

PIRATE TRIALS: AN EXAMINATION OF THE UNITED STATES' NON-
REFOULEMENT DUTIES PURSUANT TO THE UNITED NATIONS
CONVENTION AGAINST TORTURE

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INTRODUCTION	193
I. MODERN PIRACY MEETS THE INTERNATIONAL HUMAN RIGHTS REGIME	195
II. AMBIGUOUS HUMAN RIGHTS PROTECTIONS FOR PIRATES AND THE BROAD SWEEP OF UNCAT	199
III. AMERICAN OBLIGATIONS UNDER UNCAT	202
IV. THE CASE FOR EXTRATERRITORIAL APPLICATION OF UNCAT	206
V. EVIDENCE OF TORTURE IN KENYAN PRISONS AND THE LEGALITY OF THE MOU	209
CONCLUSION	211

INTRODUCTION

The British Navy delivered eight suspected Somali pirates to Kenyan authorities to stand trial in November 2008.¹ In a humid Mombasa courtroom, the prosecutor described the defendants' attack on a Danish fishing boat and the subsequent seizure of AK-47s and grenades – tools of the trade for pirates plying one of the globe's busiest shipping routes.² Defense attorney Jared Magolo denied the government's allegations and accused Kenyan prison officials of effectively torturing his clients by refusing to provide them clothing or remove their shackles while in custody.³ Presiding Judge Catherine Mwangi mocked the suggestion from

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¹ Travis Kavulla, *Prosecuting captured Somali pirates poses challenges*, FOX NEWS, Nov. 26, 2008, available at <http://www.foxnews.com/story/0,2933,457827,00.html>. Somali pirates captured by American naval forces have been similarly extradited to Kenya for trial. See, e.g., Celeste Achieng, *Kenya charges 17 Somalis with Piracy*, WASH. POST, June 11, 2009, available at http://www.washingtonpost.com/wpdyn/content/article/2009/06/11/AR2009061100939_pf.html *describing the trial of 17 Somalis for piracy transferred from American custody).

² Eugene Kontorovic, *A Guantanamo on the Sea: The Difficulties of Prosecuting Pirates and Terrorists*, 98 CAL. L. REV 243, 257 (2010).

³ Kavulla, *supra* note 1.

the bench, “Oh, I can see they’re really bleeding, eh?”⁴

In the Gulf of Aden, an area bounded by the Somali and Yemeni coastlines, pirates routinely seize the world’s largest ships and hold them for ransom.⁵ The actions of pirates threaten not only maritime shipping,⁶ but also the delivery of vital humanitarian aid to refugees and internally displaced persons.⁷ Without doubt, pirates must answer for their actions. Yet, as the account of the Kenyan trial above illustrates, the international community must examine a difficult and important question: In pursuing justice, what humanitarian protections, if any, are pirates due?

The status of pirates within human rights regimes is disputed. Indeed, some scholars argue prevailing human rights accords specifically exclude pirates, as a class, from protection.⁸ The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“UNCAT”) stands out among these treaties.⁹ Embodying an international condemnation of torture and an inalienable human right to be free from its harmful effects, the application of UNCAT is broad.¹⁰ Without exception, UNCAT seeks to prevent both the use of torture and the extradition, or *refoulement*, of individuals to states where torture is likely to occur.¹¹ As a state party to UNCAT, the United States pledges to “provide that *no one* shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”¹² Yet, under a memorandum of understanding with the Kenyan government (“MOU”),¹³ the United States may transfer

⁴ *Id.*

⁵ In 2008, Somali pirates boarded 115 vessels, hijacked 31, and fired upon 23. A total of 581 crewmembers were taken hostage, nine kidnapped, nine killed, and seven missing. These figures represent the highest annual recorded incidences of piracy, and a substantial increase over the previous year’s figures. *Unprecedented rise in piratical attacks*, INTERNATIONAL MARITIME BUREAU, Oct. 24, 2008, http://www.ice-ccs.org/index.php?option=%20com_content&view=article&id=306:unprecedented-rise-in-piraticalattacks&catid=%2060:news&Itemid=5.

⁶ Robert F. Worth, *Pirates Seize Saudi Tanker Off Kenya*, N.Y. TIMES, Nov. 18, 2008, available at 2008 WLNR 21984458.

⁷ *Pirates Hijack Tsunami Aid Ship*, BBC NEWS, July 30, 2005, available at <http://news.bbc.co.uk/2/hi/africa/4636695.stm>.

⁸ Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSN’L L. 1, 42 (2007).

⁹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter UNCAT].

¹⁰ Alice Farmer, *Non-refoulement and Jus Cogens: Limiting Anti-terror Measures that Threaten Refugee Protection*, 23 GEO. IMMIGR. L. J. 1, 18 (2008).

¹¹ UNCAT, *supra* note 9, at art. 3(1).

¹² *Id.* at preamble (emphasis added).

¹³ Yvonne Dutton, *Bringing Pirates to Justice: A Case of Including Piracy within the Jurisdiction of the International Criminal Court*, 11 CHI. J. INT’L L. 197, 220 (2010).

suspected pirates to Kenya for trial and incarceration, where torture in prisons is well-documented.¹⁴

This essay examines whether the United States' obligations under UNCAT may preclude its practice of extraditing suspected pirates to Kenya pursuant to a MOU. Part I describes the phenomenon of modern piracy, discusses challenges associated with domestic piracy trials, and "off-shoring" prosecution agreements with Kenya. Part II compares the indeterminate application of existing human rights regimes to pirates to the broad application of UNCAT protections. Part III discusses the United States' obligations under UNCAT, in particular, the *non-refoulement* provision found in Article 3. Part IV discusses whether UNCAT protections apply extraterritorially to suspected pirates held by the United States in international waters, finding support for this proposition in the treaty's language, customary international law, and international case law. Part V analyzes American obligations under UNCAT in light of human rights abuses in Kenyan prisons. Part VI concludes that the United States' obligations under UNCAT preclude the extradition of pirates to states like Kenya where it is more likely than not that they will face torture.

I. MODERN PIRACY MEETS THE INTERNATIONAL HUMAN RIGHTS REGIME

Following the hijacking of the American tanker ship *Maersk Alabama* in April 2009,¹⁵ Secretary of State Hillary Rodham Clinton detailed the impact of piracy on American foreign policy noting, "[P]irates are criminals. They are armed gangs on the sea. And those plotting attacks must be stopped . . . and brought to justice."¹⁶ Secretary Clinton's sentiments reflect a growing concern that piracy in the Gulf of Aden will cripple the shipping industry and facilitate global terrorism.¹⁷ Despite the deployment of a multi-

¹⁴ 2008 HUMAN RIGHTS REPORT: KENYA, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPARTMENT OF STATE (Feb. 25, 2009), available at <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119007.htm> [hereinafter 2008 HUMAN RIGHTS REPORT].

