Law, Pirates, and Piracy

Maritime piracy has increasingly been in the news, and in the courtroom, in recent years. Looking at the Law editor Tiffany Willey Middleton recently interviewed international legal and overseas piracy expert Douglas Guilfoyle. He discusses why piracy is a growing problem and some of the challenges it creates for the international community. Guilfoyle also outlines key points for social studies teachers for discussing issues of piracy, terrorism, and the law with students. To supplement the interview, Looking at the Law offers a case study of the 1985 hijacking of the Achille Lauro, along with an online discussion guide, as a way to engage students in these issues.

Why is the international community concerned about piracy? Why has it been difficult to prosecute pirates?

Piracy, particularly off the coast of Somalia, has become a threat to the security of international shipping. As pirates use extreme violence to board vessels and then seek to hold crews ransom, there is a risk to life and profound psychological trauma for those taken hostage. Furthermore, 90 percent of international trade moves by sea, and, in proximity to Somalia, the Gulf of Aden (leading to the Suez Canal) is a major highway for maritime commerce. Piracy threatens trade and pushes up insurance costs—even if relatively few vessels are actually attacked or captured.

The difficulty in prosecuting pirates essentially stems from what to do with them post-conviction. While every nation-state in the world has universal jurisdiction to prosecute any pirate, for a state to put a pirate on trial it has to be willing to imprison him. Some European states are concerned that human rights law could prevent pirates who have served their sentences from being returned to home countries that are known human-rights violators. States are reluctant to accept pirates for trial out of fear that they will drain already scarce judicial and prison resources. There are also practical problems in convincing national prosecutors that there will be enough evidence to convict suspected pirates, especially if they were not caught in the act of attacking. Moreover, most navies are not trained in evidence gathering.

What is piracy? Who are pirates?

Piracy is defined by the 1958 Geneva High Seas Convention (to which the United States is a party) and by the 1982 UN Convention on the Law of the Sea (which the United States has not joined) as: (1) an act of violence, detention or theft; (2) on the high seas; (3) committed for private ends; (4) by a private vessel against another vessel. This includes an offense of voluntary participation in a vessel intended for future use in piracy (cruising with piratical intent, as it were). This definition is considered the modern statement of customary international law. A pirate is anyone who commits piracy, attempts to commit piracy or who voluntarily participates in a pirate vessel (including one intended for future attacks).

Some pirates may originally have been displaced fishermen, resorting to hijacking to make a living in desperate conditions. They are now clearly a well-organized criminal enterprise run by gangs and even pirate "masterminds." While the individual gunmen who hijack ships receive only a small part of the ransoms paid by shipping companies, it is still vastly more than can be earned legitimately in a non-functioning economy.

How have pirates been treated historically? What has been the role of international law in defining piracy and treating pirates?

The history of piracy is complex. States often used the term "piracy" to denounce the actions of state-licensed privateers—the equivalent of modern private military contractors. Generally, though, piracy was taken to mean violence and robbery at sea committed without the sanction of a state. The same action by a state might be called an act of war, or of taxation, or of "state responsibility"—but was not piracy. At some points in history, those found to be pirates could famously be tried and executed aboard the capturing warship, the notorious hanging at the yardarm. The treatment of modern pirates is now governed by human rights law. Just as a police officer generally cannot shoot a suspected burglar dead on sight, it is not acceptable to blow pirates out of the water (especially when they may have hostages). Of course, if pirates are judged to pose an immediate threat to human life, navies are entitled to use lethal force in self-defense or defense of others, as happened in the Maersk Alabama incident.
Seven armed
Somali pirates
were caught in a
high-speed chase
by the NATO
alliance’s Turkish
warship Gediz
before an attack to
a merchant vessel
in the Gulf of Aden,
September 26,
2009.

[Image: Turkish Chief of
Staff/Pandrol]
against Somalis accused of attacking a U.S. warship. What is the significance of this ruling and the case?

