

Equipment Articles for the Prosecution of Maritime Piracy

17 May 2010

A Discussion Paper By:
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Somali pirates astound because their skiff-mounted attacks on state-of-the-art supertankers repeatedly yield multimillion dollar ransoms, and because they can basically count on getting away with it. Why? Because the legal framework that governs the high seas contains blatant gaps that currently make prosecuting piracy difficult —if not impossible. The result? A deeply frustrated and embarrassed international community and a rising call for engaging pirates on land.

OCEANS BEYOND PIRACY was launched to develop viable, cost-effective, low-violence solutions to the gaps in the current legal framework that allow piracy to persist. In partnership with experts from the maritime industry, government/defense, and international law, the project is leading the way internationally for the definition and adoption of equipment laws —like those used to suppress the slave trade— to define ‘intent to commit piracy’ and to prosecute based on that intent. For more information on our unique solutions, visit us at: www.oneearthfuture.org



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EQUIPMENT ARTICLES FOR THE PROSECUTION OF MARITIME PIRACY

Discussion Paper prepared for One Earth Future Foundation

May 2010

By Eugene Kontorovich[†]

Piracy is the oldest and most well established international crime. The United Nations Convention on the Law of the Sea III (1982) (UNCLOS), codifying centuries-old customary law, authorizes any nation to prosecute pirates they capture, even if that country has no connection to the crime. Yet in the current international fight against Somali piracy, prosecutions have played only a small part. Thus far, Kenya and the Seychelles have been the only nations willing to prosecute pirates under universal jurisdiction. The former has recently refused to take any more suspects captured by the coalition navies, and the latter has not yet successfully brought any cases. The situation creates an urgent need for new and easily-implementable measures to encourage prosecution by other countries.

One of the main obstacles to prosecution involves evidentiary issues. It can be difficult to prove that armed men in a boat on the high seas are pirates. They can claim to be mere fishermen unless they are caught in the act of attacking a vessel. Yet catching them in the act is also problematic. Once pirates board a vessel, they create a hostage situation that usually results in ransom rather than arrest. Thus there is only a narrow window for arrests likely to result in successful prosecutions. Of course, one need not prove an actual act of piracy to convict suspected pirates. Both “operat[ing]” a pirate vessel and “internationally facilitating” piratical acts can be prosecuted as piracy under UNCLOS.¹ Thus the crew of a skiff can be prosecuted for piracy if the vessel “has been” or is “intended” by them to be used in a piratical act.² Again, proving this is problematic when a skiff cannot be linked directly to a particular attack.

While the evidentiary difficulties may not be insurmountable, they are magnified by legal difficulties in holding captured pirates on board a warship for an extended investigation period, and by concerns that acquitted pirates would be difficult to repatriate from the prosecuting state. Thus realistically, universal jurisdiction prosecutions will only proceed when there is very solid evidence. This helps explain why most of the suspected pirates captured by coalition navies since 2008 have been released.³ While some of these situations could possibly have resulted in successful prosecutions, nations often cite evidentiary concerns to explain their release of captured suspects.⁴ Other obstacles to the prosecution of pirates, such as gaps in national legal codes and concerns about asylum exist, but the evidentiary issues can be easily addressed, and doing so would have benefits that can be shared by many countries.

This paper will discuss how the adoption into treaty or municipal law of equipment articles could facilitate the prosecution of piracy. Equipment articles are rules that create a judicial presumption of guilt on piracy charges for the crews of civilian vessels possessing certain specified equipment within a certain defined area of the high

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¹ UNCLOS III, 1833 U.N.T.S. 397, at Art. 101(b)-(c).

² *Id.* at Art. 104.

³ Vice Admiral William E. Gortney, Statement Before the House Armed Services Committee on Counter-Piracy Operations in The U.S. Central Command (Mar. 5, 2009); see also Valentina Pop, *EU mission alone cannot solve piracy problem, says admiral*, EUOBSERVER.COM (Feb. 2, 2009), at <<http://euobserver.com/13/29390>>; Jason Groves, *Navy gives Somali pirates food and water . . . then lets them sail off scot free*, DAILY MAIL ONLINE (Jan. 28, 2010), at <<http://www.dailymail.co.uk/news/article-1246300/Navy-gives-pirates-food-water--lets-sail-scot-free.html>> (reporting that of sixty-six suspected pirates captured by Royal Navy in 2009, all were freed).

