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## Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice

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# Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirates to Escape Justice

Yvonne M. Dutton

## Abstract

Pirates are literally getting away with murder. Modern pirates are attacking vessels, hijacking ships at gunpoint, taking hostages, and injuring and killing crew members.<sup>1</sup> They are doing so with increasing frequency. According to the International Maritime Bureau (“IMB”) Piracy Reporting Center’s 2009 Annual Report, there were 406 pirate attacks in 2009—a number that has not been reached since 2003. Yet, in most instances, a culture of impunity reigns whereby nations are not holding pirates accountable for the violent crimes they commit. Only a small portion of those people committing piracy are actually captured and brought to trial, as opposed to captured and released. For example, in September 2008, a Danish warship captured ten Somali pirates, but then later released them on a Somali beach, even though the pirates were found with assault weapons and notes stating how they would split their piracy proceeds with warlords on land. Britain’s Royal Navy has been accused of releasing suspected pirates,<sup>7</sup> as have Canadian naval forces. Only very recently, Russia released captured Somali pirates—after a high-seas shootout between Russian marines and pirates that had attacked a tanker carrying twenty-three crew and US\$52 million worth of oil.<sup>9</sup> In May 2010, the United States released ten captured pirates it had been holding for weeks after concluding that its search for a nation to prosecute them was futile. In fact, between March and April 2010, European Union (“EU”) naval forces captured 275 alleged pirates, but only forty face prosecution. Furthermore, when pirates are tried, they are often tried by Kenya or other African nations, rather than by the capturing nation. Kenya has entered into agreements with Canada, China, Denmark, the European Union, the United Kingdom, and the United States to try the pirates these nations capture. Mauritius, Seychelles, and Tanzania have executed similar agreements to prosecute captured pirates. In an effort to aid prosecutions, Western states have pledged money—about US \$10 million since May 2009—to alleviate the strain on the “poorly equipped and corrupt criminal justice system” and to cover the cost of transporting witnesses, training police and prosecutors, and upgrading prisons and courts.<sup>16</sup> In fact, in late June 2010, the United Nations Office on Drug and Crimes (“UNODC”) used funds from donor nations to help open a new high-security courtroom in Mombasa, Kenya to prosecute pirates.<sup>17</sup> But why are Western states refusing to prosecute pirates on their own soil even though they—more so than less-developed nations—have the money and institutional capabilities to bring pirates to justice in a swift and fair manner? After all, these states are providing Kenya and other African nations with funds and support to help them conduct piracy trials. They are spending billions to support the various naval patrols that are capturing pirates—but thereafter releasing them to continue their criminal activities. While several reasons have been advanced to explain why nations may not be

regularly prosecuting pirates, one reason often given to explain the reluctance of Western nations to try pirates on their own soil is the threat of asylum claims by convicted pirates. This reason has been advanced by academics and government representatives, among others. Roger Middleton, a researcher for Chatham House, the London-based think tank, explained it this way: “These countries don’t want to be bombarded by claims of asylum from the pirates, who would ask not to be deported to Somalia, a country at war.” In fact, in April 2008, the British Foreign Office warned the Royal Navy that detaining pirates at sea could be a violation of their human rights and could also lead to asylum claims by pirates seeking to relocate to Europe. A former Tory chairman stated that ministers in Parliament had indicated privately that the reason captured pirates were not being brought to Britain for trial (including the sixty-six suspected pirates captured by the Royal Navy in 2009—all of whom were thereafter released) was because of fears those pirates might seek asylum in the country. And at least some pirates have actually threatened to seek asylum in the West. Reports indicate that two of the pirates on trial for attacking a Dutch vessel have declared their intention to try to stay on as residents. Nevertheless, although the threat of asylum claims is frequently offered to explain Western nations’ reluctance to prosecute pirates in their territories, what is not addressed is whether this fear has any actual basis in fact or law. Instead, the statement that nations are afraid of asylum claims is followed by little explanation at all—and certainly no legal analysis of the international or domestic laws on which convicted pirates would base their claims for asylum. In any event, even if the fear of asylum claims is well-founded, is this a reason to allow Western nations to avoid their duty to prosecute crimes that violate international law? Although some pirates are being prosecuted, why should others get away with murder solely because Western nations fear asylum claims? This Article is concerned with these issues and examines international refugee law and international human rights law in an effort to determine the likely viability of any asylum claims that may be brought by pirates convicted in the West. Based on an analysis of the text of the main international treaties governing asylum and non-refoulement, as well as interpretations of the provisions contained in those treaties, this Article concludes there is little reason to believe that Western states would be required to grant refugee status (as that term is defined in the 1951 Convention Relating to the Status of Refugees) to convicted pirates. Among other things, pirates are not a group that is subject to persecution, and pirates have committed the types of serious and violent crimes that should exclude them from claiming refugee status—and thus, the residence and other benefits associated with being granted asylum. Second, states should be able to legally expel or deport convicted pirates under international human rights treaties since most pirates are likely unable to show they would face torture if expelled or returned to their country of origin. Even if pirates could show they risk torture or other inhumane treatment upon return, states may be able to satisfy their international obligations regarding non-refoulement and return pirates if the state receives diplomatic assurances that the authorities would not resort to such treatment. Furthermore, under the recent European Qualitative Directive, European Union Member States are not required to grant benefits such as residence permits to individuals who have committed serious and violent crimes, even though the European Convention on Human Rights prohibits refoulement to face torture or other ill treatment. Finally, even if there is some risk that some pirates can mount successful asylum or non-refoulement claims, the risk is one that developed Western states should assume because of the greater good that will come from ensuring that pirates are brought to justice (especially by way of fair trials and processes that respect human rights).<sup>26</sup> Developed nations risk asylum claims (by pirates and others) simply because they are developed—a status that typically carries with it an expectation that the state will protect human

rights and enforce the rule of law. In this instance, enforcing the rule of law means that nations must invoke universal jurisdiction or use the prohibitions contained in international treaties and in their own domestic laws to prosecute violent and dangerous pirates even if it means they must consider and adjudicate some additional asylum claims. Bringing to justice the pirates that commit violent acts and disrupt international waters is a goal as worthy as numerous others where nations accept the risk of asylum claims, and pirates are unlikely to be deterred from committing those acts unless nations commit to end the current culture of impunity. Part I of this Article describes the modern piracy problem, including the international law governing piracy, and the culture of impunity that surrounds it. Part II provides a brief overview of the international law providing protection for those seeking asylum, focusing on international refugee law as well as the primary treaties under international human rights law that govern the transfer of persons and specifically prohibit transfer to states where those persons would be subjected to torture or ill treatment. Parts III and IV analyze international refugee law and international human rights law in the context of potential claims by convicted pirates seeking asylum and protection against nonrefoulement. The Article concludes by suggesting that although prosecuting pirates may require states to also consider additional asylum claims, the risk that states will have to grant such claims is small and also a burden they should assume so that pirates may be brought to justice.

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PIRATES AND IMPUNITY: IS THE THREAT OF  
ASYLUM CLAIMS A REASON TO ALLOW PIRATES  
TO ESCAPE JUSTICE?

*Yvonne M. Dutton* \*

INTRODUCTION

Pirates are literally getting away with murder. Modern pirates are attacking vessels, hijacking ships at gunpoint, taking hostages, and injuring and killing crew members.<sup>1</sup> They are doing so with increasing frequency. According to the International Maritime Bureau (“IMB”) Piracy Reporting Center’s 2009 Annual Report, there were 406 pirate attacks in 2009<sup>2</sup>—a number that has not been reached since 2003.<sup>3</sup> Yet, in most instances, a culture of impunity reigns whereby nations are not holding pirates accountable for the violent crimes they commit.<sup>4</sup>

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1. See INTERNATIONAL CHAMBER OF COMMERCE INTERNATIONAL MARITIME BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS, ANNUAL REPORT 5–6, 12, 25 (2010) [hereinafter ICC-IMB].

2. *Id.* at 2. For purposes of gathering its statistics, the International Maritime Bureau (“IMB”) reports acts of piracy and armed robbery that it defines as follows: “An act of boarding or attempting to board any ship with the apparent intent to commit theft or any other crime and with the apparent intent or capability to use force in the furtherance of that act.” *Id.* at 3. It is important to note that the IMB tracks only those incidents that are reported. The true number of actual and attempted pirate attacks could be much higher, as it is generally believed that many ship owners do not report attacks for fear their ships will be delayed during an investigation or that their insurance premiums may rise. See JOHN S. BURNETT, DANGEROUS WATERS: MODERN PIRACY AND TERROR ON THE HIGH SEAS 181 (2003); PETER CHALK, THE MARITIME DIMENSION OF INTERNATIONAL SECURITY: TERRORISM, PIRACY, AND CHALLENGES FOR THE UNITED STATES 7 (2008).

3. ICC-IMB, *supra* note 1, at 5–6, 25.

4. See, e.g., INTERNATIONAL EXPERT GROUP ON PIRACY OFF THE SOMALI COAST, PIRACY OFF THE SOMALI COAST: FINAL REPORT 31 (2008) [hereinafter PIRACY OFF THE SOMALI COAST: FINAL REPORT]; Drew H. Pearson, *Can the Somali Pirates Be Stopped?*, 42 SEA CLASSICS 14, 20 (2009); Fernando Peinado Alcaraz, *Chasing Pirates is All Very Well—But Who is Going to Lock Them Up?*, EL PAIS, Aug. 17, 2009, at 4; Mike Corder, *Nations Look*

Only a small portion of those people committing piracy are actually captured and brought to trial, as opposed to captured and released.<sup>5</sup> For example, in September 2008, a Danish warship captured ten Somali pirates, but then later released them on a Somali beach, even though the pirates were found with assault weapons and notes stating how they would split their piracy proceeds with warlords on land.<sup>6</sup> Britain's Royal Navy has been accused of releasing suspected pirates,<sup>7</sup> as have Canadian naval forces.<sup>8</sup> Only very recently, Russia released captured Somali pirates—after a high-seas shootout between Russian marines and pirates that had attacked a tanker carrying twenty-three crew and US\$52 million worth of oil.<sup>9</sup> In May 2010, the United States released ten captured pirates it had been holding for weeks after concluding that its search for a nation to prosecute them was

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to Kenya as Venue for Piracy Trials, SEATTLE TIMES, Apr. 17, 2009, available at [http://seattletimes.nwsourc.com/html/nationworld/2009073898\\_apeu prosecutingpirates.html](http://seattletimes.nwsourc.com/html/nationworld/2009073898_apeu prosecutingpirates.html); Mariama Diallo, *Nations Prove More Willing to Combat Piracy than Prosecuting Pirate Suspects*, VOICE OF AMERICA, June 9, 2010, available at <http://www.voanews.com/english/news/africa/east/Nations-Prove-More-Willing-to-Combat-Piracy-than-Prosecuting-Pirate-Suspects-95861284.html>; Eric Ellen, *Bringing Piracy to Account*, JANE'S NAVY INT'L, Apr. 1997, at 29; John Knott, *United Kingdom: Somalia, the Gulf of Aden, and Piracy: An Overview, and Recent Developments*, MONDAQ, Apr. 15, 2009, available at <http://www.mondaq.com/article.asp?articleid=72910>; Henry Ridgwell, *Alleged Somali Pirates Face Trial in Europe*, VOICE OF AMERICA, June 9, 2010, available at <http://www.voanews.com/english/news/europe/Alleged-Somali-Pirates-Face-Trial-in-Europe-95985709.html>; Craig Whitlock, *Lack of Prosecution Poses Challenge for Foreign Navies Who Catch Somali Pirates*, WASH. POST, May 24, 2010, at A8.

5. See *International Efforts to Combat Maritime Piracy: Hearing Before the H.R. Subcomm. on Int'l Org., Human Rights, and Oversight*, 111th Cong. 4, 6 (2009) (statement of Rear Admiral William Baumgartner) (explaining that most pirates literally “get away” with their illegal conduct and that even when pirates are caught in the act and apprehended, they are more typically released and permitted to continue their illegal activities, rather than being brought to justice).

6. See Paulo Prada & Alex Roth, *On the Lawless Seas, It's Not Easy Putting Somali Pirates in the Dock*, WALL ST. J., Dec. 12, 2008, at A16; see also Jeffrey Gettleman, *Pirates Outmaneuver Warships off Somalia*, N.Y. TIMES, Dec. 16, 2008, at A6 (reporting that both Danish and American navies had been releasing suspected pirates).

7. See Jason Groves, *Navy Gives Somali Pirates Food and Water . . . Then Lets Them Sail off Scot Free*, DAILY MAIL (London), Jan. 28, 2010, available at <http://www.dailymail.co.uk/news/article-1246300/Navy-gives-pirates-food-water-lets-sail-scot-free.html>.

8. See *Canadian Warship Helps Vessel Evade Pirates*, CTV NEWS, May 22, 2009, [http://www.ctv.ca/CTVNews/Canada/20090522/cdn\\_warship\\_090522](http://www.ctv.ca/CTVNews/Canada/20090522/cdn_warship_090522).

9. See Ellen Barry, *Russia Frees Somali Pirates It Had Seized in Shootout*, N.Y. TIMES, May 8, 2010, at A4.

futile.<sup>10</sup> In fact, between March and April 2010, European Union (“EU”) naval forces captured 275 alleged pirates, but only forty face prosecution.<sup>11</sup>

Furthermore, when pirates are tried, they are often tried by Kenya or other African nations, rather than by the capturing nation.<sup>12</sup> Kenya has entered into agreements with Canada, China, Denmark, the European Union, the United Kingdom, and the United States to try the pirates these nations capture.<sup>13</sup> Mauritius, Seychelles, and Tanzania have executed similar agreements to prosecute captured pirates.<sup>14</sup> In an effort to aid prosecutions, Western states have pledged money—about US\$10 million since May 2009<sup>15</sup>—to alleviate the strain on the “poorly equipped and

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10. See Craig Whitlock, *Navy Releases Accused Somali Pirates Held on Warship for Six Weeks*, WASH. POST, May 29, 2010, at A10; see also Michael Scott Moore, *How Do You Prosecute a Pirate?*, MILLER-MCCUNE, Dec. 16, 2009, available at <http://www.miller-mccune.com/politics/how-do-you-prosecute-a-pirate-6181>; *Mayport-Based Destroyer Sinks Pirate Mothership*, FLA. TIMES-UNION, Apr. 3, 2010, at B-5.

11. See Diallo, *supra* note 4.

12. See, e.g., *U.S. Navy Hands over 17 Pirates to Kenya*, REUTERS, June 10, 2009, available at <http://af.reuters.com/article/djiboutiNews/idAFLA105255820090610>.

13. See, e.g., Derek Kilner, *Kenya, US Agree to Deal on Piracy*, NORTH DENVER NEWS, Jan. 27, 2009, available at <http://northdenvernews.com/content/view/1719/2>; Alphonse Shindu, *AG Queried over Kenya's Role on Piracy Cases*, DAILY NATION (Nairobi), Mar. 30, 2010, available at <http://www.nation.co.ke/News/AG%20queried%20over%20Kenya%20role%20in%20piracy%20cases/-/1056/889516/-/196m63/-/index.html>; Claire Wanja, *Kenya-China to Sign MOU on Anti-Piracy*, KENYA BROAD. CORP., Mar. 4, 2009, available at <http://www.kbc.co.ke/news.asp?nid=55949>; see also Council Decision No. 2009/293/CFSP, 2009 O.J. L 79/47, at 47 (concerning the Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer).

14. See Jean Paul Arouff, *Mauritius Says Ready to Try, Imprison Pirates*, REUTERS, June 12, 2010, available at <http://www.reuters.com/article/idUSLDE65B021>; Diallo, *supra* note 4 (stating that Seychelles recently began prosecuting pirates, setting up a special court to hear some thirty-one cases); Daniel Richey, *Mauritius to Try Accused Somali Pirates*, JURIST, June 13, 2010, <http://jurist.org/paperchase/2010/06/mauritius-to-try-accused-somali-pirates.php>; see also Council Decision No. 2009/877/CFSP, 2009 O.J. L 315/35, at 35 (discussing the signing and provisional application of the Exchange of Letters between the European Union and the Republic of Seychelles on the conditions and modalities for the transfer of suspected pirates and armed robbers from EUNAVFOR to the Republic of Seychelles and for their treatment after such transfer); Exchange of Letters between the European Union and the Republic of Seychelles, 2009 O.J. L 315/37.

15. *EU Pledges More Support to Kenya for Piracy Trials*, KENYA BROAD. CORP., July 28, 2010, available at <http://www.kbc.co.ke/news.asp?nid=65581> (noting that Australia, Canada, the European Union, France, Germany, and the United States pledged more

corrupt criminal justice system” and to cover the cost of transporting witnesses, training police and prosecutors, and upgrading prisons and courts.<sup>16</sup> In fact, in late June 2010, the United Nations Office on Drug and Crimes (“UNODC”) used funds from donor nations to help open a new high-security courtroom in Mombasa, Kenya to prosecute pirates.<sup>17</sup>

But why are Western states refusing to prosecute pirates on their own soil even though they—more so than less-developed nations—have the money and institutional capabilities to bring pirates to justice in a swift and fair manner? After all, these states are providing Kenya and other African nations with funds and support to help them conduct piracy trials. They are spending billions to support the various naval patrols that are capturing pirates—but thereafter releasing them to continue their criminal activities.<sup>18</sup> While several reasons have been advanced to explain why nations may not be regularly prosecuting pirates,<sup>19</sup> one

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than US\$10 million to the United Nations Office on Drugs and Crime (“UNODC”) program, which gives aid to other states in East Africa for the prosecution of piracy cases).

16. Tom Maliti, *UN: Donors to Give US\$9.3M on Somali Piracy Cases*, ABC NEWS, June 15, 2010, <http://abcnews.go.com/International/wireStory?id=10916654>.

17. *UN and Kenya Open Courtroom to Prosecute Pirates in Mombasa Port*, WIRE UPDATE NEWS, June 26, 2010, available at <http://wireupdate.com/wires/6943/un-and-kenya-open-courtroom-to-prosecute-pirates-in-mombasa-port>.

18. See, e.g., Antonio Maria Costa, *The War on Piracy Must Start on Land*, INT’L HERALD TRIB., June 9, 2010, at 8 (explaining that one vessel patrolling off the coast of Somalia costs US\$100,000 per day and there are more than forty vessels on patrol, suggesting an annual operational cost of about US\$1.5 billion); David Gauvey Herbert, *Piracy Is Down, and Moving Farther Out*, BURN AFTER READING, Apr. 21, 2010, available at <http://burnafterreading.nationaljournal.com/2010/04/piracy-is-down-and-why-thats-b.php> (noting that EU, NATO, and US naval forces cost just less than US\$1.9 billion per year to support).

