts<sup>21</sup> and “conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to

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<sup>18</sup> Paola Konge, *International Crimes & Child Soldiers*, 16 SW. J. INT’L L. 41, 56 (2010) (citing Prosecutor v. Sam Hinga Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), Case No. SCSL-2004-14-AR72(E), 1, 9, Special Court for Sierra Leone (May 31, 2004) [Electronic copy provided in accompanying USB flash drive at Source 25]).

<sup>19</sup> *International Standards*, Child Soldiers International, <http://www.child-soldiers.org/childsoldiers/international-standards> (last accessed Oct. 22, 2011). [Electronic copy provided in accompanying USB flash drive at Source 41].

<sup>20</sup> CRC art. 38, Nov. 20, 1989, 1577 U.N.T.S. 3 [Electronic copy provided in accompanying USB flash drive at Source 4].

<sup>21</sup> Rome Statute of the International Criminal Court art. 8(2)(b)(xxvi), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] [Electronic copy provided in accompanying USB flash drive at Source 9].

participate actively in hostilities” in internal armed conflicts.<sup>22</sup> More recently, the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict mandates that “States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.”<sup>23</sup>

Commentators have argued 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 s/he is too young to be held criminally responsible for his/her actions.<sup>24</sup> Despite the prohibition on *conscripting* children under the age of fifteen, no consensus exists in international law as to the *criminal responsibility* of these children who commit grave violations of international humanitarian and human rights law.<sup>25</sup> Internationally, MACRs range from age

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<sup>22</sup> *Id.* art. 8(2)(e)(vii).

<sup>23</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, at. 1, Feb. 12, 2002, A/RES/54/263 [Electronic copy provided in accompanying USB flash drive at Source 8].

<sup>24</sup> Nienke Grossman, *Rehabilitation or Revenge*, 38 GEO. J. INT’L L. 323, 341 (2007) (“[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.”) [Electronic copy provided in accompanying USB flash drive at Source 21]; *see also* Matthew Happold, *The Age of Criminal Responsibility in International Criminal Law*, 3 (2006), available at SSRN: <http://ssrn.com/abstract=934567> [Electronic copy provided in accompanying USB flash drive at Source 22].

<sup>25</sup> Grossman, *supra* note 24, at 323 (2007) [Electronic copy provided in accompanying USB flash drive at Source 21].



seven to eighteen.<sup>26</sup> Inconsistent state practice has precluded the emergence of a rule of customary international law on this issue.<sup>27</sup>

International instruments that mention a MACR are vague as to what the MACR should actually be. The CRC does not establish a MACR, merely requiring that “State Parties [establish] a minimum age below which children shall be presumed not to have the capacity to infringe on the penal law.”<sup>28</sup> The Rome Statute of the International Criminal Court (ICC) states that “[t]he Court shall have no jurisdiction over any person under the age of 18 at the time of the alleged commission of a crime.”<sup>29</sup>

Happold argues that the desire to avoid creating a separate juvenile justice system motivated the drafters of the Rome Statute to restrict jurisdiction to individuals over the age of eighteen<sup>30</sup> and that the provision is procedural rather than substantive, leaving the decision of whether or not to prosecute child war criminals to national courts.<sup>31</sup> This ICC jurisdictional

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<sup>26</sup> Konge, *supra* note 18, at 48 [Electronic copy provided in accompanying USB flash drive at Source 25].

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 47 (citing CRC, *supra* note 1, at art. 40(3)(a)).

<sup>29</sup> *Id.* at 50 (citing Rome Statute of the International Criminal Court art. 26, July 17, 1988, 2187 U.N.T.S. 90).

<sup>30</sup> Matthew Happold, *Child Soldiers: Victims or Perpetrators?*, 29 U. LA VERNE L. REV. 56, 84–85 (2008) [Electronic copy provided in accompanying USB flash drive at Source 23].

<sup>31</sup> Happold, *Age of Criminal Responsibility*, *supra* note 24, at 6. [Electronic copy provided in accompanying USB flash drive at Source 22].

limitation does not prevent other international tribunals or national courts from trying children.<sup>32</sup> The decision to exclude children from the court’s jurisdiction, however, leads to a puzzling result: while the ICC does not prohibit the conscription or use of child soldiers between the ages of fifteen and eighteen, the court does not have jurisdiction over any crimes that children within this age bracket commit.<sup>33</sup>

The United Nations Standard Minimum Rules of the Administration of Juvenile Justice (“the Beijing Rules”), though not themselves binding upon States, also offer guidance on what is an acceptable MACR.<sup>34</sup> Article 4 states, “in those legal systems recognizing the concept of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.”<sup>35</sup> While the MACR is left up to the discretion of the State, in recognition of differences owing to a State’s history and culture, the commentary provides that a State should “consider whether a child can live up to the moral and psychological components of criminal responsibility . . . If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless.”<sup>36</sup> The commentary to Article 4 further envisions the creation of MACRs that parallel the age at which a child gains other social rights and

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<sup>32</sup> Konde, *supra* note 18, at 50. [Electronic copy provided in accompanying USB flash drive at Source 25].

<sup>33</sup> *Id.* at 50–51.

<sup>34</sup> *Id.* at 4.

<sup>35</sup> U.N. Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) art. 4, Nov. 29, 1985, G.A. Res. 40/33 [hereinafter The Beijing Rules] [Electronic copy provided in accompanying USB flash drive at Source 5].

<sup>36</sup> *Id.* art. 4, commentary.

responsibilities.<sup>37</sup> Finally, the commentary urges the international community to make efforts “to agree on a reasonable lowest age limit that is applicable internationally.”<sup>38</sup>

The United Nations Transitional Administration in East Timor (UNTAET) stipulated regulations on juvenile justice, stating that:

For the purposes of the present regulation, any person under 18 years of age shall be deemed a minor. A minor under 12 years of age shall be deemed incapable of committing a crime and shall not be subjected to criminal proceedings. A minor between 12 and 16 years of age may be prosecuted for criminal offences only in accordance with such rules as may be established in subsequent UNTAET regulations on juvenile justice; provided, however, that minors between 12 and 16 years of age may be prosecuted under the provisions of the present regulation for any offence which under applicable law constitutes murder, rape, or a crime of violence in which serious injury is inflicted upon a victim.<sup>39</sup>

These regulations, then, fix the MACR at twelve, while providing for future juvenile justice regulations for children between twelve and sixteen.