⁴ See *id.* (noting that the Royal Navy cites evidentiary reasons for releasing pirates); Contact Group on Piracy Off the Coast of Somalia, Second Meeting of Working Group Two on Legal Issues, Chairman’s Conclusions 1, available at <http://www.marad.dot.gov/documents/WG2-2nd_Meeting_chair-conclusions-May_5-6-2009-mtg.pdf> (noting the centrality of evidentiary problems); Joint UNDOC/European Commission Program, EU Support to the Trial and Related Treatment of Piracy Suspects 3 (May 2009) [hereinafter “EU Support”], available at <http://www.asil.org/files/AnnexE-ECAssistance.pdf>; Eugene Kontorovich, “A Guantanamo on the Sea”: *The Difficulty of Dealing With Pirates and Terrorists*, 98 CALIFORNIA LAW REVIEW 234, 262-66 (2010).



seas plagued by pirate attacks. For example, equipment articles could create a presumption of piracy for people found on a vessel less than a certain length, with engines of a certain horsepower, equipped with grappling hooks, boarding ladders, armed with RPGs and/or heavy machine guns, and/or far out at sea with obviously inadequate stores of food and water (which could suggest the skiff operates from a mothership). The presence of all or some of these things would only be relevant to a finding of piracy for vessels within a predefined exclusion zone in the Gulf of Aden or Indian Ocean – not for the whole world. Such laws were crucial to the prosecution and suppression of the transatlantic slave trade in the 19th century, perhaps the greatest example of international legal cooperation before World War I. Equipment articles could help make the current naval cooperation in the suppression of piracy translate to an end of legal impunity.

The promulgation of equipment articles could bolster the other principal legal anti-piracy policies under discussion. Such rules could be used in trials in national courts, regional tribunals, or specially created international courts. By lowering the cost of prosecution, equipment articles would encourage a broader range of countries, from India to the U.S, to prosecute pirates. This could reduce the human rights concerns surrounding such trials. A major advantage of the equipment articles is that they are a relatively low-cost and quick solution, compared to more long-term fixes like creating new international tribunals or stabilizing Somalia. After the idea was first mentioned in a briefing paper from the One Earth Future Foundation,⁵ United States State Department officials have already expressed some interest.⁶

Part I of this discussion paper describes the use of equipment articles by numerous countries in the 19th century to bring slave traders to justice. Part II discusses modern treaties and municipal laws that take a similar approach to high seas crimes by using vessel configuration or cargo as a proxy for hard-to prove criminal intent. Part III briefly considers the manner in which equipment articles can be promulgated, such as national legislation, treaty, or Security Council resolution, and concerns about establishing a criminal intent.

I. EQUIPMENT ARTICLES AND THE SUPPRESSION OF THE SLAVE TRADE

Beginning in the early 19th century, international opinion began to turn against the transatlantic slave trade. Several European nations outlawed or greatly restricted it in the first decade of the century, most notably Great Britain, which abolished the trade within its dominions in 1807, and the United States, which outlawed it in 1808, as soon as the Constitution permitted.⁷ The Congresses of Vienna and Verona, which attempted to establish the principles of international order in the wake of the Napoleonic Wars, produced declarations strongly condemning the trade. But it was the United Kingdom that took the lead in international diplomatic and enforcement efforts. Britain made complete suppression of the slave trade a major focus of its foreign policy for much of the 19th century.⁸

Because slave trading was not yet an international crime, Britain could not use its extraordinary naval power to seize slave traders sailing under foreign flags, even when the slave trade was against the foreign country's law as well, as was often the case. To remedy this problem, London began systematically negotiating bilateral treaties with other naval powers. These treaties allowed warships from either party to stop, search, and

⁵ ELIZABETH ANDERSEN ET AL., SUPPRESSING MARITIME PIRACY: EXPLORING THE OPTIONS IN INTERNATIONAL LAW 19 (2009), available at <<http://www.acuns.org/programsan/suppressingmaritimepiracyexploringtheoptionsininte/>>.

