

SOMALI PIRATES: AN EXPANSIVE INTERPRETATION OF HUMAN RIGHTS

AMITAI ETZIONI*

I. INTRODUCTION.....	40
II. PIRACY: A MAJOR CRIME.....	45
III. PIRATES, CIVILIAN STATUS, AND CIVILIAN RIGHTS	47
A. <i>Procedural Rights of Free Nations in Domestic Courts</i>	47
B. <i>A Matter of Jurisdiction: Military Pursuit of Civilian Criminals?</i>	50
IV. RIGHTS DERIVED FROM INTERNATIONAL LAW	51
A. <i>Imminent Danger</i>	51
B. <i>Asylum and Extradition</i>	52
C. <i>No Delegation</i>	54
V. CONCLUSION: BALANCING RIGHTS AND THE COMMON GOOD.....	56

* Amitai Etzioni is the Director of the Institute for Communitarian Policy Studies and a University Professor and professor of International Relations at the George Washington University. He received his Ph.D. in Sociology from the University of California, Berkeley in 1958. He was also previously a professor at Columbia University and the Harvard Business School. I am indebted to Radhika Bhat for extensive research assistance and numerous editorial comments and to Commander James Kraska for numerous comments on a previous draft.

I. INTRODUCTION

Sometimes a complex issue can be captured in a few very simple words: “Prosecuting suspected pirates detained in international waters has proved difficult.”¹ And according to Douglas Burnett, an expert in maritime law, pirates are treated with a “catch and release philosophy that’s usually reserved for trout.”² Indeed, despite the fact that there has been a considerable increase in piracy in the Gulf of Aden and Indian Ocean as of 2007—Somali pirates have taken hundreds of hostages, terrorized commercial and recreational shipping, and imposed a considerable economic burden on seafaring—the majority of pirates who capture hostages were paid off, and even when caught, they were not detained or prosecuted.³ Few pirates have been confronted and killed.⁴

These observations are puzzling, given that piracy has been considered for centuries a very serious offense by most, if not all, nations and pirates were regularly killed or executed after, at most, a rather perfunctory hearing by the captain of the ship that captured them. As is often the case, more than one factor helps explain these observations, such as the vastness of the area involved. This Essay focuses on one set of factors—the effects of the interpretation of the human rights extended to pirates in recent decades.

The main thesis of this Essay is that the human rights extended to these pirates were at least initially interpreted in such an expansive way that they prevented proper attention to two basic common goods: the safety and livelihood of civilians and the right to freedom of navigation in international waters. In this way, the expansive

1. Sarah Childress, *U.S. Holds Suspects After Pirate Standoff*, WALL ST. J., Apr. 2, 2010, at A11.

2. *All Things Considered: U.S. Navy Captures Pirates* (NPR radio broadcast Apr. 1, 2010), transcript available at <http://www.npr.org/templates/story/story.php?storyId=125468411> (reporting that Burnett said this).

3. See, e.g., Corey Flintoff, *Prosecuting Pirates: No More Walking the Plank*, NPR (Jan. 9, 2010), <http://www.npr.org/templates/story/story.php?storyId=99169738> (discussing the difficulties of prosecuting captured pirates).

4. *Id.*

interpretation of human rights violated what responsive communitarians consider a legitimate balance between rights and public safety.⁵ Moreover, this interpretation of human rights undermines the rights' normativity.

In effect, one can see a parallel between the expansive interpretation of human rights in the case at hand and the expansive interpretations of individual rights in the 1980s. In the 1980s, following vastly overdue and highly justified extension of de jure and de facto rights to minorities, women, handicapped persons, and others, came some trivial extensions of rights that undermined their standing. Telling examples include the claim that the right to play Santa Claus was violated by Macy's when it refused to re-engage a person who had previously played Santa Claus but had started taking psychotropic medications.⁶ And, in Santa Monica, a feminist argued that a city ordinance limiting restroom use to the gender noted on the restroom door—unless there were more than three people in line in the women's restroom, at which point a woman could use the men's room—infringed on women's rights, for it restricted their ability to use any bathroom any time.⁷ At that time, Mary Ann Glendon's book *Rights Talk* spelled out the damage caused by excessively expanding the otherwise cardinal and valuable precept of rights.⁸ The key argument here advanced is not that pirates are without rights but that the interpretations of these rights have been expanded to the point that it undermines the rights of all other persons and corrodes the rights themselves. Additionally, the rights enjoyed by pirates must be balanced against concerns for the common good.

5. See generally Amitai Etzioni, *Too Many Rights, Too Few Responsibilities*, in TOWARD A GLOBAL CIVIL SOCIETY 99, 99–105 (Michael Walzer ed., 1995) (discussing broadly a balance between rights and public safety).

6. David Margolick, *Man With AIDS Virus Sues To Be a Macy's Santa Again*, N.Y. TIMES, Aug. 29, 1991, at B1 (reporting that the man here described filed a discrimination claim, contending that Macy's denied him the position on the basis of his HIV-positive status and that Macy's fear of his Prozac use was unfounded and a smokescreen).

7. Nancy Hill-Holtzman, *Santa Monica OKs Restroom Law*, L.A. TIMES, Nov. 14, 1991, at ME3; Robert Reinhold, *Santa Monica Journal; In Land of Liberals, Restroom Rights Are Rolled Back*, N.Y. TIMES, Nov. 15, 1991, at A14.

8. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

Others have called attention to the expansive interpretations of pirates' rights and the antisocial results. Eugene Kontorovich, a law professor at Northwestern University, wrote:

While international law has developed to include many new crimes, the successful prosecution of piracy has grown more difficult than it was in the age when ships were powered by sails. Although international law obligates nations to repress piracy, many legal rules, practical constraints, and other considerations pull states in the opposite direction.⁹

Others have called the treatment of pirates' rights the equivalent of granting "a get out of jail card."¹⁰ John Bolton, a former permanent U.S. representative to the United Nations, added that "due process is only that process that is due, and the pirates have already had more than enough."¹¹

Pirates, in recent years, have not been confronted aggressively, and many times, even when they have been caught, they have simply been released. For example, in May 2009, Portuguese forces found dynamite, automatic rifles, and rocket-propelled grenades on the mother ship of pirates they had chased away from seeking to board a German tanker. The Portuguese merely disarmed the pirates and set them free.¹² Danish forces set ten suspected pirates free in September 2008.¹³ Canadian forces pursued and then boarded a pirate vessel in April 2009, confiscated the weapons they found, and let the pirates go.¹⁴ In April 2009, Dutch forces even set pirates free who had been holding hostages onboard a ship.¹⁵ In November 2009, Greek

9. Eugene Kontorovich, "A Guantanamo on the Sea": *The Difficulties of Prosecuting Pirates and Terrorists*, 98 CALIF. L. REV. 243, 256 (2010).

10. John S. Burnett, *Captain Kidd, Human-Rights Victim*, N.Y. TIMES, Apr. 20, 2008, at WK12.

11. John Bolton, *A 'World Turned Upside Down'? U.S. Now a Judicial Target for Defending Lawful Commerce*, WASH. TIMES, Apr. 17, 2009, at A21.

12. *Piracy: Wrong Signals*, ECONOMIST, May 9, 2009, at 62.

13. Oliver Hawkins, *What to Do with a Captured Pirate*, BBC NEWS (Mar. 10, 2009), http://news.bbc.co.uk/2/hi/in_depth/7932205.stm.

14. Alison Bevege, *Somali Pirates Nabbed, Released by Canadian Frigate*, CANADA.COM (Apr. 19, 2009), <http://www2.canada.com/topics/news/story.html?id=1512697>.

15. *Dutch Forces Free Pirate Captives*, BBC NEWS (Apr. 18, 2009), <http://news.bbc.co.uk/2/hi/africa/8005730.stm>.

forces captured pirates who were believed to have attacked a French cargo ship; the pirates were released within a week.¹⁶ In April 2010, U.S. naval forces captured eleven pirates, ensured that they “had no means to conduct any more attacks,” and destroyed their mother ship but then released them onto two small skiffs.¹⁷ *The Sunday Times* reported that between August 2008 and September 2009, 343 suspected pirates were captured, disarmed, and released, compared to the 212 who were held for prosecution.¹⁸ In numerous other cases, pirates were simply paid to let their hostages go.¹⁹

Since 2007, pirates have acted with considerable impunity. In 2007 alone, 433 seafarers were either taken hostage, assaulted, injured, or killed by Somali pirates.²⁰ In 2008, the incidents of piracy off the Horn of Africa doubled, and pirates attacked 135 ships, seized forty-four, and took more than 600 seafarers hostage.²¹ The trend continued though 2009; as of the year’s end, pirates had attacked 200 ships, successfully seizing over forty and taking at least 679 seafarers hostage.²² In exchange for the release of some of

16. Jon Ungoed-Thomas & Marie Woolf, *Navy Releases Somali Pirates Caught Red-Handed*, TIMES ONLINE (Nov. 29, 2009), <http://www.timesonline.co.uk/tol/news/world/africa/article6936318.ece>.

17. Commander, Combined Maritime Forces Public Affairs, *Combined Maritime Forces Flagship Intercepts Somali Pirates*, NAVY.MIL (Apr. 2, 2010), http://www.navy.mil/search/display.asp?story_id=52370.

18. Ungoed-Thomas & Woolf, *supra* note 16.

19. See, e.g., *Report: Somali Pirates Release SKorean Ship*, ASSOCIATED PRESS (Nov. 6, 2010), <http://www.google.com/hostednews/ap/article/ALeqM5iPkCAL7ghy26OqidqrEOnQx0d6g?docId=f8a35bde92904468a359ffed1fb0947> (reporting that pirates were paid to release a South Korean supertanker).

20. Burnett, *supra* note 10.

21. *Piracy in Waters Off the Coast of Somalia*, INT’L MAR. ORG., http://www.imo.org/home.asp?topic_id=1178.

22. *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During December 2009*, INT’L MAR. ORG., 3, 6–7 (Jan. 26, 2010), http://www.imo.org/includes/blastData.asp/doc_id=12379/147.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During November 2009*, INT’L MAR. ORG., 3, 7–10 (Jan. 26, 2010), http://www.imo.org/includes/blastData.asp/doc_id=12378/146.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During September 2009*, INT’L MAR. ORG., 9–10 (Jan. 12, 2010), http://www.imo.org/includes/blastData.asp/doc_id=12298/143.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During October 2009*, INT’L MAR. ORG., 3, 7–8 (Jan. 12, 2010), http://www.imo.org/includes/blastData.asp/doc_id=12299/145.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During August 2009*, INT’L MAR. ORG., 5 (Oct. 10, 2009),

ships and hostages, pirates took in as much as \$120 million in 2008²³ and an estimated \$100 million in 2009.²⁴ 2010 appears to be unfolding in a similar manner. Between January and September 2010, pirates hijacked more than thirty ships and netted tens of millions of dollars in ransom; they are on track to have “another banner year.”²⁵

Thousands of employees on commercial ships peacefully navigating the high seas, some carrying food, aid, and medical supplies to war-torn zones of Africa, now must fear that they may be kidnapped by armed men and injured, killed, or held hostage for months, if not years. The obvious question is, given that security is the first duty of every state, why have the nations of the world not responded more forcefully to this threat? This Essay focuses on a subquestion: what role did an expansive interpretation of pirates’ human rights play in preventing legitimate and effective peacekeeping in this area?