¹⁵ The tanker *Maersk Alabama* was hijacked and its crew held for ransom by four Somali nationals in April 2009. The event was covered extensively by the news media after Navy snipers killed three of the four pirates holding the captain of the *Maersk Alabama* hostage. See, e.g., Robert McFadden and Scott Shane, *Navy Rescues Captain, Killing 3 Pirate Captors*, N.Y. TIMES, April 13, 2009, at A1, available at 2009 WLNR 6869798; Mark Gazette and Sharon Otterman, *U.S. Captain Is Hostage of Pirates*, N.Y. TIMES, April 9, 2009, at A6, available at 2009 WLNR 6612883.

¹⁶ Remarks After Meeting Between U.S. Sec'y of State Hillary Rodham Clinton and the Haitian Prime Minister Michèle Pierre-Louis (April 15, 2009) (transcript available at <http://www.state.gov/secretary/rm/2009a/04/121756.htm>).

¹⁷ U.S. Navy lawyer Michael Bahar has postulated that hijackings on the high seas could be motivated by a political desire to punish the developed Western nations, and could

national naval armada, incidents of piracy continue to increase.¹⁸ Further, the international community has struggled to implement an effective legal response to this resurgent piracy that costs the shipping industry billions of dollars in losses while endangering the lives of mariners.¹⁹

Two weeks after the *Maersk Alabama* incident, the first domestic prosecution of a suspected pirate in over a century began in the United States.²⁰ In May 2009, Abduwali Abdukhadir Muse was charged in the Southern District of New York for crimes of piracy in connection with the attack on the *Maersk Alabama*.²¹ Prosecutors charged him under U.S. law criminalizing piracy under the law of nations, intentional seizure of a ship, violence aboard a ship, and hostage taking.²² From the outset, the case was plagued with evidentiary hurdles, including testimony by Muse's father in Somalia that he was 15 years old at the time of the hijacking, a contention a magistrate judge ultimately rejected.²³ A year after proceedings commenced, Muse pled guilty to charges related to conspiracy and hostage taking, in exchange for prosecutors dropping more serious charges for hijacking.²⁴

The piracy trial of Muse may be an aberration. Upon capturing suspected pirates in the Gulf of Aden, many countries have been reluctant, or unwilling, to prosecute them.²⁵ Professor Yvonne Dutton notes "instead of bringing pirates to justice, a culture of impunity reigns, with captured pirates being released and permitted to continue their illegal activities."²⁶

ultimately bankroll terrorists. Bahar, *supra* note 8, at 26; *See also* Douglas Burgess, Jr., *Piracy Is Terrorism*, N.Y. TIMES, Dec. 5, 2008, at A33, available at 2008 WLNR 23389243 (advocating a single legal definition for pirates and terrorists based on shared qualities and motivations).

¹⁸ James Kraska and Brian Wilson, *Combating Pirates of the Gulf of Aden: Collaboration, Not Kinetics* 3 (working paper, 2008), <http://ssrn.com/abstract=1308271>; *see also* Jeffrey Gentleman, *Avoiding naval patrols, pirates strike far off the Somali coast*, INT'L HERALD TRIB., April 7, 2009, at 6, available at 2009 WLNR 7097936 (discussing increasing practice of pirates to attack ships farther from shore to avoid the multi-national naval patrol).

¹⁹ Eugene Kontorovic, *International Legal Responses to Piracy off the Coast of Somalia*, AM. SOC. INT'L L. INSIGHTS 13:2, (Feb. 6, 2009), available at <http://www.asil.org/insights090206.cfm>.

²⁰ Ed Pilkington, *Somali teen faces first US piracy charges in over a century*, THE GUARDIAN, April 22, 2009, available at <http://www.guardian.co.uk/world/2009/apr/21/somali-pirate-trial-new-york>.

²¹ *Id.*

²² *Id.*

²³ Ray Rivera, *Somali Man Pleads Guilty in 2009 Hijacking of Ship*, N.Y. TIMES, May 19, 2010, at A21, available at 2010 WLNR 10315272.

²⁴ *Id.*

²⁵ Dutton, *supra* note 13, at 216.

²⁶ *Id.*; *see also see* Craig Whitlock, *Lack of Prosecution Poses Challenge for Foreign Navies that Catch Somali Pirates*, THE WASHINGTON POST, May 24, 2010, available at

Indeed, not only is “prosecuting pirates burdensome, entailing numerous logistical difficulties, it is also expensive and time-intensive[.]”²⁷ Other hurdles to domestic prosecution include “inadequate or non-existent national laws criminalizing acts committed, concerns about the safety and impartiality of local judges, the difficulties of obtaining and preserving evidence, and fears that if convicted, the pirates will be able to remain in the country where they are prosecuted.”²⁸ Ultimately, the inclination to release pirates may lead to a situation in which “it is unlikely [pirates] will be deterred – particularly given the high rewards available to them in the form of escalating ransom payments.”²⁹

The United States and other developed nations have pursued an alternative to domestic trials: “off-shoring” prosecution and incarceration of pirates to willing African partners.³⁰ Several states, notably Canada, Denmark, China, Britain, the European Union, and the United States, have memorialized agreements with Kenya conferring prosecutorial jurisdiction over suspected pirates captured in international waters by foreign military forces.³¹ These agreements provide financial support for the prosecution of pirates.³² Under the MOU with the United States, suspects extradited to Kenya have been tried and sentenced, while others wait in prisons for their day in court.³³ Kenyan authorities have given assurances that Somali detainees will be treated humanely and receive fair trials.³⁴

http://www.washingtonpost.com/wpdyn/content/article/2010/05/23/AR2010052303893_pf.html. (“The European Union’s naval forces caught 275 pirates off the coast of Somalia in March and April [of 2010] but released 235 of them after confiscating their weapons, said Anders Kallin, a Swedish navy commander and spokesman for the E.U. forces. . . . In the same period, the U.S. Navy . . . caught 39 Somali pirates and released 18 of them.”)

²⁷ Joseph M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, 59 AM. U. L. REV. 1267, 1275 (2010).

²⁸ Dutton, *supra* note 13, at 216.

²⁹ *Id.* at 200.

³⁰ Kontorovic, *supra* note 2, at 255.

