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Pirates and Naval Officers

by

Lieutenant Commander John N. Petrie, US Navy

Two years ago I was involved in a situation in which more than 20 Vietnamese refugees, including a number of children, apparently lost their lives at the hands of "pirates." Their deaths occurred in international waters in the South China Sea. Had my ship arrived on the scene a few hours earlier, we might have had an opportunity to act on the behalf of the refugees. What we didn't know, though, was what our authority was or the extent to which we could act.

The Problem. Piracy, which is robbery at sea, has been a problem for sailors through recorded history. A recently published popular history tells us that "in the Mediterranean, piracy was accepted by merchants and seamen alike as an occupational hazard . . . the pirates achieved such widespread power that they . . . (held) Julius Caesar captive for six weeks."¹ As long as profit is to be made from what can be snatched from undefended ships at sea, pirates will attempt to take the full measure of that profit. The history of the naval profession and that of piracy are inextricably intertwined. Yet today the term piracy appears nowhere in the guidance available to naval commanders. Perhaps it is now believed that piracy is too rare to be treated separately and the subject is sufficiently dealt with in the general guidance provided. Or, perhaps the long period in which we had no experience with piracy deprived us of a point of reference from which to address the issue. Regardless of the reason, the naval commander today goes to sea without definitive guidance concerning pirates.

Perspective. The suppression of piracy has been a mission assigned to US naval forces in the past and remains one (albeit unarticulated) today.

A very brief review of US history reveals a significant commitment of naval forces was required in the early nineteenth century to suppress piracy.

Piracy was carried on along the entire shore of the Gulf of Mexico and Caribbean Sea, and among the islands, both the Bahamas and the West Indies; and even occasionally off the Southern Atlantic coast of the United States. There are reports of twenty-seven American vessels having been seized and robbed during the year 1820.²

The effect of piracy on the United States was clearly not limited to the Caribbean Sea, Gulf of Mexico, and the Sargasso Sea.

As late as 1832 the brig *Mexican*, of Salem, was captured. This piracy was committed on the high seas south of the Azores and is the last on record in the North Atlantic ocean.³

In February 1831 . . . an American vessel, the *Friendship*, was taken off the port of Kuala Batu A year later the U.S. Frigate *Potomac* landed her crew at Kuala Batu, killed 200 of the inhabitants and burnt down their houses. Yet, seven years later, the American ship *Eclipse* . . . was pirated on the same coast.⁴

Although piracy has certainly not been rampant in our times, neither has it been vanquished.

On 30 December, 1959, six pirates . . . held up the 120-ton Indonesian ship *Kim Hai Seng* off Singapore On 21 January 1961, it was reported that piracy was increasing on the high seas between North Borneo and the Celebes In October 1961 it was reported that eighty-six piracies had taken place in the Sulu Sea that year.⁵

In January 1961, the *Santa Maria*, a Portuguese luxury liner was seized at sea by a group of armed men. The initial response expressed by the US State Department was that the United States intended to recapture the ship following the guidance of international law concerning piracy.

United States, British, and Dutch warships set out to chase the vessel, perhaps originally with the intention of boarding it. A few days later, however, the United States and British governments expressed doubts as to the 'piratical' character of the action and appeared to be mainly concerned with the fate of the passengers.⁶

While, after the facts became known, the political aspects of the *Santa Maria* case separated it from the realm of piracy, the response constitutes a clear example of the intention of the United States to employ naval forces to confront and suppress piracy.* The issue of piracy, therefore, is not simply one which has remained with us through history; it has remained the responsibility of the US Navy. It follows, therefore, that it remains the business of every naval commander.

Today's Environment. The tremendous growth of Third World interest and power, the international political structure and climate, and the ever increasing volume of ocean traffic present a world ripe for piracy or international terrorism under the guise of piracy.** Piracy along the littoral of most continents or in any of the archipelago areas is often easy. All that is required is an accessible market for the booty or any source of profit directly flowing from the piracy (i.e., third party payment). Piracy is alleged to be one of the primary by-products of the international drug trade but is certainly not limited to this connection. In September 1978, pirates were reported operating off the west coast of Africa against prey as significant as large merchant ships. Piracies are being consistently reported in the waters of the Straits of Malacca, the South China Sea, the Caribbean and the Gulf of Mexico.

Proceeding from this juncture the naval commander must arm himself with knowledge.

*These examples of piracy, in its various manifestations over the last two centuries, are intended to demonstrate that piracy has survived the test of time and has remained an issue of naval interest. Specific legal interpretations are not to be implied.