Part II of this Essay deals briefly with the historical background and current status of piracy in international law, pointing to the fact that piracy has been considered for centuries a universal crime of great severity and is only paralleled in the modern law of the high seas by prohibitions on the transport of slaves. Part III discusses the problems

http://www.imo.org/includes/blastData.asp/doc_id=11909/142.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During July 2009*, INT’L MAR. ORG., 3, 5 (Oct. 10, 2009), http://www.imo.org/includes/blastData.asp/doc_id=11908/141.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During June 2009*, INT’L MAR. ORG., 3, 7–8 (July 7, 2009), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25980/138.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During May 2009*, INT’L MAR. ORG., 3, 7–11 (June 17, 2009), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25979/137.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During April 2009*, INT’L MAR. ORG., 3–6, 9–13 (May 5, 2009), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25553/136.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During February 2009*, INT’L MAR. ORG., 3, 7–9 (Apr. 22, 2009), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25551/134.pdf; *Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly—Acts Reported During March 2009*, INT’L MAR. ORG., 3, 5–10 (Apr. 6, 2009), http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25552/135.pdf.

23. Jeffrey Gettleman, *Pirates Outmaneuver Warships Off Somalia*, N.Y. TIMES (Dec. 15, 2008), <http://www.nytimes.com/2008/12/16/world/africa/16pirate.html>.

24. *Somalia’s Pirates: A Long War of the Waters*, ECONOMIST, Jan. 9, 2010, at 47.

25. Jeffrey Gettleman & Eric Schmitt, *U.S. Marines Free Ship and Capture Somali Pirates without Bloodshed*, N.Y. TIMES, Sept. 10, 2010, at A4.

that arise from the status of pirates as civilians. Part IV deals with the various international human rights interpretations that have greatly limited an effective response to the increase in piracy from 2007–2010. Part V introduces responsive communitarian ideas that call for balancing rights with concerns for the common good—in the case at hand, elementary safety on the high seas.

II. PIRACY: A MAJOR CRIME

For centuries, maritime piracy has been considered a universal crime of great severity. As far back as 1615, British courts had determined that pirates were *hostis humani generis*²⁶—an enemy of all mankind.²⁷ Judges in U.S. courts have made similar statements in past centuries.²⁸ As noted in one eighteenth-century law book, pirates captured on the high seas where it was not possible to obtain a legal judgment were subject to summary execution.²⁹ Captain Andres Breijo, the Spanish naval officer in Operation Atalanta, the EU’s antipiracy mission, commented, “In the old days, when the navy would catch a pirate, they would tie his hands and feet and throw him back in the sea’”³⁰

Piracy is a crime subject to universal jurisdiction: any state, regardless of whether or not it has any claim or connection to the property, perpetrators, or victims, may detain and prosecute suspected pirates.³¹ With regard to Somalia in particular, the UN Security Council (SC) has

26. R v. Marsh, (1615) 81 Eng. Rep. 23 (K.B.).

27. Sanford Levinson, “Precommitment” and “Postcommitment”: *The Ban on Torture in the Wake of September 11*, 81 TEX. L. REV. 2013, 2017 (2003).

28. United States v. Brig Malek Adhel, 43 U.S. 210, 232 (1844); United States v. Smith, 18 U.S. 153, 156 (1820).

29. JACOB GILES, A NEW LAW-DICTIONARY 525 (8th ed. 1762).

30. Justin Stares, *Pirates Protected From EU Task Force by Human Rights*, TELEGRAPH (Nov. 1, 2008), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/somalia/3363258/Pirates-protected-from-EU-task-force-by-human-rights.html>.

31. United Nations Convention on the Law of the Sea art. 100, 105, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. The modern view of piracy in international law is found in the United Nations Convention on the Law of the Sea (UNCLOS). UNCLOS proclaims that all states have a “duty to cooperate in the repression of piracy” and grants permission for every state to seize pirates and their ships and use their domestic courts to determine which actions to take with regard to penalties and property. *See also* United States v. Shi, 525 F.3d 709 (9th Cir. 2008), *cert denied*, 129 S. Ct. 324 (2008).

adopted five resolutions under Chapter VII of the UN Charter to aid in the capture of pirates off the Horn of Africa. In June 2008, with the consent of the Somali government, the SC passed Resolution 1816, which recognizes that states may conduct antipiracy operations within Somali territorial waters.³² A few months later, in October, the SC passed Resolution 1838, which called upon states with ships or airplanes in the area “to use on the high seas and airspace off the coast of Somalia the necessary means . . . for the repression of acts of piracy.”³³ On December 2, the Security Council adopted Resolution 1846, which encouraged states “to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law.”³⁴ Lastly, when Resolution 1816 expired in December 2008, the SC passed Resolution 1851, which called upon states to deploy military aircraft and naval vessels to the area and authorized states to “undertake all necessary measures that are appropriate *in Somalia*” to suppress “acts of piracy and armed robbery at sea.”³⁵ The resolution was adopted for the period of a year and explicitly approved military raids on Somali land “to interdict those using Somali territory to plan, facilitate or undertake” maritime piracy.³⁶