³¹ “The agreement between the US and the Government of Kenya was memorialized in a Memorandum of Understanding dated January 16, 2009, and describes the conditions of transfer of suspected pirates and property captured in the western Indian Ocean, the Gulf of Aden, and the Red Sea.” Dutton, *supra* note 13, at 216 n.125 (citing Piracy Against U.S. Flagged Vessels: Lessons Learned: Hearing Before the House Subcommittee on Coast Guard & Maritime Transportation of the Committee on Transportation & Infrastructure, 111th Cong, 1st Sess. 79 (2009) (statement of Rear Admiral Brian M. Salerno, Assistant Commandant for Marine Safety, Security and Stewardship, Dept of Homeland Security, US Coast Guard)).

³² Bernard Sanga, *Country Declines to Host Detention Camp for Pirates*, EAST AFRICAN, Oct 12, 2009, available at <http://allafrica.com/stories/200910120124>.

³³ “As of October 2009, Kenya was host to about 123 piracy suspects, ten of whom have been tried and sentenced.” Dutton, *supra* note 13, at 220.

³⁴ James Thuo Gathii, *The Use of Force, Freedom of Commerce, and Double Standards in Prosecuting Pirates in Kenya*, 59 AM. U. L. REV. 1321, 1358-59 (2010); see, e.g., Barney

These agreements have won support as examples of international cooperation to combat piracy.³⁵ More recently, however, criticism from human rights groups, legal scholars, and the media has focused on the competence of Kenya's judiciary and human rights abuses committed in its prison system.³⁶ Extradition authorized by the agreements face increasing suspicion as well. Scholars have noted "the adjudicatory effectiveness of . . . arrangement[s] such as [these], however, can hinge on economic, judicial, legal and even political factors."³⁷ Importantly, the MOU with Kenya effectively authorizes "extraordinary rendition," generally defined as the transfer of an individual to another party to potentially negate constitutional protections afforded by the capturing state.³⁸ Although the Kenyan Constitution guarantees a speedy trial and prohibits torture and inhumane or degrading treatment, non-governmental organizations have begun pressing governments to review bilateral agreements citing "violations of the pirates' rights as guaranteed by the . . . agreement[s] with Kenya."³⁹ In light of increased preference for these agreements, author Michael Passman notes that, "[b]ecause pirates will probably not be brought to the United States in large numbers to enjoy the rights guaranteed by the . . . Constitution, the international law governing the treatment of captured pirates is all the more important."⁴⁰

Jopson, *Kenya Signs Deal to Prosecute Somali Pirates*, FIN. TIMES, Dec. 12, 2008, available at http://www.ft.com/cms/s/0/9b63b8e6-c7c4-11dd-b611-000077b07658.html?ncllick_check=1.

³⁵ The International Maritime Bureau ("IMB") is a division of the International Chamber of Commerce, and represents shipping industry interests. The IMB has long played a central role providing information to mariners and naval forces regarding incidences of piracy in the Gulf of Aden. 2007 PIRACY AND ARMED ROBBERY AGAINST SHIPS ANNUAL REPORT, INT'L MAR. BUREAU, INT'L CHAMBER OF COM. 36-37 (2008), available at http://www.imo.org/includes/blastData.asp/doc_id=8028/98.pdf.

³⁶ David Osler, *Kenya piracy trials at risk of breaching human rights laws*, LLOYD'S LIST, August 25, 2009, available at <http://www.lloydslist.com/ll/blogs/kenya-piracy-trials-at-risk-of-breaching-human-rights-laws/20001015481.htm?jsessionid=65609E54F1FCEE9FA5521B34731FCF29.5d25bd3d240cca6cbbee6afc8c3b5655190f397f>; see also Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Mission to Kenya*, para. 30, U.N. Doc. A/HRC/11/2/Add.6 (May 26, 2009) (prepared by Phillip Alston) (describing severe congestion in the Kenyan criminal justice system and the prevalence of human rights abuses in the prison system) [hereinafter Phillip Alston Report].

³⁷ Isanga, *supra* note 27, at 1276.

³⁸ Krishma Parsad, *Illegal Renditions and Improper Treatment: An Obligation to Provide Refugee Remedies Pursuant to the Conventions Against Torture*, 37 DENV. J. OF INT'L L. & POL'Y 681, 682 (2009).

³⁹ Gathii, *supra* note 34, at 1336; see also Sarah McGregor, *EU, Kenya Somali-Pirate Treaty "Violates Rights," Lawyers Say*, BLOOMBERG, Aug. 19, 2009, http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aDs_bA4DxiTg.

⁴⁰ Michael Passman, *Protections Afforded to Captured Pirates Under the Law of War and*

II. AMBIGUOUS HUMAN RIGHTS PROTECTIONS FOR PIRATES AND THE BROAD SWEEP OF UNCAT

Aboard a naval vessel in the seventeenth century, the fate of a captured pirate, considered an enemy of humanity, was often a painful affair.⁴¹ Although international and domestic law called for trial-by-jury of pirates, detainees suspected of piracy were not afforded protection under the laws of war.⁴² A captured pirate, “if caught *in flagrante delicto*, [was] summarily executed; he would normally be immediately hanged by the mast of the ship or drowned by the captor.”⁴³ During the early nineteenth century, President Thomas Jefferson engaged in a military campaign against pirates, believing that “waging war, killing the Barbary pirates, and destroying their property was the best way to deter piratical attacks against American merchant ships[.]”⁴⁴ Modern nations face the more complicated prospect of charging pirates under outmoded laws, while simultaneously complying with expanded human rights regimes.⁴⁵ This struggle embodies an emerging realization that modern piracy is considerably more nuanced and complex

International Law, 33 TUL. MAR. L. J. 1, 15 (2008).

⁴¹ British courts in the 15th century held pirates *hostis humani generis* under the English Act of 1516. An Act for the punishment of pirates and robbers of the sea, 1516, 39 Hen. 8, c. 15 (Eng.); *In re Piracy Jure Gentium*, [1934] A.C. 586, 837 (P.C.) (U.K.). American courts have similarly held piracy universally justiciable. *US v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844) (holding “A pirate is deemed...hostis humani generis”).

⁴² The Dutch philosopher Hugo Grotius posited there was no need to justify war against pirates because it was not customary or necessary to declare war “against tyrants, robbers, pirates, and all persons who do not form part of a foreign state.” Gathii, *supra* note 34, at 1328 (quoting HUGO GROTIUS, *DE IURE PRAEDAE COMMENTARIUS* 218 (James Brown Scott ed., Gladys L. Williams & Walter H. Zeydel trans., Oceana Publ’ns, Inc. 1964) (1604)); see also Gopalan and Switzer, *Pirates of the Aden: A Tale of Law’s Impotence* 21-22 (working paper, 2009), available at <http://ssrn.com/abstract=1404506> (citing *Codification of International Law: Part V, A Collection of Piracy Laws of Various Countries*, 29 AM. J. OF INT’L L. 887, 910 (1932)).

