

The legal challenges in fighting piracy

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Some preliminary points

Pirates are criminals to be captured using reasonable force, not combatants. The relevant law will be that of the intervening warship and customary international law.

Article 9 of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials 1990 provides that: “Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, [or] to prevent the perpetration of a particularly serious crime involving grave threat to life ...” This is a fair reflection of the accepted standards.

The law of armed conflict may have some limited application to counter-piracy operations on land: UNSCR 1851. However, this Resolution does not change the basic law.

Security Council Resolutions 1816, 1838, 1848, 1851 all emphasise that counter-piracy operations are to be conducted compatibly with human rights law, and within the general law of the sea framework. They do not, generally, create new powers but do extend certain powers applicable on the high seas to Somalia’s territory (with the TFG’s consent). They are at present of limited practical relevance: all or almost all attacks occur outside Somalia’s territorial waters.

Piracy at international law

Article 101 of the UN Convention on the Law of the Sea defines piracy as an act of violence on the high seas, committed for private ends, by a private vessel against another vessel. This includes an offence of voluntary participation in a vessel intended for use in piracy.

This definition, accepted as customary international law, contains a number of inherent limitations as to geographic scope, the need for two vessels, the (much debated) “private ends” requirement and the very general terms in which it defines acts of violence.

The government vessels of all States have powers of: visit, search, seizure and arrest - and *may* subject captured pirates to the jurisdiction of their courts (Arts 110 and 105, UNCLOS). At customary international law all States have universal jurisdiction over pirates subsequently found in their territory.

All States have authority at international law to capture and prosecute pirates, but may not have a duty to do so. While there is a duty to cooperate to suppress piracy (Art 101), there is only a discretion to prosecute them (Art 105). Where it is impractical for the capturing warship to try a pirate, there is no mechanism in UNCLOS to transfer them to another State.

Problems of national law

International law grants States universal jurisdiction over piracy, but does not oblige them to use it. It leaves States a wide measure of discretion, often resulting in States having no adequate national law. Some States’ legal systems face problems in prosecuting crimes lacking a “link” such as the offence being committed against their national or merchant vessel, or other interests. Using military personnel to arrest pirates may also cause problems

at the national level: are they trained to gather evidence? Is there a constitutional prohibition on their use in law enforcement?

Terrorism suppression conventions

In Security Council Resolutions 1848 and 1851 it has been suggested that the Suppression of Unlawful Acts at Sea Convention could fill some of these gaps. Article 3 requires all parties to enact a domestic crime of “seizing or exercising control over a ship by force or threat thereof”. Articles 8 and 10 require that a port State *must* accept delivery of a person suspected of a Convention crime from a ship’s master and either extradite or prosecute them.

Whether this closes the gap again depends on national implementation and whether the suspect is delivered with admissible evidence in the port State’s courts. Cooperation between capturing and prosecuting States is thus vital: no “one size fits all” or “top down” solution will succeed.

The impact of human rights law

Capturing warships will also have to comply with certain human rights guarantees. Pirates cannot be sent to a State where they may face torture or persecution under the Torture and Refugee Conventions. Parties to the European Convention on Human Rights may also owe duties to criminal suspects within their extra-territorial jurisdiction including obligations to bring them promptly before a judicial authority and to secure them a fair trial. Agreements between each of the US, UK and EU with Kenya seek to meet these concerns.

Ways forward

Suppressing piracy in the Gulf of Aden will rely on regional and international co-operation, possibly through soft-law instruments such as the Djibouti Code of Conduct 2009 and legal mechanisms such as the use of ship-riders (placing one State’s law enforcement official on another State’s vessel). Trials in Kenya are being facilitated by the use of “evidentiary templates” (so partner States know what evidence to gather and how to collect it) and direct international assistance (such as funding for interpreters).

While a regional or international piracy court has been suggested, any proposal will have to answer questions of political will, expense and inevitable delay – the lessons of the Tribunals for Yugoslavia and Rwanda. An international court may also not deliver benefits to the region in terms of strengthening local justice systems, and when it inevitably closes down its accumulated experience will be dispersed.