

# Somali Pirates: An Expansive Interpretation of Human Rights\*

Amitai Etzioni



Royal Marines from the British warship HMS *Montrose* come to the aid of a German-owned ship, MV *Beluga Fortune*, after it was attacked by pirates in the Indian Ocean, 26 October 2010.

Sometimes a complex issue can be captured in a few simple words. Thus, to quote a *Wall Street Journal* reporter, “[p]rosecuting suspected pirates detained in international waters has proved difficult.”<sup>1</sup> Indeed, despite the fact that there has been an increase in piracy in the Gulf of Aden and Indian Ocean – pirates have taken hostages, terrorized shipping and imposed a considerable economic burden on seafaring – pirates have been paid off, and even when caught, they have not been detained or prosecuted. And very few pirates have been confronted and killed.

This is puzzling given that piracy has for centuries been considered a serious offence by most if not all states, and pirates were regularly killed or executed after, at most, a perfunctory hearing, by the captain of the ship that captured them. The change can be explained by many factors, but this article focuses on one – the effects of the interpretation of the human rights extended to pirates in recent decades.

The main argument here 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 interpretation of human rights violates a legitimate balance between rights and public safety.

One can see a parallel between the expansive interpretation of human rights regarding piracy and the expansive interpretations of individual rights that happened 20-30 years ago. In the 1980s, following vastly overdue 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. Examples from lawsuits include the right to play Santa Claus at a department store and the right of women to use male restroom facilities, even when there is no line in front of the

ladies room. I argue that damage is caused by excessively expanding the otherwise cardinal and valuable precept of rights.

The argument here is not that pirates should not have rights, but that the interpretation of these rights has been expanded to the point that it undermines the rights of all other persons and corrodes the rights themselves. The rights enjoyed by pirates must be balanced against concerns for the common good.

Modern pirates have not been confronted aggressively and even when caught, many have simply been released. As Douglas Burnett, an expert in maritime law, refers to it, pirates are treated with a “catch and release philosophy that’s usually reserved for trout.”<sup>2</sup> 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 a German tanker. They disarmed the pirates and set them free. Canadian forces boarded a pirate vessel in April 2009, confiscated weapons and let the pirates go. In April 2009, Dutch forces set pirates free who had been holding hostages onboard a ship. In April 2010, US naval forces captured 11 pirates, ensured that they did not have the ability to attack any ships, destroyed their mother ship and then released them. *the Sunday Times* reports that between August 2008 and September 2009, 343 suspected pirates were captured, disarmed and released, compared to the 212 who were held for prosecution.<sup>3</sup> In other cases, pirates were simply paid to let their hostages go.

Since 2007 pirates have acted with considerable impunity. In 2007, 433 seafarers were taken hostage, assaulted,

injured or killed by Somali pirates.<sup>4</sup> In 2008, the incidence of piracy off the Horn of Africa doubled, and pirates attacked 135 ships, seized 44 and took more than 600 seafarers hostage.<sup>5</sup> In 2009, pirates attacked 200 ships, successfully seizing 42 and taking at least 679 seafarers hostage.<sup>6</sup> In exchange for the release of ships and hostages, pirates took in as much as \$120 million in 2008 and an estimated \$100 million in 2009.<sup>7</sup> The figures for 2010 indicate a similar amount. According to US naval sources, more than 200 other attacks a year have not been reported because such reporting is ‘bad for business.’

Thousands of employees on commercial ships peacefully navigating the high seas now must fear that they may be kidnapped, injured, killed, or held hostage for months, if not years. Given that security is the first duty of every state, the obvious question is why haven’t states responded more forcefully to this threat? And, more importantly for this article, what role has an expansive interpretation of the human rights of pirates played in preventing effective solutions to this problem?

### ***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* – enemies of all mankind – and judges in US courts have made similar statements in past centuries.<sup>8</sup> As noted in one 18<sup>th</sup> century law book, pirates captured on the high seas where it was not possible to obtain a legal judgement were subject to summary execution.<sup>9</sup>

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. The United Nations Convention on the Law of the Sea (UNCLOS) – where the modern view of piracy in international law is found – 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 what penalties to impose.