19. See, e.g., James Kraska, *Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea*, 28 COMP. STRATEGY 197, 207 (2009) (emphasizing the logistical difficulties associated with prosecuting pirates because the cases involve suspects from one country, witnesses and victims from other countries, and vessels that are registered in or carrying cargo from other countries). The other reasons typically cited to explain why nations are not willing to prosecute pirates do not seem applicable to Western and other developed nations. For example, commentators cite to the lack of institutional capacity to handle the cost and difficulty of piracy claims that may involve victims and witnesses from various states. *Id.* But, while pirate trials are necessarily costly as they involve witnesses and evidence from various countries, these are costs and difficulties that developed nations should be able to handle—even though they may not have the political will to do so. *But c.f.* James Kraska & Brian Wilson, *Combating Pirates of the Gulf of Aden: The Djibouti Code and the Somali Coast Guard*, 52 OCEAN & COASTAL MGMT. 516, 516 (2009) (noting that captured pirates cannot be turned over to local authorities in Somalia because the



reason often given to explain the reluctance of Western nations to try pirates on their own soil is the threat of asylum claims by convicted pirates.<sup>20</sup> This reason has been advanced by academics and government representatives, among others.<sup>21</sup> Roger Middleton, a researcher for Chatham House, the London-based think tank, explained it this way: “These countries don’t want to be bombarded by claims of asylum from the pirates, who would ask not to be deported to Somalia, a country at war.”<sup>22</sup> In fact, in April 2008, the British Foreign Office warned the Royal Navy that detaining pirates at sea could be a violation of their human rights and could also lead to asylum claims by pirates seeking to relocate to Europe.<sup>23</sup> A former Tory chairman stated that ministers in Parliament had indicated privately that the reason captured pirates were not being brought to Britain for trial (including the sixty-six suspected pirates captured by the Royal Navy in 2009—all of whom were thereafter released) was because of fears those pirates might seek asylum in the country.<sup>24</sup> And at least some pirates have actually threatened to seek asylum in the West. Reports indicate that two of the pirates on trial for

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failed state generally has no responsible authorities); DIETER BERG ET AL., KNOWLEDGE SERIES: PIRACY—THREAT AT SEA: A RISK ANALYSIS 29 (2009) (suggesting that many nations close to the territory where acts of piracy are typically committed do not have the security, enforcement, and financial resources to catch and prosecute pirates). In addition, while the absence of national laws criminalizing piracy is also cited to explain the lack of prosecutions, piracy is subject to universal jurisdiction, and most nations are parties to the international treaties criminalizing piracy, which require them to implement national legislation. *See infra* Part I.B. Furthermore, France, Germany, the Netherlands, and the United States have brought charges against several suspected pirates, indicating that at least some developed nations do have the institutional capacity and necessary laws to allow them to prosecute pirates—if they also have the political will. *See infra* note 81.

20. *See* Jean Paul Arouff, *Mauritian Leader Says Country Is Ready to Tackle Piracy*, SUNDAY HERALD (Glasgow), June 13, 2010, at 35; *see also, e.g.*, Mohammed Abbas, *EU Anti-Piracy Force Urges More Prosecutions*, DAILY STAR (Beirut), Apr. 1, 2010, available at [http://www.dailystar.com.lb/article.asp?edition\\_id=10&categ\\_id=2&article\\_id=113367](http://www.dailystar.com.lb/article.asp?edition_id=10&categ_id=2&article_id=113367).

21. For example, at a workshop of international law experts and judges sponsored by the Academic Council on the United Nations System, the American Society of International Law, and the One Earth Future Foundation, many commented that the threat of asylum concerns was a reason why Western states are not eager to prosecute pirates in their territories. *See* ELIZABETH ANDERSEN ET AL., SUPPRESSING MARITIME PIRACY: EXPLORING THE OPTIONS IN INTERNATIONAL LAW 3, 6–8 (2009).

22. *See* Alcaraz, *supra* note 4.

23. *See Africa Politics: Combating Piracy*, VIEWSWIRE, Feb. 13, 2009, available at 2009 WLNR 2884026.

24. *See* Groves, *supra* note 7.

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attacking a Dutch vessel have declared their intention to try to stay on as residents.<sup>25</sup>

Nevertheless, although the threat of asylum claims is frequently offered to explain Western nations' reluctance to prosecute pirates in their territories, what is not addressed is whether this fear has any actual basis in fact or law. Instead, the statement that nations are afraid of asylum claims is followed by little explanation at all—and certainly no legal analysis of the international or domestic laws on which convicted pirates would base their claims for asylum. In any event, even if the fear of asylum claims is well-founded, is this a reason to allow Western nations to avoid their duty to prosecute crimes that violate international law? Although some pirates are being prosecuted, why should others get away with murder solely because Western nations fear asylum claims?

This Article is concerned with these issues and examines international refugee law and international human rights law in an effort to determine the likely viability of any asylum claims that may be brought by pirates convicted in the West. Based on an analysis of the text of the main international treaties governing asylum and *non-refoulement*, as well as interpretations of the provisions contained in those treaties, this Article concludes there is little reason to believe that Western states would be required to grant refugee status (as that term is defined in the 1951 Convention Relating to the Status of Refugees) to convicted pirates. Among other things, pirates are not a group that is subject to persecution, and pirates have committed the types of serious and violent crimes that should exclude them from claiming refugee status—and thus, the residence and other benefits associated with being granted asylum.

Second, states should be able to legally expel or deport convicted pirates under international human rights treaties since most pirates are likely unable to show they would face torture if expelled or returned to their country of origin. Even if pirates could show they risk torture or other inhumane treatment upon return, states may be able to satisfy their international obligations regarding *non-refoulement* and return pirates if the state receives

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25. See Bruno Waterfield, *Somali Pirates Embrace Capture as Route to Europe*, TELEGRAPH (London), May 19, 2009, <http://www.telegraph.co.uk/news/worldnews/piracy/5350183/Somali-pirates-embrace-capture-as-route-to-Europe.html>.

diplomatic assurances that the authorities would not resort to such treatment. Furthermore, under the recent European Qualitative Directive, European Union Member States are not required to grant benefits such as residence permits to individuals who have committed serious and violent crimes, even though the European Convention on Human Rights prohibits *refoulement* to face torture or other ill treatment.

Finally, even if there is some risk that some pirates can mount successful asylum or *non-refoulement* claims, the risk is one that developed Western states should assume because of the greater good that will come from ensuring that pirates are brought to justice (especially by way of fair trials and processes that respect human rights).<sup>26</sup> Developed nations risk asylum claims (by pirates and others) simply because they are developed—a status that typically carries with it an expectation that the state will protect human rights and enforce the rule of law. In this instance, enforcing the rule of law means that nations must invoke universal jurisdiction or use the prohibitions contained in international treaties and in their own domestic laws to prosecute violent and dangerous pirates even if it means they must consider and adjudicate some additional asylum claims. Bringing to justice the pirates that commit violent acts and disrupt international waters is a goal as worthy as numerous others where nations accept the risk of asylum claims, and pirates are unlikely to be deterred from committing those acts unless nations commit to end the current culture of impunity.

Part I of this Article describes the modern piracy problem, including the international law governing piracy, and the culture of impunity that surrounds it. Part II provides a brief overview of the international law providing protection for those seeking

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26. See Yvonne M. Dutton, *Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court*, 11 *CHI. J. INT'L L.* 197, 201–02 (2010). Prosecuting pirates in national courts is necessary even if piracy is included within the jurisdiction of the International Criminal Court (“ICC”). The ICC relies on a system of complementarity and expects that state parties will prosecute in their courts serious crimes of concern to the international community. Including piracy within the jurisdiction of the ICC will simply provide another avenue to prosecute captured pirates, particularly in those instances where only a failed state such as Somalia (without resources or judicial capacity) otherwise has the best case for jurisdiction over the offense. If piracy is not included within the ICC or some other international tribunal, it is even more important that developed nations accept the burdens associated with prosecuting captured pirates in their domestic courts. *See id.* at 235–36.

asylum, focusing on international refugee law as well as the primary treaties under international human rights law that govern the transfer of persons and specifically prohibit transfer to states where those persons would be subjected to torture or ill treatment. Parts III and IV analyze international refugee law and international human rights law in the context of potential claims by convicted pirates seeking asylum and protection against *non-refoulement*. The Article concludes by suggesting that although prosecuting pirates may require states to also consider additional asylum claims, the risk that states will have to grant such claims is small and also a burden they should assume so that pirates may be brought to justice.

## I. THE PIRACY PROBLEM

### A. Modern Piracy: An Ever-Increasing Threat

Although some might think piracy is the stuff of history and legend, piracy is actually a modern and ever-increasing threat to the international community. According to the IMB, between January 2005 and December 2009, there were 1477 pirate attacks worldwide.<sup>27</sup> Furthermore, the number of reported pirate attacks in 2009 alone exceeded by at least twenty-five percent the total number of such attacks in each of the prior four years.<sup>28</sup> These attacks were not without victims: in 2009, pirates boarded approximately 153 vessels, hijacked 49 ships, and took 1052 crew members hostage.<sup>29</sup> Sixty-eight of those crew members were injured in those incidents, and eight were killed.<sup>30</sup> Although the highest number of pirate attacks in 2009 occurred off the Gulf of Aden and the coast of Somalia, significant numbers of attacks also occurred in the waters off of Bangladesh, India, Indonesia, Malaysia, Nigeria, and Peru.<sup>31</sup> Victims of the attacks include flag states, ship owners, crew members, and cargo from all over the globe.<sup>32</sup>

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27. ICC-IMB, *supra* note 1, at 5–6. This amounts to almost one attack every day some place in the world.

28. *Id.* at 5–6.

29. *Id.* at 25.

30. *Id.*

31. *Id.* at 5–6.

32. See *Piracy on the High Seas: Protecting Our Ships, Crews and Passengers: Hearing Before the S. Comm. on Commerce, Sci., and Transp. and Subcomm. on Surface Transp. and*

The breadth and availability of equipment and technology has further increased the threat associated with piracy today. The use of guns in pirate attacks has more than tripled since 2007.<sup>33</sup> Somali pirates use automatic weapons and rocket propelled grenades to board and hijack vessels where they take crew hostage and demand ransom payments.<sup>34</sup> Pirates attacking off the coast of Nigeria are reported to be armed with knives and automatic weapons, which they often use against crewmembers during attacks.<sup>35</sup> In addition, pirates now operate from high-speed maneuverable skiffs that are supported by “mother ships,” enabling them to launch attacks from a distance of up to 1000 nautical miles.<sup>36</sup> In many cases, they are armed with satellite phones and GPS systems that allow them to track ships to target for attack.<sup>37</sup>

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*Merch. Marine Infrastructure, Safety, and Sec.*, 111th Cong. 2 (2009) (statement of Brian Salerno, Assistant Commandant for Marine Safety, Security, and Stewardship, US Coast Guard) [hereinafter Statement of Salerno] (“[A] single piratical attack affects the interests of numerous countries, including the flag State of the vessel, various States of nationality of the seafarers taken hostage, regional coastal States, owners’ States, and cargo shipment and transshipment States.”); ICC-IMB, *supra* note 1, at 5–6.

33. See ICC-IMB, *supra* note 1, at 12.

34. See *id.* at 22.

35. See *id.* at 25, 40.

36. See, e.g., *id.* at 23 (reporting that some attacks off the coast of Somalia had occurred at distances of approximately 1000 nautical miles from Mogadishu); PIRACY OFF THE SOMALI COAST: FINAL REPORT, *supra* note 4, at 18 (noting that pirate skiffs now operate with as many as two 150 horsepower outboard motors attached); ROGER MIDDLETON, PIRACY IN SOMALIA: THREATENING GLOBAL TRADE, FEEDING LOCAL WARS 4 (2008) (noting that Somali pirates now use mother ships to increase the range from which they can launch attacks); *Worldwide Hijackings Fall but Pirates Expand Area of Operation*, DAILY NEWS (Colombo), May 6, 2010, <http://www.dailynews.lk/2010/05/06/bus60.asp> (stating that pirate attacks had occurred some 1000 nautical miles off the Somali coast); see also Thean Potgieter, *The Lack of Maritime Security in the Horn of Africa Region: Scope and Effect*, 31 STRATEGIC REV. S. AFR. 65 (2009). In fact, on November 15, 2008, Somali pirates captured the *Sirius Star*, a supertanker carrying more than two million barrels of oil destined for the United States, some 450 nautical miles southeast of Kenya. This capture alerted the world to pirates’ ability to extend their reach well beyond the coastlines by using mother ships from which faster, smaller skiffs loaded with outboard motors can be launched. *Id.*

37. See PIRACY OFF THE SOMALI COAST: FINAL REPORT, *supra* note 4, at 17–18 (noting that pirates are equipped with sophisticated technology that they obtain using their ransom profits); *Piracy Hit All-Time High in 2009, Says Report*, DAILY NATION (Nairobi), Jan. 14, 2010, <http://www.nation.co.ke/News/-/1056/842406/-/vpb4gn/-/index.html> (explaining that pirates are equipped with automatic weapons, as well as high-tech communication gadgets like laptops, computers, satellite cell phones, and other military hardware).

Furthermore, although some pirates may be simple fisherman, recent reports indicate that attacks are being carried out by well-organized pirate gangs often headed by kingpins or backed by investors and corrupt officials lured by the hefty ransoms that pirates can now demand for the safe release of ships and their crews.<sup>38</sup> Some authorities estimate that ransom payments made to pirates for the safe return of crew totaled more than US\$100 million for the year 2009.<sup>39</sup> Estimates further put the average ransom at between US\$2 million and US\$3 million, with “mere gunmen” in Somalia earning up to US\$15,000 for participating in an attack.<sup>40</sup>

Some pirates have become so wealthy that they can hire others to carry out the attacks: they invest in weapons, boats, and communications equipment, but face little risk of arrest or

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38. See, e.g., ASSEMBLY OF THE WESTERN EUROPEAN UNION [AWEU], REPORT: THE ROLE OF THE EUROPEAN UNION IN COMBATING PIRACY, at 6, WEU Doc. A/2037 (June 4, 2009) (suggesting that piracy today is more like organized crime with many competing pirate gangs, and with profits shared according to fixed rules whereby thirty percent goes to investors, fifty percent to the attackers, and five percent to families of deceased or captured pirates); Kraska, *supra* note 19, at 199 (stating that organized crime kingpins who live in Puntland or Mombassa, Kenya are the recipients of most of the ransom monies collected by Somali pirates); Potgieter, *supra* note 36 (stating that modern pirates are often organized along military lines, and that one of the most prominent groups is the Somali Marines, an organization with between seventy-five and 100 members); Scott Baldauf, *Pirates, Inc.: Inside the Booming Somali Business*, CHRISTIAN SCI. MONITOR, May 31, 2009, at 6 (reporting that modern pirates are backed by a network of investors and corrupt officials who purchase equipment for them, assist in choosing targets based on the Lloyd's of London list of insured ships, and thereafter pay themselves by underground money transfers); Michael G. Frodl, *Somali Piracy Tactics Evolve; Threats Could Expand Globally*, NAT'L DEF. MAG., Apr. 10, 2010, <http://www.nationaldefensemagazine.org/archive/2010/April/Pages/SomaliPiracyTacticsEvolve.aspx> (reporting that pirates are funded not just by ransoms and local investor money, but also by the flow of capital from foreign criminal gangs).

39. See, e.g., Costa, *supra* note 18, at 8. For examples relating to individual ransom payments, see REPORT: THE ROLE OF THE EUROPEAN UNION IN COMBATING PIRACY, *supra* note 38, at 4 (pirates received US\$3.2 million for the release of the Ukrainian ship *Faina* after five months and received US\$3 million for the release of the *Sirius Star* after two months); Mohamed Ahmed & Abdi Guled, *Ransom Paid for Oil Tanker, Somalia Pirates Feud*, REUTERS, Jan. 17, 2010, available at <http://www.reuters.com/article/idUSTRE60G1J420100117> (pirates received ransom of approximately US\$5.5 million in January 2010 for the release of a Greek-flagged tanker); Tsvetelia Tsoleva, *Somali Pirates Free UK-Flagged Ship after Ransom*, REUTERS, June 11, 2010, available at <http://www.reuters.com/article/idUSTRE65A59V20100611> (in June 2010, US\$5.8 million was paid to pirates for the release of a UK-flagged ship).

40. See Baldauf, *supra* note 38; see also PIRACY OFF THE SOMALI COAST: FINAL REPORT, *supra* note 4, at 17 (stating that an armed pirate can earn between US\$6000 and US\$10,000 for a single hijacking yielding a ransom of about US\$1 million).

prosecution because they never board ships.<sup>41</sup> In fact, one report indicates that pirates in Somalia have organized an exchange market where local financiers can find pirate gangs to underwrite.<sup>42</sup> One wealthy former pirate told the reporter that the exchange now hosted some seventy-two “maritime companies,” ten of which had mounted successful hijackings in only a four-month period.<sup>43</sup>

### B. *The International Law Governing Maritime Piracy*

Pirates need not go unpunished for their criminal conduct inasmuch as international law provides many legal tools for prosecuting pirates. Under customary international law, piracy is the oldest crime to which universal jurisdiction<sup>44</sup> applies.<sup>45</sup> For

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41. See, e.g., REPORT: THE ROLE OF THE EUROPEAN UNION IN COMBATING PIRACY, *supra* note 38, at 9; Uma Shankari, *Follow the Money Trail to Reduce Piracy: Official Pirate Backers, Such as Organised Crime Groups, Get Bulk of Ransom Money*, SHIPPING TIMES (Singapore), Oct. 15, 2009, available at 2009 WLNR 20297638 (suggesting that piracy is a form of organized crime and that the backers of the piracy are organized crime groups who get the bulk of the ransom money).

42. See Mohamed Ahmed, *Pirate Stock Exchange Helps Fund Hijackings*, FIN. POST (Ontario), Nov. 30, 2009, <http://www.financialpost.com/news-sectors/story.html?id=2289558> (outlining the pirate stock market in Somalia and explaining how an increase in shareholders increases the money available to fund pirates' operations, which subsequently increases the ransom monies gained); see also Michael Scott Moore, *The Pirate Stock Market*, MILLER-MCCUNE, Dec. 9, 2009, <http://www.miller-mccune.com/politics/the-pirate-stock-market-5935>.

43. See Ahmed, *supra* note 42.

44. In 2000, a group of scholars and jurists met at Princeton University to examine the doctrine of universal jurisdiction. In the document resulting from that meeting, *The Princeton Principles on Universal Jurisdiction*, universal jurisdiction was defined as “criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.” PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 28 (2001).