The case is of significance only in the United States. Essentially, it held that due process requires a criminal statute be interpreted strictly and according to its meaning at the time it was passed. The U.S. law on piracy was passed in 1819. In 1820, in *U.S. v. Story*, the Supreme Court interpreted piracy under that statute as meaning "robbery at sea." No robbery, no piracy. The trial continues on other charges but it will be interesting to see if prosecutors appeal the narrow ruling of the trial judge on the meaning of piracy under statute. The sensible answer might be to update the law to reflect the United State's modern treaty commitments in the 1958 High Seas Convention.

At least one scholar has said, today, "Pirates neither fly the Jolly Roger nor wear eye patches." How, then, do we recognize pirates?

How do we recognize any criminals? We recognize them either by witnessing their criminal actions, finding evidence of their past crimes or finding evidence that they are going to commit a crime. The latter is difficult. Fishermen (and smugglers) in the Gulf of Aden carry weapons, including assault rifles, for self-defense. The usual evidence of being part of a pirate "action group" at sea are things such as having excessive fuel or horsepower aboard. The clearest evidence of pirate activity, crude ly modified boarding ladders with hooked ends and rocket-propelled grenade launchers (RPGs), are items easily dumped overboard into the sea. This can lead to situations where national prosecutors are left with a circumstantial case they consider too weak to warrant prosecution.

Somali pirates do make some use of camouflage. They are prepared to use hijacked fishing vessels as "mother ships" to increase their range from shore. The original crew is sometimes kept aboard as hostages. This can make attacking a pirate mother ship risky, as the Indian naval ship *Tabar* discovered when it sunk a mother ship in 2008. The vessel was a hijacked Thai fishing trawler with its crew still aboard. While the pirates escaped, as many as 15 innocent lives were lost.

Case Study: The 1985 *Achille Lauro* Incident and Piracy

In October 1985, four armed men, who identified themselves as members of the Palestine Liberation Front (PLF), seized control of the Italian cruise ship *Achille Lauro*, which was then in the open seas of the Mediterranean. There were approximately 400 people on board—mostly crew, but also 60 to 80 passengers, including about a dozen American nationals. In news accounts, the Palestinians were described as "hijackers." The *Achille Lauro* hijackers demanded the release of 50 Palestinian prisoners held by Israel. If their demands weren't met, they threatened to kill hostages. If they were attacked, they threatened to blow up the ship.

The incident precipitated an international crisis, involving the United States (because American citizens were on board), Italy (because it was an Italian ship), and then Egypt (because the *Achille Lauro* sailed just outside its territorial waters). In particular, U.S. and Italian government officials disagreed—at almost every step—about how to respond to the crisis as it continued to unfold.

After two days of standoff, the hijackers agreed to surrender to Egyptian authorities in return for safe passage. Prior to this, however, one of the hijackers shot and killed Leon Klinghoffer, a disabled 69-year-old American Jewish passenger. His body and wheelchair were thrown overboard. It is unclear if authorities knew of the murder when they negotiated the surrender. In any event, once American authorities learned of the murder, they, including President Ronald Reagan, were determined to bring the hijackers to justice.

Heavily armed U.S. and Italian forces intercepted the hijackers following their surrender in Egypt, then faced off against one another to see who would take them into custody. American courts issued arrest warrants for the hijackers on charges of piracy and other crimes. American officials demanded that the hijackers be extradited to stand trial in the United States. This did not happen, and the hijackers were tried in Italian courts. They were convicted, but their sentences were widely regarded as incommensurate to their crimes.

- Do you think the Palestinians should have been put on trial in the United States rather than Italy? Why?
- Were the actions of the armed men on the *Achille Lauro* acts of piracy? Were they pirates? Were they terrorists?