While customary international law and treaties do not establish a universal MACR, international criminal tribunals do offer some further guidance,<sup>40</sup> “even though no child has

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> UNTAET, *On Transitional Rules of Criminal Procedure*, ¶¶ 45, 46 U.N. Doc. UNTAET/REG/2000 (Sept. 25, 2000) [Electronic copy provided in accompanying USB flash drive at Source 7].

<sup>40</sup> Kongo, *supra* note 18, at 48 [Electronic copy provided in accompanying USB flash drive at Source 25].

appeared as a defendant before an international tribunal.”<sup>41</sup> Scholars, like Matthew Happold, have argued that the omission of a provision establishing a MACR in the Statutes of the International Criminal Tribunal for Yugoslavia and Rwanda was intentional in that the Tribunals did not plan to prosecute children.<sup>42</sup> Paola Konge, however, argues that “if the intention was to exclude persons under the age of 18 from the jurisdiction of the tribunals, one cannot help but wonder why the statutes do not do so expressly.”<sup>43</sup>

The Statute for the Extraordinary Chambers in the Courts of Cambodia (ECCC) also failed to establish a MACR, though it incorporates Article 14 of the International Covenant on Civil and Political Rights (ICCPR).<sup>44</sup> The relevant language of the ICCPR states that “[i]n the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”<sup>45</sup> Konge argues that such language supports the claim that the ECCC has jurisdiction to prosecute those offenders who were juveniles at the time of the alleged crime, since the contemplated MACR is at least less than eighteen.<sup>46</sup>

The drafters of the Statute for the Special Court of Sierra Leone, however, tackled the issue directly, granting the Court the authority to adjudicate the prosecution of soldiers who were

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<sup>41</sup> Happold, *Child Soldiers Victims or Perpetrators?*, *supra* note 30, at 85 [Electronic copy provided in accompanying USB flash drive at Source 23].

<sup>42</sup> *Id.*

<sup>43</sup> Konge, *supra* note 18, at 48 [Electronic copy provided in accompanying USB flash drive at Source 25].

<sup>44</sup> *Id.* at 49.

<sup>45</sup> *Id.* (citing International Covenant on Civil and Political Rights art. 14, G.A. Res. 2200A, U.N.GAOR, 21st Sess. Supp. No. 16 U.N. Doc. A16316).

<sup>46</sup> *Id.*

as young as fifteen years old when they committed the alleged crimes.<sup>47</sup> The Statute specifically states:

“The Special Court shall have no jurisdiction over any person who was under the age of 15 at the time of the alleged commission of the crime. Should any person who was at the time of the alleged commission of 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.”<sup>48</sup>

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, rather, on prosecuting the people who forced children to commit horrible crimes.<sup>49</sup>

In the U.S. Office of Military Commissions case against Omar Khadr, then, the Court correctly ruled that “neither 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 15 years of age.”<sup>50</sup> All that is certain regarding an international MACR is that too low of

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<sup>47</sup> 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 LAW & COMP. L.J 449, 449 (2005) [Electronic copy provided in accompanying USB flash drive at Source 16].

<sup>48</sup> Statute of the Special Court for Sierra Leone, art. 7, ¶ 1, Aug. 14, 2000 [Electronic copy provided in accompanying USB flash drive at Source 10].

<sup>49</sup> Konge, *supra* note 18, at 53 (citing *Special Court Prosecutor Says He Will Not Prosecute Children*, Press Release, Pub. Affairs Office of the Special Court for Sierra Leone (Nov. 2, 2002) [Electronic copy provided in accompanying USB flash drive at Source 25].

<sup>50</sup> *Id.* at 47 (citing Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCS in Regard to Juvenile Crimes of a Child Soldier, ¶ 18, *United States v. Khadr* (No. D-

a MACR will breach international law, though what that age is remains uncertain.<sup>51</sup> Happold argues that “there may be a trend to standardising the minimum age of criminal responsibility somewhere in the mid-teens (thirteen, fourteen, fifteen),”<sup>52</sup> while Nienke Grossman argues that “[t]he 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>53</sup> A conservative reading of what scholars are claiming regarding an international MACR suggests that there is a consensus against prosecuting children aged twelve or less.

As international law stands at the moment, however, domestic and international courts are free to prosecute children under the age of fifteen for committing acts of piracy.

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When dealing with Somali child pirates, determining the age of the child can prove to be very difficult for prosecuting courts; these children do not have birth certificates and courts have to rely on dental examinations and skeletal X-rays in order to make an age determination.<sup>54</sup> The

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022) (Apr. 30, 2008).

<sup>51</sup> See, e.g., *id.* at 54; HAPPOLD, CHILD SOLDIERS IN INTERNATIONAL LAW, *supra* note 11, at 11 [Electronic copy provided in accompanying USB flash drive at Source 3].

<sup>52</sup> Happold, *Age of Criminal Responsibility*, *supra* note 24, at 9. [Electronic copy provided in accompanying USB flash drive at Source 22].

<sup>53</sup> Grossman, *supra* note 24, at 357. [Electronic copy provided in accompanying USB flash drive at Source 21].

<sup>54</sup> Moore, *A Precedent or a Farce?*, *supra* note 15 [Electronic copy provided in accompanying USB flash drive at Source 42]; see also Mark Schenkel, *Dutch Court Looks at “Child Pirate” Case*, NRC INTERNATIONAL (May 21, 2010), <http://www.rnw.nl/africa/article/dutch-court-looks-child-pirate-case> (describing how courts use X-rays for purposes of determining one’s age) [Electronic copy provided in accompanying USB flash drive at Source 45].

reliability of these examinations is unclear; the court in Hamburg wrestling with these issues spent several days assessing whether growth-plates, which are found in the bones of children but not of adults, are reliable indicators of age.<sup>55</sup> 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 remains unclear.<sup>56</sup>

The age of now-convicted Somali pirate, Abduwali Abdiqadir Muse, was unclear throughout his trial at a federal District Court in New York.<sup>57</sup> Muse's family claimed that he was varying ages, ranging from fifteen to nineteen.<sup>58</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>59</sup> According to Deborah Osiro, "[i]t 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>60</sup>

## **B. International Standards for Juvenile Justice.**

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<sup>55</sup> *Lakotta, supra* note 7 [Electronic copy provided in accompanying USB flash drive at Source 38].

<sup>56</sup> *Id.*

<sup>57</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> [Electronic copy provided in accompanying USB flash drive at Source 44].