⁶ Andrew J. Shapiro, Assistant Secretary, Political-Military Affairs, *Counter-Piracy Policy: Delivering Judicial Consequences*: Keynote Address to American University Law Review Symposium (March 31, 2010) (favorably discussing equipment agreements analogous to those used in 19th century), available at <http://www.state.gov/t/pm/rls/rm/139326.htm>; Thomas Countryman, Principal Deputy Assistant Secretary, Political-Military Affairs, Briefing on Anti-Piracy Efforts (Feb. 18, 2010), available at <http://www.state.gov/t/pm/rls/rm/136909.htm>:

I've heard discussion among international law specialists that there ought to be a move to include the possession of pirate equipment as evidence of intent to commit piracy . . . In the same way that possession of certain kind of equipment can be taken by the police as evidence of criminal activity . . . There's no need to have ladders and grappling hooks in a fishing vessel.

⁷ For background on the Mixed Courts treaties, see Eugene Kontorovich, *The Constitutionality of International Courts: The Forgotten Precedent of Slave Trade Tribunals*, 158 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 39-115 (2009); Jenny Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE LAW JOURNAL 550 (2008); Leslie Bethell, *The Mixed Commissions for the Suppression of the Transatlantic Slave Trade in the Nineteenth Century*, 7 J. AFR. HIST. 79, 82-83 (1966).

⁸ Howard, Hazen Wilson, *Some Principal Aspects of British Efforts to Crush the African Slave Trade, 1807-1929*, 44 AM. J. INT'L L. 505 (1950).



seize slave-trading vessels from the other party. The bilateral treaties further provided that the vessels seized on suspicion of slave trading would be brought for adjudication before specially established Mixed Commissions, consisting of a judge from each nation. These tribunals were perhaps the first international human rights courts.

Britain signed the first such Mixed Commissions treaty (with the Netherlands and Portugal), in 1817, and the last (with the United States), in 1862. However, the Mixed Commissions encountered serious difficulties in demonstrating that captured vessels were engaged in the prohibited trade. If a ship did not actually have slaves on board, it could not be proven that it was engaged in slave trading, even if it was outfitted in a manner characteristic of slavers -- such as shackles and manacles, and quantities of water and other provisions far beyond the needs of the crew. Thus a slave-trading vessel had near impunity on its voyage to Africa, while it waited to take on slaves in African ports notorious for being centers of the trade, and after it had discharged its cargo in the Americas. When a vessel was caught with slaves onboard, the case was clear cut, but Britain was not content with a partial suppression of the trade.⁹ Thus the British members of the mixed commission in Sierra Leone urged the Foreign Minister that they could not effectively punish slave trading without being able to make the obvious inferences from a vessel's modifications and equipment.¹⁰

Equipment clauses first appeared in 1823 as a supplemental article to the British-Dutch mixed commission treaty.¹¹ They then became a standard feature of mixed commission and right-of-search treaties, with nearly two dozen nations signing them over the next four decades. The treaties invariably used a standard list, written by the British, that enumerated ten categories of proscribed equipment. The presence of "any one or more" of the articles would be "*prima facie* evidence that the vessel was employed in the African slave trade."¹² The presumption could, however, be rebutted with "clear and incontrovertible evidence . . . that at the time of her detention or capture the vessel was employed in a lawful undertaking, and that such of the different articles above specified . . . were indispensable for the lawful object of her voyage."¹³ The operation of many mixed court treaties, and their equipment clauses, were confined to particular regions of the high seas (south of the Equator, for example), so as not to provide a pretext for interference with shipping worldwide.