Thus, unlike in more controversial international interventions, including armed humanitarian interventions such as in Kosovo and Sudan, the international law pertaining to the capture and trial of the Somali pirates enjoys a broad consensus and a clear framework, and both

32. S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).

33. S.C. Res. 1838, ¶ 3, U.N. Doc. S/RES/1838 (Oct. 7, 2008). Security Council Resolution 1844, which is not discussed in this section, places targeted sanctions on individuals or entities “engaging in or providing support for acts that threaten the peace, security or stability of Somalia” or “obstructing the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia.” S.C. Res. 1844, ¶ 8, U.N. Doc. S/RES/1844 (Nov. 20, 2008).

34. S.C. Res. 1846, ¶ 14, U.N. Doc. S/RES/1846 (Dec. 2, 2008).

35. S.C. Res. 1851, ¶ 6, U.N. Doc. S/RES/1851 (Dec. 16, 2008) (emphasis added).

36. Press Release, U.N. Sec. Council, Security Council Authorizes States to Use Land-Based Operations in Somalia as Part of Fight Against Piracy Off Coast, Unanimously Adopting 1851 (Dec. 16, 2008), available at <http://www.un.org/News/Press/docs/2008/sc9541.doc.htm>.

the crime itself and the perpetrators of the crime are relatively easily identified. Given the clear and present danger posed by pirates, and the extensive normative and legal background regarding the ways they ought to be treated, one would expect that there would be few if any obstacles to establishing secure passage for all.³⁷

III. PIRATES, CIVILIAN STATUS, AND CIVILIAN RIGHTS

In a sort of replay of the debate concerning the rights of suspected terrorists and insurgents—which focused on whether they should be treated like criminals or POWs³⁸—the question arises whether pirates should be treated as civilians, with all the rights thereof, as unlawful combatants, or in some other way.

A. *Procedural Rights of Free Nations in Domestic Courts*

There is no international court with the jurisdiction to try pirates, and by the framework set forth in the United Nations Convention on the Law of the Sea, pirates are to be prosecuted in the domestic courts of whatever nation seizes them.³⁹ Thus, pirates are currently treated as if they are entitled to trial in a civilian criminal court, and they are granted the full panoply of criminal procedural rights of the citizens (and residents) of the particular country in which they are tried.

Given that piracy occurs on the high seas, the nature of the confrontations often involved, and the absence of police or other law-enforcement agents, adhering to this approach is highly problematic.

For example, collecting evidence on the high seas that will hold up in a criminal court is often impractical. In March 2009, the U.S. Navy released nine suspected pirates, as the

37. This reference is to legal and normative issues because this Essay does not deal with operational and logistical problems, such as the difficulties imposed by the large size of the area involved or that warships no longer have brig facilities. See James Kraska & Brian Wilson, *Fighting Pirates: The Pen and the Sword*, *WORLD POL'Y J.*, Winter 2008/09, at 46.

38. See generally PHILLIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* (2008); BENJAMIN WITTES, *LAW AND THE LONG WAR* (2008); Amitai Etzioni, *Terrorists: Neither Soldiers nor Criminals*, *MIL. REV.*, July–Aug. 2009, at 108, 108–09 (discussing whether terrorists should be treated like criminals or soldiers).

39. UNCLOS art. 105.

evidence against them was “not ironclad,” in part due to their nighttime capture.⁴⁰ In November 2009, Belgian Commander Jan De Beurme described rushing to the scene of a pirate attack only to see the suspects in the skiff throw things overboard.⁴¹ Left without evidence, the commander held that he was forced not only to set the suspected pirates free but to also fix their broken engine.⁴² And the evidence that is collected is difficult to segregate and sequester in order to meet the standards of noncontamination and the evidentiary chain of custody required by law.⁴³ Nor can one expect that those under attack will read pirates their Miranda rights—and ask them if they understood them—before the pirates blurt out any information that might be used against them in a court of law. Providing merchant ships with the personnel or training required to collect fingerprints, DNA, and other such evidence adds a burden for ships that are often stuffed with low-paid sailors from developing nations. (Nor it is clear that training merchant-ship personnel in such matters would be useful, as they are civilians and not law-enforcement personnel.)

In one case, FBI agents were flown to the scene to help collect evidence, but this is often not practical; even these agents may have a hard time collecting evidence under the circumstances.⁴⁴ U.S. Coast Guard law-enforcement detachments have been assigned to a Navy task force “to help collect and train ship-boarding team members in the best methods of collecting prosecutable evidence.”⁴⁵ Also, the U.S. Naval Criminal Investigative Service has special agents assigned to Combined Task Force-151 who “conduct

40. Kate Wiltout, *Nine Suspected Pirates Set Free; Others Could Face Trials*, VIRGINIAN-PILOT (March 3, 2009), <http://hamptonroads.com/2009/03/nine-suspected-pirates-set-free-others-could-face-trials>.

41. Will Ross, *Drones Scour the Sea for Pirates*, BBC NEWS (Nov. 10, 2009), <http://news.bbc.co.uk/2/hi/8352631.stm>.

42. *Id.*

43. *See, e.g.*, FED. R. EVID. 901; *United States v. Dent*, 149 F.3d 180, 188 (3d Cir. 1998) (citing *United States v. Kelly*, 14 F.3d 1169, 1175 (7th Cir. 1994)); *United States v. Howard-Arias*, 679 F.2d 363, 366 (4th Cir. 1982).