45. See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820) (“The common law, too, recognises and punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations (which is part of the common law) as an offence against the universal law of society, a pirate being deemed an enemy of the human race.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 404, 423 (1987) (stating that piracy is one of the offenses that the United States and other states may define and adjudicate according to the universality principle); 4 WILLIAM BLACKSTONE, COMMENTARIES 72 (9th ed. 1783) (stating that piracy is a violation of the law of nations and that “every community” has a right to punish pirates); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT’L L. 81, 110–11 (2001) (“[U]niversal jurisdiction to prevent and suppress piracy has been widely recognized in

centuries, nations have deemed pirates to be *hostis humani generis* (enemies of all mankind), such that any nation may use its own domestic laws to try and to punish those committing piracy, regardless of the pirates' nationalities or where the piratical acts took place.<sup>46</sup> It is the general heinousness of piratical acts and the fact that they are directed against ships and persons of many nationalities that warrants universal jurisdiction.<sup>47</sup> In addition to universal jurisdiction, two international treaties provide the jurisdictional bases for nations to prosecute piracy domestically. The first is the United Nations Convention on the Law of the Sea ("UNCLOS"), which specifically defines the crime of piracy.<sup>48</sup> The second is the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation ("SUA Convention").<sup>49</sup> Drafted in response to the *Achille Lauro* incident when Palestinian terrorists hijacked an Italian cruise liner, the SUA Convention covers ship hijackings.<sup>50</sup> Some 161 states are parties to UNCLOS,<sup>51</sup> and 156 are parties to the SUA Convention.<sup>52</sup>

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customary international law as the international crime *par excellence* to which universality applies."); Edwin D. Dickinson, *Is the Crime of Piracy Obsolete?*, 38 HARV. L. REV. 334, 335–39 (1925) (suggesting pirates as enemies of all mankind were subject to universal jurisdiction since the early seventeenth century).

46. See 3 EDWARD COKE, INSTITUTES ON THE LAWS OF ENGLAND 113 (1797); Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 791 (1988).

47. See, e.g., Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L L.J. 53, 60 (1981) (explaining that piracy was subject to universal jurisdiction because of its heinousness); Randall, *supra* note 46, at 793–94 (suggesting that the most accurate rationale for providing universal jurisdiction over piracy relies on the wicked and heinous nature of piracy offenses which involve violence and depredation and the fact that piracy is directed against ships of all nations); see also Statement of Salerno, *supra* note 32 ("Maritime piracy is a universal crime under international law because it places the lives of seafarers in jeopardy and affects the shared economic interests of all nations.").

48. United Nations Convention on the Law of the Sea, arts. 100–08, 110, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

49. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10, 1988, 1678 U.N.T.S. 221, 27 I.L.M. 668 [hereinafter SUA Convention].

50. See, e.g., REPORT: THE ROLE OF THE EUROPEAN UNION IN COMBATING PIRACY, *supra* note 38, at 12; Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 270–72 (1988).

51. For a list of state ratifications, see U.N. Div. for Ocean Affairs & the Law of the Sea, Chronological List of Ratifications to the Convention on the Law of the Sea, [http://www.un.org/Depts/los/reference\\_files/chronological\\_lists\\_of\\_ratifications.htm](http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm)



Article 105 of UNCLOS codifies piracy's status as a crime subject to universal jurisdiction and provides that any state may seize pirate ships and arrest and prosecute pirates.<sup>53</sup> In addition, under Article 100, states are actually required to cooperate in the repression of piracy to the fullest possible extent,<sup>54</sup> a mandate that suggests that states should make some efforts to assist in the arrest and prosecution of pirates. Regarding the acts over which states would have jurisdiction, UNCLOS defines piracy as:

any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).<sup>55</sup>

Under Article 103, a ship is a pirate ship "if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to Article 101."<sup>56</sup>

In sum, UNCLOS provides a definition of the crime of piracy that is broad enough to cover many acts of modern piracy.<sup>57</sup> In

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(last updated Nov. 15, 2010). Notably, although the United States is not a party to UNCLOS, it did ratify an earlier version of the treaty with identical provisions regarding piracy. *See* Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

52. *See Status of Conventions*, INT'L MAR. ORG., <http://www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx> (last visited Dec. 1, 2010).

53. UNCLOS, *supra* note 48, art. 105.

54. *Id.* art. 100 ("All states shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.").

55. *Id.* art. 101.

56. *Id.* art. 103.

57. Although UNCLOS does contain a broad definition of the crime of piracy, commentators have noted that it may not be able to cover all acts that are presently understood or reported as pirate attacks. For example, under Article 101 of UNCLOS, the definition of piracy includes only those acts that occur on the high seas or outside

addition, the vast majority of nations are party to UNCLOS, and it even contains a provision that, at least in theory, requires nations to prosecute piratical acts.<sup>58</sup>

Under the SUA Convention, a prohibited offense is committed by anyone who (1) “seizes or exercises control over a ship by force or threat thereof or any other form of intimidation,”<sup>59</sup> (2) “performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship,”<sup>60</sup> or (3) attempts to do any of the above.<sup>61</sup> In contrast to UNCLOS, this convention applies to offenses committed even in territorial or archipelagic waters or in port, as long as the ship is scheduled for international navigation.<sup>62</sup> In terms of jurisdiction, any signatory state may prosecute violations of the SUA Convention provided that the offense (1) was against a ship flying its flag, (2) occurred in its territory, (3) was committed by a national of the state, or (4) had a national of the state as a victim.<sup>63</sup> Furthermore, the convention requires the signatory state in whose territory an offender is found to either extradite or prosecute.<sup>64</sup> Accordingly, the SUA Convention, unlike UNCLOS, does appear to cover pirate attacks that occur while ships are in territorial waters.<sup>65</sup> And although only signatory states with a nexus to the offense are entitled to prosecute,<sup>66</sup> 156 states are party to the convention. Furthermore, as noted above, there are four different ways in which signatories may assert the

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the territory of any state. Thus, where acts of piracy occur in territorial waters and ports, UNCLOS is not applicable. In such cases, only the nation in whose territory the acts occurred has jurisdiction to prosecute using UNCLOS. Other nations would have to use other legal tools, such as universal jurisdiction or the SUA Convention, discussed below, in order to prosecute acts of piracy that occurred in the territorial waters of another state. *See id.* art. 101.

58. *Id.* art. 100.

59. SUA Convention, *supra* note 49, art. 3(1)(a).

60. *Id.* art. 3(1)(b).

61. *Id.* art. 3(2)(a).

62. *Id.* art. 4.

63. *Id.* art. 6.

64. *Id.* arts. 7, 10.

65. *Id.* art. 3. However, the SUA Convention also may not cover attacks occurring solely while a ship is docked at shore given the treaty’s requirement that the attack “is likely to endanger the safe navigation of the ship.” *Id.* art. 3(1)(b).

66. *See id.* art. 6.

necessary nexus to the offense allowing them to prosecute offenders on their soil.<sup>67</sup>

C. *The Culture of Impunity: Nations' Reluctance to Prosecute Pirates*

The international community has demonstrated its concern over the severity of the problems associated with modern piracy in a number of ways. Naval patrols incorporating a host of different nations have formed and now roam pirate-infested waters in an effort to disrupt pirate attacks.<sup>68</sup> The United Nations Security Council has also taken unprecedented steps in an effort to repress piracy occurring off the coast of Somalia. By a series of resolutions adopted during 2008, the Security Council not only authorized coalition navies to enter the territorial waters of Somalia and use “all necessary means to repress acts of piracy and armed robbery,” but also authorized states to use land-based operations in Somalia to fight piracy.<sup>69</sup> Indeed, by Resolution 1851, for a period of one year, “[s]tates and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia” were permitted to take “all necessary measures that are appropriate in Somalia . . . to bring to justice those who are using Somali territory to plan, facilitate or undertake acts of piracy and armed robbery at sea.”<sup>70</sup> That resolution received unanimous support from member

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67. *See id.*

68. *See, e.g.*, REPORT: THE ROLE OF THE EUROPEAN UNION IN COMBATING PIRACY, *supra* note 38, at 8–9 (noting that in November 2007, countries, including Canada, Denmark, France, and the Netherlands, began providing naval escorts for World Food Program ships and that various multinational naval operations have cooperated to conduct counter-piracy operations thereafter); U.N. Secretary-General, *Report of the Secretary-General Pursuant to Security Council Resolution 1846 (2008)*, ¶ 30, U.N. Doc. S/2009/146 (Mar. 16, 2009) (noting that beginning in late 2008, a multinational naval force comprised of some fifteen states (CTF-150) started conducting counter-piracy operations around the Arabian Sea, the Gulf of Aden, and the Indian Ocean). The European Union has also launched its own counter-piracy operation off the coast of Somalia using frigates and naval patrol aircraft. *See* REPORT: THE ROLE OF THE EUROPEAN UNION IN COMBATING PIRACY, *supra* note 38, at 9. In addition, China, India, and Russia have coordinated their actions with other forces. *See id.*

69. *See* S.C. Res. 1816, ¶ 7(b), U.N. Doc. S/RES/1816 (June 2, 2008); S.C. Res. 1851, ¶ 7, U.N. Doc. S/RES/1851 (Dec. 16, 2008).

70. S.C. Res. 1851, *supra* note 69, ¶¶ 6–7.

states, who stressed the many negative consequences resulting from the acts of piracy off of Somalia's coast.<sup>71</sup>

In addition, international and regional groups have been formed to address the problem of piracy and to study ways to repress it. The United States, for instance, created an International Contact Group on Piracy off the Coast of Somalia ("Contact Group").<sup>72</sup> As of June 2010, some fifty nations were members of the Contact Group, which has working groups to focus on a variety of counter-piracy efforts.<sup>73</sup> Nations in the areas closest to important shipping lanes have also been coordinating separately to address the problem of piracy. In January 2009, seventeen states from the areas surrounding the Western Indian Ocean, the Gulf of Aden, and the Red Sea met in Djibouti and adopted a Code of Conduct concerning the repression of piracy ("Djibouti Code").<sup>74</sup> The Djibouti Code covers, among other things, the possibilities of shared naval and air patrols, as well as the use of piracy information exchange centers in Kenya, Tanzania, and Yemen.<sup>75</sup> Saudi Arabia recently signed the Djibouti Code, becoming the thirteenth state to sign the code of conduct.<sup>76</sup>

However, despite all this cooperation and the monies spent on patrols (which some estimates suggest total well over US\$1

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71. Press Release, Security Council, Security Council Authorizes States to Use Land-Based Operations in Somalia, as Part of Fight against Piracy off Coast, Unanimously Adopting 1851, U.N. Press Release SC/9541 (Dec. 16, 2008).

72. See Statement of Salerno, *supra* note 32, at 7.

73. See Press Release, U.S. Dep't of State, Contact Group on Piracy off the Coast of Somalia Marks First Anniversary (Jan. 26, 2010), available at <http://www.state.gov/r/pa/prs/ps/2010/01/135862.htm>. The working groups are (1) military coordination and information sharing, (2) judicial aspects of piracy, (3) shipping self-awareness, and (4) improvement of diplomatic and public information aspects of piracy. *Id.*

74. See, e.g., *High-Level Meeting in Djibouti Adopts a Code of Conduct to Repress Acts of Piracy and Armed Robbery against Ships*, INT'L MAR. ORG., Jan. 30, 2009, available at [http://www.imo.org/About/mainframe.asp?topic\\_id=10933](http://www.imo.org/About/mainframe.asp?topic_id=10933); *IMO Djibouti Meeting Agrees Antipiracy Measures*, MARINE LOG, Jan. 30, 2009, available at [www.marinelog.com/DOCS/NEWSMIX/2009jan00302.html](http://www.marinelog.com/DOCS/NEWSMIX/2009jan00302.html); *Nine Countries Sign Deal to Fight Somali Piracy*, ALARABIYA.NET (Dubai), Jan. 29, 2009, available at <http://www.alarabiya.net/articles/2009/01/29/65299.html>; International Maritime Organization [IMO], *Protection of Vital Shipping Lanes: Sub-Regional Meeting to Conclude Agreements on Maritime Security, Piracy, and Armed Robbery against Ships for States from the Gulf of Aden, Red Sea Areas, and Western Indian Ocean*, at 5, IMO Doc. C/102/14 (Apr. 3, 2009).

75. See IMO, *supra* note 74, ¶ 10.

76. See *Saudi Arabia Signs Djibouti Anti-Piracy Code*, MAR. EXEC., Mar. 11, 2010, available at <http://www.maritime-executive.com/article/saudi-arabia-signs-djibouti-anti-piracy-code>.

billion annually),<sup>77</sup> pirate attacks are on the rise.<sup>78</sup> Pirates are not being deterred from their criminal activities, a fact which is unsurprising if one considers that the majority of pirates are not prosecuted even after being captured while committing acts of piracy.<sup>79</sup> Although pirates could be prosecuted using universal jurisdiction or under UNCLOS or the SUA Convention,<sup>80</sup> a culture of impunity reigns<sup>81</sup> whereby the majority of captured pirates are returned to their skiffs or dropped on shore.<sup>82</sup> States have apparently used universal jurisdiction as a basis for prosecuting acts of piracy only in very few instances.<sup>83</sup> States have used UNCLOS and the SUA Convention provisions even more rarely.<sup>84</sup> Many have not even implemented domestic legislation

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77. See *Costa*, *supra* note 18 and accompanying text.

78. See *supra* notes 27–28 and accompanying text.

79. See *supra* notes 5–12 and accompanying text.

80. Indeed, as noted above, both UNLCOS and the SUA Convention contain provisions which purport to obligate states to cooperate in bringing pirates to justice. See SUA Convention, *supra* note 49, arts. 7, 10; UNLCOS, *supra* note 48, art. 100.

81. Some nations are prosecuting pirates, but the prosecutions are few when compared to the number of pirates (including those who finance and plan the attacks) who must have participated in several hundred attacks that have occurred in each of the last several years. For example, the Netherlands prosecuted five Somali pirates who attacked a Dutch Antilles-flagged ship. In June 2010, those five were found guilty of sea robbery. See Toby Sterling, *Dutch Court Sentences 5 Somali Pirates to 5 Years*, WASH. TIMES, June 17, 2010, <http://www.washingtontimes.com/news/2010/jun/17/dutch-court-sentences-5-somali-pirates-5-years>. France is prosecuting several more piracy suspects. See Corder, *supra* note 4. The first pirate prosecuted by the United States in more than a century pled guilty in May 2010 to participating in hijacking the *Maersk Alabama* and holding its American captain hostage off the coast of Somalia during April 2009. See, e.g., Patricia Hurtado & David Glovin, *Somali Man Pleads Guilty in U.S. to Hijacking Ship*, BLOOMBERG BUSINESSWEEK, May 19, 2010, available at <http://www.businessweek.com/news/2010-05-19/somali-man-pleads-guilty-in-u-s-to-hijacking-ship-off-africa.html>; Ed Pilkington, *Somali Faces First Trial in over a Century in the US for Piracy*, GUARDIAN (London), Apr. 22, 2009, at 15. In July 2010, Seychelles sentenced eleven Somali pirates to ten years in prison for attempting to seize a coastguard boat in September. See *Eleven Somali Pirates Jailed in Seychelles*, RTT NEWS, July 26, 2010, <http://www.rttnews.com/Content/GeneralNews.aspx?Id=1370247&SM=1>.

82. See *supra* notes 5–12 and accompanying text.

83. See Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183, 192 (2004) (citing ALFRED RUBIN, *THE LAW OF PIRACY* 302, 348 n.50 (2d ed. 1998)).

84. See Eugene Kontorovich, "A Guantanamo on the Sea": *The Difficulties of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV. 243, 254 (2010) (stating that the SUA Convention has only been used once—in a case originally brought by the United States in the United States District Court in the District of Hawaii against a cook who commandeered a fishing trawler); Carlo Tiribelli, *Time to Update the 1988 Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 8 OR. REV. INT'L L.

incorporating treaty provisions relating to the repression of piracy—even though they agreed to do so by the treaty terms.<sup>85</sup>

Absent a significant increase in criminal prosecutions, it is unlikely that pirates will be deterred from committing their violent—and lucrative—acts.<sup>86</sup> Indeed, in April 2010, the international community and the Security Council noted that the failure of nations to accept their duty to prosecute and imprison pirates was undermining the international community’s anti-piracy efforts.<sup>87</sup> To address this failure, the Security Council adopted a unanimous resolution calling on all states to criminalize piracy under their national laws and to consider favorably the prosecution of piracy suspects and imprisonment of convicted pirates.<sup>88</sup>

Nations—particularly Western nations—should do just that: arrest, prosecute, and jail pirates. Western nations generally have the expertise, institutions, and funds required to prosecute pirates, and they should not be permitted to assert the fear of asylum claims as a reason for refusing to prosecute captured

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133, 136 (2006) (noting that UNCLOS apparently has only been used once in a case against Greenpeace).

85. See, e.g., AWEU, *supra* note 38, at 13.

86. Deterrence and the prevention of future criminal activity are primary goals of criminal prosecutions—including international criminal prosecutions. For example, the preamble to the Rome Statute creating the International Criminal Court emphasizes the potential deterrent effect of the court, noting that it is being created “to put an end to impunity for the perpetrators of [the covered crimes] and thus to contribute to the prevention of such crimes.” Rome Statute of the International Criminal Court pmbl., ¶ 5, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute]; see M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 410 (2000) (“The pursuit of justice and accountability, it is believed, fulfills fundamental human values, helps achieve peace and reconciliation, and contributes to the prevention and deterrence of future conflicts.”); *c.f.* Michael P. Scharf, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes against Humanity: The Prosecutor v. Dusko Tadic: An Appraisal of the First International War Crimes Tribunal Since Nuremberg*, 60 ALB. L. REV. 861, 869 (1997) (“If people in leadership positions know there’s an international court out there, that there’s an international prosecutor, and that the international community is going to act as an international police force, I just cannot believe that they aren’t going to think twice as to the consequences. Until now, they haven’t had to. There’s been no enforcement mechanism at all.” (quoting Richard Goldstone)).

87. See S.C. Res. 1918, pmbl., U.N. Doc. S/RES/1918 (Apr. 27, 2010); see also Press Release, Security Council, Unanimously Adopting Resolution 1918 (2010), Calls on All States to Criminalize Piracy Under National Laws, U.N. Press Release SC/9913 (Apr. 27, 2010).

88. See *supra* note 87.

pirates on their own soil. Even if there is some risk of asylum claims, that risk is outweighed by the duty to ensure that violent criminals are brought to justice and that future violent acts are deterred. Furthermore, that risk is one that must be assumed if states are to live up to their obligations under international law.<sup>89</sup>

## II. *OVERVIEW OF THE INTERNATIONAL LAW PROVIDING PROTECTION FOR ASYLUM SEEKERS*

Under international law, states are under no obligation to grant asylum<sup>90</sup> to those seeking it.<sup>91</sup> However, where basic human rights would be threatened by returning an individual to his country of origin, a need for international protection may arise.<sup>92</sup> Thus, the right to deny admission to asylum seekers is limited by the principle of *non-refoulement*—a principle that finds expression primarily in refugee law, but also in international human rights law.<sup>93</sup> Under that principle, states have a responsibility to protect individuals from being removed, returned, or transferred to a country where they are at risk of being persecuted or tortured.<sup>94</sup> The *non-refoulement* provisions of particular relevance to the problem of prosecuting pirates are contained in (1) the 1951 Geneva Convention Relating to the Status of Refugees (“Refugee

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89. See generally M. CHERIF BASSIOUNI, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995) (discussing state duties to prosecute international crimes and the legal foundations for such duties under international law).