The equipment clauses had a significant effect on the trade.¹⁴ After Spain grudgingly adopted equipment articles in 1835, slave-trading using Spanish-flagged vessels diminished. The application of the articles to Portuguese and Brazilian vessels shortly thereafter drove slavers from those flags.¹⁵ There is even an extraordinary precedent for the use of equipment articles in the absence of a treaty. In 1839, when Brazil refused to bolster its existing mixed courts treaty with equipment articles, the British "made it known in naval circles that they considered [themselves] justified within the terms of the *existing* treaties, in capturing Brazilian ships on the strength of their fittings alone."¹⁶

Even more boldly, that same year, when Portugal refused to renew a mixed court treaty, Britain announced that it would nonetheless continue to seize slave traders under the Portuguese flag and try them before *British* Vice Admiralty courts. Equipment articles would apply in these proceedings.¹⁷ Here, Britain unilaterally applied equipment articles to high seas conduct that it considered, in advance of an international consensus, a universally cognizable crime against the law of nations. Britain went beyond what international law authorized at the time -- though as a result, Portugal relented and signed an equipment articles treaty in 1842. This precedent supports promulgating piracy equipment laws through national municipal legislation in addition to treaties

⁹ Bethell, *supra*, at 86.

¹⁰ Martinez, *supra*, at 611.

¹¹ Bethell, *supra*, at 86.

¹² Treaty between the United States and Great Britain for the Suppression of the Slave Trade (1862), Art. VI, *available at*, http://avalon.law.yale.edu/19th_century/br1862.asp.

¹³ *Id.*

¹⁴ See David Eltis & Paul F. Lachance, *Estimates of the size and direction of transatlantic slave trade voyages: The Trans-Atlantic Slave Trade Database* (2009), at 17, *available at* <http://www.slavevoyages.org/downloads/EstimatesMethod.pdf>; Martinez at 612.

¹⁵ See Holger Lutz Kern, *Strategies of Legal Change: Great Britain, International Law, and the Abolition of the Transatlantic Slave Trade*, 6 *J. History of Int'l Law* 233, 249-50 (2004).

¹⁶ Bethell, *supra*, at 86.

¹⁷ *Id.* at 89-90; Wilson, *supra* at 512-13.



In the United States, Congress made slave trading a crime in 1818, and attached the death penalty in 1820. Yet the U.S. law only applied to Americans or American vessels. While the U.S. did not enact “equipment articles,” judges often accepted circumstantial equipment-based evidence.¹⁸ Many ships were condemned despite being found with no slaves on board. Still, specific equipment laws may have made securing convictions in American courts still easier when slaves were not found on board, at least by giving specific guidance to judges as to what evidence can safely be taken as incriminating, and would have made courts more confident about making such presumptions.¹⁹ U.S. courts faced an easier task in the slave trade cases than courts trying Somali pirates today. They were not applying international law of piracy against foreigners (a limited power), but rather a purely municipal prohibition against Americans. Thus they would have had a greater margin of interpretive or adjudicative discretion.

In 1862, the United States ratified the Treaty between the United States and Great Britain for the Suppression of the Slave Trade (also known as the Lyons-Seward Treaty), allowing for the right of search on the high seas, creating mixed commissions, and adopting the standard equipment articles.²⁰ The United States had until then kept out of the mixed commission treaty system mostly because of the right of search. The War of 1812 had been fought in large part over the Royal Navy’s practice of stopping U.S. merchantmen to search for “British” sailors to impress, or force into British service. When Britain first proposed a slave trade treaty in 1817, the Monroe Administration rejected it out of hand as reminiscent of this insulting practice. Despite some serious constitutional objections about the mixed courts, none of the objections were related to the equipment articles.

In the 19th century, the equipment articles’ effectiveness was limited by slave traders’ ability to seek flags of convenience from nations that had not signed the treaties. Such evasion is far less likely in present circumstances given that Somali pirates’ vessels are invariably Somali, and they have little opportunity to seek registry from any of the “Big Four” flag states. Moreover, the evidentiary problems posed by Somali pirates are far more severe - and thus the benefits of the equipment articles greater - because the piratical act constitutes a tiny fraction of their voyage. Perhaps the biggest difference is that the slave trade was not yet an international crime, while piracy of course is. Thus using equipment articles to act against foreign vessels on the high seas required making special treaties because the underlying conduct was not a general international crime. Piracy is already universally cognizable in international law. Thus equipment articles would simply specify what can be considered *evidence* of the commission of an already existing crime. Such details are left to the discretion of national courts under UNCLOS, and thus do not require additional treaties.²¹