<sup>58</sup> Osiro, *supra* note 3, at 13 [Electronic copy provided in accompanying USB flash drive at Source 27].

<sup>59</sup> Richardson, *supra* note 57 [Electronic copy provided in accompanying USB flash drive at Source 44].

<sup>60</sup> Osiro, *supra* note 3, at 13 [Electronic copy provided in accompanying USB flash drive at Source 27].

*i. Should Courts Prosecute Child Pirates?*

Judicial proceedings against children should be a measure of last resort,<sup>61</sup> with a preference for remedies involving diversion.<sup>62</sup> (“Diversion” involves 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>63</sup> Advocates of prosecution argue that *not* prosecuting children who commit serious violations of international law may itself be a breach of international law and that prosecutions of children who volunteer freely will help end impunity, recognize the autonomy of older children who have the capacity to choose, and ensure that children aren’t specifically recruited to commit breaches of international law.<sup>64</sup> Those arguing against all prosecutions of children who commit international crimes often argue that the limited

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<sup>61</sup> CRC, *supra* note 1, art. 40, ¶3(b) (“Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings . . .”) [Electronic copy provided in accompanying USB flash drive at Source 4]; *see also* The Beijing Rules, *supra* note 35, art. 11 (“Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial . . .”) [Electronic copy provided in accompanying USB flash drive at Source 5].

<sup>62</sup> CRC, *supra* note 1, art. 40, ¶4 (“A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other 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.”) [Electronic copy provided in accompanying USB flash drive at Source 4]; The Beijing Rules, *supra* note 35, art. 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.”)[Electronic copy provided in accompanying USB flash drive at Source 5].

<sup>63</sup> Commentary to The Beijing Rules, *supra* note 35, art. 11. [Electronic copy provided in accompanying USB flash drive at Source 5].

<sup>64</sup> Kongsø, *supra* note 18, at 64 [Electronic copy provided in accompanying USB flash drive at Source 25].



resources allocated to the prosecution of international crimes should go towards the prosecution of adult offenders who bear the most responsibility and that children are more “victims” than “perpetrators.”<sup>65</sup>

The debate over whether to prosecute child soldiers is salient to the decision as to whether courts should prosecute child pirates. The decision may hinge on how courts construe the idea of voluntariness. Referring to child soldiers, Matthew Happold argues that:

[w]hile young people may appear to choose military service, the choice is not exercised freely. They may be driven by any of several forces, including cultural, social, economic or political pressures. Children might enlist to ensure that they and their families are fed, or for their own protection . . .<sup>66</sup>

These same forces, specifically the need to provide for themselves, may lead children to engage in piracy off the Horn of Africa. A recent report from the Congressional Research Service concluded that Somalia is facing one of its worst humanitarian crises in decades, resulting in the deaths of approximately 30,000 children and a third of remaining children facing malnutrition.<sup>67</sup> Jay Bahadur, a journalist who spent six months in Puntland researching Somali piracy, characterizes the epidemic of child piracy as a product of the children’s environment, arguing that “[f]or the masses of unemployed and resentful youth, piracy was a quick way to achieve the respect and standard of living that the circumstances of their birth denied them.”<sup>68</sup>

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<sup>66</sup> HAPPOLD, CHILD SOLDIERS IN INTERNATIONAL LAW, *supra* note 11, at 11. [Electronic copy provided in accompanying USB flash drive at Source 3].

<sup>67</sup> Ted Dagne, *Somalia: Current Conditions and Prospects for Lasting a Peace*, CONGRESSIONAL RESEARCH SERVICE 1, 1 (2011) [Electronic copy provided in accompanying USB flash drive at Source 30].

<sup>68</sup> BAHADUR, THE PIRATES OF SOMALIA, *supra* note 13, at 36. [Electronic copy provided in accompanying USB flash drive at Source 2].

Somali social structures also highlight how complex it is to determine how truly voluntary is a child's decision 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>69</sup> The majority of the population falls within one of four major clan-families: the Darod, Dir, Hawiye, and Rahanweyn.<sup>70</sup> From these four major clans, there are subdivisions that "descend hierarchically from clan-families, to clans, sub-clans, varying numbers of sub-sub-clans . . ."<sup>71</sup>

For example, Abidwali—aged somewhere around sixteen and currently facing trial in Hamburg, Germany after Dutch ships captured him—explains that he comes from the Tumul clan and, as such, must obey the orders of the Hawiye, the dominant clan.<sup>72</sup> According to Abidwali, "As 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>73</sup>

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<sup>69</sup> *Id.* at 27; see also Dr. Andre Le Sage, *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives*, CENTRE FOR HUMANITARIAN DIALOGUE 1, 15 (Jul. 2005) (quoting Bernard Helander, *Is There a Civil Society in Somalia?*, Summary of Remarks to SIDA Conference, Nairobi: UNDOS (Sept. 1997)) ("[T]he clan structure forms a 'completely encompassing social grid that organizes every single individual from the time of birth'") [Electronic copy provided in accompanying USB flash drive at Source 24].

<sup>70</sup> Le Sage, *supra* note 69, at 15 [Electronic copy provided in accompanying USB flash drive at Source 24].

<sup>71</sup> *Id.* at 16.

<sup>72</sup> Lakotta, *supra* note 7 [Electronic copy provided in accompanying USB flash drive at Source 38].

<sup>73</sup> *Id.*

The prosecution advocates a different understanding of Abidwali's capacity to make his own decisions, arguing that Abidwali matured earlier than usual as "someone who has to rely on his own devices" and that Somalis understand that robbery and extortion are serious crimes.<sup>74</sup> As of April 2011, Abidwali's defense attorney had 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>75</sup>

Further, when analyzing whether prosecuting child pirates will have a general deterrent effect, courts should consider the opinion of Jay Bahadur. Bahadur argues that the solution to piracy lies in incentivizing more legitimate pursuits;<sup>76</sup> naval attacks and the threat of prosecution may increase the "cost" of piracy, but until there is a viable alternative "benefit," then the problem will remain unresolved.<sup>77</sup>

The situation of child pirates, then, is different from the situation of child soldiers in a critical way: children choose to engage in piracy often out of economic need and if/when they

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*; see also Grossman, *supra* note 24, at 348 (arguing that significant changes in moral development may also occur during adolescence, supporting the idea that holding children accountable for violations of the laws of war may be inappropriate when they are too young to hold independent moral views.) [Electronic copy provided in accompanying USB flash drive at Source 21].