90. The term “asylum” has no agreed-upon definition in international law. However, it generally refers to the protection of an individual by a state other than the individual’s state of origin or habitual residence from human rights violations or other similar proscribed harms. See CORNELIUS WOLFRAM WOUTERS, *INTERNATIONAL LEGAL STANDARDS FOR THE PROTECTION FROM REFOULEMENT* 23 (2009).

91. See WALTER KALIN & JORG KUNZLI, *THE LAW OF INTERNATIONAL HUMAN RIGHTS PROTECTION* 510 (2009) (noting that Article 14 of the Universal Declaration of Human Rights provides only that individuals have the right “to seek and enjoy in other countries asylum from persecution,” with no corresponding obligation on the part of states to grant that asylum request); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 14 (Dec. 10, 1948).

92. See United Nations High Commissioner for Refugees [UNHCR], *Providing International Protection Including through Complementary Forms of Protection*, UNHCR Doc. EC/55/SC/CRP.16 (June 2, 2005).

93. Aoife Duffy, *Expulsion to Face Torture? Non-Refoulement in International Law*, 20 INT’L J. REFUGEE L. 373, 373–83 (2008); Emanuela-Chiara Gillard, *There’s No Place Like Home: States’ Obligation in Relation to Transfers of Persons*, 90 INT’L REV. RED CROSS 703, 704 (2008).

94. WOUTERS, *supra* note 90, at 24.

Convention”) and the 1967 Protocol Relating to the Status of Refugees (“1967 Protocol”);<sup>95</sup> (2) the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (“CAT”);<sup>96</sup> (3) the International Covenant on Civil and Political Rights (“ICCPR”);<sup>97</sup> and (4) the European Convention for the Protection of Human Rights and Fundamental Freedoms (“ECHR”).<sup>98</sup>

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95. See Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150 [hereinafter Refugee Convention]. The Refugee Convention covers only those persons who have acquired the status of refugees as a result of acts occurring before January 1, 1951. The Protocol Relating to the Status of Refugees is a treaty that incorporates Articles 2 through 34 of the Refugee Convention and covers those who have attained the status of refugees based on acts occurring after January 1, 1951. See The Protocol Relating to the Status of Refugees, art. 1, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter 1967 Protocol]. For a list of states party to the Refugee Convention and the 1967 Protocol, see UNHCR, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol (Oct. 1, 2008), <http://www.unhcr.org/3b73b0d63.pdf>.

96. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]. For a list of states party to CAT, see United Nations Treaty Collection (Feb. 12, 2010), [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en).

97. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]. For a list of states party to the ICCPR, see United Nations Treaty Collection (Feb. 12, 2010), [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

98. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] (as amended by Protocol No. 11 and including Protocols 1, 4, 6, 7, 12, 13, and 14). For a complete full text list of the ECHR, and all Protocols, see COUNCIL OF EUROPE, *Complete List of the Council of Europe's Treaties*, <http://www.conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG> (last visited Dec. 1, 2010). For a list of states party to the ECHR, see COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=&CL=ENG> (last visited Dec. 1, 2010). There are other regional treaties that also address states' *non-refoulement* obligations. See, e.g., Convention Governing Specific Aspects of Refugee Problems in Africa, June 20, 1974, 1001 U.N.T.S. 45 [hereinafter OAU Convention]; American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123 [hereinafter ACHR]; Inter-Am. Ct. H.R., Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Serv.L.V/II.82, doc.6 rev.1 at 25 (1992); African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58. Consideration of these regional treaties, however, is beyond the scope of this Article because it is focused on the obligations of Europe and other Western nations to prosecute pirates notwithstanding potential asylum claims.



A. Non-Refoulement *in the Refugee Context*

The principle against *refoulement* was developed in relation to the protection of refugees and is specifically addressed in the Refugee Convention and the 1967 Protocol. The purpose of the convention is the international protection of fundamental human rights of individuals who are not protected by their own country.<sup>99</sup> According to Article 33(1), “No Contracting State shall expel or return (*‘refouler’*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>100</sup>

The protections against *refoulement* and the other benefits associated with the Refugee Convention<sup>101</sup> apply only to one who satisfies the definition of “refugee” contained in Article 1(A)(2), namely, a person who “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country.”<sup>102</sup>

Even where an individual meets the definition in Article 1(A)(2), however, he or she may still be excluded from the definition of “refugee” for certain other reasons. Specifically, Article 1(F) forbids states from granting refugee status<sup>103</sup> to:

any person with respect to whom there are serious reasons for considering that:

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99. See WOUTERS, *supra* note 90, at 35.

100. Refugee Convention, *supra* note 95, art. 33(1).

101. See *infra* Part. II.A (discussing the benefits associated with being a “refugee” within the meaning of the Refugee Convention are not limited to a prohibition against *refoulement*).

102. Refugee Convention, *supra* note 95, art. 1(A)(2).

103. See James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in the New World Disorder*, 34 CORNELL INT’L L.J. 257, 263 (2001). According to Professors Hathaway and Harvey, Article 1(F) was designed to give legal force to Article 14(2) of the Universal Declaration of Human Rights, which states that the right to asylum “may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.” *Id.* (quoting Universal Declaration of Human Rights, *supra* note 91). They further suggest that Article 1(F) is crafted as a mandatory mechanism of exclusion to reflect the fundamental conviction that certain persons, because of the acts they have committed, are not deserving of international protection. *Id.*

He has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

He has been guilty of acts contrary to the purposes and principles of the United Nations.<sup>104</sup>

Individuals who have committed the criminal acts referenced in Article 1(F) are excluded from the definition of “refugee” under the Refugee Convention and the 1967 Protocol, which means that they are not protected under refugee law from *non-refoulement* and may be returned to their country of origin (although, as noted below, they may be afforded some protection against *refoulement* under international human rights law).<sup>105</sup>

Those who are accorded the status of refugee may also be refused the convention’s protection against *refoulement* under Article 33(2) because they pose a fundamental threat to the country in which they are seeking refuge. The benefit of the *non-refoulement* provision may not “be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.”<sup>106</sup> Therefore, even those who meet the “refugee” definition may still be denied the protections against *refoulement* where there are reasonable grounds to conclude they constitute a future danger to the security of the country in which they are seeking refuge or where their conviction of violent or other serious crimes causes them to be a future danger to the community.<sup>107</sup>

Determinations of refugee status under the Refugee Convention and the 1967 Protocol are left to the state in whose

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104. Refugee Convention, *supra* note 95, art. 1(F).

105. *See infra* Part II.B.

106. Refugee Convention, *supra* note 95, art. 33(2).

107. *See* Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 134–35 (Erika Feller et al. eds., 2003).

territory the refugee applies for refugee status.<sup>108</sup> However, state parties to the Refugee Convention are required to cooperate with the United Nations High Commissioner for Refugees (“UNHCR”) in the implementation and enforcement of the convention.<sup>109</sup> The UNHCR may provide advice and guidelines on the proper interpretation of the convention’s terms.<sup>110</sup> In addition, in 1958, the United Nations Economic and Social Council created the Executive Committee (“ExComm”) to advise the UNHCR in the exercise of its statutory functions.<sup>111</sup> The ExComm adopts Conclusions on International Protection advising states and the UNHCR on the proper interpretation and application of the Refugee Convention.<sup>112</sup> Nevertheless, while both the UNHCR and the ExComm may issue advice and guidance, neither has any specific enforcement power to obligate states to adopt its views.<sup>113</sup> Accordingly, states may vary somewhat in the criteria they apply in determining whether an individual is entitled to refugee status and asylum (and the benefits, such as residency that are associated with that status) or protection from *refoulement*.

In the event the state does determine the individual meets the “refugee” definition and is not otherwise excludable under Article 33(2), the Refugee Convention entitles the individual to certain benefits in addition to protection against *refoulement*. For example, refugees have the right to access courts of the state (Article 16); to seek wage-earning employment, subject to certain limitations (Articles 17–19); to receive elementary education

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108. See GUY S. GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 53–54 (3d ed. 2007).

109. See Refugee Convention, *supra* note 95, pmb., arts. 35–36.

110. See WOUTERS, *supra* note 90, at 40–41; see also UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 (Jan. 1992) [hereinafter UNHCR Refugee Handbook].

111. See WOUTERS, *supra* note 90, at 44.

112. *Id.* at 45. The Executive Committee (“ExComm”) is comprised of a number of states that are members of the United Nations.

113. *Id.* at 40, 45–46. For example, the UNHCR Refugee Handbook is referred to in refugee status proceedings throughout the world, though courts also often note that it is not binding. See GOODWIN-GILL & MCADAM, *supra* note 108, at 54 n.17; see also *Immigration and Naturalization Serv. v. Aguirre-Aguirre*, 526 U.S. 415, 427–28 (1999). Indeed, the United States Supreme Court has stated that although the UNHCR Refugee Handbook “may be a useful interpretive aid . . . it is not binding on the Attorney General, the BIA, or the United States courts.” *Id.*

(Article 22(1)); to obtain certain housing and social welfare rights (Articles 20–21, 23–24); and to obtain travel documents, subject to certain limitations (Article 28). Because these rights are guaranteed by virtue of satisfying the definition of “refugee” under the Refugee Convention, persons meeting the definition also benefit from the ability to have the United Nations High Commissioner for Refugees intervene on their behalf to insist that those rights are observed by state parties.<sup>114</sup>

#### B. Non-Refoulement *in the Human Rights Context*

Those not granted refugee status nor protected against *refoulement* under international refugee law may still benefit from the principle under the “complementary protection” granted by states under international human rights law.<sup>115</sup> The treaties prohibiting *refoulement* most relevant to the potential asylum claims that could be brought by pirates convicted in Western nations are CAT, the ECHR, and the ICCPR.<sup>116</sup> Each prohibits—or has been interpreted to prohibit—returning persons to countries where they would face torture, or in some cases, where they would face cruel, inhuman, or degrading treatment or punishment.<sup>117</sup> Unlike the Refugee Convention, which allows for certain exclusions and exceptions to the prohibition against *refoulement*, the provisions in each of these three human rights treaties is worded in terms that have caused some to conclude

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114. See Refugee Convention, *supra* note 95, art. 35; KALIN & KUNZLI, *supra* note 91, at 513.

115. See Jane McAdam, *Complementary Protection and Beyond: How States Deal with Human Rights Protection 1* (UNHCR: Evaluation and Policy Analysis Unit, Working Paper No. 118, 2005). “Complementary protection” describes the protection granted by states to individuals on the basis of an international need outside the Refugee Convention framework. That protection may be available under a human rights treaty or under more general humanitarian principles, such as where protection is given to those fleeing war and violence. See *id.*; see also Gillard, *supra* note 93, at 727 (noting that even those who fail to receive protection under refugee law may be entitled to “complementary protection” under international human rights law, or under international humanitarian law, if he or she is in a state experiencing armed conflict). The present Article is limited to discussing the claims that captured pirates might assert under international treaties, and accordingly, an analysis of any potential humanitarian claims is beyond its scope.

116. See CAT, *supra* note 96, art. 3(1); ICCPR, *supra* note 97, art. 7; ECHR, *supra* note 98, art. 3.

117. See, e.g., ECHR, *supra* note 98, art. 3.

that they allow no exceptions or derogation.<sup>118</sup> Nevertheless, as described in more detail below, each of the treaties provides somewhat varying levels of protection to applicants—for example, in terms of the type of future potential conduct against which the applicant may be protected and the level of risk the applicant must show in order to receive protection. Moreover, whether the applicant is protected against *refoulement* under these treaties depends not only on whether the country to which the applicant is applying for protection is a party to the treaty, but also how the particular country has interpreted treaty provisions or defined them in its own domestic law.<sup>119</sup> Finally, even if the individual is protected against *refoulement* pursuant to these treaties, neither the treaties themselves—nor the bodies that interpret them—require that the individual be accorded any particular residence or other status in the receiving state.

### C. *The CAT Non-Refoulement Provision*

The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment was adopted by the United Nations General Assembly in December 1984<sup>120</sup> and entered into force in 1987. Article 3 of the treaty prohibits returning an individual to a country where “there are substantial grounds for believing he would be in danger of being subjected to torture.”<sup>121</sup> As the language suggests, *refoulement* is only

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118. See Gillard, *supra* note 93, at 729; see also CAT, *supra* note 96, art. 2(2) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”); Saadi v. Italy, App. No. 37201/06, ¶ 127 (Eur. Ct. H.R. Feb. 28, 2009), <http://www.unhcr.org/refworld/docid/47c6882e.html> (stating that the prohibition against torture or other inhuman or degrading treatment or punishment contained in the ECHR is absolute in nature such that states could not deport individuals who faced such threats even where those individuals were accused of serious crimes and could constitute a threat to national security if not deported).

119. Some scholars have suggested that the principle of *non-refoulement* has become part of established customary international law such that states must comply with the principle even if they are not parties to CAT, the ECHR, the ICCPR, or the Refugee Convention. See, e.g., Guy S. Goodwin-Gill, *Non-refoulement and the New Asylum Seekers*, reprinted in *INTERNATIONAL REFUGEE LAW: A READER* 130 (B.S. Chimni ed., 2000); Lauterpacht & Bethlehem, *supra* note 107, at 140–64. However, other scholars disagree. See, e.g., J.C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 363 (2005). This Article takes no position on the issue.

120. G.A. Res. 39/46, ¶ 2, U.N. Doc. A/RES/39/46 (Dec. 10, 1984).

121. CAT, *supra* note 96, art. 3.

proscribed where there is a risk of torture. An individual's potential exposure to other forms of cruel, inhuman, or degrading treatment or punishment does not give rise to a *non-refoulement* obligation under CAT.<sup>122</sup>

CAT specifically defines torture as:

(a)ny 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 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.<sup>123</sup>

Notably, by the terms of the treaty, for a potential act to constitute "torture," which creates a *non-refoulement* obligation, it must be inflicted by or with the acquiescence of a public official or other person acting in an official capacity. Persons in danger of being subjected to torture by private actors are not protected from *refoulement* under CAT, unless a government official consented or acquiesced to the abuse. According to the drafters, the requirement for state action or acquiescence reflects the expectation that any potential private violence or torture would be addressed via domestic law enforcement mechanisms, meaning that mechanisms for international protection would not be required.<sup>124</sup>

Regarding the risk of torture, the risk must be one that the individual personally faces.<sup>125</sup> It is not enough that the country to which the individual would be returned is one where there exists a consistent pattern of gross, flagrant, or mass violations of

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122. See David Weissbrodt & Isabel Hortreiter, *The Principle of Non-Refoulement: Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties*, 5 BUFF. HUM. RTS. L. REV. 1, 8 (1999).

123. CAT, *supra* note 96, art. 1.

124. J. HERMAN BURGERS & HANS DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK ON THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT* 120 (1988).

125. KALIN & KUNZLI, *supra* note 91, at 493–94.

human rights.<sup>126</sup> Furthermore, the individual must meet the initial burden of showing there are “substantial grounds for believing” he would be in danger of being subjected to torture in the future if *refouled*.<sup>127</sup> The Committee against Torture, whose role it is to supervise compliance with CAT, offers the view that “substantial grounds for believing” suggests a risk of future torture “beyond mere theory or suspicion,” but not at the level of “being highly probable.”<sup>128</sup> However, while the Committee’s views and interpretations<sup>129</sup> of treaty language do provide some guidance to states, its views, and even its decisions in individual cases, are not binding.<sup>130</sup>

Rather, under CAT, states are charged with implementing the terms of Article 3 into their own domestic laws, and the precise terms of various state laws regarding *non-refoulement* to face torture will differ as a result.<sup>131</sup> For example, the United States has expressly stated that it understands the “substantial grounds” language in Article 3 to mean “it is more likely than not” that the individual would be tortured.<sup>132</sup> Canada, on the

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126. See U.N. Comm. against Torture [UNCAT], General Comment No. 1: Implementation of Article 3 of the Convention in the Context of Article 22, ¶¶ 6–7, U.N. Doc. A/53/44 (Nov. 21, 1997) [hereinafter General Comment No. 1]. The Committee against Torture assesses the particular circumstances of each case to determine whether the particular individual risks being subjected to torture. It considers, among other things, whether the state concerned exhibits “a pattern of gross, flagrant or mass violations of human rights.” *Id.* However, even if there are indications that torture is regularly practiced in the state, the individual must still show that he is personally in danger of being tortured. See UNCAT, *Mutombo v. Switzerland*, Commc’n No. 13/1993, ¶ 9.3, U.N. Doc. CAT/C/12/D/13/1993 (Apr. 27, 1994).

127. See General Comment No. 1, *supra* note 126, ¶ 5; WOUTERS, *supra* note 90, at 484–87; Weissbrodt & Hortreiter, *supra* note 122, at 14–15.

128. See General Comment No. 1, *supra* note 126, ¶¶ 6, 7; UNCAT, *R.K. v. Sweden*, Commc’n No. 306/2006, ¶ 8.3, U.N. Doc. CAT/C/40/D/309/2006 (May 19, 2008) (“[T]he Committee has determined that the risk of torture must be foreseeable, real and personal.”).

129. The International Court of Justice has authority to offer binding interpretations of CAT’s provisions, but it has not yet had the opportunity to provide its views. See WOUTERS, *supra* note 90, at 432.

130. See, e.g., CAT, *supra* note 96, art. 22(7); AHCENE BOULESBAA, *THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT* 63 (1999). The Committee itself has noted that its views are only declaratory. UNCAT, *Amei v. Switzerland*, Commc’n No. 34/1995, ¶ 11, U.N. Doc. CAT/C/18/D/34/1995 (May 29, 1997). Therefore, the Committee generally relies on moral persuasion to convince state parties to follow its views and opinions.

131. GOODWIN-GILL & MCADAM, *supra* note 108, at 221, 297.

132. See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—Ratification and Accession of the United States, ¶ 2, Oct.

other hand, has broadened the protection available to individuals under Article 3 and prohibits returning one to a country where he would face cruel, inhuman, or degrading treatment, as opposed to only torture as defined by CAT.<sup>133</sup>

Furthermore, it is the courts of the state party to which individuals facing torture must initially apply for protection against *refoulement*. Individuals may only apply to the Committee against Torture for protection if the state in which they seek to remain is party to Article 22 of CAT,<sup>134</sup> and even then, the individual must have exhausted all potential state avenues for relief.<sup>135</sup> As of June 2010, forty-four states were party to Article 22.<sup>136</sup> As noted above, even if the Committee determines that the individual may not be returned because he faces a substantial danger of being tortured, the Committee has no power to force the state to comply with its decision, though it can, and will, make efforts to persuade the country to adopt its views.<sup>137</sup>

#### D. *The ICCPR Non-Refoulement Provision*

The ICCPR was adopted in 1966 and entered into force in 1976. Together with the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”), and the Universal Declaration of Human Rights, it forms the International Bill of Human Rights.<sup>138</sup> While the ICCPR legally binds states to protect a variety of human rights, it does not specifically contain a *non-*

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21, 1994, 1830 U.N.T.S. 322; *see also* United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declarations and Reservations, <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-9.en.pdf> [hereinafter CAT Declarations and Reservations] (last visited Dec. 1, 2010).