⁴³ Ingrid Detter, *The Law of War and Illegal Combatants*, 75 GEO. WASH. L. REV. 1049, 1099 (2007) (citing 1 L. OPPENHEIM, *INTERNATIONAL LAW* 616 (H. Lauterpacht ed., 8th ed. 1955)).

⁴⁴ Gathii, *supra* note 34, at 1331.

⁴⁵ Julian Isherwood, *Pirates Released on Beach*, POLITIKEN, September 24, 2009, available at <http://politiken.dk/newsinenglish/article572053.ece> (last visited Mar. 19, 2011); see *International Piracy on the High Seas: Hearing Before the H. Subcomm. on Coast Guard & Maritime Transportation*, 111th Cong. (Feb. 4, 2009) (statement of Rear Adm. William Baumgartner), available at <http://www.uscg.mil/cgjournal/message.asp?Id=118> (citing the significant legal and logistical challenges in transporting pirates, evidence and witnesses to appear in their courts as a reason patrolling navies do not take custody of pirates); see also Brian Wilson, *Fighting Pirates: The Pen and the Sword*, WORLD POL’Y J., Winter 2008, at 45, available at <http://www.mitpressjournals.org/doi/abs/10.1162/wopj.2009.25.4.41> (noting the “great expanse and logistical and legal burdens of transporting the pirates to a Western country for prosecution”).

than its storied predecessor.

International law calls for the suppression of all piratical acts, and confers universal jurisdiction on all states to prosecute pirates.⁴⁶ The United Nations Convention on the Law of the Seas (“UNCLOS”) requires all states to “cooperate to the fullest possible extent in the repression of piracy on the high seas in any other place outside the jurisdiction of any State.”⁴⁷ The United States, not yet party to UNCLOS, has expressed its desire to ratify the treaty and has acted in conformity with its mandate with respect to suppression of piracy.⁴⁸ Unfortunately, while UNCLOS authorizes trials for all suspected pirates by supplying the necessary universal jurisdiction, it does not provide procedural guidelines for their prosecution.⁴⁹

Many international human rights agreements simply do not consider the unique status of pirates. Scholars have variously applied humanitarian protections to pirates, a task made difficult by the non-explicit nature of the treaty documents themselves.⁵⁰ Neither the Third nor Fourth Geneva Conventions, which proscribe protections owed to detainees during times of conflict, mention pirates.⁵¹ Several foundational humanitarian protection documents explicitly single out pirates as a group of combatants who deserve no protection.⁵² Michael Passman comments on the difficulty of applying treaties to pirates, noting:

The historical realities of piracy fly in the face of three fundamental assumptions that anchor the modern law[s] of war [providing humanitarian protections] First, pirates are the archetype of a nonstate war maker. Second,

⁴⁶ Kontorovic, *supra* note 2, at 14; see RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 34 cmt. B (1965).

⁴⁷ United Nations Convention on the Law of the Sea, art. 100, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

⁴⁸ UNCLOS was sent to the U.S. Senate for ratification in October 2007. Secretary of State Hillary Clinton noted in her confirmation hearing that one of her top priorities included ratification of UNCLOS. Transcript of Sec’y of State Designate Hillary Rodham Clinton’s Confirmation Hearings, January 13, 2009, *available at* http://www.cfr.org/publication/18225/transcript_of_hillary_clintons_confirmation_hearing.html.

⁴⁹ UNCLOS, *supra* note 47, art. 105.

⁵⁰ Passman, *supra* note 40, at 16.

⁵¹ Geneva Convention Relative to the Treatment of Prisoners of War, arts. 4-5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁵² “In Francis Lieber’s Instructions for the Government of Armies of the United States in the Field, a foundational document of the modern law of war, pirates are specifically used as an example of combatants who deserve no protection.” Passman, *supra* note 40, at 17 (citing Richard Jackson, *The Law of War and the Academy*, 14 NEW ENG. J. INT’L & COMP. L. 1, 3 (2007)).

pirates are not always easily distinguishable from civilians until it is too late Third, like other nonstate actors, pirates often do not reciprocate lawful treatment.⁵³

Still others, like Professor Eugene Kontorovic, have stated that “pirates are at least presumptively civilians,” deserving of certain minimal protections.⁵⁴ He notes, “while the Geneva Conventions do not necessarily apply to conflicts with pirates on the high seas, the minimal obligations of [the treaty] are widely thought to be generally applicable to all uses of military force as a matter of customary law.”⁵⁵ As a result, except in situations of self-defense, “naval forces are prohibited from killing pirates and must instead seek to apprehend them.”⁵⁶

In the absence of consensus regarding the applicability of human rights protections to pirates, UNCAT is notable for its *per se* application to all individuals, regardless of status.⁵⁷ In its preamble, the drafters of UNCAT note that the treaty’s application, without exception, derives from the “inherent dignity of the human person.”⁵⁸ To this end, “the nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under . . . the Convention.”⁵⁹

The prohibition against state-sanctioned torture was recognized widely before the adoption of UNCAT as a principle of customary international law.⁶⁰ Abuses of this prohibition led the drafters of UNCAT to create the structure for enforcement of a blanket international ban on torture.⁶¹ To this end, UNCAT is built upon three foundational principles:

Article 1.

1. [T]orture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person . . . 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

⁵³ Passman, *supra* note 40, at 18.

⁵⁴ Kontorovic, *supra* note 2, at 257.

⁵⁵ *Id.* at 257 n.110.

⁵⁶ *Id.* at 257.

⁵⁷ David Stewart comments that although the Convention is not “the first international instrument to criminalize acts violating internationally recognized human rights, it is one of the most specific and comprehensive.” David Stewart, *The Torture Convention and the Reception of International Criminal Law Within the United States*, 15 NOVA L. REV. 449, 449 (1991).

⁵⁸ UNCAT, *supra* note 9, at preamble.

⁵⁹ Stewart, *supra* note 57, at 452.

⁶⁰ *Id.*; *see also* Parsad, *supra* note 38, at 684.

⁶¹ UNCAT *supra* note 9, at art. 1.

include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

...

Article 2.

1. Each State Party shall take . . . measures to prevent torture in any territory under its jurisdiction.
2. No exceptional circumstances whatsoever . . . may be invoked as a justification of torture.

...

Article 3.