44. Serge F. Kovaleski et al., *Talks Break Down in Standoff with Pirates*, N.Y. TIMES, Apr. 12, 2009, at A12.

45. Jacquelyn S. Porth, *Legal Experts Take Action to Prosecute Pirates*, AMERICA.GOV, (Feb. 27, 2009), <http://www.america.gov/st/peacesec-english/2009/February/20090227144346sjhtrop0.3818781.html>.

interviews of suspects and witnesses and coordinate with lawyers and foreign law enforcement.”⁴⁶

Consider that even under the less-demanding tribunals that terrorism suspects face, the evidence, often obtained on the battlefield, frequently does not meet the tribunals’ standards. Military prosecutors have estimated that under the Military Commissions Act they have enough evidence to be able to bring to trial, at best, only eighty Guantanamo detainees.⁴⁷ Domestic criminal courts’ evidentiary standards are higher, and hence, even more difficult to meet.⁴⁸

All of this means that of those pirates who are detained and turned over to legal authorities, the majority are “unlikely to ever stand trial primarily due to a lack of available evidence and substantial legal hurdles.”⁴⁹ This seems to be one reason pirates are released rather than detained and prosecuted—and continue to terrorize the high seas.

A recent example illustrates the difficulty of prosecuting pirates in U.S. courts. On April 10, 2010, a skiff fired a shot at a U.S. Navy vessel, which returned fire and destroyed the skiff. One man was killed and the remaining six were arrested on piracy charges. The defense argued that the U.S. Supreme Court had defined piracy in 1820 as “robbery at sea” and thus the men’s actions did not meet this definition. The judge in the case, Raymond A. Jackson, threw the piracy charges out, concluding that the government “failed to establish that any unauthorized acts of violence or aggression committed on the high seas constitutes piracy.”⁵⁰

46. *Id.*

47. *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2008) (statement of Benjamin Wittes, Fellow and Research Director in Public Law, The Brookings Institution), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=3390&wit_id=7214.

48. See Michael B. Mukasey, *The Obama Administration & the War on Terror*, 33 HARV. J.L. & PUB. POL’Y 953, 959 (2010) (arguing that trials at Guantanamo were “governed by rules of evidence whose touchstone for admissibility is simply relevance and apparent reliability, rather than conformity to all the technical rigors of the Federal Rules of Evidence.”). Compare Military Commissions Act of 2009, 10 U.S.C.A. § 949a (West 2010), with, e.g., FED. R. EVID. 801–04.

49. Richard Meade, *In the Dock: The Problems with Prosecuting Pirates*, LLOYD’S LIST, May 1, 2009.

50. John Schwartz, *Somalis No Longer Face Federal Piracy Charges*, N.Y. TIMES, Aug. 18, 2010, at A16.

It is difficult to understand why taking steps to commit a crime—punishable in other areas of conduct from bank robberies to murder, albeit less severely than if the crime has been actually committed—does not apply to piracy, long considered a major offense worldwide.

B. A Matter of Jurisdiction: Military Pursuit of Civilian Criminals?

As pirates are treated as civilians but function beyond any nation's territory, at least one nation has found it difficult to deal with them. Germany was caught in a new catch-22: the German police were not equipped to combat pirates off the coast of Somalia, but the military, which does have the capability to do so, was at first prevented from dealing with them because pirates are considered to be civilians. Walter Kolbow, a member of the Social Democratic Party, contended that "according to our understanding of the law, police officers but not soldiers may arrest criminals."⁵¹ Other Germans feared that allowing the German navy to take on police duties would open the floodgates for military actions against civilians in Germany. The debate in the German parliament over the response to piracy off the coast of Somalia lasted for the better part of 2008, despite German ships having been attacked and German citizens having been taken hostage on multiple occasions in early to mid-2008.⁵² While the German parliament debated the matter, a German naval vessel participating in Operation Enduring Freedom was unable to do anything but provide assistance to ships in emergencies,⁵³ which in practice meant that the navy could chase away pirates who were engaged in an attack but could not pursue them if they backed down, catch

51. *The Law and the High Seas: Germany Looks to Battle Pirates*, SPEIGEL ONLINE INT'L (Nov. 21, 2008), <http://www.spiegel.de/international/germany/0,1518,591891,00.html>.

52. See *Berlin Looks at Ways to Battle Somali Kidnappers*, SPEIGEL ONLINE INT'L (June 26, 2008), <http://www.spiegel.de/international/germany/0,1518,562204,00.html>; *Somali Pirates Demand \$2 Million Ransom for German Hostages*, DEUTSCHE WELLE (Jan. 7, 2008), <http://www.dw-world.de/dw/article/0,3453015,00.html>; *Somali Pirates Release German, Japanese Ships: Maritime Group*, AFP (Sept. 11, 2008), <http://afp.google.com/article/ALeqM5jVT4IZcmwMTPVm1yw2hKbb7Aqm-g>.