II. MODERN ANALOGS

While the anti-slave trade equipment laws have largely been forgotten, recent years have seen a revival of maritime security laws that employ a similar logic. The 2005 Protocol to the Convention for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf (1988) (SUA Protocol)²² criminalizes the transportation or possession on the high seas of certain equipment that, while having legitimate uses, could also be used for serious crimes. For example, under the Protocol, a person commits an offense when he transports on board a ship any equipment that could be used to design or make unconventional weapons. Such an offense is potentially very broad – a vast range of industrial equipment is “dual-use.” The treaty limits its scope by requiring that the defendant have “the intention that [the equipment] will be used for unconventional weapons; and excludes nuclear material shipped to, from or by state parties to the Non-Proliferation Treaty. With regard to piracy, a geographic exclusion zone could have a similar limiting effect.

While dealing with much higher-stakes crimes, the principle of the Protocols is the same as equipment laws. When suspicious dual-use material is found on a ship, proving a design to make an unconventional weapon, let alone a design to use it, is exceedingly difficult. The Protocol in effect criminalizes the possession of the

¹⁸ DON E. FEHRENBACHER, *SLAVEHOLDING REPUBLIC*, at 175, 196 (2001).

¹⁹ RON SOODALTER, *HANGING CAPTAIN GORDON: THE LIFE AND TRIAL OF AN AMERICAN SLAVE TRADER 26-27* (Simon and Schuster, 2007).

²⁰ For a discussion of the American reception of the treaties, see generally, Kontorovich, *International Courts, supra*.

²¹ See UNCLOS Art. 105.

²² International Maritime Organization (IMO), *Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, 14 October 2005, available at: <http://www.unhcr.org/refworld/docid/49f58c8a2.html> [accessed 26 April 2010].



equipment itself as a way of getting around these evidentiary difficulties. Thus use of equipment laws to prove piracy should be far less controversial because piracy is already a universally recognized crime; there is no international crime of designing or possessing unconventional weapons. Moreover, the SUA Protocol regulates matters going directly to the gravest national security interests, which may explain the wariness of states to sign it.²³

Another maritime security measure quite similar to equipment articles involves United States laws about vessels used for drug smuggling on the high seas. The United States targets maritime drug trafficking on the high seas by criminalizing certain kinds of vessels and equipment and through the creation of substantive offenses that serve a evidentiary purposes. Prosecuting drug importation poses evidentiary problems similar to piracy and the slave trade. A vessel encountered on the high seas can dump its cargo overboard. Even if a vessel is captured on the high seas with drugs on board, it is difficult to prove that it was destined for the United States. Such boats rarely carry an itinerary or route plan. The statutes discussed here apply U.S. law to foreign vessels on the high seas, even when there is no concrete proof of intent to import to America. Rather, the statutes in effect presume that certain circumstances, including a vessel's configuration, can allow it to be treated as if a link to the U.S. could be shown. Just as one does not haul coal to Newcastle, one would not ship cocaine to Columbia.

During the cocaine boom of the 1980s, the U.S. Coast Guard complained that under then-existing law, when encountering a foreign drug-laden vessel on the high seas, they could not obtain enough evidence to warrant bringing the crew to the U.S.²⁴ In response, Congress in 1986 enacted the Maritime Drug Law Enforcement Act (MDLEA), which applies U.S. narcotics law to foreign vessels on the high seas even without any proof that they were headed to America.²⁵ The MDLEA in effect creates a presumption that large shipments of narcotics on the high seas are destined for, or would substantially affect, the U.S market.