1. No State Party shall expel, return (“refouler”), or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.⁶²

The *non-refoulement* provision contained in Article 3 is distinguishable from analogous provisions in other human rights treaties because it is non-derogable.⁶³ UNCAT therefore confers two significant protections on captured pirates. First, State Parties may not torture suspected pirates. Second, State Parties may not extradite suspected pirates to territories where they are likely to face torture. The reach of these provisions take on special significance when considering the American obligations under UNCAT in conjunction with the operation of the Kenya-United States MOU.

III. AMERICAN OBLIGATIONS UNDER UNCAT

Determining the obligations of the United States under UNCAT must take place within an established interpretive methodology. The Vienna Convention on the Law of Treaties (“VCLT”) contains the general rules for interpreting obligations of State Parties to a treaty.⁶⁴ Article 31 states that treaties “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”⁶⁵ The interpretive context of a treaty includes agreements made at the signing,⁶⁶ subsequent agreements made between the parties,⁶⁷ subsequent practice in the application of the treaty,⁶⁸ and relevant

⁶² *Id.* at arts. 1-3.

⁶³ Parsad, *supra* note 38, at 683.

⁶⁴ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

⁶⁵ *Id.* at art. 31(1).

⁶⁶ *Id.* at art. 31(2)(a).

⁶⁷ *Id.* at art. 31(3)(a).

⁶⁸ *Id.* at art. 31(3)(b).

international law.⁶⁹ In the event of ambiguity, or in the event that an interpretation leads to a “manifestly absurd or unreasonable” result, a State may consult supplementary means of interpretation.⁷⁰

Jurisdiction, in the context of treaties, concerns the extent of a State’s obligation to regulate conduct, as enabled and limited by international law.⁷¹ The many provisions conferring jurisdiction contained in UNCAT may give rise to ambiguity concerning its extraterritorial application. UNCAT contains no less than nine jurisdictional clauses⁷² under a broad Article 2 mandate for State Parties to prevent torture in “any territory under its jurisdiction.”⁷³ For example, Article 5 calls on each state party to establish jurisdiction over offenses criminalized by domestic torture laws, when offenses are committed “in any territory under its jurisdiction, or on board a ship or aircraft registered in that State.”⁷⁴ By contrast, Article 3 prohibitions of refoulement lack an analogous clause, and its affirmative “reach” is unspecified.

Interpretive sources referenced by VCLT are central to any discussion concerning the ambiguity of obligations of the United States pursuant to UNCAT Article 3. The following discussion of these obligations references reservations made at signing, supplemental discussions of jurisdiction, and subsequent State practice to demonstrate tension between the limited jurisdiction preferred by the United States, and a broader interpretation suggested by the text of the treaty, international case law, and customary international law.

By ratifying UNCAT on October 21, 1994, ten years after its adoption by the United Nations General Assembly, the United States became party to the *non-refoulement* provision embodied by Article 3 of the treaty.⁷⁵ However, in its Ratification Statement, the U.S. Senate adopted several reservations designed to limit and clarify the application of the treaty under American law.⁷⁶ The reservation to Article 3 speaks directly to the legality

⁶⁹ *Id.* at art. 31(3)(c).

⁷⁰ *Id.* at arts. 32(a), 32(b).

⁷¹ Marko Milanovic, *From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties*, 8 HUMAN RIGHTS L. REV. 411, 420 (2008).

⁷² “Jurisdiction clauses are contained in articles 2(1), 5(1)(a), 5(2), 7(1), 11, 12, 13, 16, 22(1) of UNCAT.” *Id.* at 414.

⁷³ UNCAT, *supra* note 9, art. 1.

⁷⁴ *Id.* at art. 5(1)(a).

⁷⁵ Executive Session before the United States Senate, 101st Cong., at S17490 (October 27, 1990) [hereinafter Executive Session].

⁷⁶ CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, REPORT FROM THE COMMITTEE ON FOREIGN AFFAIRS, S. EXEC. RPT. NO. 101-30, at 29 (August 30, 1990), *microformed on* Sup. Docs. No. Y1.1/6:101-30 [hereinafter Senate Committee Report].

of extradition of suspected pirates to other states. In respect to UNCAT's *non-refoulement* provision, the United States "[d]oes not consider itself bound by Article 3 insofar as it conflicts with the obligations of the United States towards States *not party to the Convention* under bilateral extradition treaties with such States."⁷⁷ The meaning of this reservation is uncomplicated, precluding the reach of Article 3 to agreements with States not party to UNCAT. The Senate negotiation history also supports this view.⁷⁸ Kenya, however, is a state party to UNCAT.⁷⁹

It is notable that at ratification the United States interpreted the "substantial grounds for believing that he would be in danger of . . . torture" language of Article 3 to mean "more likely than not" that torture will occur.⁸⁰ UNCAT does not specify what constitutes "substantial grounds", thus leaving a determination to the state party.⁸¹ Consistent with the *non-refoulement* provision of the Refugee Act of 1980, an individual may not be extradited to another state where threat of persecution is "more likely than not" as opposed to "well-founded."⁸² David Stewart notes, "because adherence to the Convention would require (rather than permit) *non-refoulement* . . . the more stringent standard was considered the appropriate referent as a matter of domestic law."⁸³ Article 3, interpreted in conjunction with this reservation, precludes the United States from extraditing suspected pirates to Kenya if it is "more likely than not" that they will be subjected to torture.

Although no limitation on the territorial application of Article 3 is referenced in the reservation itself, the Senate Committee on Foreign Relations Report on UNCAT ("Senate Committee Report"), accompanying the domestic law setting UNCAT into force, presents interpretations of the Article 3 reservation which also constrain its extraterritorial application.⁸⁴ First, the Senate Committee Report clarifies its Article 3 interpretation by stating that the *non-refoulement* prohibition applies to "expulsion or return of persons in the *United States* to a particular State, and does not grant a

⁷⁷ Executive Session, *supra* note 75 (emphasis added).

⁷⁸ Senate Committee Report, *supra* note 76, at 16-17.

⁷⁹ Kenya ratified UNCAT on Feb. 21, 1997. *Status of Treaties, Human Rights*, UNITED NATIONS TREATY COLLECTION, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

⁸⁰ Senate Committee Report, *supra* note 76, at 16.

⁸¹ Stewart, *supra* note 57, at 458.

⁸² *Id.*; see Refugee Act of 1980, Pub. L. No. 96-212, §203(e), 94 Stat.102, [codified at 8 U.S.C. § 1253(h)(1) (1980)]; *INS v. Stevic*, 467 U.S. 407 (1984) (interpreting the statutory burden of proof for withholding of removal); *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (interpreting the statutory burden of proof for discretionary asylum claims).