53. See *Berlin Looks at Ways to Battle Somali Kidnappers*, *supra* note 52.

them, or detain them—let alone shoot them.⁵⁴ This situation changed in December 2008 when the German parliament voted to deploy troops as part of the EU's Operation Atalanta, authorizing the use of force to suppress piracy.⁵⁵ However, the ambiguities involved continued to hobble German (and other nations') antipiracy operations. This was one reason, among others, that Germany's GSG-9 federal police unit, which is trained to handle hostage situations, was recalled in 2009 when it set out to free hostages held by pirates off the coast of Somalia.⁵⁶

A new understanding of the legal status of pirates may be called for, as it is for terrorists. Currently, pirates are often treated as if they are entitled to all the rights of the citizens of whatever nation captures or contends with them on the high seas, which in turn is one more reason they are rarely deterred and, in effect, prosper.⁵⁷

IV. RIGHTS DERIVED FROM INTERNATIONAL LAW

A. *Imminent Danger*

For some of those untutored in legal matters, the best way to deal with pirates may be to shoot them on sight. After all, modern maritime pirates are much like armed intruders who break into one's home. Some have warned against such a response on pragmatic grounds—Somali pirates have been careful not to harm their hostages, as long as they were not confronted. Arming merchant ships might lead to an escalation of violence, and many ports do not allow firearms aboard civilian vessels in port.⁵⁸ And while warships and other government-authorized vessels do have a right to defend themselves and others through the use of deadly

54. *German Navy Inspector Discusses Expansion of Navy Powers to Combat Piracy*, BBC MONITORING EUROPEAN, Apr. 28, 2008.

55. Press Release, EU NAVFOR, German Bundestag Decides on German Atalanta Mandate (Dec. 19, 2008), available at <http://www.eunavfor.eu/2008/12/german-bundestag-decides-on-german-atalanta-mandate>.

56. *Are German Anti-Pirate Forces Hampered by Bureaucrats?*, SPEIGEL ONLINE INT'L (May 14, 2009), <http://www.spiegel.de/international/germany/0,1518,624908,00.html>.

57. Flintoff, *supra* note 3.

58. See, e.g., *Port of Pascagoula Tariff*, PORT OF PASCAGOULA, <http://www.portofpascagoula.com/sectionI.html> (stating the prohibition of weapons on any port property).

force if attacked, military personnel are expected to detain and try pirates if possible, rather than to kill them.⁵⁹ This expectation is in line with the domestic policy in democratic society according to which law enforcement officers are often criticized when they discharge their firearms when they could have instead arrested a criminal or convinced him to surrender. Thus, when pirates captured and held hostage Captain Richard Philips on board the Maersk Alabama, President Obama granted the authority for the Navy to use force only if the captain was in “imminent danger.”⁶⁰ Indeed, the three pirates were shot and killed only when one of them aimed an AK-47 at the hostage.⁶¹

It should be noted that such criteria maximize danger to the hostage and minimize risk for the hostage takers. This is the case because the pirates could have easily killed the captain out of sight or the snipers may not have been able to shoot the pirates in the split second it takes to kill an unarmed hostage. Moreover, the pirates were increasingly on edge after the captain tried to escape, the USS Bainbridge closed in, and their food, water, and fuel supply dwindled.⁶² To limit killing the pirates to visible imminent danger is to set a high price on the human rights of pirates at the expense of the rights of the hostage.⁶³

One may argue that there is nothing expansive about the imminent danger standard. The use of force in maritime law enforcement is a well-established customary international standard.⁶⁴ All across the globe, this standard is reflected in domestic police force policies (including the U.S.).⁶⁵ However,

59. DEP'T OF THE ARMY, F-M 27-10, THE LAW OF LAND WARFARE app. at A-1 (1956) (“The law of war . . . requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes . . .”).

60. Robert D. McFadden & Scott Shane, *Navy Rescues Captain, Killing 3 Pirate Captors*, N.Y. TIMES, Apr. 13, 2009, at A1.

61. *Id.*

62. *Id.*

63. See Universal Declaration of Human Rights art. 3, art. 6, G.A. Res. 210, U.N. GAOR, 3rd Sess. (1948) (“Everyone has the right to life, liberty and security of person.”) (“Everyone has the right to recognition everywhere as a person before the law.”).

64. Patricia Jimenez Kwast, *Maritime Law Enforcement and the Use of Force: Reflections on the Categorisation of Forcible Action at Sea in the Light of the Guyana/Suriname Award*, 13 J. CONFLICT & SECURITY L., 49, 56 (2008).

65. See, e.g., 14 U.S.C. § 89 (2006) (granting the use of force for maritime law enforcement to the United States Coast Guard).

the balance between the security of the civilians on ships peacefully negotiating the high seas—and the rights of pirates (and terrorists)—Is not cast in stone. Throughout legal history, this balance has been re-examined and revised. Given the ease with which pirates operate, it deserves another round of re-examination.

B. *Asylum and Extradition*

Another source of legal difficulties in confronting pirates results from asylum and extradition laws. First, if a European nation brings a Somali pirate to its shores for trial, the pirate may be able to remain in the country under asylum laws. At least by the laws of EU countries, a person need not show that he had been specifically targeted in his country of origin; it suffices to show that there is enough indiscriminant violence taking place in the applicant's place of origin that he would face a real risk of his life being in danger if he were returned.⁶⁶ It is a standard, authorities fear, pirates may meet and one reason they fear bringing pirates to their shores.

That they may qualify for asylum is not an idle legal speculation. In the 1995 case *Chahal v. The United Kingdom*, the European Court of Human Rights ruled that Article 3 of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) provides that where there are substantial grounds for believing the deportee would be at risk of torture, "his conduct cannot be a material consideration."⁶⁷ Thus, pirates cannot be shipped back to Somalia if they can show that they may be tortured in that country.