More recently, the U.S. has criminalized the use of a particular type of vehicle because of its popularity in drug smuggling.²⁶ The law in effect provides that suspects can be prosecuted just for *being* on a vessel that possesses certain unusual characteristics. In recent years, drug smugglers have taken to using shallow submersible and semi-submersible vessels, which could be easily scuttled upon detection, thereby destroying all the evidence.²⁷ The crew would jump into the water, and the Coast Guard would have to rescue them rather than arrest them, a frustration reminiscent of the current catch and release debacle playing out in the Gulf of Aden.²⁸ In response, the U.S. enacted the Drug Trafficking Vessel Interdiction Act of 2008 (DTVIA), which criminalizes the mere use or operation of such vehicles on the high seas "with the intent to evade detection."²⁹ Congress believed that such vessels generally "have no legitimate use" and "make prosecution difficult,"³⁰ which became the major policy reasons for banning vessel equipment.³¹ While broadly prohibiting such vessels on the high seas, the law creates a

²³ The Protocol has 11 state parties, accounting for over 6% of global shipping tonnage. It has not yet entered into force. See IMO, Summary of Status of Convention (March 31, 2010), available at http://www.imo.org/home.asp?topic_id=910.

²⁴ See S. Rep. No. 96-855 (1980), as reprinted in 1980 U.S.C.C.A.N. 2785, 2785-86.

²⁵ See 46 U.S.C.A. § 70502(c)(1).

²⁶ See Drug Trafficking Vessel Interdiction Act of 2008 ("DTVIA"), codified at 18 U.S.C. § 2285.

²⁷ See Cong. Rec., H7239 (110th Cong.) (Statement of Rep. Lungren) (explaining proposed law designed to give tool to prosecutors to use when no contraband found).

²⁸ *Id.*; CONGRESSIONAL RECORD 10253-24 (Sept. 27, 2008):

However, under current law, it is not illegal to operate one of these vessels. Therefore, in order to successfully prosecute these criminals, the Coast Guard must obtain evidence of drug trafficking or other illicit conduct—a dangerous proposition on the high seas. Coast Guard teams must physically board the SPSS, often in the dead of night, while it is travelling at up to ten knots. The teams must then risk their lives to apprehend the traffickers and seize the drugs aboard the SPSS.

And the drug traffickers know the law. They know that the Coast Guard must obtain evidence of drugs so they will often scuttle the vessel and jump overboard—turning a criminal apprehension into a rescue mission. ... By prohibiting the possession of SPSS vessels . . . we ensur[e] swift prosecution of the cocaine traffickers.

²⁹ 18 U.S.C. § 2285 (a).

³⁰ See Cong. Rec., H7239 (110th Cong.) (Statement of Rep. Lungren).

³¹ *Id.* at 7240 (Rep. Lungren) ("[W]e need this legislation, to allow us to have a legal premise for prosecuting them for actually being on the high seas."). See also, Letter of Patrick M. Ward, U. S. Interdiction Coordinator to Ricardo H. Hinojosa, Chairman, United States Sentencing Commission (March 20, 2009) ("The [DTVIA] was passed with the specific intent of bringing these skilled, highly paid crews to justice despite their proclivity' to destroy the vessels and all other evidence of their criminal intent."), available at http://www.usssc.gov/pubcom_200903/USInterdictionCoord_PC033009.pdf.



variety of affirmative defenses suspects can invoke to demonstrate, by a preponderance of the evidence, they were not involved in drug trafficking.³² Thus the law only *presumes* that such vessels are engaged in the drug trade, but this presumption can be rebutted.

The MDLEA is regularly used to prosecute suspected drug traffickers apprehended on the high seas,³³ and it has withstood a variety of challenges in the courts.³⁴ While the DTVIA has only recently been enacted, it has already been the basis for several prosecutions, where suspected traffickers have been caught without drugs but in a submersible vessel.³⁵ While other nations may not have such laws, their use by the United States has not occasioned protest. On the contrary, the MDLEA cases almost always proceed with the consent of the defendant's home state. To facilitate MDLEA cases, the United States has negotiated bilateral maritime agreements with 26 Caribbean and Latin American countries. These agreements set out the framework for the United States to stop, search and board the other state's vessels on the high seas if they are suspected of drug trafficking. It is these searches that give rise to MDLEA cases.³⁶ Thus a significant number of countries have explicitly or implicitly assented to the MDLEA's evidentiary principle, one reminiscent of equipment articles. Indeed, since unlike piracy, neither drug trafficking nor the operation of submersible vessels constitutes universally cognizable crimes, the application of equipment laws to piracy on the high seas would be even less controversial.³⁷

III. IMPLEMENTING EQUIPMENT LAWS AGAINST CONTEMPORARY PIRATES

Equipment articles against Somali pirates could be promulgated in several ways, each with its advantages and disadvantages. The specific list of proscribed equipment and boat configurations should be informed by discussions with naval and maritime security specialists. Unlike their 19th century predecessors, such lists could require more than the presence of one article to trigger the presumption of guilt; rather, they could specify a combination of equipment.

