Pirates Then and Now

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Date : November 24, 2010

Eugene Kontorovich, *"A Guantanamo on the Seas": The Difficulty of Prosecuting Pirates and Terrorists,* 98 Cal. L. Rev. 243 (2010).

Eugene Kontorovich has struggled to return the outlawry of pirates to the legal agenda. Admittedly, he has had some assistance from brigands off the coast of Somalia and in the Indonesian Straits of Malacca. Nonetheless, as world attention turns to the indeterminate status of non-state actors who practice a form of warfare unencumbered by uniforms, the principle of distinction from civilians, or any of the evolved norms of respect for civilians, medical personnel and countless other features of the law of war, the legacy of clear international legal rules governing pirates seems like an attractive safe harbor. Surely nothing is more settled than the fact that pirates are *hostis humani generis,* enemies of all mankind, for whom jurisdiction is universal and punishment merciless.

Or so it would seem. As Kontorovich well tells the tale, in the intervening centuries many international conventions have emerged reflecting both more sophisticated international relations and the emergence of human rights norms. Among these are the Geneva Conventions, other sources of international humanitarian law, refugee laws, and international laws of the seas.

Kontorovich notes:

> None of these measures were designed to obstruct antipiracy efforts; the conventions were generally adopted without any thought about a resurgence of high sea piracy. But the growth of international legal norms that limit state authority and provide greater protection for individuals make it harder for nations to perform the oldest and perhaps most basic law enforcement function in international law: preventing privacy. (P. 246.)

Kontorovich's examination of the current difficulties in prosecuting pirates, even as domestic criminal laws clearly cover such acts, is a cautionary tale about the assumption that inherited categories of either international law or ordinary criminal law can well address the problem of non-state terrorism. Consider the case of five Somalis picked up by a Dutch navy detachment patrolling the Somali coast and called upon to defend a ship registered in the Dutch Antilles. The five were charged under a 17th century law addressing "sea robbery." During the capture, however, the pirate vessel was sunk, together with all the incriminating evidence. The Somalis were defended under the modern criminal procedure of the Netherlands, including challenges to the lack of evidence, and sentenced under its lenient criminal laws, which include consideration of the economic plight of Somalia. The pirates received five-year sentences, minus time served, a far cry from the customary execution of pirates. In the meantime, the pirates have asked for asylum and for the right to have their extended families immigrate to the Netherlands.

The difficulty of transposing piracy from a simpler era to the modern world of procedural rights and individual protections is a great cautionary tale for the simple solutions to the problem of international terrorism. Much of the debate on the detention and prosecution of terrorists takes the form of a battle over categories, with the assumption that with the category comes the answer. Either suspected

terrorists are criminals, or they are unlawful combatants outside the bounds of international humanitarian law. The civil libertarian left argues the first position and assumes that domestic prosecution follows. The Bush administration took the second position, and then claimed that there were accordingly no legal restraints. The Obama administration has uncomfortably tried to find a way to steer between both poles. With each position comes a bending of categories, either through the expansion of inchoate crimes of material aid to terrorism, or through the unseemly use of detentions in violation of the common articles of the Geneva Conventions. Others have taken up the resulting "juridification" of the attempt to reduce war to the domain of criminal law (the term is from the excellent discussion in Gerry Simpson's, *Law, War & Crime*). Kontorovich's is the most careful examination of the original source of transnational prosecution of piracy.

A look back at the laws against piracy shows how little is resolved by the war of categories. For all the development of international law, its command is seriously compromised if "it cannot respond effectively to an atavism like piracy." (P. 275.) Even resolved categories do not capture the nuances of the intersection between national enforcement and international law. To his credit, Kontorovich uses the fight with piracy to illuminate rather than resolve the more difficult questions of prolonged fights against international terrorist groups. The sense of international outlawry applies to both groups, but the common ground does not obliterate the differences between primarily financial actors and those motivated by ideology and religion. If new legal paradigms are needed to deal with pirates it follows that much work remains to address properly the new threat of international terrorism.

Cite as: Samuel Issacharoff, *Pirates Then and Now*, JOTWELL (November 24, 2010) (reviewing Eugene Kontorovich, *"A Guantanamo on the Seas": The Difficulty of Prosecuting Pirates and Terrorists,* 98 Cal. L. Rev. 243 (2010)), https://conlaw.jotwell.com/pirates-then-and-now/.