



Africa Programme/International Law Briefing Note: AFP/IL BN 2009/01

Pirates and How to Deal With Them

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22 April 2009

This briefing note draws on a meeting of a roundtable of experts held at Chatham House on 26 February 2009 by the Africa Programme and the International Law Discussion Group. It brought together lawyers and practitioners from the military, industry and diplomatic services to clarify some of the legal concerns around combating piracy off the Somali coast. The paper draws on presentations by Agustin Blanco-Bazan of the International Maritime Organisation (IMO), Commodore Neil Brown of the Royal Navy and Dr Douglas Guilfoyle from University College London, and on the discussion that followed. The meeting was chaired by Elizabeth Wilmshurst of Chatham House.

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Introduction

In 2008, piracy off the coast of Somalia went from being an irritation to a major global concern.¹ Now navies from at least 17 states, organized around three multinational taskforces, are patrolling Somalia's seas. So far in 2009², 79 ships have been attacked and 19 ships and their crews taken hostage. Pirates captured by various states' navies are standing trial in Puntland, Kenya, France and the Netherlands. Navies have had some success in their primary aim of disrupting piratical activity and the success rates for pirate attacks has dropped from around 1 in 3 to about 1 in 4. However, as well-publicized cases of pirates being released after capture have demonstrated, there are perceived to be legal constraints on the action of some states and confusion about the legal powers of others.

The meeting focused on legal issues concerning the arrest and prosecution of pirates. Other legal concerns such as payment of ransom money to pirates and the use of private security firms are not addressed here.

Naval or police action cannot provide any long-term solution to piracy in Somalia. It is very difficult to deal with a law and order problem in a country in a state of lawlessness. Only addressing the root causes, including the internal problems of the country, will offer a way to stop piracy. The naval presence may, however, reduce the severity of the problem, and improving or clarifying the legal framework in which navies operate will certainly help.

Legal framework

The international legal framework on piracy is drawn from the UN Convention on the Law of the Sea 1982 (UNCLOS) and the Suppression of Unlawful Acts against the Safety of Maritime Navigation Convention 1988 (SUA). Not all states have incorporated UNCLOS into their domestic legislation, and even fewer have incorporated SUA. But long before these treaties were adopted piracy was an offence under international law. SUA requires states to accept delivery of persons responsible for seizing control over a ship by force. Warships are obliged by UNCLOS to take action against piracy but they are

¹ Roger Middleton, *Piracy in Somalia: Threatening Global Trade, Feeding Local Wars*, Chatham House Briefing Paper, October 2008,

<http://www.chathamhouse.org.uk/publications/papers/view/-/id/665/>.

² International Maritime Bureau - correct at 17 April 2009

acting in a policing rather than a purely military role when doing so. There is no basis for a 'war on piracy'; this is a criminal law issue.

The anti-piracy missions are operating under authority granted by UN Security Council resolutions, including 1816(2008), 1838(2008), 1846(2008), and 1851(2008). These give cooperating states the right to pursue and capture pirates in Somali waters and, in the case of resolution 1851, on Somali land. There is, however, a stipulation that consent must first be received from the Transitional Federal Government of Somalia and then be notified to the UN Secretary General. Given this stipulation, the Security Council resolutions were not strictly necessary, since the Transitional Government could have granted permission for foreign states to conduct law enforcement operations within its waters or territory without them. One new element in the resolutions is the specific mention of the assistance of the EU and NATO. The resolutions also encourage the use of ship riders, a system allowing law enforcement personnel from regional states to embark on warships and effect the arrest of pirates captured by the warship, or to authorize the pursuit of pirates into the territorial waters of their sending state. A similar arrangement exists in the Caribbean aimed at combating drugs-smuggling.

Legal powers to use force in the disruption of piracy

The Rules of Engagement (ROEs) adopted by various navies must take into account that the actions off the Somali coast are of a police nature rather than purely military. Article 110 (UNCLOS) provides the legal basis in international law for the use of force for this purpose. Customary international law provides basic principles governing the appropriate amount of force to be used where it is lawful to stop and arrest a ship at sea.³ Navies thus have the right to use reasonable force in pursuit of their law-enforcement mission.

³ The principles were considered in another context by the International Tribunal for the Law of the Sea in the case of *Saiga 2* (http://www.itlos.org/start2_en.html). See also the case of *S.S. 'Im Alone'* (*Canada/United States, 1935*), *U.N.R.I.A.A., Vol. III*, p. 1609 and *The Red Crusader* case (*Commission of Enquiry, Denmark–United Kingdom, 1962*), *I.L.R., Vol. 35*, p. 485.