133. Immigration and Refugee Protection Act 2001, S.C. 2001, c. 27, § 97(1) (Can.).

134. *See* CAT, *supra* note 96, art. 22(1). Under Article 22, state parties agree that UNCAT may receive and consider communications from individuals who claim to be a victim of a violation of CAT by a state party—including a violation of the Article 3 prohibition on *refoulement* to face torture.

135. *Id.* art. 22(5) (b).

136. *See generally* CAT Declarations and Reservations, *supra* note 132.

137. *See* WOUTERS, *supra* note 90, at 431; *see also* Weissbrodt & Hortreiter, *supra* note 122, at 17 (stating that the Committee cannot reach binding decisions, but rather reviews petitions and forwards its opinions regarding the merits to the state party and the individual concerned).

138. *See* Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUM. RTS. Q. 703, 705 & n.7, 708 n.24 (1997).



*refoulement* provision. Rather, the duty of states to refrain from returning individuals to states where they would be subjected to torture has been implied by the United Nations Human Rights Committee—the committee responsible for implementation of the ICCPR.<sup>139</sup> That Committee has held that parties to the ICCPR shall not remove a person to another country “where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7” of the treaty.<sup>140</sup> Article 6 protects the right to life, proscribes the arbitrary deprivation of life, and regulates the imposition of the death penalty.<sup>141</sup> Article 7 provides, “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”<sup>142</sup> According to the Committee, states must not expose individuals to any of the dangers listed above by virtue of their extradition, expulsion, or *refoulement*.<sup>143</sup>

The ICCPR itself provides no definition of torture or the other forms of proscribed ill-treatment or punishment. However, at least in some respects, the Human Rights Committee has interpreted the ICCPR’s protections against *refoulement* as being broader than those contained in CAT. By its General Comments, the Committee has stated that Article 7 protects against acts

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139. The ICCPR established the Human Rights Committee pursuant to Article 28. The Committee’s main role is to ensure state accountability through its power to review and comment on reports that states are required to submit under Article 40—reports in which states are to detail the measures they have adopted to give effect to the pronouncements contained in the ICCPR. *See* ICCPR, *supra* note 97, arts. 28, 40.

140. *See* U.N. Human Rights Committee, 80th Sess., General Comment No. 31: Nature of the General Obligation on States Parties to the Covenant, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

141. *See* ICCPR, *supra* note 97, art. 6.

142. *Id.* art. 7.

143. In its General Comment No. 20 on Article 7, the U.N. Human Rights Committee stated that, in its view, “States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.” 44th Sess., General Comment No. 20: Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art. 7), ¶ 9, U.N. Doc. HRI/GEN/I/Rev.1 (Mar. 10, 1992); *see* U.N. Human Rights Committee, General Comment No. 31, *supra* note 140, ¶ 12.

committed by persons acting in their *private* capacity as well as persons acting in an official capacity.<sup>144</sup>

According to the Human Rights Committee, to avoid *refoulement* under the ICCPR, the individual must meet the initial burden of showing “substantial grounds for believing that there is a real risk” of being subjected to torture, or other cruel, inhuman or degrading treatment or punishment.<sup>145</sup> The applicant generally has the burden of initially producing detailed information to support his claim.<sup>146</sup> The state must then assess the claim and submit substantive grounds for its position regarding *refoulement*.<sup>147</sup>

Again, it is the state that has primary responsibility for determining whether individual applicants are entitled to protection against *refoulement* under the ICCPR. Individuals may only bring claims before the Human Rights Committee if the state in which they seek to remain is a party to the Optional Protocol to the ICCPR<sup>148</sup> and if they have exhausted all domestic avenues for relief.<sup>149</sup> As of June 2010, 113 states were party to the ICCPR’s Optional Protocol.<sup>150</sup> To date, however, the Committee has considered only a very few cases involving a claim to be protected against *refoulement* under Article 6 or 7 of the ICCPR.<sup>151</sup> As such, there is little case law to aid in interpreting the exact scope of any *non-refoulement* obligation under the treaty. In fact,

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144. U.N. Human Rights Committee, General Comment No. 20, *supra* note 143, ¶ 2; U.N. Human Rights Committee, General Comment No. 31, *supra* note 140, ¶ 8.

145. *See* U.N. Human Rights Committee, General Comment No. 31, *supra* note 140, ¶ 12.

146. WOUTERS, *supra* note 90, at 396.

147. *Id.* at 396–97.

148. *See* Optional Protocol to the ICCPR art. 1, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 302, 302 (entered into force Mar. 23, 1976).

149. *See id.* art. 2.

150. *See* UNITED NATIONS TREATY COLLECTION (Feb. 12, 2010), <http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-5.en.pdf>.

151. Wouters found that as of August 2008, the Human Rights Committee had only considered the merits of a *refoulement* claim under Article 7 of the ICCPR in eleven cases. Of the eleven cases, five involved extradition. *See* WOUTERS, *supra* note 90, at 367 & n.41. This author’s own research post-August 2008 did not reveal additional Article 6 or 7 cases in the *refoulement* context that addressed the merits of the issue (two cases were deemed inadmissible). *See* UN Human Rights Committee, Wilfred v. Canada, Commc’n No. 1638/2007, U.N. Doc. CCPR/C/94/D/1638/2007 (Nov. 18, 2008); UN Human Rights Committee, Esposito v. Spain, Commc’n No. 1359/2005, U.N. Doc. CCPR/C/89/D/1359/2005 (May 30, 2007).

many of the cases the Committee has considered under Article 6 or 7 concern claims seeking to avoid extradition to face charges that carry a potential death sentence.<sup>152</sup> In any event, even in those cases where the Committee does determine the individual is protected against *refoulement* under the ICCPR, those determinations are not binding on state parties. As with the CAT Committee, the committee overseeing the ICCPR is limited to persuading the state to accept its views.<sup>153</sup> The United States, for example, does not accept the Committee's conclusion that the ICCPR creates a *non-refoulement* obligation. It argues that the text of the ICCPR contains no such prohibition on *refoulement* and has expressly stated that it does not intend to be bound to any *non-refoulement* obligation under the ICCPR.<sup>154</sup> Although the Committee has expressed concern with the United States' refusal to adopt the Committee's interpretation of Articles 6 and 7,<sup>155</sup> the United States still maintains that the ICCPR does not give rise to a *non-refoulement* obligation.<sup>156</sup>

#### E. *The ECHR Non-Refoulement Provision*

The ECHR was adopted in 1950 and entered into force in 1953. All forty-seven member states of the Council of Europe have ratified it.<sup>157</sup> Although it too contains no specific *non-*

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152. See WOUTERS, *supra* note 90, at 391–94.

153. See GOODWIN-GILL & MCADAM, *supra* note 108, at 297. Of course, Wouters makes the point that if a state has committed to the optional procedures for individual complaints, one may expect that the state will honor the views of the Committee and that the Committee's views in individual cases will be instructive. WOUTERS, *supra* note 90, at 366–67.

154. See U.S. DEP'T OF STATE, LIST OF ISSUES TO BE TAKEN UP IN CONNECTION WITH THE CONSIDERATION OF THE SECOND AND THIRD PERIODIC REPORTS OF THE UNITED STATES OF AMERICA (2006).

155. See U.N. Human Rights Committee, 87th Sess., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: United States of America, ¶ 16, U.N. Doc. CCPR/C/USA/CO/3 (Dec. 18, 2006).

156. See U.N. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: United States of America, Addendum: Comments by the Government of the United States of America on the Concluding Observations of the Human Rights Committee, U.N. Doc. CCPR/C/USA/CO/Rev.1/Add.1, 8–10 (Feb. 12, 2008). The United States, however, does acknowledge that it is bound by CAT not to *refoule* persons where the evidence demonstrates “it is more likely than not” that the individual would be tortured. See *id.*

157. See DAVID HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 1–2 (2d ed. 2009).

*refoulement* provision, one has been implied.<sup>158</sup> The European Court of Human Rights is empowered to interpret the convention,<sup>159</sup> and in *Soering v. United Kingdom*, it held that Article 3 of the ECHR<sup>160</sup> prohibits *refoulement* to countries where there are “substantial grounds” to believe that the individual would face a “real risk of . . . torture or to inhuman or degrading treatment or punishment.”<sup>161</sup> Based on Article 3, the court has developed a body of case law that has become a strong safeguard against *refoulement*.<sup>162</sup> For example, the protections of Article 3 cannot be derogated in time of war or other public emergency.<sup>163</sup> Nor can even the highest interests of the public—such as to fight terrorism<sup>164</sup> or to protect national security<sup>165</sup>—justify state actions that would breach Article 3. Furthermore, the protections of Article 3 of the ECHR are available to everyone, regardless of

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158. See, e.g., *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831, 1853; *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 34–35 (1989).

159. See ECHR, *supra* note 98, art. 32(1).

160. “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” *Id.* art. 3.

161. See *Soering*, 161 Eur. Ct. H.R. (ser. A) at 35; see also *Chahal*, 1996-V Eur. Ct. H.R. at 1853.

162. Until the entry into force of the Eleventh Protocol to the ECHR on November 1, 1998, the ECHR provided for a European Commission on Human Rights, which was the initial stage at which individual applications for relief under the Convention were considered. The Commission’s role was to either broker a friendly settlement or to consider the case on the merits and issue a non-binding report. Thereafter, the case would be referred to the Committee of Ministers, the Council of Europe, or the European Court of Human Rights. With the Eleventh Protocol, the Commission was abolished, and presently only the European Court of Human Rights interprets and applies the ECHR. See WOUTERS, *supra* note 90, at 198–99. However, where the Court has not spoken on an issue, some pre-1998 Commission interpretations remain authoritative. See HARRIS ET AL., *supra* note 157, at 17.

163. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 65 (1978).

164. See *Tomasi v. France*, 15 Eur. H.R. Rep. 1, 33 (1992).

165. See *Chahal*, 1996-V Eur. Ct. H.R. at 1855 (holding that the absolute character of Article 3 did not permit deportation to India if there was a real risk of ill-treatment, irrespective of the applicant’s conduct, and notwithstanding that such conduct may pose dangers to the country’s national security). Indeed, the court noted that the protection against *refoulement* under Article 3 is wider than that provided under Article 33 of the Refugee Convention, which contains exceptions. See *id.*; see also *Saadi v. Italy*, No. 37201/66, ¶¶ 138, 141 (Eur. Ct. H.R. Feb. 28, 2008), <http://www.unhcr.org/refworld/docid/47c6882e2.html> (confirming its decision in *Chahal* and holding that potential danger to a state’s national security or community cannot influence a determination under Article 3 as to whether or not the individual would face a real risk of ill-treatment at the country of return).

their character or their past criminal conduct.<sup>166</sup> Moreover, claims that the applicant will be ill-treated by private, as well as public actors, may give rise to a *non-refoulement* obligation under Article 3 if the evidence shows that the state would be unable to protect the applicant from the private actors concerned.<sup>167</sup>

To obtain protection against *refoulement* under Article 3 of the ECHR, the individual must present a credible claim containing sufficient facts and circumstances to show he will be subjected to a real risk of torture or ill-treatment in the country of return.<sup>168</sup> The initial burden of presenting evidence of a “real risk” is on the applicant, after which the state has the burden of assessing the claim and gathering any additional relevant information regarding it.<sup>169</sup> The necessary risk level is “a real, personal, foreseeable or likely risk which goes beyond a mere possibility but does not need to be certain or highly probable.”<sup>170</sup> For a risk to be real and personal, it must relate to the individual; the applicant must show particular circumstances that put him in danger of harm.<sup>171</sup> The general situation in the country of

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166. See KALIN & KUNZLI, *supra* note 91, at 494–95. For example, in *Ahmed v. Austria*, the court held that if the applicant faced a real risk of being subjected to ill-treatment in Somalia, the applicant’s criminal record was not material to the state’s consideration of whether he was entitled to protection under Article 3 of the ECHR. 1996-VI Eur. Ct. H.R. 2195, 2208.

167. See HARRIS ET AL., *supra* note 157, at 88; KALIN & KUNZLI, *supra* note 91, at 495; WOUTERS, *supra* note 90, at 225. In *H.L.R. v. France*, the court stated that it would not rule out the possibility that Article 3 may “also apply where the danger emanates from persons or groups of persons who are not public officials.” However, it noted that the risk must be real and the authorities of the receiving state must not be able “to obviate the risk by providing appropriate protection.” 1997-III Eur. Ct. H.R. 745, 758.

168. The ECHR itself does not define torture nor inhuman or degrading treatment or punishment, but the court has suggested that torture is the most severe form of ill-treatment, and requires an element of intent to cause serious and cruel suffering. See *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 66–67. Degrading treatment or punishment is less severe, but precisely what constitutes such treatment will depend on the facts and circumstances of the case. See WOUTERS, *supra* note 90, at 221–22, 238–40; see also HARRIS ET AL., *supra* note 157, at 70. The possibility of facing socio-economic harms upon return, however, is not the type of ill-treatment against which Article 3 protects. See WOUTERS, *supra* note 90, at 240–41.

169. See WOUTERS, *supra* note 90, at 274.

170. See *id.* at 247. Wouters formulated this risk statement based on the court’s language in several cases: *Cruz Varas v. Sweden*, 201 Eur. Ct. H.R. (ser. A) at 28 (1991); *Vilvarajah v. United Kingdom*, 215 Eur. Ct. H.R. (ser. A) at 36, 37 (1991); and *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 34–35 (1989).

171. For example, in *Vilvarajah*, the court concluded that there was no violation of Article 3 based on returning applicants to Sri Lanka where the evidence did not indicate that the applicants were personally being singled out for ill-treatment, but rather, faced

return—even where massive human rights violations are occurring—does not alone give rise to a claim under Article 3.<sup>172</sup>

As is the case with the other treaties, the state parties have primary responsibility for ensuring that the rights and guarantees of the ECHR are provided to persons within their jurisdiction.<sup>173</sup> Claims alleging breaches of the convention's terms must first be brought before national courts.<sup>174</sup> However, of the treaties discussed, the ECHR provides for significantly more binding oversight of state practices as regards treaty interpretation and enforcement. For example, all state parties to the ECHR are automatically subject to the jurisdiction of the European Court of Human Rights.<sup>175</sup> In addition, both states and individuals are entitled to bring claims alleging breaches of the convention's terms.<sup>176</sup> In particular, pursuant to Article 34, state parties agree that "any person, non-governmental organization or group of individuals," regardless of nationality, may bring an application claiming to be a victim of a breach of the convention.<sup>177</sup> The European Court of Human Rights in Strasbourg<sup>178</sup> has jurisdiction over all such claims as long as all domestic remedies have been exhausted.<sup>179</sup>

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no greater threat of ill-treatment than did all Tamils, given the political situation in Sri Lanka. *Vilvarajah*, 215 Eur. Ct. H.R. (ser. A) at 37.

172. *See id.*; *see also* H.L.R. v. France, 1997-III Eur. Ct. H.R. at 758–59 (holding that deportation to Colombia was not in violation of Article 3 where applicant pointed only to the general situation of violence in Colombia, and did not show other factors indicating that he would be personally targeted for ill-treatment).

173. *See* HARRIS ET AL., *supra* note 157, at 13, 23. Article 1 of the ECHR requires the parties to "secure" the rights of the Convention. ECHR, *supra* note 98, art. 1.

174. *See* ECHR, *supra* note 98, art. 35(1); *see also* HARRIS ET AL., *supra* note 157, at 23. Pursuant to Article 13 of the ECHR, states are required to provide an "effective remedy" under national law for individuals who have arguable claims under the Convention. ECHR, *supra* art. 13.

175. GOODWIN-GILL & MCADAM, *supra* note 108, at 298.

176. *See* ECHR, *supra* note 98, arts. 33–34.

177. The Eleventh Protocol to the ECHR made this obligation to accept individual complaints compulsory as of 1998. *See id.* art. 34.

178. Section II of the ECHR discusses the establishment of the court and the election of judges. ECHR, *supra* note 98, § 2.

179. *See id.* art. 35(1). Although the European Court of Human Rights does have a significant role in enforcing state *non-refoulement* obligations under Article 3, it has not actually issued an enormous number of decisions in that context since 1989—the year it first stated that Article 3 contained a prohibition against *refoulement*. As of August 2008, Wouters found that the court had only delivered a decision on a complaint under Article 3 of the ECHR involving a *refoulement* situation in twenty-nine cases. Of those twenty-nine, nineteen concerned the return of aliens in the asylum context. *See*

Unlike the decisions of the bodies responsible for overseeing the other treaties discussed above, the decisions of the European Court of Human Rights are binding on the parties to the claim.<sup>180</sup> State compliance with the court's judgments is monitored by the Committee of Ministers of the Council of Europe,<sup>181</sup> which is comprised of government representatives of the various member states.<sup>182</sup> However, even if the court determines that *refoulement* is prohibited by Article 3 of the convention, it will not specify what legal status the state should accord the applicant.<sup>183</sup>

### III. ARE PIRATES LIKELY TO SUCCEED IN ESTABLISHING A RIGHT TO ASYLUM AND PROTECTION AGAINST REFOULEMENT UNDER INTERNATIONAL REFUGEE LAW?

#### A. *The Persecution Requirement*

Pirates should not be able to meet the definition of a "refugee" under the Refugee Convention and the 1967 Protocol (nor receive its protections against *refoulement*) because they are likely unable to demonstrate the "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion"<sup>184</sup> that would prevent them from being returned to their country of origin. The evidence relating to pirates indicates that they are anything but a persecuted group; rather they are individuals who hijack ships and hold innocent crew hostage in exchange for ransom payments. Moreover, any convicted pirates would only be in the country in which they were seeking asylum because they were captured committing illegal acts, not because they were fleeing some circumstances that caused them to feel persecuted.<sup>185</sup>

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WOUTERS, *supra* note 90, at 188–89 & nn.7–8. This author's research post-August 2008 revealed only eleven more decisions in the *refoulement* context under Article 3.

180. *See* ECHR, *supra* note 98, art. 46(1).

181. *See id.* art. 46(2).

182. HARRIS ET AL., *supra* note 157, at 5.

183. GOODWIN-GILL & MCADAM, *supra* note 108, at 297.

184. *See* Refugee Convention, *supra* note 95, art. 1(A)(2).