**The potential for dissident quasi-political organizations to hire mercenaries to harass shipping to the detriment of the mercantile interest of any specific state or group of states is real in a world which deals with professional terrorists in increasing numbers.

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What is the Guidance?

Arming himself with knowledge will require the naval commander to review the literature. Here are the salient points and some elucidating information.

United States Navy Regulations, 1973. Navy regulations provide no specific guidance concerning piracy. They include several articles which when taken together, however, provide the broad guidance which could, depending on interpretation and situation, demand action on the part of the naval commander.

- Article 0605 requires that international law be observed even if that means acting at variance to *Navy Regulations* when they are in conflict. This article, then, considers international law as superior to *Navy Regulations* and permits action which would otherwise be considered a violation of them to ensure compliance with international law.

- Article 0914 requires that violations of international law transgressing the rights of the United States or its citizens be met with “. . . such action as is demanded by the gravity of the situation . . .” and places responsibility for the use of force “wholly upon” the naval commander.

- Article 0915 restricts the use of force in peacetime to self defense and then only as a last resort. The situations which demand the use of force in peacetime are left to the “. . . sound judgment of responsible naval personnel”

- Article 0920 requires the naval commander to protect “all commercial craft” of the United States “. . . insofar as lies within his power . . .” within international law.

- Article 0925 requires the naval commander to “afford all reasonable assistance to distressed ships . . . without serious danger to his ship or crew”

- Article 1101 requires every officer to understand all laws appropriate to the scope of his authority. Further, “In the absence of instruction he shall act in

conformity with the policies and customs of the service to protect the public interest.”

- Article 1124 demands the naval commander have a working knowledge of United States history in that it requires that he “. . . shall conform . . . to the precedents established by the United States . . . ” in relations with foreign nations.

- Article 1201 states that, “United States Navy Regulations is the principal regulatory document of the Department of the Navy, endowed with the sanction of law, as to duty, responsibility, (and) authority . . . (and mandates that no instrument) . . . issued within the Department of the Navy (shall) conflict with, alter or amend any provision of Navy Regulations.”

International Law. Navy Regulations demand a great deal of the naval commander which can only be fully understood vis-à-vis piracy when viewed in the light of international law. The most authoritative and current document which bears on this problem is the 1958 Geneva Convention on the High Seas which treats piracy, inter alia, in some detail.*

- Article 14 requires that all States “. . . cooperate to the fullest possible extent . . . ” to suppress piracy on the High Seas.

- Article 15 defines piracy as unlawful “. . . acts of violence, detention, or any act of depredation . . . ” committed by person(s) not acting as the agents of any state or political organization, i.e., privately.

- Articles 19 and 21 taken together authorize any warship to “. . . seize a pirate ship . . . or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.” This action brings the pirates under the jurisdiction of the courts of the warship’s state.

- Article 22 authorizes the boarding (visit and search) of ships suspected of being engaged in piracy.

The 1958 Convention on the High Seas was addressed in official correspondence from the Acting Secretary of State, Douglas Dillon, to President Eisenhower. President Eisenhower included this correspondence as an enclosure with the treaty when submitting it to the Senate for ratification. The Acting Secretary’s report specifically discussed piracy as addressed in the treaty and as such stands as an authoritative statement of the United States’ position on piracy as treated therein. Mr. Dillon advised the President,

. . . included in the convention are eight articles dealing with the suppression of piracy. These articles dealing with . . . piracy correspond closely to those drafted by the International Law Commission and reflect the existing state of international law on the subject.⁷

Several of the signatory nations cited exceptions to the definition and delimitation of piracy in Article 15. This is not surprising as piracy is defined variously by the civil laws of different countries. For example, the United States recognizes the Article 15 definition as consistent with international law, but Congress, under the authority granted in the Constitution, has historically defined piracy in much broader terms.

*The United Nations conference on the Law of the Sea III has not altered these provisions.

England has also developed a more far reaching definition of piracy for civil jurisdiction.

The number of definitions of piracy is myriad. The legal concept of piracy has undergone evolutionary changes over the centuries and sometimes outright mutations when states have defined it to justify self-serving actions. Considering piracy herein as robbery (and associated violence) carried out for personal gain against defenseless apolitical civilians on the high seas, however, allows our analysis to proceed from actions which have consistently and universally been recognized as within the definition of piracy under international law. Piracy as robbery, therefore, constitutes a valid model within which to evaluate the authority of the naval commander to act within his guidance.