The case of the Indian warship *Tabar*, which attacked a suspected pirate vessel, sunk the ship and caused loss of life, highlights the importance of having correct Rules of Engagement. In the *Tabar* instance, the ship that was attacked was later identified as a recently hijacked fishing vessel with hostages on board; it was not a pirate ship. Naval vessels should have a different approach to ships once pirates have taken hostages. The action taken by the *Tabar* would not have been legal in the UK, for example. The situation should be classified not as piracy but as hostage-taking once hostages are on board.

Within the shipping industry there is a perception that international law leaves navies weak and able to do little to combat pirates. There is a well-founded concern that this perception is also shared by pirates themselves. While there may be difficulties in the case of individual states (for example the German constitution allows engagement in counter-terrorism rather than against the criminal offence of piracy), navies do have sufficient powers under international law to combat piracy and they are permitted to use reasonable force against pirates. It is important that this fact is well publicized.

Arrest and detention and the European Convention on Human Rights (ECHR)

The perception that navies are weak is strengthened by a number of instances where pirates have been apprehended by naval forces which have subsequently had to release them. In some cases this is because of peculiarities of the laws of a particular country. For example, Denmark and Germany can prosecute pirates only if they have threatened national interests or citizens.

Under French law, a captain may apprehend and hold pirates, but only a judicial authority can arrest and detain them. The issue of terminology is an important one; between capture and their handing over to a judicial authority the pirates are 'in the hands of' the navy, to give one example of the language used.

Navies whose states are parties to the European Convention on Human Rights are obliged to comply with the requirements of that Convention. In the case of *Medvedyev*⁴ before the European Court of Human Rights, a French naval ship had captured a Cambodian-flagged vessel suspected of drug-

⁴ <http://www.echr.coe.int/echr/>, No. 3394/03.

running. The Court ruled against France for failure to properly inform judicial authorities of the navy's actions and on the grounds that it did not have a secure basis in both international and national law for their arrest. France has appealed to the Grand Chamber and is making changes to its system of *préfets maritimes*. However, the Court dismissed a claim that the applicants in *Medvedyev* had not been brought promptly before judicial authorities as there was no reasonable alternative to holding them for the 13 days required to take them to port.

Given that it can take many days to get from the Gulf of Aden to Kenya, the most popular destination for captured pirates, navies cannot be expected to hand over pirates immediately to a judicial authority. There was discussion at the roundtable as to whether this raised problems of compatibility with the ECHR (Article 5). Pirates captured in the Gulf of Aden are not arrested until they arrive in Kenya, where they see a judge within 24 hours. There is a considerable length of time when pirates are not free but have yet to be arrested. Drawing on the *Medvedyev* case, it was agreed that if the pirates were held in order to hand them over to judicial authorities for arrest and detention and the pirates were in fact taken to the appropriate country to be handed over, holding them for the necessary period of time for the naval vessel to get to that country would not breach the ECHR; nor would the fact of their holding.

For some navies, however, the issue does not normally arise in that form, since pirates are not brought onto warships but are left in their own skiffs, although not allowed to depart. There was discussion about the stage at which the ECHR would apply. Under Article 1, the ECHR applies to persons within a state's jurisdiction, the test for which is now agreed to be a question of 'control' in extra-territorial situations. At what stage, then, are pirates under the control of the military? It was agreed that the ECHR clearly applies where naval or other public vessels are holding pirates aboard and are in control of them. However, there was a difference of opinion with regard to the situation where the pirates are not taken on board the naval vessel, especially in cases where there are no naval officers aboard the pirate vessel (for example, where it has been surrounded and subdued). Most EU countries would regard such a degree of control to be covered by the Convention. But some would not. The view of the latter probably derives from the fact that application of the Convention would be problematic if the pirates are *not* to be taken for prosecution, but are eventually to be freed. In that case, if the Convention did apply, it would be difficult to argue that the 'holding' of the pirates was compatible with Article 5.

A further issue regarding the ECHR relates to the obligations of states which hand over captured pirates to another country for the purpose of arrest. The UK is satisfied by the assurances it has received from the Kenyan authorities regarding the treatment of suspected pirates, and France is likewise satisfied with assurances it has received from Puntland. Human Rights Watch, however, has questioned the validity of assurances from Kenya, and jails in Puntland are known not only to be unpleasant but also to allow escapes.