<sup>76</sup> BAHADUR, THE PIRATES OF SOMALIA, *supra* note 13, at 23 [Electronic copy provided in accompanying USB flash drive at Source 2].

<sup>77</sup> *Id.*; see also James Kraska, *Freakonomics of Maritime Piracy*, 16 *Brown J. World Affairs* 117 (2010) ("In order to arrest the growth in piracy, the costs and risks of engaging in the crime have to go up and the anticipated benefits must go down.") [Electronic copy provided in accompanying USB flash drive at Source 26]; see also Sarah Percy & Anja Shortland, *The Business of Piracy in Somalia*, DIW BERLINE, 1033 Discussion Paper, 45 (2010) (arguing that there is little incentive for local Somalis to end piracy). [Electronic copy provided in accompanying USB flash drive at Source 28].

return to their homes, the very conditions that exposed them to engaging in piracy (poverty, unemployment, etc.) are still present, while child soldiers return to their homes *after* the conditions that exposed them to engaging on hostilities (the presence of active hostilities) have ended. Will prosecutions of child pirates help reduce maritime piracy when “imprisoning 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>78</sup>

Finally, courts should consider the commentary of defense lawyer, Oruko Nyawinda:

The question is, 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 activities. Otherwise, we’ll just continue trying these poor guys and the trials will go on and on.<sup>79</sup>

His concern speaks to the oft-repeated argument that courts should focus on prosecuting the organizers of piracy groups, not necessarily the individuals committing the acts.<sup>80</sup>

*ii. Juvenile Justice and Pre-trial Detention.*

If and when such prosecutions of children do occur, pre-trial detention should also be used as a measure of last resort. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the General Assembly on December 14, 1990, state that “[d]etention before trial shall be avoided to the extent possible and limited to exceptional

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<sup>78</sup> BAHADUR, THE PIRATES OF SOMALIA, *supra* note 13, at 23 [Electronic copy provided in accompanying USB flash drive at Source 2].

<sup>79</sup> *Id.* at 166.

<sup>80</sup> Snow, *supra* note 17 [Electronic copy provided in accompanying USB flash drive at Source 46].

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. . . .<sup>81</sup> 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.”<sup>82</sup> Finally, the Beijing Rules use the same language as the CRC, providing that “[d]etention pending trial shall be used only as a measure of last resort and for the shortest possible period of time,” further stating that juveniles “shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults”<sup>83</sup>; the commentary discusses the danger of “criminal contamination” while in detention pending trial and stresses the importance of pursuing alternate measures.<sup>84</sup>

*iii. Procedural Safe-Guards for Juveniles.*

During trial, a court must maintain procedural safeguards—such as presumption of innocence, knowledge of charges against him or her, and rights of privacy and appeal<sup>85</sup>—that protect the child’s right and consider the child’s well-being throughout the process.<sup>86</sup> The CRC

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<sup>81</sup> U.N. Rules for the Protection of Juveniles Deprived of their Liberty, art. 17, Dec. 14, 1990, G.A. Res. 45/113. [Electronic copy provided in accompanying USB flash drive at Source 6].

<sup>82</sup> CRC, *supra* note 1, art. 37(a) [Electronic copy provided in accompanying USB flash drive at Source 4].

<sup>83</sup> The Beijing Rules, *supra* note 35, art. 11, including commentary. [Electronic copy provided in accompanying USB flash drive at Source 5].

<sup>84</sup> *Id.*

<sup>85</sup> Grossman, *supra* note 24, at 343 [Electronic copy provided in accompanying USB flash drive at Source 21].

<sup>86</sup> *Id.* at 346.

mandates that in all actions concerning children in courts of law, “the best interests of the child shall be a primary consideration”<sup>87</sup> and that a child should be:

[t]reated 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 re-integration and the child’s assuming a constructive role in society.<sup>88</sup>

Further, state practice and a number of international instruments suggest that customary international law requires courts to treat children differently than adults in criminal proceedings<sup>89</sup>; however, despite the articulation of this principle, there are no clear requirements for ensuring that children receive different treatment than adults.<sup>90</sup>

*iv. Sentencing of Convicted Juveniles.*

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<sup>87</sup> CRC, *supra* note 1, art. 3, ¶ 1. [Electronic copy provided in accompanying USB flash drive at Source 4].

<sup>88</sup> Grossman, *supra* note 24, at 343 (citing CRC, *supra* note 1, art. 40, ¶2) [Electronic copy provided in accompanying USB flash drive at Source 21].

<sup>89</sup> Konge, *supra* note 18, at 55 (citing CRC, *supra* note 1, art. 1, 3, 12, 36, 38, 40,41; *Geneva Declaration of the Rights of the Child of 1924*, League of National O.J. Spec. Supp. 2, at 43 (1924); Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), at 19, U.N. Doc. A/4354 (Nov. 20, 1959); International Covenant on Civil and Political Rights art. art. 10, 14(4), G.A. Res. 2200A, U.N.GAOR, 21st Sess. Supp. No. 16 U.N. Doc. A16316); Beijing Rules, *supra* note 35; United National Rules for the Protection of Juveniles Deprived of their Liberty, *supra* note 81, art. 205; United Nations Guidelines for the Protection of Juvenile Delinquency (The Riyadh Guidelines), G.A. Res. 45/112, Annex, U.N. GAOR, 45th Sess., Supp. No. 49A, at 201, U.N. Doc. A/45/49 (Dec. 14, 1990)). [Electronic copy provided in accompanying USB flash drive at Source 25].

<sup>90</sup> *Id.* at 56.

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>91</sup> In pursuit of this goal, for example, the Statute for the SCSL 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.<sup>92</sup> According to Michael Custer:

At the heart of this goal is the understanding that . . . juveniles are more amenable to rehabilitation into productive members of society. 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. . . . [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>93</sup>

Just as the drafters of the Statute for the SCSL considered 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>94</sup> courts sentencing child pirates should consider the extremities of the environment from which these children come as mitigating factors for purposes of sentencing.

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<sup>91</sup> *Id.*; see also Grossman, *supra* note 24, at 346 [Electronic copy provided in accompanying USB flash drive at Source 21].

<sup>92</sup> Custer, *supra* note 47, at 458. [Electronic copy provided in accompanying USB flash drive at Source 16].

<sup>93</sup> *Id.* at 470.