The *Achille Lauro* incident offers an exciting, complicated, real-life scenario for students to analyze, discuss, and connect to international piracy issues today. The American Bar Association Division for Public Education offers teachers a free maritime piracy discussion guide, "Pirates and the Law in the 21st Century." It includes the *Achille Lauro* case study, along with introductory discussion starters and editorial cartoons. Download "Pirates and Law in the 21st Century" at www.abanet.org/publiced/lookingatthelaw.shtml
were lost. If you're a merchant vessel in the Gulf of Aden, over 200 nautical miles from shore, and a speedboat suddenly appears and attempts to approach you, you can be fairly confident it's a pirate attack.

What has been the role of the UN Security Council in combating piracy?

Since 2008, the UN Security Council has passed a string of resolutions encouraging states to use their existing powers under international law to take action against piracy. It has called for cooperation to that end, such as granting powers to enter territorial waters to suppress pirate activity. It has helped encourage the establishment of cooperative mechanisms such as the Contact Group on Piracy off the Coast of Somalia and the Shared Awareness and Deconfliction process, which bring together states cooperating to fight piracy in the Gulf of Aden.

Are pirates civilians? Military combatants? If neither, what are they? How should we define them legally?

All naval officers involved in the fight against piracy I have spoken to are quite clear that pirates are not military combatants. To be a military combatant there must be an armed conflict. Armed conflicts occur between government forces or between government forces and "organized armed groups." Pirates do not target government forces deliberately and do not seek confrontation with them. Moreover, they are unlikely candidates to meet the laws of war definition of "organized armed groups," which requires a chain of responsible military command, among other requirements. While they are organized and armed, they are only organized and armed in the same sense as drug cartels in some countries. When we speak of the "war on drugs" it is not one to which the laws of war apply; it is the same with counter-piracy operations.

All states involved in combating piracy are clear that pirates are civilians and therefore may be targeted with force under ordinary policing principles. The UN guidelines on the use of firearms by law enforcement officials summarize the position we find in most legal systems: "lethal force may be used against civilians in self-defense or defense 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.” Simply put, a person who commits piracy under international law is a common criminal. Period.

**How do you think international law—and U.S. law—should be reformed to better address the contemporary threat of piracy?**

There is little need for new universally applicable international law. The relevant international law provides general authorization for states to act against piracy and provides powers to that end. However, this permission to act needs to be translated into national law. Updating U.S. statutory offenses to reflect the 1958 High Seas Convention would be a good start.

Ultimately, states might conclude networks of treaties governing the transfer of evidence, cases, and prisoners. This is already happening to some extent under memoranda of understanding concluded between various states (and the European Union) and Kenya or the Seychelles.

**As high school social studies teachers think about these issues, what are the most important points they should pass on to their students?**

Newspapers often claim the law of jurisdiction over pirates is unclear or that it is scandalous that any suspected pirates are released without prosecution. These claims need careful attention. After long historical debate, we now have fairly clear international law governing piracy. Every state in the world has jurisdiction to prosecute a pirate, no matter who they attacked. International law, however, needs implementing in national legal systems. Not every country in the world has an adequate counter-piracy law.

When we read about suspect pirates being released at sea without prosecution, the problems are more practical than about gaps in the law. How would you convince a jury on the other side of the world, beyond reasonable doubt, that men found in a boat with guns (but no ladders or heavy weapons) are really pirates? Furthermore, for warships to take pirates back to their flag state for prosecution could be difficult and expensive; and states may need assistance to cope with a sudden surge of piracy cases. If you are a U.S. warship and you capture suspected pirates, and you wish to transfer them to Kenya for trial, you need arrangements in place ahead of time so U.S. naval officers know what evidence to gather (and how to do it) so that a prosecution in Kenya will stand up in court. This is not impossible, but it does take careful planning. The ultimate answer is closer international cooperation. This is happening, but it takes time.

Finally, the law alone will not solve piracy. Nor will naval deployments. Protecting shipping and prosecuting pirates are important, but the root causes lie ashore in war-torn countries. If we want to end piracy, we need to bring peace to those countries. This will be the most difficult and complex task of all.

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