Given these rules concerning asylum and Somalia's current political situation—ongoing attacks from the Al Shabaab insurgents that control Kismaayo and the deep south and the sporadic fighting between Puntland and Somaliland—the British Foreign Office, has decided that in order to prevent the possibility that captured pirates could

66. Case C-465/07, *Elgafaji v. Staatssecretaris van Justitie*, 2 C.M.L.R. 45 (2009).

67. *Chahal v. United Kingdom*, 22 Eur. Ct. H.R. 413 (1996).

claim asylum in the UK, the Royal Navy should refrain from bringing pirates to trial in the UK.⁶⁸

Furthermore, states that capture pirates but that are, like the UK, either unwilling or unable to prosecute them domestically are effectively barred from extraditing the pirates to Somalia for trial by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the ECHR. Article 3 of the CAT states “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.”⁶⁹ Under Sharia, which is applied in varying degrees throughout Somalia,⁷⁰ the pirates could face very severe punishments, which would constitute torture under international law and under the domestic laws in many of the patrolling countries.⁷¹

Furthermore, Article 3 of the ECHR bars torture and inhuman or degrading treatment or punishment,⁷² and while it does not explicitly state a prohibition on extraditing a person to a state in which he would be in danger of being tortured, in its 1989 decision in the case of *Soering v. U.K.*, the European Court of Human Rights held that:

It would hardly be compatible with the underlying values of the Convention . . . were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would

68. Marie Woolf, *Pirates Can Claim UK Asylum*, TIMES (London) (Apr. 13, 2008), <http://www.timesonline.co.uk/tol/news/uk/article3736239.ece>.

69. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

70. See *Human Rights*, UNITED NATIONS POLITICAL OFFICE FOR SOMALIA (Sept. 15, 2009), <http://unpos.unmissions.org/Default.aspx?tabid=1928>; see also *Sharia Imposed at Somali MPs Base*, BBC News (Jan. 27, 2009), <http://news.bbc.co.uk/2/hi/africa/7854527.stm>; *Somali Region to Switch to Sharia*, BBC NEWS (Nov. 20, 2006), <http://news.bbc.co.uk/2/hi/africa/6166960.stm> (both discussing the use of Sharia law and courts in Somalia).

71. While the Transitional Government of Somalia could offer countries assurances that the captured pirates would not be subject to torture, the acceptance of these assurances depends the judgment that they are valid. As a side note, the pirates operating off the coast of Somalia have not fallen inside the protections of the Geneva Conventions up to date. See generally Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1 (2008) (discussing situations in which the Geneva Conventions might apply).

72. Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, CETS 005, 213 U.N.T.S. 222.

be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, . . . would plainly be contrary to the spirit and intendment of the Article⁷³

This decision is binding on all signatories to ECHR, which includes all European states that have deployed warships to the effort to repress piracy off the coast of Somalia.

C. No Delegation

A nation reluctant to try pirates in its domestic courts and unable to legally extradite them to their country of origin might seek to turn them over to another nation for trial (and punishment if convicted). Furthermore, many countries cannot prosecute pirates because they “don’t have domestic statutes on their books that allow for the prosecution of the crime of piracy because it was long considered a thing of the past,” according to Peter Chalk of the RAND Corporation.⁷⁴ Indeed, the United States, Denmark, the EU, and the United Kingdom have all agreed with Kenya that it will accept captured pirates and try them in its courts.⁷⁵ And while Kenya has recently stated that it is seeking to cancel these agreements and cease acceptance of pirates for trial, citing the burden to its court system,⁷⁶ the option also faces opposition on human rights grounds. The agreement between the U.S. and Kenya has led to criticism from Human Rights Watch (HRW), which contends that the Kenyan justice system does not guarantee a fair trial. HRW stated, “[t]he [Kenyan] police have a terrible record of long periods of detention without trial,” that there are “terrible conditions in the prisons” and “very poor record of access to legal representation” as well as “interminable delays in the court process.”⁷⁷

73. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) (1989).

74. *To the Point: Marines Raid Hijacked Ship off Somalia*, WKCRW (Sept. 9, 2010), http://www.kcrw.com/news/programs/tp/tp100909the_run_on_kabul_ban.

75. Sarah Childress, *Pact With Kenya on Piracy Trials Gets First Test*, WALL ST. J., Feb. 17, 2009, at A8 (noting also that Kenya will not accept all cases, and it decides which cases it is willing to pursue).

76. *Kenya Seeks to Cancel Deals for Trying Somali Pirates*, AFP (Apr. 1, 2010), http://www.google.com/hostednews/af/article/ALeqM5jDQgVLTDR4BjimFIUAs_1mFVvk8OA.

77. *Rights Group Questions US Deal to Send Pirates to Kenya*, VOICE OF AMERICA (Feb. 13, 2009), <http://www.voanews.com/english/archive/2009-02/2009->

The legal aid network Lawyers of the World, which is representing over forty of the captured pirates in Kenya, says that the agreements between Kenya and other nations and the EU violate the human rights of the suspects.⁷⁸ And German lawyers have filed a civil suit in Germany in support of the pirates held in Kenya, claiming that a fair trial is impossible in Kenya because there is no presumption of innocence.⁷⁹ In another suit, German lawyers argue that the German government is responsible for ensuring that the pirates receive proper representation in Kenya, suggesting Germany should pay for it because defendants in the African nation do not have the right to government-provided counsel, except in capital cases.⁸⁰