<sup>94</sup> *Id.* at 474.

Radhika Coomaraswamy, UN Special Representative for Children and Armed Conflict, advocates a similar approach, stating that no individual under the age of 18 should undergo prosecution and that courts should focus on rehabilitative measures.<sup>95</sup> However, prosecution doesn't preclude rehabilitation and, in the context of child soldiers, some scholars have argued that future courts need to balance the goals of rehabilitation and punitive punishment in order to move the afflicted countries forward.<sup>96</sup>

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Standards for juvenile justice require a court, at a minimum, to give primary consideration to a child's well-being and to emphasize rehabilitation in any sentencing structure. When handling cases involving child pirates, courts should be sensitive to how the clan structure affects a child's ability to make independent decisions, the degree to which prosecutions will promote a general deterrence to children, and the severity and extremity of life in Somalia as a potential mitigating factor in sentencing.

### **C. Current Treatment of Child Pirates in Regional Courts, specifically Kenya**

Apprehending States have been rendering captured piracy suspects to regional courts, most significantly to Kenya and the Seychelles.<sup>97</sup> Criticisms of the Kenyan courts, in particular,

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<sup>95</sup> Snow, *supra* note 17 [Electronic copy provided in accompanying USB flash drive at Source 46].

<sup>96</sup> Custer, *supra* note 47, at 476 [Electronic copy provided in accompanying USB flash drive at Source 16].

<sup>97</sup> Osiro, *supra* note 3, at 1 [Electronic copy provided in accompanying USB flash drive at Source 27]; *see generally* James Thuo Gathiii, *Kenya's Piracy Prosecutions*, 104 AM. J. INT'L L. 416 (2010) (examining how international law has been applied in Kenyan courts as well as considering the fairness of such proceedings). [Electronic copy provided in accompanying USB



include: 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>98</sup> Jay Bahadur questions the decision to establish a regional piracy court in Kenya, stating that “[w]ith international tribunals established to resolve issues ranging from war crimes to bilateral trade disputes, it is inexplicable that an issue of such obvious global dimensions as high seas piracy should have been relegated to Kenyan courts . . . Somali detainees are amongst the most in need of international protection.”<sup>99</sup>

Common complaints from piracy suspects detained in Kenya include ill treatment at the hands of prison guards and other prisoners, and lack of food and medical attention.<sup>100</sup> Deborah Osiro writes that:

[t]he dire conditions of detention in Kenyan prisons, particularly the overcrowding, lack of adequate health services and high levels of violence, create a very harsh environment. There is a backlog of cases waiting to be tried, which results in the prolonged confinement of the accused. . . *Most minors are incarcerated with adults*; rape of inmates by fellow inmates and prison officials is common; meals are not only inadequate but half-rations are sometimes given as punishment.<sup>101</sup>

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flash drive at Source 19].

<sup>98</sup> Osiro, *supra* note 3, at 1 [Electronic copy provided in accompanying USB flash drive at Source 3]; *see also* BAHADUR, THE PIRATES OF SOMALIA, *supra* note 13, at 167. [Electronic copy provided in accompanying USB flash drive at Source 27].

<sup>99</sup> BAHADUR, THE PIRATES OF SOMALIA, *supra* note 13, at 167–68 [Electronic copy provided in accompanying USB flash drive at Source 2].

<sup>100</sup> Osiro, *supra* note 3, at 8 [Electronic copy provided in accompanying USB flash drive at Source 27].

<sup>101</sup> *Id.* at 14 (emphasis added).

The United Nations Office on Drugs and Crime (UNODC) has tried to cure some of these defects by providing support to the courts, prosecution, the police, and the prison system in order to have these trials pass international scrutiny.<sup>102</sup> Pirate defender Oruko Nyawinda complained that the windfall of the UNODC program went entirely to the prosecutors, the prisons, and the attorney general's office, with none of these funds going to defense lawyers.<sup>103</sup> Despite these concerns, some scholars argue that Kenya *is* capable of administering justice to pirates in a fair manner.<sup>104</sup>

While, in general, there is a dearth of information on the specific fate of child pirates, the BBC reported that the Supreme Court of the Seychelles convicted four children under the age of eighteen for piracy or piracy related crimes, who are currently serving out a ten-year sentence in the Seychelles.<sup>105</sup> While international law does not strictly ban the imprisonment of minors,<sup>106</sup>

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<sup>102</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) [Electronic copy provided in accompanying USB flash drive at Source 20]; BAHADUR, THE PIRATES OF SOMALIA, *supra* note 13, 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.”) [Electronic copy provided in accompanying USB flash drive at Source 2].

<sup>103</sup> BAHADUR, THE PIRATES OF SOMALIA, *supra* note 13, at 165. [Electronic copy provided in accompanying USB flash drive at Source 2].

<sup>104</sup> Michael Davey, *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) [Electronic copy provided in accompanying USB flash drive at Source 17].

<sup>105</sup> *Somali Pirates Sentenced to 10 Years in Seychelles*, *supra* note 9 [Electronic copy provided in accompanying USB flash drive at Source 47].

<sup>106</sup> *See, e.g.*, Beijing Rules, *supra* note 35, art. 17.1(b) (“Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum.”) [Electronic copy provided in accompanying USB flash drive at Source 5].

especially when the child commits or attempts to commit a serious act of violence<sup>107</sup> such as piracy, the commentary to the Beijing Rules suggests that “strictly punitive approaches are not appropriate.”<sup>108</sup> The imposition of a ten-year sentence against four individuals under the age of eighteen may suggest that the courts in the Seychelles are not focusing enough on the child’s well-being and potential for rehabilitation.

According to Chief Magistrate Rosemelle Mutoka, who has presided over many of the Kenyan piracy cases, Kenya has separate justice systems for adults and juveniles.<sup>109</sup> However, when a minor commits a crime *with* an adult, that child goes to trial in an adult court—although, for purposes of rights and sentencing, juvenile law always applies.<sup>110</sup> With Somali children facing trial in Kenya, then, courts handle juvenile cases concurrently with the children’s alleged adult co-perpetrators.

Chief Magistrate Mutoka also stated that pirates await trial in a detention facility, usually kept together with other members of their piracy group.<sup>111</sup> The Kenyan prison system keeps the

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<sup>107</sup> *Id.* art. 17.1(c) (“Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offenses and unless there is no other appropriate response.”).

<sup>108</sup> *Id.*, commentary (d) to art. 17.