With regard to Somalia, the UN Security Council (UNSC) has 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 UNSC passed Resolution 1816, which permits states to conduct anti-piracy operations within Somali territorial waters. In October 2008, it 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.”<sup>10</sup> On 2 December 2008, it



Crew of the French destroyer *De Grasse* (D 612) detain suspected pirates in the Gulf of Aden, November 2010.



USS *Ashland* (LSD 48) sailors rescue suspected pirates from the sea approximately 330 nautical miles off the coast of Djibouti after their skiff was destroyed, 10 April 2010.

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 human rights law. Lastly, when Resolution 1816 expired in December 2008, the UNSC passed Resolution 1851, which called upon states to deploy military aircraft and naval vessels to the area and authorized states to “take all necessary measures that are appropriate *in Somalia*” (emphasis added) to suppress “acts of piracy and armed robbery at sea.”<sup>11</sup> 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”<sup>12</sup> maritime piracy.

Thus, unlike in more controversial international interventions, including humanitarian interventions in Kosovo and Sudan, the international law pertaining to the capture and trial of pirates enjoys a broad consensus and a clear framework, and both the crime itself and the perpetrators of the crime are relatively easily identified. Given the danger posed by pirates and given the extensive normative and legal background regarding the ways they ought to be treated, one would expect that there would be few if any legal and normative obstacles to establishing secure passage for all (although there may be operational and logistical problems).

### ***Pirates, Civilian Status and Civilian Rights***

Much like the debate concerning the rights of suspected terrorists and insurgents – which focuses on whether they should be treated like criminals or prisoners of war – there has been debate about whether pirates should be treated as if they were civilians, with all the rights thereof, as unlawful combatants, or in some other way.

There is no international court with the jurisdiction to try pirates, and according to the framework set forth in UNCLOS, pirates are to be prosecuted in the courts of

whatever state seizes them. 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 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 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. Suspects often throw incriminating items overboard and without evidence, they cannot be prosecuted. And the evidence that is collected is difficult to segregate and sequester in order to meet the standards of non-contamination and the evidentiary chain of custody required by law. One cannot expect that those under attack will read pirates their rights – and ask them if they understood them – before the pirates blurt out any information that might be used against them in a court. Providing merchant ships with the personnel or training required to collect fingerprints, DNA and other evidence adds a burden for ships that are often staffed with low-paid sailors from developing states. As well, it is not clear that training merchant ship personnel in such matters would be useful – they are civilians, not law enforcement personnel.

The evidentiary standards of domestic criminal courts are high and hence difficult to meet. All of this means that the majority of pirates who are detained and turned over to legal authorities are unlikely either to stand trial or to be convicted due to a lack of evidence and the huge legal hurdles that are involved. This is one reason pirates are released rather than detained and prosecuted – and continue to terrorize the high seas. As pirates are treated as civilians but function beyond any state’s territory, it is difficult to deal with them. The legal ambiguities involved continue to hobble anti-piracy operations.

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 were entitled to all the rights of the citizens of whatever state captures or contends with them on the high seas, which in turn is one more reason they are rarely deterred and, in effect, prosper.

### ***Rights Derived from International Law***

For some, the best way to deal with pirates may be to shoot them on sight. Others have warned against such a response on pragmatic grounds – Somali pirates have usually 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. And while government-authorized vessels do have a right to defend themselves and others through the use of deadly force if attacked, military personnel are expected to detain and try pirates if possible, rather than to kill them. The US Army Field Manual stipulates that “[t]he law of war ... requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes.”<sup>13</sup> This is in line with the domestic policy in democratic society, whereby law enforcement officers are expected to arrest a criminal rather than shoot him. Thus, when pirates captured and held Captain Richard Philips hostage onboard *Maersk Alabama*, President Obama granted the authority for the US Navy to use force only if the captain was in “imminent danger.”<sup>14</sup> Indeed, the three pirates were shot and killed only when one of them aimed an AK-47 at the hostage.