The definition of piracy under international law became tractable when the Declaration of Paris, in 1856, abolished privateering. This declaration, by providing an international instrument which considers private persons, even when in possession of letters of marque or reprisal, to be operating outside the law, put an end to abuses of legality and of one state's privateer being another state's pirate. Reprisals are now limited to those consistent with the law of war, executed by the armed forces of a state.

This brings us to consideration of the law of war. Here the naval commander's guidance is embodied in Naval Warfare Information Publication (NWIP) 10-2, *Law of Naval Warfare*. NWIP 10-2 presents international law as related to naval warfare and amplifies several international instruments. Its purpose is to aid the naval commander in fulfilling his responsibilities under international law.

NWIP 10-2 does not address piracy. Therefore, before discussing any of the precepts of the law of war as they may concern piracy and the naval commander, we must establish that the law of war is germane.

In the sixteenth century Pierino Belli wrote concerning the law of the war and noted piracy to be a special case of warfare.

... Hostilities should not be begun except after a proclamation or declaration of war, as it is called. But it is customary to make an exception in the case of pirates, since they are both technically and in fact already in a state of war . . . it should be permissible for anyone to attack them.⁸

In the seventeenth century Sir Leoline Jenkins wrote, on the same issue.

You are therefore to enquire of all pirates and searovers, they are in the eye of the law *Hostes Humani Generis*, enemies not of one nation . . . only, but of all mankind. They are outlawed, as I may say, by the Law of Nations⁹

These concepts of the pirate being at *war* with all nations are consistent with the currently recognized procedures for dealing with piracy in the 1958 Geneva Convention on the High Seas which mandates:

- All States shall (repress) . . . piracy
- Every State may seize a pirate ship
- A seizure on account of piracy may be carried out only by warships
- A warship . . . is . . . justified in boarding . . . (a) ship (suspected to be) . . . engaged in piracy

These are clearly derived from, and analogous to, belligerent rights. It does not

necessarily follow, that because these rights are extended to the naval commander, he may assume all belligerent rights are his regarding pirates. In the absence of instruction, however, he is obligated to take action as required by the situation, using sound judgment; and to follow the customs of the service. In 1823 the Navy Department issued orders to Commodore David Porter for the suppression of piracy in the West Indies. These orders stated, *inter alia*:

Pirates are considered by the law of nations the enemies of the human race In regard to pirates there is no neutral party; they being the enemies of the human race, all nations are parties against them and may be considered as allies¹⁰

There seems herein to be some justification for viewing pirates as enemies within the customs of the naval service.

Commodore Porter's orders from the Navy Department apparently flow from a series of laws enacted by Congress between March 1819 and January 1823. These laws in turn were enacted under the authority distributed to the Congress in Article I, section 8, clauses 10 and 11 of the Constitution.

The Congress shall have the power . . .

10. To define and punish piracies and felonies on the high seas, and offenses against the law of nations;

11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water.

It is pertinent that piracy, and the provisions for the now defunct privateering, are dealt with in the clauses concerning war. This places piracy clearly within the purview of the Congress, and into the context of war. Congress has since established and maintained statutes investing the President with the authority to employ ". . . public armed vessels . . ." to suppress piracy against ". . . merchant-vessels of the United States and their crews . . ."¹¹ Investing this authority in the President also put the onus of suppressing piracy on the armed forces. The term ". . . public armed vessels . . ." predates the current legislation and originally appeared 3 March 1819 in an Act of the Fifteenth Congress of the United States entitled "An Act to protect the Commerce of the United States, and punish the Crime of Piracy." Since the Constitution gives the Congress the authority to punish piracy and to issue letters of marque and reprisal, serving a mandate to the President was effectively a mandate to the armed forces. He could not engage privateers for this service but was solely empowered to act as Commander in Chief of the Army and Navy.

It would seem then, the intention of the Congress in requiring the President to suppress piracy was to have this become a mission of the navy; and, that the United States has historically dealt with the suppression of piracy as action against an enemy.

In general, it has been, and continues to be, the policy of the United States to apply the laws of warfare to those situations in which the armed forces of the United States are engaged in armed conflict regardless of whether or not such hostilities are designated as "war."¹²

Proceeding from this point, inspection of the *Law of Naval Warfare* (NWIP 10-2) for guidance in dealing with pirates seems appropriate.

- Paragraph 300 states that reprisals are a legal means of enforcing international law.

• Paragraph 310 dictates that reprisals should be taken “. . . only as a last resort to induce an enemy to desist from unlawful practices . . . (further) If immediate action is demanded as a matter of military necessity, a subordinate commander may, on his own initiative, order appropriate reprisals ”

• Paragraph 441 defines visit and search as a belligerent right.