<sup>109</sup> Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 8 [Electronic copy provided in accompanying USB flash drive at Source 1].

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*; *see also* BAHADUR, THE PIRATES OF SOMALIA, *supra* note 13, at 163 (“[Wanini] Kieri [warden at Shimo prison] decided to give the pirates their own prison block, with a few Kenyans mixed in to fill up the remaining space.”) [Electronic copy provided in accompanying USB flash drive at Source 2].

groups of suspected pirates separate from the general Kenyan prison population.<sup>112</sup> Children remain in pre-trial detention in the same facilities as their adult counterparts, but the children have expressed a desire to stay with members of their piracy group, which usually consists of members of the same clan.<sup>113</sup>

While international standards of juvenile justice require that parents or guardians of detained child receive notification of their child's situation,<sup>114</sup> Chief Magistrate Mutoka explained that this is extremely difficult. The courts try to contact any of the child's family members who are living in Kenya<sup>115</sup>; the difficulty associated with contacting the child's family members who live in Somalia where communications infrastructure is lacking may fall within one of the "special exceptions" contemplated in the CRC.

When asked whether there were facilities in Kenya that might house these children while they await trial, Chief Magistrate Mutoka explained that the Children's Remand House

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<sup>112</sup> Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 8 [Electronic copy provided in accompanying USB flash drive at Source 1].

<sup>113</sup> *Id.*

<sup>114</sup> *See, e.g.,* CRC, *supra* note 1, 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.*") (emphasis added) [Electronic copy provided in accompanying USB flash drive at Source 4].

<sup>115</sup> Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 8 [Electronic copy provided in accompanying USB flash drive at Source 1]; *see also* BAHADUR, THE PIRATES OF SOMALIA, *supra* note 13, 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 of Shimo] figured that her prisoners were able to send messages that would eventually find their way back to their relatives in Somalia.") [Electronic copy provided in accompanying USB flash drive at Source 2].

would not be an appropriate facility, as that house is mainly for younger children who have committed minor crimes, not children accused of committing serious breaches of international law.<sup>116</sup> Thus, while international law requires pre-trial detention to be a measure of last resort and the separation of children from adults, the practical realities of the Kenyan prison system, as well as the children's preferences to stay with their clan, have dictated different results.

Chief Magistrate Mutoka expressed concern regarding the lack of international and domestic interest in assisting child pirates; she views this as hypocrisy on the part of local child rights groups that refuse to see Somali children as victims who didn't fully understand the larger consequences of what they have involved themselves in.<sup>117</sup> Lawyers handle the cases of entire groups of pirates but no one specifically represents minors.<sup>118</sup> Chief Magistrate Mutoka expressed concern that since lawyers are unable to address the specific needs of individual pirates, the lawyers are certainly unable to address the unique needs of suspected child pirates.<sup>119</sup> She advocates precluding trials against suspected child pirates or, at a minimum, she believes that only children somewhere around the age of sixteen should ever face trial.<sup>120</sup>

While the Kenyan courts have not yet dealt with sentencing convicted child pirates, Mutoka hypothesizes that the courts will find some, if not many, of these children to be guilty.<sup>121</sup>

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<sup>116</sup> Interview with Chief Magistrate Rosemelle Mutoka, *supra* note 8 [Electronic copy provided in accompanying USB flash drive at Source 1].

<sup>117</sup> *Id.*

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

<sup>119</sup> *Id.*

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

<sup>121</sup> *Id.*

In fact, before she left Mombasa to pursue an advanced legal degree in the U.S., Mutoka was presiding over a case that involved a group of about twenty suspected pirates, seven to eight of whom are minors.<sup>122</sup>

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States willing to prosecute pirates domestically are faced with the daunting challenge of deciding what to do with child pirates. Kenya, where the most significant piracy prosecutions have taken place, has not yet provided an inadequate solution to the problem of child piracy.

#### **D. Possibilities for Sending Child Pirates Back to Semi-Autonomous Regions in Somalia**

##### *i. Can States Return Pirates, in General, to Somalia for Trial, Without Breaching the Principle of Non-Refoulement?*

Nations that patrol the waters off the Horn of Africa are reluctant to prosecute suspected pirates due the potential costs and difficulties.<sup>123</sup> States apprehending pirates have often engaged in a “catch and release” policy, whereby foreign navies disarm pirates and release them back to Somalia, in order to prevent the pirates from making asylum claims upon arriving in a different country.<sup>124</sup> Further, governments have been reluctant to return accused pirates to Somalia for

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<sup>122</sup> *Id.*

<sup>123</sup> Kontorovich, *supra* note 6 [Electronic copy provided in accompanying USB flash drive at Source 37].

<sup>124</sup> *See, e.g.*, Colin Freeman, *British Police to Launch Seychelles Pirate Hunting Base*, THE TELEGRAPH (Oct. 8, 2011), <http://www.telegraph.co.uk/news/worldnews/piracy/8815552/British-police-to-launch-Seychelles-pirate-hunting-base.html> (Much of the counter-piracy efforts to date have been hampered by the lack of courts willing to try suspects arrested by foreign navies).

trial, fearing that, in doing so, they would breach the principle of *non-refoulement*, which prohibits states from returning people to a place where they will likely face abuse.<sup>125</sup> France is a notable exception, often returning piracy suspects to Puntland.<sup>126</sup> Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishment (CAT) provides that:

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>127</sup>

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European courts fear pirates will try to seek asylum after being released, while Kenyan courts are often already overburdened - hence the much-criticised practice of “catch and release.””) [Electronic copy provided in accompanying USB flash drive at Source 35].

<sup>125</sup> Kontorovich, *supra* note 6 [Electronic copy provided in accompanying USB flash drive at Source 37].

<sup>126</sup> Osiro, *supra* note 3, at 9 [Electronic copy provided in accompanying USB flash drive at Source 27]; *see also* Kontorovich, *supra* note 6 [Electronic copy provided in accompanying USB flash drive at Source 37].

Puntland is a relatively stable semi-autonomous region within Somalia. *See infra*, notes 135–142 and accompanying text.

<sup>127</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishment, art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85. [Electronic copy provided in accompanying USB flash drive at Source 12].