185. In the case of Somalia, the UNHCR has stated that some individuals may qualify for refugee status under the Refugee Convention on the grounds that they fled their country because of the dangers associated with the armed conflict or generalized violence in the country, particularly where the conflict is rooted in religious, ethnic, and political disputes and *where specific groups are being targeted*. *See* UNHCR, Eligibility

Indeed, even if the pirates could argue that they did not want to return to their country of origin because of instability or poor circumstances, this should not be enough to satisfy the “refugee” definition. The UNHCR Refugee Handbook notes that poor conditions in a country alone will not entitle one to international protection as a refugee; the individual must show good reason why he individually fears persecution.<sup>186</sup>

It is true that some Somalis have been able to establish a well-founded fear of persecution or other ill-treatment by demonstrating their membership in a minority clan or tribe that is subjected to persecution because control of the area where they live is in the hands of some other clan or tribe that discriminates—sometimes violently—against them.<sup>187</sup> Even in those circumstances, however, some individuals may be returned to Somalia where there is an internal flight or relocation alternative,<sup>188</sup> namely, to an area of Somalia where the individual would be safe from persecution.<sup>189</sup>

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Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Somalia, 38, U.N. Doc. HCR/EG/SOM/10/1 (May 5, 2010) [hereinafter UNHCR Somalia Eligibility Guidelines]. As noted above, however, this consideration should not be relevant to most pirates since they would not be in the country of refuge to flee Somalia: they would only be in the country of refuge because they were captured committing criminal acts that affect the international community.

186. See UNHCR Refugee Handbook, *supra* note 110, ¶¶ 37–39.

187. See, e.g., *Sheekh v. Netherlands*, App. No. 1948/04, ¶¶ 139–40, 146 (Eur. Ct. H.R. Jan. 11, 2007), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=812685&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (holding that returning a member of the Ashraf minority clan who fled Somalia because of intimidation and assaults by persons in control would constitute a violation of Article 3 of the ECHR since evidence showed he faced real risk of ill-treatment if returned to “relatively safe” areas of Somalia); Refugee Appeal No. 76062 [Oct. 15, 2007] New Zealand Refugee Status Appeals Authority, Auckland, ¶¶ 87–91, available at [http://www.nzrefugeeappeals.govt.nz/PDFs/Ref\\_20071015\\_76062.pdf](http://www.nzrefugeeappeals.govt.nz/PDFs/Ref_20071015_76062.pdf) (holding that the applicant showed a well-founded fear of being persecuted on the basis of race as member of a minority clan, the Bantu Tunni Torre, by members of controlling clans, entitling him to “refugee” status within the meaning of the Refugee Convention).

188. The internal flight or relocation alternative is premised on the idea that some claims of persecution are limited to a specific part of the country (for example, because the locale is controlled by some majority that discriminates against the minority population of which the applicant is a member) and absent in another part. Where an individual can be returned to a part of his country of origin where he will not be subjected to persecution, international protection is unnecessary. See, e.g., UNHCR Somalia Eligibility Guidelines, *supra* note 185, at 33; WOUTERS, *supra* note 90, at 104–05.

189. According to the UNHCR, it may be possible to internally relocate some Somalis to Somaliland or Puntland if, for example, the individual is a member of a



In any event, Somali pirates should not be among the individuals who are able to show persecution because control of an area is in the hands of persons who discriminate against them. Pirates in Somalia are adding to the instability of the country in the hopes of profiting wildly from their illegal activities, and they also tend to control the parts of the country where they operate and live. A recent report of the UNHCR notes that several parts of southern and central Somalia are under pirate control.<sup>190</sup> The Nairobi Report, which was issued by an international expert group on piracy occurring off the Somali coast, states that, as of 2008, the Puntland region of Somalia is an epicenter of piracy and that it operates at all levels of society, including within government.<sup>191</sup> Of course, circumstances may change by the time convicted pirates serve their sentences. But, at present, there is little reason to believe that pirates would be able to demonstrate a well-founded fear of persecution based on their characteristics or beliefs, including their membership in a minority clan or tribe.

#### B. *Article 1(F) Exclusion*

Even if pirates could establish a well-founded fear of persecution, however, they must be excluded from the definition of “refugee” by operation of Article 1(F) because there are “serious reasons for considering” that they have committed the types of non-political crimes that make them undeserving of international protection.<sup>192</sup> Specifically, assuming they have

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majority or minority clan or originates from the area. The existence of armed conflict in southern and central Somalia has caused the UNHCR to conclude that presently there is no available internal flight or relocation alternative in those areas. *See* UNHCR Somalia Eligibility Guidelines, *supra* note 185, at 34–35. However, as of August 2010, and although it is being criticized by human rights organizations and others, the Netherlands has entered into a memorandum of understanding (the terms of which had not been disclosed to the public) with the Transitional Federal Government (“TFG”) of Somalia whereby rejected asylum seekers can be forcibly returned to the area near Mogadishu, which is controlled by the TFG. *See* Marike Peters, *Dutch Deportation of Somalis “a Death Sentence,”* RADIO NETHERLANDS WORLDWIDE, July 22, 2010, available at <http://www.rnw.nl/english/print/144701>; Amnesty International, *Netherlands: Government Must Stop Imminent Deportation of Somalis*, AI Index EUR 35/002/2010 (July 27, 2010).

190. UNHCR Somalia Eligibility Guidelines, *supra* note 185, at 7.

191. PIRACY OFF THE SOMALI COAST: FINAL REPORT, *supra* note 4, at 17.

192. *See* Refugee Convention, *supra* note 95, art. 1(F); *see also* UNHCR Refugee Handbook, *supra* note 110, ¶ 140 (noting that Article 1(F) of the Refugee Convention

committed violent and egregious acts such as murder or hijacking in the course of a pirate attack, pirates would probably meet the Article 1(F)(b) exclusion since they have committed “a serious non-political crime outside the country of refuge” prior to admission to that country of refuge.<sup>193</sup> Although states may differ in how they define “serious crimes,” the UNCHR Refugee Handbook suggests that a “serious crime” is a “capital crime or a very grave punishable act.”<sup>194</sup> Acts like murder and hijacking would meet this definition.<sup>195</sup> Pirates should also be unable to claim their acts were political: acts are non-political where they are committed for personal reasons such as financial gain,<sup>196</sup>

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lists the categories of persons who are not considered deserving of international protection); UNHCR, Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, ¶ 3, U.N. Doc. HCR/GIP/03/05 (Sept. 4, 2003), available at <http://www.unhcr.org/3f7d48514.html> [hereinafter UNHCR Article 1F Exclusion Guidelines]. Article 1(F)(b) implements the language of Article 14(2) of the Universal Declaration of Human Rights, by which the right to asylum “may not be invoked in the case of prosecutions genuinely arising from non-political crimes.” Universal Declaration of Human Rights, *supra* note 91, art. 14(2), at 74.

193. Refugee Convention, *supra* note 95, art. 1(F)(b). Even egregious acts of piracy would not likely meet the Article 1(F)(a) exclusion criteria because the acts prohibited by that section are crimes against peace, war crimes, or crimes against humanity as defined in international instruments. See UNHCR Article 1F Exclusion Guidelines, *supra* note 192, ¶¶ 11–13. Crimes against peace are essentially tantamount to crimes arising from the planning, preparation, or initiation of a war of aggression. See WOUTERS, *supra* note 90, at 122–23 (citing the definition of a “crime against peace” from the 1945 Charter of the International Military Tribunal). War crimes involve attacks committed in times of armed conflict against those not participating or no longer participating in hostilities. See Rome Statute, *supra* note 86, art. 8. Although “crimes against humanity” contemplates egregious crimes, like murder and rape that might be part of a pirate attack, to constitute a crime against humanity, the acts must be committed “as part of a widespread or systematic attack” directed against a civilian population. See *id.* art. 7(1). The UNHCR Article 1F Exclusion Guidelines suggest that an isolated act can “constitute a crime against humanity if it is part of a coherent system or a series of systematic and repeated acts.” UNHCR Article 1F Exclusion Guidelines, *supra* note 192, ¶ 13.

194. UNHCR Refugee Handbook, *supra* note 110, ¶ 155; UNHCR Article 1F Exclusion Guidelines, *supra* note 192, ¶ 14.

195. See, e.g., UNHCR Refugee Handbook, *supra* note 110, ¶ 155; UNHCR Article 1F Exclusion Guidelines, *supra* note 192, ¶ 14. Indeed, most of the offenses with which a pirate was charged in the Southern District of New York carried potential sentences of between twenty years and life imprisonment. See Press Release, United States Attorney, Southern District of New York, Somali Pirate Pleads Guilty in Manhattan Federal Court to Maritime Hijackings, Kidnappings, and Hostage Takings (May 18, 2010), available at <http://www.ncis.navy.mil/PubNewsRoom/hlites/News%20Articles/NCIS%20assists%20in%20conviction%20of%20Somali%20pirates.pdf>.

196. UNHCR Refugee Handbook, *supra* note 110, ¶ 152; UNHCR Article 1F Exclusion Guidelines, *supra* note 192, ¶ 15. In *Aguirre-Aguirre v. INS*, the US Supreme

which is precisely why modern-day pirates are hijacking ships and demanding huge ransom payments.<sup>197</sup> Furthermore, the pirate acts will necessarily have been committed outside the country of refuge.<sup>198</sup>

Regarding Somalia, in particular, pirates are among the types of criminals that the UNHCR cautions states to consider excluding from refugee status.<sup>199</sup> It advises states to pay particular attention to, among others, those who are members of “criminal gangs.”<sup>200</sup> It defines those gangs to include individuals, such as former militias, who are “lured into criminal activities for the financial rewards from activities such as kidnapping and the lucrative business of boarding ships in the Gulf of Aden or the

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Court suggested that political crimes were those where the political aspect of the offense outweighs its common-law character. 526 U.S. 415, 422 (1999).

197. *See supra* Part I.A.

198. The UNHCR suggests that states should weigh the gravity of the offense in question against the consequences of exclusion—namely the likelihood of persecution and its severity—when determining whether an individual must be excluded under Article 1(F)(b). *See* UNHCR Refugee Handbook, *supra* note 110, ¶ 156; UNHCR Article 1F Exclusion Guidelines, *supra* note 192, ¶ 24. However, not all states agree that such balancing is appropriate. In *Aguirre-Aguirre*, the US Supreme Court stated that balancing was not appropriate under Article 1(F)(b), noting that “it is not obvious that an already-completed crime is somehow rendered less serious by considering the further circumstance that the alien may be subject to persecution if returned to his home country.” 526 U.S. at 426. The United Kingdom has also rejected applying a balancing test when applying Article 1(F). *See* Helene Lambert, *The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law*, 55 *INT’L & COMP. L.Q.* 161, 175 (2006); *see also* *Gil v. Canada* (Minister of Employment and Immigration) [1995] 1 F.C. 508, 534–35 (Can. Fed. Ct. 1994) (“[T]he claimant to whom the exclusion clause applies is ex hypothesi in danger of persecution; the crime which he has committed is by definition ‘serious.’ . . . It is not in the public interest that this country should become a safe haven for mass bombers.”). Professors Hathaway and Harvey, similarly, argue that because asylum seekers described in Article 1(F)(b) could not qualify for refugee status within the meaning of the Refugee Convention, states are under no duty to consider the merits of a protection claim made by such persons. Hathaway & Harvey, *supra* note 103, at 264. In any event, those pirates that have committed murders or similarly grave offenses would not likely benefit from a balancing test in any event. Indeed, by way of example, the UNHCR has commented that “a person guilty of deliberate infliction of serious harm to or killing of civilians outside the scope of combat would not benefit from proportionality considerations.” UNHCR, Statement on Article 1F of the 1951 Convention, July 2009, at 35, *available at* <http://www.unhcr.org/4a5edac09.html> [hereinafter UNHCR 2009 1F Statement].

199. *See* UNHCR Somalia Eligibility Guidelines, *supra* note 185, at 35 (“In light of Somalia’s long history of armed conflict, serious human rights violations and transgressions of international humanitarian law, exclusion considerations under Article 1F of the 1951 Convention may arise in relation to individual asylum claims by Somali asylum-seekers.”).

200. *See id.* at 35–37.

Indian [Ocean] and holding them, their crews and cargos for ransoms.”<sup>201</sup> Thus, although the UNHCR will still expect states to consider the specific facts and circumstances associated with each application for protection under the Refugee Convention, pirates who belong to criminal gangs and have committed violent acts against seafarers should come within Article 1(F)’s exclusion provision denying refugee status to those who have committed serious non-political crimes.

One question that arises is whether conduct will still be considered a crime leading to exclusion from refugee status under Article 1(F)(b) if the applicant has already been convicted and served his sentence. Professors Hathaway and Harvey argue that the preparatory documents leading to the Refugee Convention suggest that Article 1(F)(b) is intended to exclude fugitives and to ensure that refugee law does not impede state obligations under extradition treaties.<sup>202</sup> They therefore suggest that persons who have committed crimes within the state of refuge *and* persons whose crimes are no longer justiciable do not fall within Article 1(F)(b).<sup>203</sup>

Nevertheless, they also recognize that not all commentators or states agree that Article 1(F)(b) is so limited.<sup>204</sup> For example, the UNHCR Refugee Handbook advises that states should consider both aggravating and mitigating circumstances when making exclusion determinations under Article 1(F)(b). Whether an individual has served his time is among those mitigating factors, but that fact alone does not require states to conclude that the individual cannot be excluded for having committed a serious non-political crime outside the country.<sup>205</sup> In addition, more recent guidance from the UNHCR indicates that, although the exclusion clauses should be interpreted in a restrictive manner,<sup>206</sup> states may still be justified in excluding individuals who have committed grave and heinous crimes, even if the individual has been pardoned or was granted amnesty for

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201. *See id.* at 37 n.279.

202. Hathaway & Harvey, *supra* note 103, at 299–301.

203. *See id.*

204. *See id.* at 299–304.

205. UNHCR Refugee Handbook, *supra* note 110, ¶ 157.

206. UNHCR Article 1F Exclusion Guidelines, *supra* note 192, ¶ 2.

the offense.<sup>207</sup> Furthermore, although they criticize the practice as being inconsistent with the purpose of Article 1(F)(b), Professors Hathaway and Harvey acknowledge that states have excluded individuals who have committed serious non-political crimes notwithstanding that the individuals had served time for their offenses.<sup>208</sup> Finally, it is worth pointing out that the language of Article 1(F)(b) is not limited to persons who have not yet been adjudged guilty and served time for their offenses; it speaks only of serious, non-political crimes committed outside the country of refuge.<sup>209</sup> Accordingly, although some countries may choose not to apply Article 1(F)(b) to individuals who have served time for their offenses, many will not, and the language of the provision and the guidance provided by the UNHCR do not require that limitation on the article's applicability.

In addition to relying on Article 1(F)(b)'s exclusion provision, some states may also conclude that the broadly-worded Article 1(F)(c)—which requires excluding individuals who have committed “acts contrary to the purposes and principles of the United Nations”—is also a basis for refusing to grant protection to pirates under the Refugee Convention.<sup>210</sup> The UNHCR suggests that the language of Article 1(F)(c) is rather unclear and, as a result, should be read narrowly.<sup>211</sup> It also suggests that because Articles 1 and 2 of the United Nations Charter basically set out the fundamental principles that states must uphold in their mutual relations, it appears that “in principle only persons who have been in positions of power in a State or State-like

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207. *Id.* ¶ 23; UNHCR, Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, Sept. 4, 2003, ¶ 73, *reprinted in* 15 INT'L J. REFUGEE L. 502 (2003) [hereinafter UNHCR Background Note to the Exclusion Clauses].

208. Hathaway & Harvey, *supra* note 103, at 302–03. For example, in *Ovcharuk v. Minister for Immigration and Multicultural Affairs*, the Full Court of the Federal Court of Australia concluded that nothing in Article 1(F)(b) required that its application be limited only to those criminals who were fugitives from justice who had not already been convicted and served time. (1998) 158 ALR 289, 294, 300, 302–04 (Austl.).

209. In fact, the UNHCR made just this same point. *See* UNHCR Background Note to the Exclusion Clauses, *supra* note 207, ¶ 72; *see also* GOODWIN-GILL & MCADAM, *supra* note 108, at 175 (suggesting that the “fugitives from justice” thesis appears to be losing favor as being inconsistent with the ordinary meaning of the words in Article 1(F)(b), which contains no such limitation on its application).

210. Refugee Convention, *supra* note 95, art. 1(F)(c).

211. *See* UNHCR Article 1F Exclusion Guidelines, *supra* note 192, ¶ 17.

entity” would appear capable of committing acts contrary to the purposes and principles of the United Nations.<sup>212</sup>

However, the UNHCR, like other commentators and courts, has now stated that the broad language of the clause permits other interpretations. In fact, the UNHCR acknowledges that the present reality is one where individuals and groups other than those in government can be responsible for acts—such as acts of terrorism—which are contrary to the principles and purposes of the United Nations.<sup>213</sup> For example, in *Pushpanathan v. Canada*, the Supreme Court of Canada concluded that Article 1(F)(c) applies to “individuals responsible for serious, sustained, or systematic violations of fundamental human rights which amount to persecution in a non-war setting” and “where there is consensus in international law that particular acts constitute sufficiently serious and sustained violations of fundamental human rights as to amount to persecution, or are explicitly recognized as contrary to purposes and principles of the United Nations.”<sup>214</sup> In sum, although the precise contours of the Article 1(F)(c) exclusion clause are far from settled,<sup>215</sup> in some circumstances, individual pirates and the acts they commit may be excludable under this provision if they are not already excludable under Article 1(F)(b).

### C. Article 33 (2) Exceptions to the Non-Refoulement Principle

Article 33(2)’s “security of the country” and “danger to the community” exceptions may also operate in some circumstances to bar convicted pirates who otherwise are able to meet the “refugee” definition from the Refugee Convention’s *refoulement* protection.<sup>216</sup> Generally speaking, Article 33(2)’s exceptions should be interpreted restrictively and may only be applied if necessary and proportionate, which means that there must be a rational connection between removing the refugee and the

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212. *See id.*

213. *See* UNHCR 2009 1F Statement, *supra* note 198, at 28–29.

214. *Pushpanathan v. Canada* (Minister of Citizenship & Immigration), [1998] 1 S.C.R. 982, ¶¶ 64, 65 (Can.).

215. *See* GOODWIN-GILL & MCADAM, *supra* note 108, at 189–90; WOUTERS, *supra* note 90, at 126.

216. According to the UNHCR, Article 1(F) “is aimed at preserving the integrity of the refugee protection regime,” while “Article 33(2) concerns protection of the national security of the host country.” *See* UNHCR 2009 1F Statement, *supra* note 198, at 8.

elimination of the danger resulting from his presence in the state or community in which he is seeking refuge.<sup>217</sup> According to the UNHCR, *refoulement* must be the last resort, and the state must conclude that the danger to the state or community outweighs the risks to the refugee if returned to his country of origin.<sup>218</sup> Nonetheless, the United States does not require any proportionality assessment under its equivalent of Article 33(2).<sup>219</sup>

The “security of the country” exception, however, is probably not applicable in the majority of modern piracy cases since it contemplates a showing of *future* danger that is so serious as to be a threat to the national security of the host country.<sup>220</sup> The types of acts that threaten national security are acts aimed at overthrowing the government; acts which threaten the country’s constitution, peace, and independence; and acts of terrorism and espionage.<sup>221</sup>

However, convicted pirates may fall within Article 33(2)’s “danger to the community” exception. That clause denies protection against *refoulement* to individuals who, “having been convicted by a final judgment of a particularly serious crime, constitute[] a danger to the community” of the country in which

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217. See Letter from Thomas Albrecht, UNHCR Deputy Regional Representative, to Paul Engelmayer, Esq., WilmerHale, at 1–3 (Jan. 6, 2006), available at <http://www.unhcr.org/refworld/pdfid/43de2da94.pdf> [hereinafter UNHCR Request for Advisory Opinion].