⁸³ Stewart, *supra* note 57, at 458.

⁸⁴ Senate Committee Report, *supra* note 76, at 16.

right . . . to avoid expulsion to other States.”⁸⁵ The first clause may limit the application of Article 3 protections to those detained within the territory of United States. Read with the second clause, “to avoid expulsion to other States,” the interpretation appears to affirmatively foreclose extraterritorial application.

The United States has adopted a more limited interpretation of its non-*refoulement* obligations in practice as well. In its report to the Committee Against Torture (“Committee”), the adjudicative body of UNCAT, the United States reiterated its Article 3 obligations to not transfer persons to countries where it is ‘more likely than not’ that they will be subject to torture.⁸⁶ However, in certain cases, the United States will extradite an individual to states where torture is a concern after securing assurances from a foreign government that it will not torture the transferred individual.⁸⁷

In its response to the U.S. report, the Committee criticized reliance on diplomatic assurances and questioned the United States’ commitment to the spirit of the *non-refoulement* provision.⁸⁸ Moreover, the Committee expressed concern that the United States considers the *non-refoulement* provision not to extend to individuals detained outside its *de jure* territory.⁸⁹ The Committee provided two recommendations. First, the United States’ UNCAT jurisdiction should apply to all persons “under the effective control of its authorities, of whichever type, wherever located in the world.”⁹⁰ Second, the United States should apply the *non-refoulement* guarantee to all detainees in its custody.⁹¹ The recommendations may have limited impact; the United States does not currently accept the Committee’s jurisdiction. While the United States will “recognize and accept the Committee to investigate any reliable reports it may receive indicating a systematic practice of torture in the United States . . . [it] will not, at least at this point, accept the competence of the Committee to consider individual complaints of treaty violations.”⁹²

With regard to the MOU, two issues emerge from this examination of

⁸⁵ *Id.* (emphasis added).

⁸⁶ U.N. Comm. Against Torture, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, Addendum, United States of America*, para. 15, U.N. Doc. CAT/C/48/Add.3/Rev.1 (Jan. 13, 2006) [hereinafter US CAT Report].

⁸⁷ *Id.*

⁸⁸ U.N. Comm. Against Torture, *Consideration of Reports Submitted By State Parties Under Article 19 of the Convention, Conclusions and Recommendations of the Committee Against Torture*, para 21, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) [hereinafter CAT Response].

⁸⁹ *Id.* at para. 15.

⁹⁰ *Id.*

⁹¹ *Id.* at para. 20.

⁹² Stewart, *supra* note 57, at 469.

the United States' perceived obligations under UNCAT: First, whether the prevailing interpretation limits the application of *non-refoulement* protections under UNCAT to suspected pirates aboard American vessels in the Gulf of Aden; second, if UNCAT applies, whether the United States is precluded from extraditing suspected pirates captured in the Gulf of Aden to Kenya for prosecution where evidence exists of officially sanctioned torture.

IV. THE CASE FOR EXTRATERRITORIAL APPLICATION OF UNCAT

Despite American reservations made to UNCAT, persuasive authority suggests that both the text of the treaty and customary international law require extraterritorial application of UNCAT's Article 3 *non-refoulement* provisions. At the outset, prohibition of torture is considered a preemptory, *jus cogens* norm of international law "from which no derogation is permitted."⁹³ As an extension of the *jus cogens* prohibition of torture, *non-refoulement* is a "principle of customary international law by which a person may not be returned to a country where he or she may face persecution or be subject to torture[.]"⁹⁴ Professor Alice Farmer notes, "[f]or several decades, authorities have held that *non-refoulement* is a principle of customary international law, and is binding on all states regardless of specific assent, an assertion that demonstrates the acceptance of *non-refoulement* by the international community of states as a whole."⁹⁵ Further, "[t]he non-derogability of a norm emphasizes the special status of the right, holding that it cannot be set aside, even in circumstances that would justify derogation

⁹³ U.N. Office of the High Comm'n for Human Rights, *Comm'n on Human Rights, Human Rights Comm., General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, P 10, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (Nov. 4, 1997); see, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702; Steven Ackerman, *Torture and Other Forms of Cruel and Unusual Punishment in International Law*, 11 VAND. J. TRANSNAT'L L. 653 (1978).

⁹⁴ Parsad, *supra* note 38, at 682 (citing Sir Elihu Lauterpacht & Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 163-64 (Erika Feller, Volker Türk & Frances Nicholson eds., Cambridge University Press 2003) (2001) (describing that the customary norm of *non-refoulement* prohibits return of a person to a country where there are "substantial grounds" for asserting that the person will be subject to torture)).

⁹⁵ "While commentators initially differed on the extent to which *non-refoulement* should be considered a principle of customary international law, it is now settled that the principle is of a fundamentally norm-creating character such that it can be used to form the basis of a general rule of law." Farmer, *supra* note 10, at 24 (internal citations omitted); see *North Sea Continental Shelf (F.R.G. v. Den./F.R.G. v. Neth.)*, 1969 I.C.J. 3, at paras. 37, 63 (Feb. 20) (distinguishing between being bound by "specific assent" by ratifying a treaty and being bound by customary international law which is automatic and does not require assent and to which no reservations may be made); see also VCLT, *supra* note 64, art. 53.

from other rights.”⁹⁶

With respect to the extradition of suspected pirates to prosecuting nations, “the decisive factor cannot be the place where the person concerned [is] located . . . [r]ather, the only point at issue is whether the person concerned is under the control of state institutions or is affected by their actions.”⁹⁷ Author Krishma Parsad posits “[w]ithout such extraterritorial application . . . the purpose behind [UN]CAT, to prevent torture, cannot be satisfied because it allows states to renege on their international obligations.”⁹⁸ Recalling that treaties “shall be interpreted in good faith in accordance with . . . [their] object and purpose,”⁹⁹ it is difficult to argue that the United States, as the capturing state, may be exempted from its *non-refoulement* obligations where detained pirates may be tortured in Kenya.¹⁰⁰

Rulings from other adjudicative bodies conform to the Committee’s recommendation that Article 3 protections have extraterritorial effect vis-à-vis interpretation of similar human rights treaties.¹⁰¹ Europe has struggled with the extraterritorial application of *non-refoulement* provisions contained in the European Convention on Human Rights (“ECHR”). The landmark holding from the European Court of Human Rights (“ECtHR”) regarding the extraterritorial application of ECHR came in the 1996 case *Loizidou v. Turkey*.¹⁰² The Court held in *Loizidou* that ECHR applied wherever a state exercised “effective control of an area outside its national territory,”¹⁰³ locating the nexus for extraterritorial application of human rights treaties in

⁹⁶ Farmer, *supra* note 10, at 25.