Upon first examination of the CAT, it seems that a state is barred from forcibly returning *anyone* to Somalia.<sup>128</sup> After all, “Somalia has had no functioning central government since 1991, and has largely been dominated by warlords of rival and warring clans, and has been in the grips of an Islamic revolutionary movement whose stated goal is to make Somalia an Islamic state and impose Islamic law.”<sup>129</sup>

The possibility of breaching the international norm against *non-refoulement* is certainly present if and when a state returns an accused pirate to southern Somalia, areas that are largely under the control of Islamists.<sup>130</sup> Religious leaders have declared that dealing with pirates is *haram*—forbidden in Islam.<sup>131</sup> In fact, the Islamist Court Union, which preceded the presence of the militant group currently waging war against the TFG, Al-Shabaab, began shutting down piracy operation in the city of Haradheere, which pushed many pirates into Puntland.<sup>132</sup> In May 2010, Islamist militias vowed to end piracy in Haradhere through the imposition of shari’a

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<sup>128</sup> Davey, *supra* note 104, at 1224–25 [Electronic copy provided in accompanying USB flash drive at Source 17].

<sup>129</sup> *Id.*

<sup>130</sup> BAHADUR, THE PIRATES OF SOMALIA, *supra* note 13, at 47 (describing the Islamic Courts Union as “an Islamist political movement that has wrested control from the TFG [Transitional Federal Government] and competing warlord factions. . . . Ethiopian intervention [referring to the 2006 Ethiopian invasion of Somalia] drove the ICU’s moderate leadership into exile and sparked a radicalization of the organization, as the ICU’s extremist military wing, Al-Shabaab, splintered from the groups and launched a brutal insurgency against the Ethiopian occupiers”) [Electronic copy provided in accompanying USB flash drive at Source 2].

<sup>131</sup> *Id.* at 20.

<sup>132</sup> *Id.* at 49.



law.<sup>133</sup> Given the militant brand of Islam that Al-Shabaab espouses, it is likely that returning suspected pirates, including children, to areas under Al-Shabaab control would breach the principle of *non-refoulement*.<sup>134</sup>

However, to characterize Somalia as a county in anarchy without the rule of law is not entirely accurate.<sup>135</sup> According to Jay Bahadur, “[c]ontrary 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>136</sup> When discussing Somalia, it is important to distinguish between Southern/Central Somalia (which is further divided into areas under Transitional Federal Government (TFG) control and areas under control of different warring factions); Puntland; and Somaliland. Puntland and Somaliland are semi-autonomous regions within Somalia that do not have international recognition as independent states, yet

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<sup>133</sup> Mustafa Haji Abdinur, *Somali Islamists Vow to End Piracy, Pirates Flee with Ships*, AGENCE FRANCE-PRESS (May 10, 2010), available at <http://www.france24.com/en/20100503-somali-islamists-vow-end-piracy-pirates-flee-with-ships> [Electronic copy provided in accompanying USB flash drive at Source 31].

<sup>134</sup> See Davey, *supra* note 104, at 1225 (citing Jeffrey Gettleman, *Somalia: Rape Victim Executed*, N.Y. Times, Oct. 29, 2008, at A9) (“[T]o the extent that there is law in Somalia it has often been arbitrary and cruel.”) [Electronic copy provided in accompanying USB flash drive at Source 17].

<sup>135</sup> See Le Sage, *supra* note 69, at 22 [Electronic copy provided in accompanying USB flash drive at Source 24].

<sup>136</sup> Jay Bahadur, *Heroes in a Land of Pirates*, NEW YORK TIMES (Jan. 4, 2010), available at <http://www.nytimes.com/2010/01/04/opinion/04bahadur.html?pagewanted=all> [Electronic copy provided in accompanying USB flash drive at Source 33].

function as such; these two regions enjoy relative stability and have functioning justice systems.<sup>137</sup>

Four types of justice systems exist within Somalia:

- i. Formal Judiciary structure in regional administrations (including those formal systems in Somaliland, Puntland, and regions under TFG control);
- ii. Traditional, clan-based systems (the customary law that exists between clans known as *xeer*);
- iii. Shari'a courts—since the mid-1900s, independent sharia courts have emerged in various parts of Somalia, particularly in urban areas; and
- iv. Civil Society initiatives and ad hoc mechanisms established by Somali militia-factions.<sup>138</sup>

These formal systems all face the same general limitations: a 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>139</sup> Overall, though, the judicial systems of Somaliland

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<sup>137</sup> “In northern Somalia, the situation was quite different [than southern Somalia]. Political control over substantial, contiguous territories was quickly established by two former militia-factions – the Somali National Movement (SNM) and the Somali Salvation Democratic Front (SSDF) – which created the autonomous regional administrations of ‘Somaliland’ and ‘Puntland’, respectively. Each has achieved a significant degree of peace, security and public support in the territory under administrative control.” Le Sage, *supra* note 69, at 22 [Electronic copy provided in accompanying USB flash drive at Source 24].

<sup>138</sup> *Id.* at 14–15.

<sup>139</sup> *Id.* at 31–33.

and Puntland “should be lauded;”<sup>140</sup> human rights violations are neither systematic nor widespread, the most common being arrest without warrant and detention without trial of government critics, human rights activists, and journalists.<sup>141</sup>

Michael Davey advocates an interpretation of the CAT that would allow, in some circumstances, States to return piracy suspects to Somalia without breaching international law:

“[T]he U.S. government (and any other country) may, consistent with international law at 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.”<sup>142</sup>

Others, like Deborah Osiro, argue that such diplomatic assurances that a person will not face abuse are insufficient under the jurisprudence of the European Court of Human Rights and that the U.S. executive branch lacks the unchecked authority to assess the reliability of these assurances—that these diplomatic assurances may face judicial review.<sup>143</sup> If one accepts Davey’s arguments, it may be possible for States to return child pirates to Somalia, under certain circumstances, thereby avoiding the challenges of prosecuting these children in foreign courts.

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<sup>140</sup> *Id.* at 31, citing *The Judicial System in Somaliland*, Academy for Peace and Development, 2002.

<sup>141</sup> *Id.*

<sup>142</sup> Davey, *supra* note 104, at 1227 [Electronic copy provided in accompanying USB flash drive at Source 17].

<sup>143</sup> Osiro, *supra* note 3, at 10 [Electronic copy provided in accompanying USB flash drive at Source 27].