Such criteria maximize danger to the hostage and minimize risk for the hostage takers. 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 a hostage. Moreover, the pirates were increasingly on edge after the captain tried to escape, USS *Bainbridge* closed in, and their supply of narcotic *khat* dwindled. 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.

One may argue that there is nothing expansive about the imminent danger standard. However, 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 examination.

Another source of legal difficulties in confronting piracy results from asylum and extradition laws. If a European

state brings a Somali pirate to its shores for trial, the pirates 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 indiscriminate 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.<sup>15</sup> It is a standard, authorities fear, pirates may meet and one reason they fear to bring pirates to their shores.



Photo: US Navy/Released  
Following a pirate attack on the tanker *MV Evita* northwest of the Seychelles on 31 March 2010, USS *Farragut* tracked down and briefly detained 11 suspected pirates who were released in two small skiffs while the mother skiff was sunk.

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, adopted in 1950, provides that where there are substantial grounds for believing the deportee would be at risk of torture, “his conduct cannot be a material consideration.”<sup>16</sup> 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, the British Foreign Office has decided that in order to prevent the possibility that captured pirates could claim asylum in the UK, the Royal Navy should refrain from bringing pirates to trial in the UK. There is, however, no other courts in which they can be tried.

States that capture pirates but that are 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).

Article 3 of the CAT states “[n]o 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.”<sup>17</sup> Under sharia law, which is applied in varying degrees throughout Somalia, the pirates could face severe punishments, which would constitute torture under international law and domestic law in many of the patrolling countries. While the Transitional Government of Somalia could offer assurances that the captured pirates would not be subject to torture, these assurances depend on the government being in control of the country (which it isn’t) and an independent judicial assessment of the crime (which is unlikely given the state of the judicial system).

A state reluctant to try pirates in its domestic courts and unable to extradite them to their country of origin, might seek to turn them over to another state for trial (and punishment if convicted). Indeed, the United States, Denmark, the EU and the United Kingdom have all signed agreements with Kenya to try captured pirates in its courts. This seemed to be a good solution for some people. Kenya will not, however, accept all cases, and it decides which cases it is willing to pursue. There are other problems too – for example Kenya has recently stated that it is seeking to cancel these agreements and cease acceptance of pirates for trial, citing the burden on its court and prison systems. This option also faces opposition on human rights grounds. Human Rights Watch (HRW) contends that the Kenyan justice system does not guarantee a fair trial. HRW states that the “[Kenyan] police have a terrible record of long periods of detention without trial,” there

are “terrible conditions in the prisons,” Kenya has a “very poor record of access to legal representation” and there are “interminable delays in the court process.”<sup>18</sup>

The legal aid network Lawyers of the World, which is representing over 40 of the captured pirates in Kenya, says that the agreements between Kenya and other states violate the human rights of the suspects.<sup>19</sup> 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. 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 most defendants in Kenya cannot afford counsel and there is no right to government-provided counsel, except in capital cases.<sup>20</sup>

In sum, there are no international courts to try pirates, the different roles of police and the military complicate the pursuit of pirates, procedural rights set standards for evidence against pirates that are difficult to meet on the high seas, and various rights – observed by democracies – prevent imprisonment, deportation, extradition, or delegation of trials to other states. These legal considerations seem to be one significant reason piracy thrives.

### ***Balancing Rights and the Common Good***

Communitarians 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. We constantly work to find the proper balance between these claims. Moreover, although rights advo-