⁹⁷ Andreas Fischer-Lescano, *et. al.*, *Border Controls at Sea: Requirements Under International Human Rights And Refugee Law*, 21 INT’L J. REFUGEE L. 256, 267-68 (noting “[t]here can be no place outside the country of origin of the person concerned where the [treaty’s] *non-refoulement* principle does not apply – whether this be on a state’s own territory, at its borders, beyond national borders, in transit zones or in areas declared as international zones.”).

⁹⁸ Parsad, *supra* note 38, at 689.

⁹⁹ VCLT, *supra* note 64, at art. 31(1).

¹⁰⁰ *Id.*

¹⁰¹ Discussion surrounding *non-refoulement* often occurs in the context of refugee and immigration law with regards to treaties specifically protecting refugees and asylum seekers seeking admission into a host state. In the United States, UNCAT protections are most often utilized in the immigration context to prevent the removal (“withholding of removal”) of an individual to a country where she will likely face torture. The applicability of *non-refoulement* arguments made in the refugee law arena to discussions of extraditions at issue in this essay is widely recognized. Fischer-Lescano, *supra* note 97, at 267; *see* Stewart, *supra* note 57, at 457-58.

¹⁰² *Loizidou v. Turkey*, App. No. 15318/89, 20 *Eur. H.R. Rep.* 99, at para. 52 (1996), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=695884&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

¹⁰³ *Id.* at para. 62.

the projection of sovereign power, rather than in particular geographic boundaries.¹⁰⁴

In the 2008 case *Saadi v. Italy*,¹⁰⁵ the ECtHR handed down a strong reaffirmance of *Loizidou* and confirmed the non-derogability of the *non-refoulement* provisions of ECHR. In *Saadi*, the petitioner was extradited to Tunisia after the Italian government secured diplomatic assurances from Tunisia that the petitioner would not be tortured.¹⁰⁶ The petitioner contended that it was common knowledge that the Tunisian government engaged in torture, a belief confirmed by both the U.S. State Department and Amnesty International.¹⁰⁷ Upon extradition, the petitioner was subjected to torture and the Court held that Italy had violated the *non-refoulement* provision of ECHR.¹⁰⁸ In its disapproval of the Italian stance, the Court noted that where a substantial likelihood for torture exists, diplomatic assurances may never derogate ECHR's *non-refoulement* provisions,¹⁰⁹ and where a state exerts control over an individual in custody, the ECHR's *non-refoulement* protections are absolute.¹¹⁰

The U.S. Supreme Court has reached the opposite conclusion regarding the extraterritorial application of *non-refoulement* provisions. In *Sale v. Haitian Centers Council*, the U.S. Supreme Court held that the *non-refoulement* provisions of the U.N. Conventions Relating to the Status of Refugees did not apply to actions taken by the Coast Guard in the international waters.¹¹¹ The ruling relied heavily on the text and the negotiating history of the treaty to find a lack of affirmative language suggesting extraterritorial application.¹¹² This decision has been subject to extraordinary criticism,¹¹³ most prominently from the dissent noting that the

¹⁰⁴ Milanovic, *supra* note 71, at 425.

¹⁰⁵ *Saadi v. Italy*, Appl. No. 37201/06, Eur. Ct. H.R. (2008), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=829510&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>.

¹⁰⁶ *Id.* at para. 54.

¹⁰⁷ *Id.* at paras. 82, 98, 99.

¹⁰⁸ *Id.* at para. 114.

¹⁰⁹ *Id.* at para. 127.

¹¹⁰ *Id.* at para. 138.

¹¹¹ *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 177 (1993). The non-refoulement provisions of the Conventions Relating to the Status of Refugees are codified at Article 33.1. U.N. Conventions Relating to the Status of Refugees, art. 33, Apr. 22, 1954, 189 U.N.T.S. 150.

¹¹² *Id.* at 180.

¹¹³ See, e.g., Lori A. Nessel, *Externalized Borders and the Invisible Refugee*, 40 COLUM. HUM. RTS. L. REV. 625 (2009); Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 39, 43 (1994) (noting that the majority of the Court applied a presumption against extraterritoriality, notwithstanding that the statute at issue was enacted pursuant to a multilateral treaty and without "acknowledging the primacy of the principle of *nonrefoulement* in customary international law"); Harold Hongju Koh, REFLECTIONS ON

ruling would effectively “eviscerate” the treaty’s *non-refoulement* provisions.¹¹⁴

The Committee has repeatedly clarified that the intent of UNCAT includes the extraterritorial application of Article 3.¹¹⁵ The Committee response to the United States, referenced above, was explicit in its affirmation of UNCAT’s application to all individuals under the effective control of the state party.¹¹⁶ In the case of extradition and rendition, this has grown into an understanding that human rights protections must apply in cases where a state exerts authority over an individual, a standard referenced by the Committee, the European Court of Human Rights, and scholars.¹¹⁷ These sources provide ample evidence to support a proposition that Article 3 obligations of United States apply extraterritorially, and are non-derogable by diplomatic assurances from partner states. The notion that actions of the United States in international waters escape the reach of UNCAT’s *non-refoulement* provisions is challenged by customary law, the intent of UNCAT, and legal interpretations suggesting otherwise. This conclusion necessarily implicates the legality of the MOU, leaving only the question of the likelihood that suspected pirates will face torture upon extradition to Kenya.

V. EVIDENCE OF TORTURE IN KENYAN PRISONS AND THE LEGALITY OF THE MOU

The United States Department of State has documented serious human rights abuses in Kenya.¹¹⁸ A 2008 report released by the Department of State included the revelation that “police frequently used violence and torture during interrogations and as punishment [for] pre-trial detainees and convicted prisoners.”¹¹⁹ Common methods of torture in prisons included “whipping, burning with cigarettes, and beating with gun butts and wooden clubs.”¹²⁰ The 2007 Department of State report was similarly damning, finding that “torture in prisons was commonplace and inflicted openly . . . while prison and detention center conditions continued to be harsh and life

REFOULEMENT, 35 *Hastings Int’l L.J.* 1 (1994).

¹¹⁴ *Id.*, dissent at 196.; *See, Fischer-Lescano, et. al., supra* note 97, at 266 (discussing the political nature of the ruling and its departure from accepted methods of treaty interpretation).

¹¹⁵ CAT Response, *supra* note 88.

¹¹⁶ *Id.* at para.15.