*i. Can States Return Child Pirates to Certain Areas of Somalia Without Breaching the Principle of Non-Refoulement?*

In general, Somaliland supports the UN-backed plan to hold convicted pirates in its prisons and the plan to set up special courts for captured pirates in the Indian Ocean region.<sup>144</sup> Conditions in most prisons in Somaliland are known for being harsh. “The [prison] in Berbera was built in 1884 during the Ottoman Empire and doesn’t look like it has changed much since. Piles of garbage dot the prison yard. Prisoners reach out through rusted bars to complain about conditions, including lack of food.”<sup>145</sup> However, the UN completed a new \$1.5 million prison in Hargesia, the capital of Somaliland, that can handle up to 400 inmates and meets the minimum UN standards.<sup>146</sup>

Somaliland also has a separate juvenile justice system.<sup>147</sup> The purpose of the law is “to provide 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> and it seeks to “homogenize the provisions of

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<sup>144</sup> Amran Abocar, *Somaliland President Backs Piracy Prisons*, REUTERS (Apr. 21, 2011 6:40 AM), <http://af.reuters.com/article/topNews/idAFJJOE73K04120110421> [Electronic copy provided in accompanying USB flash drive at Source 43].

<sup>145</sup> 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> [Electronic copy provided in accompanying USB flash drive at Source 32].

<sup>146</sup> *Id.*

<sup>147</sup> Juvenile Justice Law No. 36/2007, Republic of Somaliland (2007) [Electronic copy provided in accompanying USB flash drive at Source 45].

<sup>148</sup> *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). [Electronic copy provided in accompanying USB flash drive at Source 14].

Secular, Sharia and Somali Customary laws relating to children in conflict with law.” The law established the MACR at fifteen years of age. While laudable in its scope and 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>149</sup>

Even if the juvenile justice system in Somalia were fully functioning, sending child pirates to Somaliland would not be a viable option in most cases. Somaliland Minister of Justice Ismail Air refuses to take pirates from other parts of Somalia, but only accepts Somalilanders.<sup>150</sup> Puntland, on the other hand, is a major hub of piracy and intends to be a federal state *within* Somalia, whenever such a Somalia exists. Given the intention to be part of a future unified-Somalia, it is likely that the government of Puntland would likely be more willing than Somaliland to receive pirates from the South, particularly from Haradhere.

The Puntland Constitution defines a minor as “any individual below the age of fifteen (15) years” and provides that a “minor has a right to life, name, nationality, education and support.”<sup>151</sup> According to Abdulaziz Mohamed Hamud, a child protection consultant with Oxfam Novib, Puntland should have a separate juvenile justice system to

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<sup>149</sup> *Inhuman Sentencing of Children in Somalia: Draft Report for the Child Rights Information Network*, CRIN 2 (Mar. 2011), available at [www.crin.org/docs/Somalia\\_final.doc](http://www.crin.org/docs/Somalia_final.doc). [Electronic copy provided in accompanying USB flash drive at Source 29].

<sup>150</sup> Langfitt, *Somaliland Struggles in Effort to Fight Piracy*, *supra* note 145 [Electronic copy provided in accompanying USB flash drive at Source 40].

<sup>151</sup> Constitution of Puntland art. 31, 2008 [Electronic copy provided in accompanying USB flash drive at Source 11].

deal with child offenders.<sup>152</sup> Hamud is involved in lobbying for a Juvenile Justice Law, “aimed at guaranteeing children’s rights, so that children would no longer be kept in jail with adults or tried in adult courts.”<sup>153</sup>

As of March 2011, UNDP and UNICEF are working on developing a juvenile justice law for Puntland:

In 2009, a Traditional Leaders Conference was held in Garowe, Puntland, which aimed, among other things, to revise and standardise customary law and to review aspects of it which are contrary to international human rights standards and Sharia. The Conference adopted a Declaration which set out a number of agreements, including confirmation of the leaders’ view that the traditional justice system is best suited to deal with juvenile justice, calling on police and other concerned parties to settle cases involving children through customary law before passing them to the police stations and public prisons, and advocating for a formal law to address violations of children’s rights.<sup>154</sup>

Further, The Draft for the National Youth Policy of the Puntland State of Somalia addresses the need for the region to develop a campaign that discourages youth from engaging in piracy.<sup>155</sup>

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<sup>152</sup> *Somalia: Poverty Pushes Bosasso Children on to Streets*, *supra* note 14 [Electronic copy provided in accompanying USB flash drive at Source 48].

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> The National Youth Policy of the Puntland State of Somalia, Draft, art. 4.3, Dec. 2008. [Electronic copy provided in accompanying USB flash drive at Source 13].

Returning child pirates to Puntland, upon the further development of the juvenile justice system in the region, may provide apprehending States with a viable solution to the complex problem of prosecuting child pirates.

#### **IV. Conclusion**

Prosecuting child pirates who were below the age of twelve at the time of the commission of piracy would violate the potentially emerging rule of customary international law that sets the MACR at somewhere between thirteen and fifteen. If using as a model the Statute for the Special Court of Sierra Leone, the only international criminal tribunal to explicitly have jurisdiction over child perpetrators, then a MACR for child pirates should begin at age fifteen. However, due to the absence of a clear rule in international law regarding the MACR, courts presently are free to prosecute child soldiers, even those child soldiers who were under the age of fifteen at the time of the commission of the piracy.

When a court prosecutes a child pirate, the court must adhere to the standards of juvenile justice outlined in the Convention on the Rights of the Child, while paying close attention to other international instruments such as The Beijing Rules and the Rules for the Protection of Juveniles Deprived of their Liberty. If possible, courts should avoid prosecuting child pirates, instead trying to divert them to different programs that focus on rehabilitation. The above-mentioned international instruments require that a court, at a minimum, must keep the best interest of the child in mind throughout the proceedings and should impose rehabilitative measures upon the child in lieu of strictly punitive sentences.

Despite the need for implementing these protections, the international community has largely ignored the specific needs of child pirates. The judicial and prison system within Kenya is unable to meet the international standards prescribed for the protection of children—child pirates await trial in detention with adults, share lawyers with large groups of other pirates, and frequently cannot maintain contact with their family members in Somalia.

Piracy prosecutions, in general, are complicated and expensive; apprehending States are hesitant to try suspected pirates abroad due to the pirates' potential asylum claims and out of fear of sending these individuals back to Somalia, thereby breaching a State's commitment to the principle of *non-refoulement*. With guarantees of fair treatment from governments of Somalia's semi-autonomous regions and further development of juvenile justice systems within those regions, states may have the option of returning child pirates to certain regions in Somalia to face judicial proceedings.