A. Domestic statutes

International law leaves much of the secondary aspect of criminal law – rules about conspiracy, attempts, evidence and rules of procedure – to the discretion of national legislation. In the U.S., this discretion enjoys a constitutional dimension. Congress can “define and punish piracies and felonies on the high seas.”³⁸ The Framers of the US Constitution understood the details of these crimes and particular modes of proof and trial were not explicit in international law, and that international law left a range of options from which Congress could choose. Equipment articles are part of this secondary dimension of international law that nations can legislate without prior international agreement. Thus nations can implement equipment articles by legislating them into their domestic law codes. Such legislation would obviously only apply to trials in those nations' courts. This would be particularly helpful for nations whose courts could potentially become regional piracy prosecution centers. Even countries with a policy of prosecuting only pirates who attack their own vessels would be able to bring cases more easily with such laws.

³² See § 2285(e)(1) The broad affirmative defenses include having a proper registry; being engaged in a governmentally-licensed or regulated activity of any kind; or having an onboard vessel identification system.

³³ See Eugene Kontorovich, *Beyond the Article I Horizon: Congress's Enumerated Powers and Universal Jurisdiction Over Drug Crimes*, 93 MINNESOTA LAW REVIEW 1191, 1204 & n. 85(2009) (citing and counting cases).

³⁴ *Id.* at 1204-06. The objections the MDLEA and DTVIA have focused on the defendants' lack of nexus with the U.S., which has given rise to unsuccessful Fifth Amendment arguments, as well as arguments based on the limits of Congress's Art. I power over “Piracies and Felonies” on the high seas. See generally, *id.*, *United States v. ANGULO-HERNÁNDEZ*, 576 F. 3d 59 (1st. Cir. 2009) (Tourruella, dissenting from denial of rehearing en banc). None of these arguments would be applicable to piracy, the classic offense for which international law requires no nexus. See Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NORTHWESTERN UNIVERSITY LAW REVIEW 149, 198-201 (2009).

³⁵ See, e.g., Azadeh Ansari, *Smugglers sink 'drug subs,' but not feds' case*, CNN.com, (Jan. 14, 2009), available at <http://www.cnn.com/2009/CRIME/01/14/drug.subs/index.html>; see also, Coast Guard Press Release, <http://www.piersystem.com/go/doc/823/248281/>.

³⁶ Kontorovich, *Beyond the Art. I Horizon*, *supra* at 1202-03.

³⁷ *Id.* at 1223-27.

³⁸ U.S. Const, Art. I, § 8.



With the exception of piracy, nations may lack authority under international law to punish foreigners for crimes on the high seas with which they have no nexus. Since there is no international crime of carrying the relevant equipment (RPGs, grappling hooks) aboard private vessels on the high seas, equipment articles promulgated through national legislation may raise concerns that they criminalize beyond what the international law permits. But this concern misperceives equipment laws. They do not define a new crime. Rather, they establish the elements of proof for an existing crime – piracy. This can be seen from the fact that the proposed articles only make possession of the equipment a rebuttable presumption. A suspect can be found in possession of the equipment yet acquitted, because the possession is not the underlying crime – rather, it is piracy against the law of nations.