All said and done, there are no international courts to try pirates; the different roles of national police forces and the military complicate the pursuit of pirates; procedural rights set standards for collection and custody of evidence against pirates that are difficult to meet on the high seas by naval personnel; and various rights—observed by democracies—prevent imprisonment, deportation, extradition, or delegation of trials to other nations. (While Kenya is a democracy, many observers have misgivings about the integrity of its justice system. Peter Chalk has observed, “the [Kenyan] court system is so inefficient and corrupt that the actual efficiency of these trials is very, very low. Today, I think only about 12 to 13 pirates have actually been successfully prosecuted of the ones that have been put on shore there.”⁸¹) To reiterate, the thesis here advanced is not that the extended application of human rights to pirates is the only reason pirates are so often not confronted, detained, and

02-13-voa43.cfm?CFID=263096949&CFTOKEN=12225224&jsessionid=6630520c6c29dd8d32fb533945714f95a2b7.

78. *Paris-based Group Says Accused Somali Pirates Denied Rights*, VOICE OF AMERICA (Aug. 27, 2009), <http://www.voanews.com/english/2009-08-27-voa36.cfm>.

79. Jeffrey White, *German Lawyers Launch Pirate Defense Team*, CHRISTIAN SCI. MONITOR (Apr. 15, 2009), <http://www.csmonitor.com/2009/0416/p06s01-wogn.html>.

80. Matthias Gebauer, *Attorneys File Suit in Germany on Behalf of Alleged Pirates*, SPIEGEL ONLINE INT'L (Apr. 15, 2009), <http://www.spiegel.de/international/europe/0,1518,619103,00.html>; see also *2008 Human Rights Report: Kenya*, U.S. DEPARTMENT OF STATE (Feb. 25, 2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/afr/119007.htm> (stating that the vast majority of defendants in Kenya are tried without legal counsel, as they cannot afford representation).

81. *To the Point*, *supra* note 74.

prosecuted but that these legal considerations seem to be one significant reason piracy thrives.

V. CONCLUSION: BALANCING RIGHTS AND THE COMMON GOOD

Communitarians, especially responsive communitarians,⁸² maintain that we face two strong normative claims: that of individual rights and that of the common good, of which public safety is the prime category. Neither is a priori privileged, and we constantly work to find the proper balance between these two claims. (Courts often proceed by referring to compelling public interest, which they take into account in addition to rights considerations.) Moreover, although rights advocates tend to frame their arguments in strong terms, as if any concession or reinterpretation of what rights entail or the common good demands are a violation, both claims have historically been modified and rebalanced as conditions change. Thus, the First Amendment right to free speech as now understood was largely fashioned in the 1920s and the federal right to privacy was forged only after 1965. After 9/11, the balance between rights and homeland security was modified during the Bush Administration and again recalibrated during the first year of the Obama Administration. In the UK, criminal suspects could be legally held only for forty-eight hours without charge; however, this was extended to up to twenty-eight days for terrorism suspects. Courts and legislatures draw on the fact that the rights themselves are often formulated in ways that suggest limitations and balancing (e.g. the Fourth Amendment of the U.S. Constitution reads “The right of the people to be secure . . . against *unreasonable* searches and

82. For more discussion of responsive communitarianism, see *The Communitarian Vision*, THE COMMUNITARIAN NETWORK, <http://communitariannetwork.org/communitarian-vision/> (last visited November 26, 2010). To read the “Responsive Communitarian Platform,” see *The Responsive Communitarian Platform*, THE COMMUNITARIAN NETWORK, <http://communitariannetwork.org/about-communitarianism/responsive-communitarian-platform/> (last visited November 26, 2010). For the list of founding platform endorsers, see *Founding Endorsements*, THE COMMUNITARIAN NETWORK, <http://communitariannetwork.org/about-communitarianism/responsive-communitarian-platform/founding-endorsers/> (last visited November 26, 2010). See generally AMITAI ETZIONI, MY BROTHER’S KEEPER 199–318 (2003) (recounting the launching of the The Communitarian Project).

seizures, shall not be violated”⁸³), and in reference to changes in conditions, particularly relevant to the issue at hand is that after a wave of skyjacking in the early 1970s, the U.S. courts allowed the introduction of screening gates in airports, despite that fact that they constitute searches without individualized suspicion and without a warrant.⁸⁴ All this applies to the way pirates are treated. (The ways one decides which consideration is to take precedence—the common good or individual rights—or to what extent the two can be reconciled is a matter beyond the scope of this Essay.)⁸⁵

The preceding discussion suggests that the times call for a reexamination of the ways pirates are treated. Few would disagree that they pose a serious threat to the peaceable navigation of the high seas. The level of threat has been rising over time, given that the “business” is very lucrative and the risks and costs imposed by law-enforcement authorities are rather small. This Essay seeks to point to the problem rather than offer a new interpretation of human rights and an explanation of the extent to which a rebalancing of rights and the common is called for. This work remains to be carried out.

Given that piracy has been considered for centuries a serious offense by most people and nations, given the relative ease with which pirates can be identified (compared, for instance, to terrorists, who pass themselves off as regular civilians), and given the growing harm pirates are inflicting, one would expect that dealing with this threat to the common good could be more readily treated than many others.

83. U.S. CONST. amend. IV (emphasis added).

84. *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973).

85. For further discussion of this topic, see AMITAI ETZIONI, *THE LIMITS OF PRIVACY* (1999), and AMITAI ETZIONI, *HOW PATRIOTIC IS THE PATRIOT ACT?* (2004).