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Inspection and Seizure of “Armed and Equipped” Somali Pirates: Lessons from the British and American Anti-Slavery Squadrons (1808-1860)

John I. Winn, J.D., LL.M

What a glorious and advantageous trade this is. It is the hinge on which all the trade of this globe moves. (James Houston, eighteenth-century British slave merchant)

When pirates are observed in boats with guns, ladders and even hostages, it beggars belief that they cannot be prosecuted, assuming that states have the necessary laws in place and the will to do so. (Richard Ottaway, Chairman, Foreign Affairs Committee-House of Commons)

I. INTRODUCTION

Unlike the romanticized pirates of the seventeenth and eighteenth centuries, modern era Somali-based pirates represent a continuing threat to cargo, passenger, and deep-water fishing vessels in and around the Indian Ocean. Estimates of per capita economic losses associated with these pirates range from $5 to $12 billion dollars per year. These associated costs include, increased (i.e., inefficient) cruising speeds, re-

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routing of shipping lanes, security equipment, insurance, and ransoms for kidnapped crew-members. While criminal prosecutions, armed security, and shipboard counter-piracy technologies are important factors in reducing the risk and efficacy of piratical attacks, the primary factor underpinning improved conditions off the Somali coast is an overwhelming multi-national armada involving up to fifty vessels from twenty-five countries. This effort is extravagantly expensive and almost certainly unsustainable over the long term. Furthermore, even as various flotillas patrol the Somali coast, a ‘round-hole-square-peg’ legal infrastructure limits criminal prosecution of pirates to those relatively few pirates caught aboard seized vessels, who take or murder hostages, or are fool-hardy enough to fire upon interdicting warships. A more practical solution, may be found in the historical precedent of the nineteenth century British and, to a lesser extent, American, anti-slavery naval squadrons. Much as active naval interdiction, inspection, and seizure of individual slave-ships effectively put an end to the Atlantic slave-trade by approximately 1850, putting an end to Somali piracy today may be as simple as stopping Somali Pirates one boat at a time.

Although several hundred Indian Ocean pirates have been tried and imprisoned in recent years, pirate crews are equally likely to be fed and watered by intervening warships and set back afloat following legal consultations. According to the Congressional Research Service, approximately 90% of pirates interdicted at sea are released without further action. Pirates have also been reported to be using larger (hijacked) merchant vessels as support vessels (i.e. “mother-ships”) and more seaworthy pursuit craft while ranging even further out to sea and westward toward the coast of India.

Because criminal prosecutions are not currently feasible in Somalia, pirate trials in foreign prosecutorial states involve significant resource

6. 1850 marks the date that Brazil (which had refused to enforce the terms of its 1826 Treaty with Britain) agreed to allow British vessels to inspect its merchant vessels. Slave “smuggling” in smaller ships and in mixed cargo continued until approximately 1866. See generally KENNETH MORGAN, SLAVERY AND THE BRITISH EMPIRE: FROM AFRICA TO AMERICA (2008).
7. FOREIGN AFFAIRS COMMITTEE, PIRACY, supra note 2.
commitments, including prison building,\(^\text{10}\) transportation,\(^\text{11}\) witness travel, and evidence collection. In April 2012, the British Foreign Office advised the Royal Navy to avoid detaining pirates of certain nationalities in view of the possibility that pirates may actually invoke claims for asylum under British law if their states of nationality use torture or allow execution as judicial punishment.\(^\text{12}\) Even if convicted outside of Somalia, pirates returned for incarceration in Somalia are typically freed (or allowed to “escape”) after paying nominal bribes.\(^\text{13}\) In view of these and other considerations, coalition warships typically merely “observe” suspected pirate vessels while avoiding active interdiction unless pirates initiate aggressive action against other vessels.\(^\text{14}\)

In January 2011, the United Nations Secretary General noted “with concern that the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates.”\(^\text{15}\) Currently, neither the International Criminal Court (ICC) nor the International Tribunal for the Law of the Sea (ITLOS)\(^\text{16}\) sustain criminal jurisdiction over piracy or piracy-related offenses. Although Article 3(1) of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA)\(^\text{17}\) partially fills this jurisdictional gap in ITLOS by invoking a universal obligation to either punish or extradite persons who commit

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\(^{10}\) A Working Group on Legal Issues (WG2) under the International Contact Group on Piracy off the Coast of Somalia (CGPCS) was tasked with increasing regional prosecutions and increasing post-sentencing prison capacity in Puntland and Somaliland. CGPCS was formed under U.N. Security Council Resolution 1681 (Dec. 16, 2009) and involves 60 states and organizations under the leadership of Denmark. Most prosecutions have taken place in Madagascar, Seychelles, and Kenya. See James Thuo Gathii, *Kenya’s Piracy Prosecutions*, 104 AM. J. INT’L L. 416 (2010).

\(^{11}\) Captain David Reindorp (RN) provided the following testimony to the Foreign Affairs Committee of the House of Commons: “You could be doing this 1,800 miles out into the Indian Ocean; it would take you five or six days to get a pirate back if you had to steam him back, and you may not want to send your one and only helicopter off to do that, because that might be better used looking out for and trying to deter and interdict pirate operations.” *Piracy*, supra note 2, at 29.