Photo: US Navy/Released

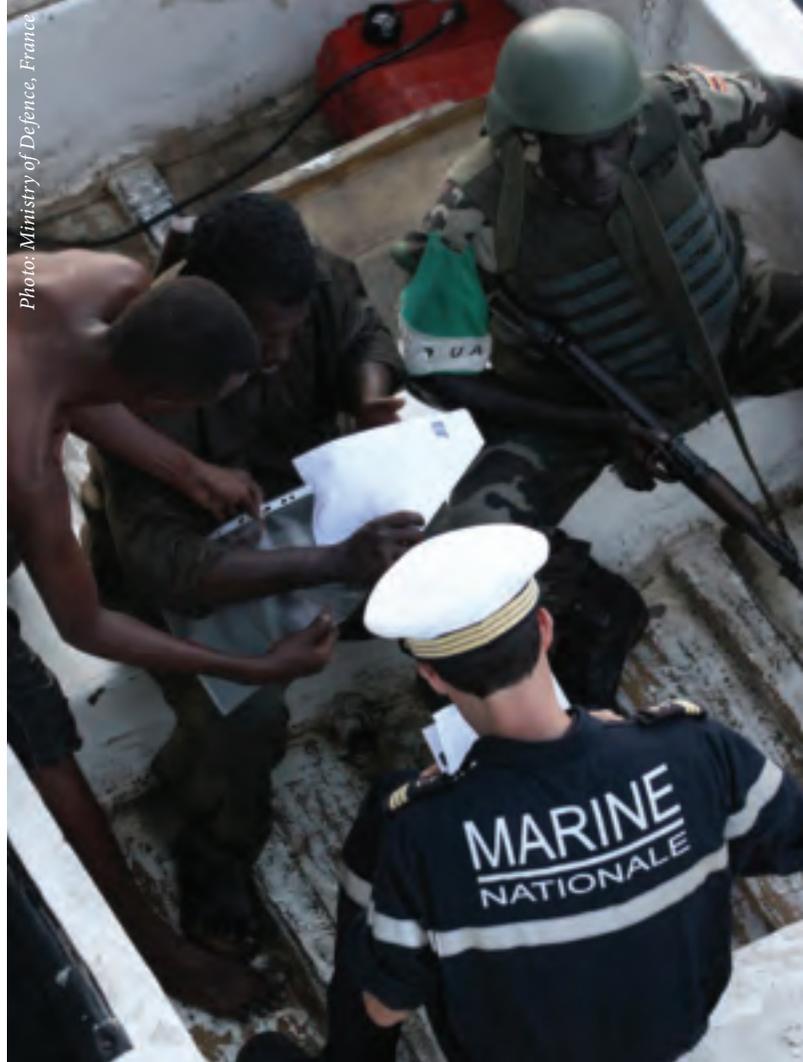
A team from the amphibious assault ship USS *Boxer* (LHD 4) tows the lifeboat from *Maersk Alabama* after the rescue of Captain Richard Phillips, 13 April 2009. Phillips was held captive by suspected Somali pirates in the lifeboat for five days after a failed hijacking attempt off the Somali coast.

cates tend to frame their arguments in strong terms, as if any concession or re-interpretation of what rights entail or the common good demands is a violation, historically, both claims have been modified and rebalanced as conditions change. After a wave of skyjacking in the early 1970s, governments began to allow screening in airports despite that fact that this constituted searches of millions of people without individualized suspicion and without a warrant. After 9/11, in many countries the balance between rights and security was modified. Courts and legislatures draw on the fact that the rights themselves are often formulated in ways that suggest limitations and balancing (e.g., both the 4<sup>th</sup> Amendment to the US Constitution and section 8 of the Canadian *Charter of Rights* secure people against *unreasonable* searches). All this applies to piracy.

This article suggests that it is time for a re-examination of the way pirates are treated. Few would disagree that they pose a serious threat to navigation of the high seas. The level of threat has been rising over time, the business is lucrative and the costs imposed by law enforcement authorities are small. Given that piracy has been considered a serious offence for centuries, given the relative ease with which pirates can be identified (compared, for instance, to terrorists), and given the growing harm pirates are inflicting, one would expect that this threat to the common good could be more readily addressed than many others. 🍷