218. See, e.g., *id.* at 2, 7–8; UNHCR, Note on Diplomatic Assurances and International Refugee Protection, Aug. 2006, ¶ 13, available at <http://www.unhcr.org/refworld/docid/44dc81164.html> [hereinafter UNHCR Note on Diplomatic Assurances].

219. 8 U.S.C. § 1158(b)(2)(A)(ii) denies asylum (which is the equivalent of refugee status under the Refugee Convention) to an individual who “having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of the United States.” “Withholding of removal” (which is the equivalent of protection against *refoulement* under the Refugee Convention) is not available to an applicant if he, “having been convicted by a final judgment of a particularly serious crime, is a danger to the community of the United States.” 8 U.S.C. § 1231(b)(3)(B)(ii). These provisions do not require any consideration of whether *refoulement* would eliminate the danger or whether *refoulement* is the last possible resort for eliminating the danger posed by the individual’s presence in the community.

220. Lauterpacht & Bethlehem, *supra* note 107, at 135–36; UNHCR Note on Diplomatic Assurances, *supra* note 218, ¶ 12.

221. See WOUTERS, *supra* note 90, at 115; Atle Grahl-Madsen, UNHCR, Division of International Protection, Commentary on the Refugee Convention 1951 Articles 2–11, 13–37, at 140 (1997), available at <http://www.unhcr.org/refworld/docid/4785ee9d2.html> (commentary written by Professor Atle Grahl-Madsen in 1963).

they are seeking refuge.<sup>222</sup> Although there is no universal definition for “particularly serious crime,”<sup>223</sup> commentators have suggested that murder, rape, armed robbery, and arson are examples of the types of crimes that would qualify.<sup>224</sup> “Danger to the community” refers to future danger to the population, rather than to the larger interests of the state.<sup>225</sup>

One question that arises is the extent to which Article 33(2) requires that one convicted of a particularly serious crime must *also* be shown to be a danger to the community. The UNHCR and some commentators suggest that the additional showing of danger is necessary.<sup>226</sup> According to the UNHCR, for the “danger to the community” exception to apply, the refugee must have been convicted of a very serious crime, and it must be shown “that the refugee, in light of the crime and conviction, constitutes a very serious present or future danger to the community of the host country.”<sup>227</sup> The assessment of danger may include considerations of the nature of the crime committed, the facts concerning its commission, and evidence of recidivism or likely recidivism.<sup>228</sup>

On the other hand, states are charged with implementing the Refugee Convention and are not bound by the UNCHR’s interpretations of the convention.<sup>229</sup> Thus, in the United States, evidence that the individual has been convicted of a particularly serious crime operates to also demonstrate that the individual is a

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222. Refugee Convention, *supra* note 95, art. 33(2).

223. See WOUTERS, *supra* note 90, at 117. For example, in connection with consideration of asylum claims (refugee status under the Refugee Convention), the United States defines a “particularly serious crime” as encompassing “aggravated felonies,” which include such acts as crimes of violence and theft offenses that carry a term of imprisonment of at least one year and offenses relating to ransom demands. See, e.g., 8 U.S.C. § 1158(b)(2)(B)(i); *id.* § 1101(a)(43)(F)–(H). In connection with consideration of “withholding of removal” claims (*refoulement* under the Refugee Convention), the United States defines a “particularly serious crime” to include “aggravated felonies” committed by the alien for which he served an aggregate term of imprisonment of at least five years. See *id.* § 1231 (b)(3)(B)(ii).

224. See Lauterpacht & Bethlehem, *supra* note 107, at 139.

225. See, e.g., WOUTERS, *supra* note 90, at 116; Lauterpacht & Bethlehem, *supra* note 107, at 138.

226. See Lauterpacht & Bethlehem, *supra* note 107, at 140; see also UNHCR Note on Diplomatic Assurances, *supra* note 218, ¶ 12.

227. UNHCR Note on Diplomatic Assurances, *supra* note 218, ¶ 12.

228. GOODWIN-GILL & MCADAM, *supra* note 108, at 239–40; Lauterpacht & Bethlehem, *supra* note 107, at 140.

229. See *supra* notes 108–113 and accompanying text.



danger to the community, such that refugee status and the protections against *refoulement* are denied.<sup>230</sup> The Eleventh Circuit Court of Appeals explained that the plain language of the provision—which mirrors Article 33(2) of the Refugee Convention—includes no conjunction such as “and” between the conviction clause and the danger clause, suggesting that no separate determination of dangerousness is required.<sup>231</sup> It further explained that requiring a separate determination of dangerousness would entail evidentiary difficulties relating to proving the likelihood of the applicant’s recidivism—a burden it concluded that Congress did not intend to impose on the conduct of deportation proceedings.<sup>232</sup>

In light of the foregoing, it seems that Article 33(2)’s “danger to the community” provision would probably bar many pirates from protection against *refoulement*—assuming that any pirates were able to even establish refugee status under Article 1 of the convention. First, pirates convicted of murder, hijacking, armed robbery, or other violent acts associated with modern piracy will have committed “particularly serious crimes.” As noted above, in some jurisdictions like the United States, this alone will mean that the pirate is also a danger to the community. States should reach the same conclusion that the pirate is a danger to the community applying the UNCHR’s test that considers the nature and circumstances of the crime committed and the likely recidivism of the criminal. Certainly some pirates may claim that their unfortunate circumstances caused them to engage in piracy. However, this and other arguments are likely to be discounted where the underlying facts demonstrate the pirate was involved, for example, in threatening innocent seafarers at gunpoint and holding them hostage in order to reap a financial windfall. Furthermore, although each case will have its own unique facts, pirates who have committed

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230. *See, e.g.*, *Lapaix v. U.S. Att’y Gen.*, 605 F.3d 1138, 1141 n.2 (11th Cir. 2010) (“Conviction of a particularly serious crime necessarily renders one a danger to the community.” (quoting *Zardui-Quintana v. Richard*, 768 F.2d 1213, 1222 (11th Cir. 1985))); *Gao v. Holder*, 595 F.3d 549, 555 n.1 (4th Cir. 2010) (“[O]nce the particularly serious crime determination is made, the alien is ineligible for withholding without a separate finding on dangerousness.” (quoting *Kofa v. INS*, 60 F.3d 1084, 1088 (4th Cir. 1995) (*en banc*))).

231. *Zardui-Quintana*, 768 F.2d at 1222.

232. *See id.* at 1222–23.

violent acts will probably have some difficulty convincing a fact finder that their prison stay has reformed them—particularly if the acts on which their conviction was based were violent in nature or if the facts show that they have some other history of violence.

Finally, in states that follow the UNCHR's requirements for applying Article 33(2)'s "danger to the community" exception, states should be able to show that removing the pirate is necessary and proportionate. First, *refoulement* will remove the pirate from the state, which should thereby eliminate the danger of having him in the community. Whether *refoulement* is the last resort will depend on the precise facts of the case, but the UNHCR suggests that the state of refuge should consider whether prosecution, restrictions on movement (such as imprisonment), or removal to a safe third country might just as effectively remove the danger posed by the refugee.<sup>233</sup> Indefinite imprisonment is certainly one option to remove the risk to the community posed by convicted pirates, and some states have indefinitely imprisoned some asylum seekers.<sup>234</sup> However, and although the UNHCR recommends it as an alternative to removal, the drafters of the Refugee Convention apparently assumed the indefinite imprisonment would be no better than *refoulement*.<sup>235</sup> As to the safe third country alternative, it may not be viable because one might expect that other countries will be unwilling to accept into their own communities pirates who have been convicted of violent offenses.<sup>236</sup> Finally, although each case will have unique characteristics, the danger to the community will likely outweigh any danger to the pirate upon being *refouled*. Based on the realities of modern piracy, the facts should show that the convicted pirate was engaged in armed acts of violence against innocent seafarers for financial gain. This is the type of person a fact finder should conclude may pose a great danger to the community.

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233. See UNHCR Request for Advisory Opinion, *supra* note 215, at 7.

234. See WOUTERS, *supra* note 90, at 114 n.484 (citing HATHAWAY, *supra* note 119, at 352).

235. See *id.*

236. Of course, if another safe country does accept the convicted pirate, then the pirate will not be granted asylum in the state in which he was convicted.

D. *Status and Rights under the Refugee Convention*

Because state laws interpreting and implementing the Refugee Convention differ, and because states are entitled to determine whether refugees are entitled to asylum or residence permits, the rights accorded to any pirates who may qualify for refugee status under the Refugee Convention will differ depending on the laws prevailing in the state in which they are seeking refuge.<sup>237</sup> For example, pursuant to the EU Qualification Directive, Member States must provide “refugees” residence permits “which must be valid for at least three years and renewable unless compelling reasons of national security or public order otherwise require.”<sup>238</sup> However, according to Article 21(3) of the EU Qualification Directive, Member States are not required to grant residence permits to refugees who are a “danger to the state or community” based on provisions equivalent to those found in Article 33(2) of the Refugee Convention.<sup>239</sup> And, of course, those pirates who cannot demonstrate persecution or who meet the Article 1(F) exclusion criteria aimed at criminals are not entitled to any benefits associated with refugee status. In the United States, as noted above, because they have probably committed “serious non-political crime[s]” or “particularly serious crime[s],” pirates should not be eligible for refugee status or protection from *refoulement*.<sup>240</sup>

Even if pirates are not refugees, and thus denied protections under international refugee law, some convicted pirates,

237. See WOUTERS, *supra* note 90, at 158 (“The country of refuge has the sovereign authority to decide on the legal status of the refugee and the rights attached to such status.”).

238. Council Directive 2004/83/EC on Minimum Standards for the Qualification and Status of Third-country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted, art. 24(1), 2004 O.J. L 304/20, at 21[hereinafter EU Qualification Directive]. Member States may provide greater benefits to refugees if they wish. For example, the United Kingdom apparently grants five-year residence permits. See Hugo Storey, *EU Refugee Qualification Directive: A Brave New World?*, 20 INT’L J. REFUGEE L. 1, 16 n.45 (2008).

239. Compare EU Qualification Directive, *supra* note 238 art. 21(2)–(3), at 20 with Refugee Convention, *supra* note 95, art. 33(2).

240. See 8 U.S.C. § 1158(b)(2)(A)(ii)–(iii) (denying asylum to aliens who have committed serious non-political offenses outside the United States and to aliens convicted of particularly serious crimes); *id.* § 1231(b)(3)(B)(ii)–(iii) (denying protection against *refoulement* to aliens who have committed serious non-political offenses outside the United States and to aliens convicted of particularly serious crimes).

however, may be able to seek subsidiary rights to remain or seek protection against *refoulement* under international human rights law. The question of whether pirates are likely to succeed in establishing such rights is addressed below.

IV. ARE PIRATES LIKELY TO SUCCEED IN ESTABLISHING A RIGHT TO PROTECTION AGAINST REFOULEMENT UNDER INTERNATIONAL HUMAN RIGHTS LAW?

With respect to the international treaties providing for protection against *refoulement* under international human rights law, most pirates should not be able to demonstrate grounds for believing they would be subjected to torture or other forms of ill-treatment if they were returned to their country of origin. As discussed in connection with potential claims of persecution, the evidence relating to pirates does not indicate they are individuals who are subjected to torture or ill-treatment. Rather, pirates commit acts of violence against innocent seafarers in the hopes of obtaining undeserved financial rewards. In Somalia, the evidence further indicates that it is the pirates who are in control of the areas where pirates live and operate.<sup>241</sup> Even if pirates belonged to some minority clan or tribe, their claims of potential torture or ill-treatment based on those grounds may be less than credible given that they managed to become pirates—and thus, the very individuals who are responsible for unprovoked, violent acts. Furthermore, the fact that there is generalized violence or a pattern of human rights violations in the country is ordinarily not enough to warrant protection from *refoulement* under international human rights treaties. Although such circumstances may be considered, the individual himself will still have to show that he personally is in danger of torture or ill-treatment.<sup>242</sup>

A. *The United States Example*

In the United States, convicted pirates have limited options for seeking protection against *refoulement* under international

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241. See *supra* notes 190–191 and accompanying text.

242. See *supra* notes 126, 171–172 and accompanying text; see also EU Qualification Directive, *supra* note 238, art. 15(c), at 19 (requiring a “*serious and individual* threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict” for the individual to qualify for protection under international human rights treaty obligations (emphasis added)).

human rights law. First, of the three international human rights treaties described above, the United States only considers itself subject to a *non-refoulement* obligation under CAT,<sup>243</sup> which covers only claims of torture, as opposed to ill-treatment; it is not a party to the ECHR; and it does not agree that the ICCPR contains a *non-refoulement* obligation.<sup>244</sup> To state a claim under CAT in the United States, the pirate would have to produce evidence showing it is “more likely than not” that he would be tortured if returned to his country of origin.<sup>245</sup> And because the United States is not a party to Article 22 of CAT, individuals cannot bring complaints before the Committee against Torture.<sup>246</sup> Therefore, while the Committee may be able to comment on or criticize the determinations made by US courts in cases alleging that an individual will be tortured if *refouled*, the committee can make no contrary determination.

In addition, those convicted of “particularly serious crimes” are not only ineligible for asylum in the United States, but they are also denied any permanent “withholding of removal” even if they are able to show that they face torture in their country of origin.<sup>247</sup> Such applicants are entitled only to “deferral of removal,”<sup>248</sup> a status that (1) does not entitle the applicant to lawful or permanent immigration status in the United States; (2) permits reconsideration if the applicant is no longer subject to likely torture; and (3) allows for the possibility of deporting the

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243. Congress implemented the obligations flowing from Article 3 of CAT in the Foreign Affairs Reform and Restructuring Act (“FARRA”) of 1998, Pub. L. No. 105-277, 112 Stat. 2681 (codified at 8 U.S.C. § 1231). FARRA states in pertinent part:

It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

*Id.* § 2242(a), 112 Stat. 2681–822.

244. *See supra* notes 154–155 and accompanying text.

245. *See supra* note 132 and accompanying text; *see also* 8 C.F.R. § 208.16(c)(2) (2010); *Ghebrehiwot v. Attorney Gen.*, 467 F.3d 344, 352 (3d Cir. 2006) (noting that one applying for relief under CAT bears the burden of showing that it is more likely than not that he would be tortured if removed to the proposed country of removal).

246. *See* CAT, *supra* note 96, art. 22.

247. *See* 8 C.F.R. § 208.16(d)(2) (requiring a mandatory denial of withholding of removal to applicants convicted of particularly serious crimes, even though they are able to establish likely torture upon return to the country of removal).

248. *See id.* § 208.17(a).

applicant to another safe third country.<sup>249</sup> Accordingly, pirates convicted of acts such as murder, hijacking, kidnapping, or armed robbery would likely be denied any permanent residence status in the United States or any *permanent* protection against *refoulement* even if they could show they would be tortured in some particular country of removal.<sup>250</sup>

### B. *The European Union Example*

Pirates convicted in Europe may not fare significantly better than those in the United States. It is true that many countries in Europe have joined Article 22 of CAT,<sup>251</sup> such that individuals are entitled to bring claims before the Committee against Torture if they have exhausted domestic avenues for relief. Many, but for the notable exception of the United Kingdom, are also party to the individual complaint procedures under the Optional Protocol to the ICCPR.<sup>252</sup> In addition, and more importantly from a standpoint of enforcement of treaty obligations, all Council of Europe member states (which includes all European Union Member States) are parties to the ECHR and are automatically subject to the jurisdiction of the European Court of Human Rights.<sup>253</sup>

Nevertheless, even if states may not return individuals to states where they would be subjected to torture or ill-treatment in violation of these several international human rights treaties, states in Europe do not have to provide residence permits to persons who have been convicted of serious crimes. Pursuant to the EU Qualification Directive, Member States are not required to grant refugee status to persons who, because they have committed certain types of crimes, would be excludable under the Directive's equivalent of Article 1(F) of the Refugee Convention.<sup>254</sup> Nor, as noted above, are EU Member States required to provide the benefits associated with refugee status to refugees who pose a danger to the security of the state or who,

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249. *See id.*, § 208.17(b)(1)(i), (b)(1)(iv), (b)(2).

250. *See supra* Part III.C (discussing what constitutes a "particularly serious crime" in the United States).

251. For example, Belgium, Denmark, France, Germany, Ireland, the Netherlands, and Spain are all parties to Article 22.

252. *See* UNITED NATIONS TREATY COLLECTION, *supra* note 148.

253. *See supra* note 175 and accompanying text.

254. *See* EU Qualification Directive, *supra* note 238, art. 12(2), at 18.

“having been convicted by a final judgment of a particularly serious crime, constitute[] a danger to the community” of the Member State.<sup>255</sup> Pirates should be excludable as refugees under the EU Qualification Directive’s provisions equivalent to Article 1(F) or excluded from refugee status benefits on the grounds that they have been convicted of a crime that causes them to be a danger to the community. As such, pirates should not be eligible for the three-year residence permit that the EU Qualification Directive requires Member States to grant to refugees.<sup>256</sup>

The EU Qualification Directive also provides for “subsidiary protection” for persons who do not qualify for refugee status but are otherwise deserving of international protection because they face a real risk of serious harm—including torture, ill-treatment, or threat to life because of indiscriminate violence—if returned to their country of origin.<sup>257</sup> Like refugee status, however, subsidiary protection is not available “where there are serious reasons for considering that” the person has (1) “committed a crime against peace, a war crime, or a crime against humanity;” (2) “committed a serious crime;” (3) “been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;” or (4) “constitutes a danger to the community or to the security of the member state in which [he] is present.”<sup>258</sup> Under Article 17(2), persons who instigate or otherwise participate in any of the criminal acts referenced above are also ineligible for subsidiary protection and its associated benefits.<sup>259</sup> Because convicted pirates should at a minimum qualify as having committed a “serious crime” under Article 17(1)(b), they are likely unable to qualify for subsidiary

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255. *See id.* art. 14(4)–(5), at 18.

256. *See id.* art. 24(1), at 21 (requiring Member States to issue residence permits that must be valid for at least three years and renewable to the refugee unless compelling reasons of national security or public order require otherwise).

257. *Id.* art. 2(e), at 14, 15, 19. Article 15 states:

Serious harm consists of: (a) death penalty or execution; or (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

*Id.* at 19.

258. *Id.* art. 17(1), at 19.