¹¹⁷ *Id.*; *See also* Milanovic, *supra* note 71, at 447 (discussing human rights treaty jurisdiction application to any place where a state exercises power over a territory and its inhabitants).

¹¹⁸ 2008 HUMAN RIGHTS REPORT, *supra* note 14.

¹¹⁹ *Id.*

¹²⁰ *Id.*

threatening.”¹²¹ A statement released by the Special Rapporteur for the United National High Commissioner for Human Rights confirms many of these findings, and condemns a lack of impetus for any meaningful reform.¹²²

Reports detail a severely backlogged Kenyan legal system; the Chief Justice has admitted to a judicial backlog of nearly one million criminal cases, resulting in detainees “spending more than three years in prison before their trials [are] completed.”¹²³ Data compiled by international NGOs, like the Independent Medico-Legal Unit, reveal that by 2006 Kenyan prisons were at over 243% capacity and guards routinely used torture to subdue the incarcerated population.¹²⁴ The BBC documented further abuses, noting in a 2003 report that “brutality and negligence . . . is the hallmark of jails throughout Kenya,¹²⁵ while Voice of America reported that suspected pirates held in the Shimon la Tewa prison were mostly juveniles with untreated open wounds.¹²⁶

The European Union has bankrolled efforts by the United Nations to revamp the Kenyan criminal justice and prison system in response to criticism of bilateral extradition agreements.¹²⁷ In particular, Shimo La Tewa Prison “has received several upgrades including mattresses for the prisoners.”¹²⁸ Professor James Thuo Gathii notes, the United Nations “is essentially retrofitting the Kenyan criminal justice system, which is already heavily backlogged and bedeviled by basic problems such as inadequate prison space[.]”¹²⁹ While the United Nations hoped that these interventions would “reduce the incidence of beatings, lack of health care, and prison overcrowding” conditions in Kenyan prisons remain poor.¹³⁰ The 2009 U.S.

¹²¹ 2007 HUMAN RIGHTS REPORT: KENYA, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPARTMENT OF STATE (March 11, 2008), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2007/100487.htm>.

¹²² Phillip Alston Report, *supra* note 36, at para. 31.

¹²³ *Id.*

¹²⁴ TORTURE AND RELATED VIOLATIONS IN KENYA: ALTERNATIVE REPORT TO THE UNITED NATIONS COMMITTEE AGAINST TORTURE, INDEPENDENT MEDICO-LEGAL UNIT 176 (2008), *available at* <http://www.imlu.org/images/documents/torture%20and%20related%20violations%20in%20kenya%282008%29.pdf>.

¹²⁵ *Inside Kenya's 'worst' prison*, BBC NEWS, Mar. 4, 2003, *available at* <http://news.bbc.co.uk/2/hi/africa/2816217.stm>.

¹²⁶ *Paris-based group says accused Somali Pirates denied rights*, VOICE OF AMERICA, Aug. 27, 2009, *available at* 2009 WLNR 16728133.

¹²⁷ Gathii, *supra* note 34, at 1353.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *See* 2009 HUMAN RIGHTS REPORT: KENYA, BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPARTMENT OF STATE (Mar. 11, 2010), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135959.htm>.

Department of State Report issued in March 2010, following UN intervention, revealed that a "prison assessment during the year concluded that torture, degrading and inhuman treatment, unsanitary conditions, and extreme overcrowding were endemic in prisons."¹³¹

In order for an individual to claim relief under Article 3 of UNCAT, he must demonstrate that his pain is not the result of lawful sanctions, and that the Article 1 definition of torture is satisfied.¹³² At minimum, credible reports generated by the U.S. Department of State, the United Nations, NGOs and the news media may implicate the United States' Article 3 definition of torture. The MOU, at best, appears to rest on unsteady legal grounds.

CONCLUSION

The Kenya-United States MOU should be closely scrutinized to determine whether the United States is in violation of its obligations as a state party to UNCAT. If the torture of extradited suspected pirates in Kenya is more likely than not, the United States should no longer honor the MOU. While many states party to UNCAT have signed similar agreements with Kenya,¹³³ this does not release the United States from its responsibility to honor human rights. The Convention Against Torture, notwithstanding alternate interpretations by the United States, protects all individuals from torture, regardless of geographic or jurisdictional conditions. This intent is buttressed both by preemptory norms of international law and case law.

Although this essay has not specifically addressed legal alternatives to battling piracy, they are already available. Until a favorable regional solution is presented, American civilian courts are capable of adjudicating trials of suspected pirates under domestic law, despite the obstacles and expense involved.¹³⁴ In the long term, some have suggested the establishment of piracy tribunals in the region, similar to the International Criminal Court, where suspected pirates would receive protections under international law.¹³⁵

Policy considerations for ceasing extradition of suspected pirates to Kenya exist in surplus. Journalist Alisha Ryu articulates the precarious

¹³¹ *Id.*

¹³² The Office of Legal Counsel, U.S. Dept. of Justice, recently revised the legal standard for torture as criminalized under U.S. law. Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, Office of Legal Counsel, U.S. Dept. of Justice, December, 30, 2004, <http://www.justice.gov/olc/18usc23402340a2.htm>.

¹³³ Dutton, *supra* note 13, at 220.

¹³⁴ Gopalan and Switzer, *supra* note 42, at 21.

¹³⁵ Bahar, *supra* note 8, at 81-83.

situation noting, “charges of mistreatment or abuse of suspected Somali pirates brought to Kenya under a vague, little publicized agreement could again stir up anger and resentment among Muslims and Somalis and the region.”¹³⁶ The torture of captured pirates will further call into question the motives and values of our efforts, and the efforts of the developed world, to suppress piracy.¹³⁷

Perhaps the image of pirates as “enemies of all humanity” has prevented the public from examining the United States’ non-refoulement duties under UNCAT. In the not so distant past, pirates were exempt entirely from basic human protections.¹³⁸ Professor Kontorovic suggests that by using Kenya as a “go-to state for piracy prosecution,” the United States is willing to sacrifice human security for suspected pirates in exchange for convenience and expediency.¹³⁹ The ramifications of this decision are manifold. The ratification of treaties like UNCAT demonstrates that even pirates must be afforded basic human rights. The torture of suspected pirates extradited by the United States should place our desire for justice in sharp relief with a concern for human dignity.

¹³⁶ Alisha Ryu, *Rights groups question US deal to send pirates to Kenya*, VOICE OF AMERICA, February 13, 2009, available at 2009 WLNR 2888533.

¹³⁷ Passman, *supra* note 40, at 39.

¹³⁸ Gopalan and Switzer, *supra* note 42, at 11.

¹³⁹ Kontorovic, *supra* note 2, at 270.