#### Notes

- \* I am indebted to Radhika Bhat for extensive research assistance and editorial comments, and to Commander James Kraska for numerous comments on a previous draft.
1. Sarah Childress, "U.S. Holds Suspects after Pirates Standoff," *Wall Street Journal*, 2 April 2010, p. A11.
  2. "All Things Considered: U.S. Navy Captures Pirates," NPR radio broadcast, 1 April 2010.
  3. "Navy Releases Somali Pirates Caught Red-handed," Times Online, 29 November 2009, available at [www.timesonline.co.uk/tol/news/world/africa/article6936318.ece](http://www.timesonline.co.uk/tol/news/world/africa/article6936318.ece).
  4. John S. Burnett, "Captain Kidd, Human-Rights Victim," *à e New York Times*, 20 April 2008, available at [www.nytimes.com/2008/04/20/opinion/20burnett.html?\\_r=1](http://www.nytimes.com/2008/04/20/opinion/20burnett.html?_r=1).
  5. International Maritime Organization, "Piracy in Waters off the Coast of Somalia," available at [www.imo.org/home.asp?topic\\_id=1178](http://www.imo.org/home.asp?topic_id=1178).
  6. International Maritime Organization, "Reports on Acts of Piracy and Armed Robbery Against Ships: Issued Monthly," reports for 2009, available at [www.imo.org/includes/blastDataOnly.asp/data\\_id%3D25980/138.pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D25980/138.pdf).
  7. For 2008 figures see Jeffrey Gettleman, "Pirates Outmaneuver Warships Off Somalia," *à e New York Times*, 15 December 2008, available at [www.nytimes.com/2008/12/16/world/africa/16pirate.html](http://www.nytimes.com/2008/12/16/world/africa/16pirate.html). For 2009 figures see, "A Long War of the Waters," *à e Economist*, 9 January 2010, p. 47.
  8. See *King v. Marsh*, 81 Eng. Rep. 23 (K.B. 1615); and *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 156 (1820).
  9. G. Jacob, *A New Law Dictionary*, chapter on "Pirates" (8<sup>th</sup> edition, 1762).
  10. United Nations Security Council Resolution (S.C. Res.) 1838, U.N. Doc. S/RES/1838 (7 October 2008); 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



A French sailor hands over suspected pirates to the authorities of partner countries such as Kenya, the Seychelles, or Puntland (Somalia) for legal processing, November 2010.

- of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia." S.C. Res. 1844, U.N. Doc. S/RES/1844 (20 November 2008).
11. S.C. Res. 1851, U.N. Doc. S/RES/1851 (16 December 2008).
  12. Press Release, Security Council, "Security Council Authorizes States to Use Land-Based Operations in Somalia as Part of Fight Against Piracy Off Coast, Unanimously Adopting 1851 (2008)," U.N. Doc. SC/9541 (16 December 2008).
  13. US Army Field Manual No. 27-10, "The Law of Land Warfare," Department of the Army, 18 July 1956, available at [www.globalsecurity.org/military/library/policy/army/fm/27-10/Ch1.htm](http://www.globalsecurity.org/military/library/policy/army/fm/27-10/Ch1.htm).
  14. Robert D. McFadden and Scott Shane, "Navy Rescues Captain, Killing 3 Pirate Captors," *à e New York Times*, 13 April 2009, p. A1.
  15. *Meki Elgafaji and Noor Elgafaji v. Staatssecretaris van Justitie*, Eur. Ct. H.R., available at [www.ehcr.coe.int/eng](http://www.ehcr.coe.int/eng).
  16. *Chahal v. à e United Kingdom* (No. 22), 1996-V Eur. Ct. H.R. 21.
  17. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Article 3, 10 December 1984, 1465 U.N.T.S. 85.
  18. Alisha Ryu, "Rights Group Questions US Deal to Send Pirates to Kenya," Voice of America, 13 February 2009, available at [www.voanews.com/english/news/a-13-2009-02-13-voa43-68768147.html](http://www.voanews.com/english/news/a-13-2009-02-13-voa43-68768147.html).
  19. Alisha Ryu, "Paris-based Group Says Accused Somali Pirates Denied Rights," Voice of America, 27 August 2009, available at [www.voanews.com/english/2009-08-27-voa36.cfm](http://www.voanews.com/english/2009-08-27-voa36.cfm).
  20. See Jeffrey White, "German Lawyers Launch Pirate Defense Team," *Christian Science Monitor*, 15 April 2009, available at [www.csmonitor.com/2009/0416/p06s01-wogn.html](http://www.csmonitor.com/2009/0416/p06s01-wogn.html).

Amitai Etzioni is a Professor at *à e George Washington University* and the author of *Security First: For a Muscular, Moral Foreign Policy* (Yale, 2007).