• Paragraph 500 defines merchant vessels as “. . . all vessels . . . which are not in the warship . . . category ” Warship is defined as a naval vessel under the legitimate control of a member of its state’s armed forces.

• Paragraph 501 explains enemy character may be acquired by a vessel through “. . . taking a direct part in the hostilities on the side of the enemy . . . (or) resisting an attempt to establish identity, including visit and search ”

• Paragraph 503 further allows that “Enemy . . . vessels may be attacked and destroyed . . . with or without warning (for) . . . Refusing to stop upon being duly summoned ”

• Paragraph 640 mandates “. . . prior to going into action a warship (must show) her true colors.”

This is certainly not all a naval officer should know about his legal responsibilities under international law. It may, however, provide a reasonable framework from which a naval commander may assess his situation concerning piracy.

Knowledge of (the) basic tenets (of international maritime law) and apt application to his activity is not only a direct service obligation of each . . . naval officer but also serves as a yardstick of his erudition and understanding of behavior at sea.¹³

What Can the Commander Do?

Let us bring the foregoing principles of law, customs, and precedents into focus through analysis of the naval commander’s legal position and his authority to act in three very general, theoretical encounters with piracy. We will consider all situations as occurring on the high seas and our decisions will assume that our military superiors provide us no additional guidance.

Attacks Against US Flag Vessels. The clearest legal situation we will consider is to encounter a vessel operating under the US flag under attack or duress by any other vessel. The character of the other vessel is inconsequential in this case but plainly it includes pirate vessels. The naval commander has a clear responsibility for the protection of the rights of the United States under Article 0914 of *US Navy Regulations*. He need not determine whether the attack is piratical because he is already inescapably bound to the defense of the vessel.

Action. Naval forces should approach with caution, attempting to stabilize the situation without the use of force. The naval commander should report the situation to his superiors by the fastest means available. His command should assume full readiness for action and should proceed to the assistance of the US flag vessel placing a warship between the assumed pirates and the US flag vessel and taking “. . . such action as is demanded by the gravity of the situation.”¹⁴ He should use force only as his last resort. If the situation is stabilized without the use of force the naval commander should identify the attacking vessel. If in his estimation that vessel has

committed an act of piracy, he should seize her. (She can be libeled in rem and sold if necessary to pay for damages if she is the legitimate property of the pirates; if not their legitimate property, it would seem that her title remains with her original owners.) If the pirates resist or use force to dissuade him, the commander is authorized to use his own force consistent with military necessity and the principle of proportionality. If the pirate vessel attempts to escape, he is authorized to pursue and use force, to the limit of foreign territorial sea and even into that sea if the foreign littoral state grants permission to continue the pursuit.

Attacks Against Other Than US Flag Vessels. This situation is the most critical which may confront the naval commander. On his own initiative, he has no legal authority to defend other than US flag vessels, unless some specific conditions are met.

First, he must assess the character of the attacking vessel. If she is a warship, as defined in the *Law of Naval Warfare*, action on his personal initiative is not authorized. But, if the commander determines that the attacking warship is under control, not of her legitimate commander but of mutineers or others committing piratical acts, this changes the character of the attacking vessel, as he must view it, to that of a pirate ship.¹⁵

If the attacking vessel claims to be acting under the control of insurgents and the vessel being attacked is a party to the political issues at question in the insurgency, that is not a matter of piracy. Political insurgents, however, acting against a vessel of a third party may be treated as pirates.

. . . for insurgents to be treated as pirates they would have to commit some predatory act against the nationals of third states or their property, and . . . such acts would need *prima facie* to be unconnected with their political activities.¹⁶

Once the commander has determined the attacking vessel has a piratical character, or he believes he has reason to suspect so, his position is more tractable than at first but remains tenuous.

- The 1958 Convention requires "all States . . . cooperate to the fullest possible extent . . ." to suppress piracy.

- It further authorizes the seizure of a ship, even on suspicion of piracy, by any warship.

- *Navy Regulations* requires the observance of international law even if departure from the other regulations is required.

- *Navy Regulations* further requires the commander to take action as the situation demands. This provision, however, applies to the defense of the United States or its citizens.

- *Navy Regulations* restricts the use of force in peacetime to self defense.

- Finally, *Navy Regulations* requires the naval commander to render assistance to those in distress if he can do so without serious danger to his ship or his crew.

This apparently puts the naval commander on the horns of a dilemma. The situation can be resolved by assuming;

- The observance of international law requires a departure from *Navy Regulations* as authorized by Article 0605.