B. Treaties

One could imagine promulgating equipment articles through a multilateral treaty like the SUA Protocol. Yet such treaties require the agreement of a significant number of states to become effective, and could take years to be implemented. Perhaps the most convenient method of implementing equipment articles today most closely follows the 19th century model. Equipment laws became a central feature of anti-slavery enforcement by being incorporated in a network of bilateral treaties between Britain and other states. Naturally, the most important of these treaties were the ones with major slave-trading states, such as Portugal and Brazil. Fortunately, almost all of the current pirates are Somali nationals in Somali vessels. Thus an agreement -- between coalition states on anti-piracy patrol and/or the nation hosting piracy prosecutions on the one side, and the Somali Transitional Government on the other side -- that specifies proscribed equipment would give the prosecuting state all the authority they need for much more aggressive arrest and prosecution. Agreements with Somalia would avoid any concerns about equipment laws going beyond the existing definition of piracy in international law. Moreover, the bilateral treaty route could avoid many of the technical difficulties with multilateral treaties (slowness) and national laws (incompleteness of coverage).

C. Security Council resolutions

Equipment laws could also be articulated in Security Council resolutions. The advantage of such resolutions is that they could be adopted quickly, would provide a uniform international standard, and would relate these evidentiary rules to the international crime of piracy. Even if the resolutions have no binding legal force in judicial proceedings, they might make nations more willing to act, as the four resolutions authorizing force against Somali pirates in Somali territory did.³⁹ However, the Security Council, under its Chapters VII authority to address threats to global security, has established tribunals to try international crimes, such as the International Tribunals for the Former Yugoslavia and Rwanda, or the hybrid Special Tribunal for Lebanon. Piracy is a crime that can already be tried by all countries. Presumably a Security Council resolution under Chapter VII could set out equipment articles and authorize any nation involved in implementing prior resolutions on Somali piracy to rely on equipment laws for arrests and prosecution.

D. Issues of intent.

The mixed courts of the adjudicated slave trade disputes did not have criminal jurisdiction; they could only condemn the vessel in civil proceedings. In a criminal prosecution, some evidence of a criminal intent would be necessary, though naturally the details of *mens rea* vary from jurisdiction to jurisdiction. The SUA Protocol and the DTVIA are both criminal statutes, but require some specific intent on the part of the defendant, in conjunction with the proscribed equipment.

While the details of intent requirements and piracy statutes vary from nation to nation, one way of dealing with the intent issue is to make the presence of relevant equipment evidence that the *vessel* is a “pirate ship” under UNCLOS Art. 103 rather than that the individuals onboard are guilty of piracy under UNCLOS Art.

³⁹ See Douglas Guilfoyle, *Counter-Piracy Law Enforcement and Human Rights*, 59 INT. & COMP. L. Q. 141, 147-48 (2009) (noting that while Security Council anti-piracy resolutions do not confer new substantive powers, given Somalia’s consent to enforcement in its territory, they make it “politically or constitutionally easier” for some states to act).



101(a). This allows the equipment articles to leverage an evidentiary presumption about intent built into UNCLOS. A pirate ship is defined as a vessel “intended by the persons in dominant control to be used for the purpose of committing” piratical acts.⁴⁰ Furthermore, the crew of such a vessel is guilty of piracy itself if they know the “facts making it a pirate ship.”⁴¹ If equipment articles are *prima facie* evidence that a vessel is a pirate ship, i.e., that those on board intend to commit piracy, this would itself allow a finding that the crew is guilty of piracy itself under Art. 101(b) so long as they are aware of the presence of the relevant equipment. Given the small size of pirate vessels, it would be quite improbable that those onboard would not know of the presence of the equipment.

IV. CONCLUSION

Equipment articles would be a beneficial addition to national and international attempts at combating piracy. They have a long history of being effective and fair in contexts ranging from the suppression of the slave trade to the prosecution of drug smugglers. Since piracy itself is already an international crime, equipment articles for piracy could be promulgated through bilateral treaties, existing multilateral treaties, and Security Council resolutions. Indeed, current treaties already provide ample opportunity for the incorporation of equipment articles in both the international legal framework against piracy and the various municipal codes of states that wish to prosecute pirates. Britain’s treatment of slave trade equipment rules in the 19th century and the United States’ current laws against submersible and other vessels engaged in drug trafficking provides a precedent for promulgating equipment laws through national municipal legislation in addition to treaties. Wherever and however they were incorporated, equipment articles are a relatively easily-implementable prosecutorial strategy that would increase the effectiveness and hence the impact of current international anti-piracy efforts.

⁴⁰ Art. 104.

⁴¹ Art. 101(b).