Jurisdiction to prosecute pirates

UNCLOS allows all states to take universal jurisdiction over piracy; that is, it allows all states to prohibit and prosecute pirates wherever they operate. There is some debate about whether states are *required* by international law to adopt domestic legislation to enable their authorities to prosecute pirates. Courts and legislatures are often reluctant to establish jurisdiction over events occurring outside their territory. However, UNCLOS (Article 100) requires states to cooperate in the repression of piracy 'to the fullest possible extent'; this should be interpreted as meaning that any state having an opportunity of taking measures against piracy and failing to do so is in breach of its duty under international law.⁵ Most of those states that are not parties to UNCLOS are parties to the 1958 High Seas Convention which preceded it and which has a similar provision. Most states in the world therefore share this obligation.

At present Kenya is the closest country with the competence and legislation to prosecute pirates. Some pirates have been brought to France and the Netherlands to stand trial but the preference is very much for prosecuting pirates within the region. France is sending pirates to Puntland, with which it has an agreement, but is also supportive of EU moves to seek prosecution by Kenyan authorities. Both the UK and the United States have entered into Memoranda of Understanding with Kenya on the prosecution of pirates.

At the meeting, an example was given of a trial of pirates in Kenya. Kenyan authorities were able to begin the trial of pirates captured by *HMS Cumberland* within six weeks. (By contrast, in France the evidence-gathering phase of the *Le Ponant* case will take at least a year.) Five witnesses from the Royal Navy were present, as well as the Greek master from the

⁵ This interpretation is supported by the Commentary of the International Law Commission on the provision of the 1958 High Seas Convention on which the UNCLOS provision was based.

commercial ship involved. The latter's presence had to be facilitated by the industry and the navy – there is no power to compel the attendance of witnesses. Cooperation leading to the criminal proceedings had been a success, but enormously costly in terms of naval time and resources. A problem with these cases is that in Kenyan law witnesses must be present in person at the trial. This requires ships' captains, leaders of boarding parties and pilots to be available for the trials, as well as the masters of commercial vessels that have been attacked. This will require cooperation from the shipping industry in terms of logistics and finance. Kenyan law has the advantage of applying not only to those caught red-handed; co-conspirators may also be prosecuted.

Flag states are not at present very much involved in prosecution; some states and organizations would like to see this change. Assistance to the Yemeni coastguard should lead to a situation where pirates can be handed over to the Yemeni authorities for prosecution, but this will take some time. Analysts of Yemen have also pointed out that the country is far from stable and may not make a good or reliable partner. Djibouti, which might have been considered well located for prosecuting pirates, is reluctant to take the responsibility; but training of naval and customs officials and prosecutors from elsewhere in the region is ongoing there.

For future success in dealing with captured pirates, local capacity-building in Somalia and the region should continue. One difficulty is the absence of relevant legislation. The International Maritime Organisation and UNDOC (the United Nations Office on Drugs and Crime) have been involved with assistance and support for the adoption of local legislation. The Djibouti Code of Conduct has been signed by nine regional states, with undertakings to review local laws. Piracy is simply one example of a criminality problem in the region.

Some hold the view that, even if it were possible to achieve a perfectly functioning legal process for captured pirates, naval action would remain focused on deterring and disrupting pirate activity rather than expending the time and resources to take pirates to local countries for prosecution. It is not the mission of every naval vessel to take pirates for prosecution, but rather to suppress piracy by other means including disruption. Many practical problems arise if ships are to be engaged in sailing to countries to deliver pirates, with captains having to appear as witnesses, instead of being involved in further disruption activities. In the view of others, successful prosecutions represent the best means of deterring piracy.

Conclusions

It was not the purpose of the meeting on which this briefing note was based to come to formal conclusions, but the chairman considered that it was possible to draw the following from the discussion.

1. International law provides sufficient authority for public vessels to use force for the suppression of piracy in the high seas. Whichever vessels with public authority are used (whether naval or coastguard, or naval combined with police), they are undertaking a police function against the criminal activity of piracy. The degree of force used must not exceed that reasonably required in the circumstances.
2. For those states which are parties to the European Convention on Human Rights, there is no legal problem with their public vessels holding pirates on board for the purpose of taking them to a proper jurisdiction for arrest and prosecution. There may, however, be a problem in relation to the holding of pirates on their own vessels, and not allowing them to go, for the purpose of disruption of piracy, rather than of detention for prosecution.
3. There were no easy solutions to the problem of prosecution or extradition of pirates. Capacity-building in the region is the way forward. The huge difficulties must not be underestimated; these are not limited to the absence of relevant local legislation. The leadership of the country concerned may be complicit with the pirates. Prisons and prison systems – and judicial systems more generally – needed to be developed. Capturing countries must be able to receive credible human rights assurances from the states to which they hand over the pirates for prosecution.