- The customs of the sea demand assistance be rendered to those in distress.

- The special character of pirates under international law and precedent in the US

Navy renders them to be legitimately considered as an enemy intrinsically authorizing exercise of belligerent rights including the use of force consistent with military necessity and the principle of proportionality.

Action: Based on *these assumptions* the naval commander, once he has assessed the piratical character of the perpetrators, could discharge this situation in exactly the same manner he did in the first.

Known Pirates Encountered On The High Seas. In theory, the known pirate can be dealt with as he was in both of the previous situations. In practice, however, the naval commander has more time and less justification to act unilaterally when a crime is not in progress.

Action: The naval commander can exercise the belligerent right of visit and search to confirm the identity of the pirates or ensure the vessel and her crew or contents are of such a character as to constitute evidence, before seizing the vessel. He may also want simply to track and report the pirates until the arrival of forces from some local state seeking to gain jurisdiction.

Summary. All of these conclusions have required some interpretation of the laws and information available to the naval commander. He can usually rely on communications with seniors to confirm or redirect his actions. That does not guarantee their assistance. The decisions could fall to the commander alone. Without specific guidance he can only exercise sound judgment and report his results.

While the legality of the proposed actions is clearly supportable, it is most noteworthy that with the exception of defense of the rights and property of the citizens and government of United States the naval commander must invoke the one line in *Navy Regulations* which allows him to disregard all other legal responsibilities under them. This is justified by the mandate in *Navy Regulations* to fulfill his responsibilities under international law, in this case to suppress piracy; an issue not provided for within the Navy guidance for action under international law.

In searching international law on the subject, the naval commander finds it legal to visit and search any vessel he suspects of piracy and if that vessel resists he may engage her to destruction if necessary. What risk he is authorized to undertake to accomplish this remains undefined. If he captures the pirates he will probably be directed to deliver them for further transfer to the jurisdiction of the US Federal Courts.

The authority for his actions is tenuous in that it is based on legal permission (under international law *not Navy Regulations*) to take action and in the final analysis cannot be considered, in any sense, a legal obligation to intercede for foreign flag vessels nor to pursue the known pirate to the exclusion of any other assigned mission.* Many facts he cannot determine beforehand could shift the legal balance against the naval commander *and* his unwitting partner in the action, the US government. His safest

*Surprisingly the US Coast Guard is operating under essentially the same guidance—or lack of guidance, in the case of foreign vessels on the high seas.

legal course, therefore, is to abstain from action in the absence of instruction. This, however, puts the naval commander, and consequently the United States, in the compromising moral position of ignoring the predicament of the innocent prey while it is within their power to deliver the victims from their plight. Exercising the option not to act would precipitate a judgment inimical to the reputation of the United States in the court of world opinion.

The theoretical situation of the naval commander weighing whether or not to use force against pirates in the name of the United States to assist innocent apolitical foreign civilians in the absence of clear instruction is not alleged to be inevitable or even probable, but it is undeniably foreseeable. One hopes the dilemma will be resolved by elucidation from within the Navy by some other means than a definitive analysis of the case study by court-martial.

Piracy should be treated in NWIP 10-2 as a special case of naval warfare.

NOTES

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3. *Ibid.*, p. 89.
4. A.G. Course, *Pirates of the Eastern Seas* (London: Frederick Muller Ltd., 1966), p. 88.
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6. Ferenc A. Váli, "The Santa Maria Case," *Northwestern University Law Review*, March-April 1961, p. 169.
7. US Congress, Senate, Committee on Foreign Relations, *Four Conventions and an Optional Protocol Formulated at the United Nations Conference on the Law of the Sea*, Hearings (Washington: US Govt. Print. Off., 1959), p. 9.
8. Pierino Belli, *De Re Militari et Bello Tractatus* (London: Clarendon Press, 1936), p. 83.
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10. Smith Thompson for the Navy Dept., Appendix to Allen, p. 100.
11. US Navy Dept., *Law Relating to the Navy Annotated*, v. 1, p. 2304.
12. US Navy Dept., *Law of Naval Warfare NWIP 10-2*, (Washington: US Govt. Print. Off., 1974), p. 1-4.
13. S.G. Gorshkov, *Sea Power and the State*, 2nd ed. (Moscow: Voenne Izdatel'stvo Ministertva Obrorony 1976; reprinted ed., Annapolis: Naval Institute Press, 1979), p. 47.
14. *Navy Regulations*, Article 0914.
15. US Congress, p. 31.
16. L.C. Green, "Piracy and the Santa Maria," *The Malayan Law Journal*, June 1961, p. 7.

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