259. *Id.* art. 17(2), at 19.

protection in the EU—even if they are able to show that they would be tortured or ill-treated upon return to their country of origin. Of course, if some pirates could show they would be tortured or ill-treated (which should be unlikely in most cases), EU Member States would not be able to return them to a country where that danger exists. But, since the pirates at a minimum would have committed a serious crime under Article 17(1)(b), states would not be required to grant them the one-year renewable residence permit that is available to those who qualify for subsidiary protection.<sup>260</sup>

It is true that because the EU Qualification Directive sets minimum standards for EU Member States, some states may provide greater protection for certain reasons and categories of persons.<sup>261</sup> However, because pirates are probably unable to demonstrate substantial grounds for believing they would be subjected to serious harm, and would likely be excluded from claiming subsidiary status because they have committed violent crimes, the EU Qualification Directive would not require states to grant them residence permits.<sup>262</sup> Whether there are options available to allow states to remove convicted pirates from their country in the event that the pirates can make a showing of serious harm is discussed in the following section.

C. *The Use of Internal Protection Options or Diplomatic Assurances to Remove Any Risk of Torture or Ill-Treatment*

In those cases where convicted pirates are able to prove they would be subjected to torture or ill-treatment, states may seek to remove the pirate and eliminate that risk of harm by using internal flight or protection options or diplomatic assurances.

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260. *See id.* art. 24(2), at 21.

261. *See id.* art. 1, at 14 (“The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.”).

262. In July 2010, news reports indicated that Seychelles had passed a special law allowing easy extradition of the pirates it convicted to Somalia. *See Eleven Somali Pirates Jailed in Seychelles*, RTT NEWS, July 26, 2010, <http://www.rttnews.com/ArticleView.aspx?Id=1370247>. Because a copy of the law was not made available, the grounds on which it has predicted the extradition of convicted pirates are unknown. Presumably, the law will comply with international refugee law and international human rights law since Seychelles is a member of CAT, the ICCPR, and the Refugee Convention.



The internal flight or protection alternative is available where the evidence shows that the risk of torture or ill-treatment is limited to a particular part of the country, and where the individual would be able to enter and remain in another part of the country in which the government or an international organization would be able to protect him against such treatment.<sup>263</sup> Indeed, in *H.M.H.I. v. Australia*,<sup>264</sup> the Committee against Torture approved the use of an internal protection alternative in a case in which the individual claimed a risk of torture in Mogadishu, Somalia. The Committee concluded that Australia could return the individual to Kenya, where he could take advantage of the UNHCR's voluntary repatriation program and return to a safe area within Somalia.<sup>265</sup> Of course, the availability of the internal protection alternative will depend on the facts of the particular case, and it may sometimes be difficult for states to find an alternative safe location where a convicted pirate would be welcome and protected.

As to diplomatic assurances that an individual will not be tortured or ill-treated upon *refoulement*,<sup>266</sup> whether assurances may be relied on to relieve states of their obligations under international human rights treaties to protect individuals will also depend on the particular circumstances of the case.<sup>267</sup> States satisfy their human rights obligations only if the diplomatic

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263. See, e.g., WOUTERS, *supra* note 90, at 291–93 (discussing internal protection under the ECHR); *id.* at 398–99 (discussing internal protection under the ICCPR); *id.* at 494–96 (discussing internal protection under CAT).

264. *H.M.H.I. v. Australia*, No. 177/2001, UNCAT, U.N. Doc. CAT/C/28/D/177/2001, ¶ 6.6 (2002).

265. See *id.* In the United States, when considering applications for withholding of removal, immigration judges are entitled to consider whether there is another location in the country of removal where the individual is not likely to be tortured. 8 C.F.R. § 208.16(c)(3)(ii) (2010).

266. Assurances can be written undertakings in formal agreements, such as memoranda of understanding. Assurances can also be given less formally through diplomatic channels. See Gillard, *supra* note 93, at 742.

267. See *id.* at 744 (noting that although the issue of diplomatic assurances has come before the European Court of Human Rights and the Committee against Torture, neither has adopted a general position on the practice nor condemned it outright, preferring instead to consider the matter on a case-by-case basis); see also KALIN & KUNZLI, *supra* note 91, at 497 (stating the same); Kate Jones, *Deportations with Assurances: Addressing Key Criticisms*, 57 INT'L & COMP. L.Q. 183, 186 (2008) (arguing that the cases before the European Court of Human Rights have not concluded that assurances are inherently reliable, but rather assess whether they eliminate the risk of torture based on the relevant facts).

assurances on which they are relying 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>268</sup> Regarding reliability, facts to consider are the general human rights situation in the state at the relevant time<sup>269</sup> and whether the sending state has put in place effective means to monitor implementation of the assurances by the receiving state.<sup>270</sup> In particular, the Committee against Torture recommends that in determining whether *refoulement* is proper under Article 3 of CAT, states should only rely on diplomatic assurances from states “which do not systematically violate the Convention’s provisions, and after a thorough examination of the merits of each individual case.”<sup>271</sup> It further recommends that states establish and implement effective post-return monitoring mechanisms.<sup>272</sup>

The European Court of Human Rights similarly focuses on the quality of the assurances and the level of monitoring in determining whether states violate Article 3 of the ECHR by returning applicants to areas where they allege they would be subjected to torture or ill-treatment. For example, in *Mamatkulov v. Turkey*, the court found that Turkey did not violate Article 3 when it extradited two applicants to Uzbekistan based on diplomatic assurances from the Uzbek Ministry of Foreign Affairs.<sup>273</sup> Those assurances were contained in two letters and stated that the applicants would not be subjected to torture or sentenced to capital punishment and that the country would

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268. UNHCR Note on Diplomatic Assurances, *supra* note 218, at 9 (emphasis in original) (citing *Agiza v. Sweden*, No. 233/2003, UNCAT, U.N. Doc. CAT/C/34/D/233/2003, ¶¶ 13.4–13.5 (2005) and *Chahal v. United Kingdom*, 1996-V Eur. Ct. H.R. 1831).

269. *See id.*

270. *See Alzery v. Sweden*, Comm’n’s No. 1416/2005, UNHRC, U.N. Doc. CCPR/C/88/D/1416/2005, ¶ 11.5 (Nov. 10, 2006) (finding assurances insufficient where they contained no mechanism for monitoring their enforcement and where no arrangements were otherwise made for monitoring outside the text of the assurances).

271. *See* UNCAT, Conclusions and Recommendations of the Committee against Torture: United States of America, ¶ 21, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006).

272. *See id.* The Human Rights Committee has also commented that where torture is systematic in a country, the less likely it is that the real risk of torture can be eliminated by diplomatic assurances. Like the Committee against Torture, it also recommends that states adopt clear and effective mechanisms to effectively monitor the treatment of individuals removed in accordance with diplomatic assurances. *See* U.N. Human Rights Committee, Concluding Observations of the Human Rights Committee: United States of America, ¶ 16, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

273. *Mamatkulov v. Turkey*, 2005-1 Eur. Ct. H.R. 225, 322.

abide by its obligations under CAT.<sup>274</sup> Turkish diplomats were also permitted to visit the applicants in prison after their convictions and found them to be in good health.<sup>275</sup> On the other hand, the court has found assurances ineffective to alleviate the risk that the applicant will be tortured where the assurances were not specific or where they were outweighed by other contrary evidence—such as where the practice of torture is endemic or tolerated by the authorities.<sup>276</sup>

Nevertheless, and notwithstanding that their use has been criticized,<sup>277</sup> states frequently rely on diplomatic assurances.<sup>278</sup> Assurances allow states to ensure that persons they return are not subjected to torture or other ill-treatment. At the same time, assurances allow states to remove persons who do not satisfy the requirements for obtaining residence. In the United States, for

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274. *See id.* at 303.

275. *See id.* at 307.

276. *See Saadi v. Italy*, App. No. 37201/66, ¶¶ 143, 148 (Eur. Ct. H.R. Feb. 28, 2008) <http://www.unhcr.org/refworld/docid/47c6882e.html> (where the Tunisian government stated in response to a request for assurances that its laws guaranteed prisoner's rights and that Tunisia was a member of relevant international treaties but, such as Amnesty International reports, showed evidence of widespread torture by or tolerated by the authorities).

277. *See, e.g.*, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Rep. of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 51, U.N. Doc. A/60/316 (Aug. 30, 2005) [hereinafter *Interim Report of the Special Rapporteur*]. In his 2005 report to the UN General Assembly, the Special Rapporteur strongly criticized the practice of relying on diplomatic assurances, which he argued are unreliable and ineffective in protecting against torture and ill-treatment. Among other things, he expressed the view that such assurances tend to be sought from states that systematically practice torture; that post-return monitoring mechanisms do not guarantee against torture; and that assurances are either not legally binding or cannot be enforced by the state receiving them. *See id.* ¶¶ 46, 51. States, however, have responses to these concerns. Kate Jones, Assistant Legal Adviser at the UK's Foreign and Commonwealth Office, explains that the UK's policy of relying on diplomatic assurances is actually a way of ensuring that it complies with human rights obligations, rather than avoiding them. *See Jones, supra* note 267, at 185–88. She notes that even though some assurances in the past have proven to be unreliable, the United Kingdom now builds protections into its assurances—in particular, independent monitoring arrangements. As to the fact that agreements are with states that have poor records, she acknowledges that assurances would not be required if there was not some question about how states would treat the returned individuals. *See id.* at 186–88. Nevertheless, she suggests that it does not follow that assurances from such states are inherently unreliable, particularly since the agreements are made at the highest possible levels of government and failure to comply with such political commitments could seriously damage diplomatic relations with the sending country or subject the receiving state to negative publicity. *See id.* at 187–88.

278. UNHCR Note on Diplomatic Assurances, *supra* note 218, at 2.

example, reliable diplomatic assurances that a person would not be tortured if returned to that state permit the government to permanently remove a person whose removal otherwise would be deferred.<sup>279</sup>

While diplomatic assurances are usually sought on an individual basis, recently states have begun negotiating more general agreements to the effect that the persons deported to a particular country will not be subjected to human rights violations (which can thereafter be supplemented by specific assurances in the case of a particular individual). The United Kingdom has entered into general agreements for assurances with Algeria, Jordan, Lebanon, and Libya and those agreements typically allow for an independent human rights body to monitor implementation of the assurances.<sup>280</sup>

Whether the European Court of Human Rights or domestic courts will conclude that these agreements are sufficient to ensure that deportees' rights under Article 3 of the ECHR will not be violated, however, is unclear.<sup>281</sup> In an appeal by two Libyans the United Kingdom sought to deport, the UK Special Immigration Appeals Commission ("SIAC"), concluded that, although diplomatic assurances are capable of reducing a risk of breaching Article 3 of the ECHR, even the detailed protections contained in the agreement with Libya<sup>282</sup> were not enough to prevent ill-treatment.<sup>283</sup> In particular, the SIAC expressed concerns about the chosen monitoring body; the unreliability and unpredictability of Libyan leader Colonel Muammar Qaddafi; the absence of civil society to shame the government into compliance; and the newness of the United Kingdom's

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279. See 8 C.F.R. § 208.18(c) (2010).

280. See Jones, *supra* note 267, at 184.

281. See Ashley Deeks, Am. Soc'y of Int'l Law, *Promises Not to Torture: Diplomatic Assurances in U.S. Courts*, 56–60 (Dec. 2008) (discussing litigation brought by individuals challenging their deportation and the quality of the diplomatic assurances contained in agreements with Algeria, Jordan, and Libya).

282. Memorandum of Understanding between the General People's Committee for Foreign Liaison and International Co-Operation of the Great Socialist People's Libyan Arab Jamahiriya and the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland Concerning the Provision of Assurances in Respect of Persons Subject to Deportation, Libya-U.K., Oct. 18, 2005, available at <http://www.fco.gov.uk/resources/en/pdf/libya-mou>.

283. See generally *DD v. Sec'y of State for the Home Dep't*, [2007] UKSIAC Nos. SC/42/2005 & SC/50/2005 (U.K.).

diplomatic relationship with Libya.<sup>284</sup> By contrast, in a number of cases brought by Algerians contesting their deportations, the SIAC concluded that the Algerian government had negotiated the assurances agreement with the United Kingdom in good faith and that diplomatic pressure by the United Kingdom would help enforce the assurances.<sup>285</sup> The SIAC emphasized the domestic situation in Algeria, which it noted had improved to the extent that there was less violence and a decrease in abuses by security forces.<sup>286</sup>

In sum, whether a state can use diplomatic assurances to aid it in removing any pirates who do not satisfy residency requirements (because, for example, they have been convicted of serious crimes) but are able to establish that they face a risk of torture in the country of removal will depend on the particular circumstances of the case. However, assurances are certainly an available option where the state of return is one that does not systematically practice or condone torture. And, if the pirate's state of origin is one that does systematically practice torture, states can seek to return the pirate to a neighboring state with better practices.<sup>287</sup> In all cases, states should be able to negotiate diplomatic assurances that will be effective in removing the risk of torture or ill-treatment: assurances must be specific, and the sending state must put in place an effective post-removal monitoring system.

### CONCLUSION

The language of the relevant international treaties, interpretations of that language, and state practice all generally indicate that pirates who are convicted of violent crimes should not be eligible for asylum or complementary forms of protection against *refoulement*. As to refugee status under the Refugee Convention, most pirates are probably unable to show that they

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284. *See id.* ¶¶ 317, 319, 346, 348, 368–71.

285. *See Deeks, supra* note 280, at 59–60.

286. *See Y v. Sec'y of State for the Home Dep't*, [2006] UKSIAC No. SC/36/2005, ¶ 3 (U.K.).

287. It may be difficult to convince states that are not otherwise responsible for the pirate to accept him in their community. However, many things are possible with diplomacy. After all, as noted above, Kenya, Mauritius, Seychelles, and Tanzania have all reached agreements with a number of other countries to accept captured pirates for jailing and prosecution. *See supra* notes 12–14 and accompanying text.

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would be persecuted because of their race, nationality, political opinion, or membership in a particular group if returned to their country of origin. Furthermore, convicted pirates will have committed the kinds of violent crimes that should exclude them from refugee status and, accordingly, from being granted asylum and the benefits associated with it, such as residence permits. Even if pirates are not excluded from refugee status, states may not have to protect them against *refoulement* under the Refugee Convention on the grounds that they have been convicted of a particularly serious crime that causes them to be a danger to the community in which they are seeking refuge.

Nor should pirates generally be able to claim protection against *refoulement* under the relevant international human rights treaties. First, there is little reason to believe that most pirates would be able to state and prove a claim that they would be subjected to torture or ill-treatment if returned to their country of origin. Even if some could, however, the laws of the United States and the European Union provide that persons who have been convicted of, or committed, certain serious crimes—like the violent crimes pirates would have committed—are not eligible for residence permits. Furthermore, even though such persons cannot be *refouled* to face torture or ill-treatment, their deferral of removal in the United States is only temporary, and removal may recommence if circumstances change. Moreover, in both the United States and Europe, states can seek reliable diplomatic assurances with monitoring mechanisms in order to remove the risk of torture and allow convicted pirates to be deported to their countries of origin. If the country of origin is not an available option, states can seek to remove pirates to other safe countries. Accordingly, although states that convict pirates may face additional asylum claims, and although each factual circumstance is unique, assuming pirates have committed violent crimes, those asylum claims are likely to be unsuccessful—at least in terms of gaining the pirate residence in the country of conviction.

Of course, the mere fact of additional asylum claims that need to be investigated, considered, and adjudicated is a burden on states. The issue of what to do with pirates who are not eligible for residency, but who cannot be *refouled* because they have been able to show they would be subjected to torture or ill-

treatment if returned, also poses a burden on states. It may be difficult to obtain reliable diplomatic assurances from the state of origin, and it may also be difficult to find another safe country willing to accept into its community a convicted pirate.

Nevertheless, the risk of asylum claims and the difficulties associated with adjudicating them are burdens that developed nations face in any event. During 2008, the United States granted asylum to about 20,500 persons and resettled another 60,200 refugees from other countries.<sup>288</sup> Canada received 34,800 applications for asylum in 2008, and granted 7550.<sup>289</sup> The EU Member States received 238,400 requests for asylum during 2008.<sup>290</sup> Regarding Somalia in particular, UNHCR reports that there were some 700,000 refugees from that country in 2009 alone.<sup>291</sup> And, in 2008, Sweden, the United Kingdom, and the United States received more than 3000 claims each from Somalis seeking refuge.<sup>292</sup> Together, the EU Member States received approximately 14,300 requests for asylum by Somalis during 2008.<sup>293</sup> Nations face and accept asylum claims like these because they are developed and follow the rule of law—making them a place where less-privileged individuals seek refuge.

Developed nations also willingly accept the risk of additional asylum claims in fulfilling goals they otherwise view as worthwhile. For example, states accept the risk of asylum claims or *non-refoulement* claims when they engage in armed conflict and capture prisoners. The various state military forces operating in Afghanistan and Iraq must regularly face questions about whether their transfer of detainees will violate the principle of *non-refoulement*.<sup>294</sup> States also seek to have foreign nationals

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288. See *World Refugee Survey 2009, Country Reports: United States*, U.S. COMM. FOR REFUGEES AND IMMIGRANTS [USCRI], <http://www.refugees.org/countryreports.aspx?id=2365> (last visited Dec. 1, 2010).

289. See *World Refugee Survey 2009, Country Reports: Canada*, USCRI, <http://www.refugees.org/countryreports.aspx?id=2321> (last visited Dec. 1, 2010).

290. See *World Refugee Survey 2009, Country Reports: Europe*, USCRI, <http://www.refugees.org/countryreports.aspx?id=2327> (last visited Dec. 1, 2010).

291. See UNHCR Somalia Eligibility Guidelines, *supra* note 185, at 2 (reporting that the number of Somali asylum-seekers and refugees has jumped from approximately 485,000 in 2006 to over 700,000 by the end of 2009).

292. See *World Refugee Survey 2009*, USCRI, available at <http://www.refugees.org/FTP/WRS09PDFS/RefuandAsylumseek.pdf>.

293. See *World Refugee Survey 2009: Country Reports Europe*, *supra* note 290.

294. See Gillard, *supra* note 93, at 704–05.

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extradited in order to stand trial in their country where the foreign national has committed crimes in the country or which affect its citizens.

Captured pirates should not be able to escape justice simply because developed nations do not wish to deal with a relatively few additional asylum claims. Prosecuting pirates who have committed violent acts that disrupt international transport and harm innocent seafarers is necessary to actually deter pirates from continuing to commit those violent crimes.<sup>295</sup> In the current culture of impunity, where pirates are captured and then released, pirates are learning that crime pays huge ransoms. Prosecutions of more pirates can help to teach pirates a different lesson. Developed nations generally have the resources, institutions, and expertise to permit them to try captured pirates in their domestic courts. They should also be able to conduct those trials fairly and in accordance with processes that respect human rights.<sup>296</sup> Bringing pirates to justice and deterring future acts of piracy is a goal at least as worthy as others which have caused nations to consider asylum claims—a goal that developed nations should embrace rather than seek to avoid.

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295. See *supra* note 86 and accompanying text.

296. By contrast, the solution of sending pirates to Kenya to be jailed and prosecuted has been criticized on the grounds, among others, that Kenya has a corrupt and slow judicial system that does not respect the human rights of its prisoners. For a summary of some of these criticisms, see Dutton, *supra* note 26, at 224–26.