\(^{16}\) The International Tribunal for the Law of the Sea (ITLOS) was established by the United Nations Convention on the Law of the Sea (UNCLOS) (1982).

piratical offenses (while avoiding the use of the word “piracy”), SUA suffers from similar jurisdictional limitations. Once a lawful boarding has taken place (with the permission of the vessel’s flag state), Article 6 of SUA does not provide for any independent or prescriptive criminal jurisdiction. SUA likewise denies the capturing state the right to prosecute offenders without permission of the flag state. Prosecuting suspected pirate-mariners who are merely found in boats armed and equipped for piratical attacks is problematic at best under both international law and the domestic laws of prosecutorial states including the United States.

In United States v. Said, Judge Raymond Jackson of the Eastern District Court of Virginia ordered the dismissal of piracy charges against six Somali nationals accused of attacking a Navy vessel in April 2010. The decision to dismiss was based upon a finding that because there was no actual “robbery at sea” as required under the 1820 Supreme Court decision in United States v. Smith, there could be no “piracy.” Citing extensively from nineteenth-century jurisprudence, the court in Said noted that “piracy” must be carefully distinguished from “mere piratical undertakings,” which are not criminally punishable. Abdiwali Abdiqadir Muse, the sole surviving hijacker of the MV Maersk Alabama in 2009, pled guilty to various federal charges in the Southern District of New York, but prosecutors allowed the piracy charge to be dropped, possibly in light of concerns with legal definitional aspects of “piracy.”

Legal difficulties notwithstanding, the greater question for concerned states remains the fundamental, long-term efficacy of prosecuting mere pirate underlings. Warlord financiers certainly have no difficulty replacing these pirate foot soldiers in an impoverished failed state such as Somalia. Jennifer Cooke, Africa Program Director for the Center for

19. SUA Convention, art. 10 ¶1.
20. United States v. Said, 757 F. Supp. 2d 554 (E.D. Va. 2010), vacated 680 F.3d 374 (4th Cir. 2012). The six defendants were charged for opening fire on the USS Ashland from a small boat in April 2010. Id. at 556. The Ashland returned fire, sank the skiff and killed one of the occupants. Id. at 557. But see United States v. Dire, 680 F.3d 446 (4th Cir. 2012). In the Dire opinion, the Fourth Circuit refused to accept the “static” definition of piracy from Said and held that 18 U.S.C. § 1651 incorporated a definition of piracy that “changes with advancements in the law of nations.” Dire, 680 F.3d at 469.
22. Id. at 560–61.
Strategic and International Studies noted that “unless you get some solution on land, or cooperation from local authorities, this will just remain a problem that you can tamp down only occasionally.”

Given Somalia’s three thousand kilometer coastline, any serious suppression effort must involve stopping and actually seizing pirate vessels large and small (including mother-ships) found at sea armed and equipped for piracy. Boat and ship seizures would have to be conducted regardless of whether or not the crew members found aboard are detained for criminal charges or merely set back on the shore.

Toward these ends, a highly successful nineteenth-century model for multinational maritime criminal interdiction is instructive. From 1808 through 1860, the Royal Navy’s West African Counter-Slavery Squadron, also known as the “Preventative Squadron,” working under various complex treaty regimes, stopped, boarded, inspected, and seized merchant slave ships. As a result of active interdictions, forfeitures, and generous cash bounties for liberated slaves, trans-Atlantic maritime slavery was rendered commercially impracticable well before the mid-nineteenth century. Active suppression efforts also included blockading slave ports and estuaries as well as occasional riverine forays against slave holding facilities (i.e. “barracons”). Between the risks of interception at sea, confiscation, or even capital punishment on land, dedicated slave ships essentially disappeared from Atlantic waters. It is estimated that between 1820 and 1860, fewer than 10,000 African slaves were imported (smuggled) into the United States, and most of these were transported from Haiti or other Caribbean ports. An examination of the historical measures taken to suppress maritime slave trading may provide solutions to the piracy issues of today. This Article recommends a similar policy of active interdiction and seizure.


27. In 1840, then Commander Joseph Denman R.N. (later Admiral Denman) undertook an expedition up the Gallinas River (present day Sierra Leone) to liberate slaves awaiting transportation. Unfortunately, the Spanish owners brought suit in admiralty against Denman. Although found not liable many years later, the Queen’s Advocate issued an opinion the next year advising against further blockades or landings under international law. See Jenny S. Martinez, Slave Trade on Trial: Lessons of a Great Human Rights Law Success, BOSTON REV., Sept.-Oct. 2007.

28. The best known case involved the ship La Amistad is United States v. Libellants and Claimants of the Schooner Amistad (The Amistad), 40 U.S. 518 (1841).
II. The Suppression of Maritime Slave Trading (1808–1860)

During the Napoleonic Wars (1803–1815), British warships lawfully boarded and inspected suspected slave vessels in order to determine whether they were belligerents or lawful prizes of war. After 1815, applicable international law did not permit the Royal Navy to stop foreign-flagged ships, even those suspected of piracy. Nevertheless, under the Treaties of Paris, Kiel, and Ghent in 1814, as well as the Congress of Vienna (1815) and in separate treaties with Portugal and Spain in 1817, slave inspections continued with certain limitations. In 1824, British domestic law defined slaving as piracy, subject to the penalty of death. Early enforcement efforts, especially with Spanish, Portuguese, Brazilian, and American vessels, were complicated by treaty terms and restrictions that limited seizures to those vessels carrying slaves. As could be expected, slave ships under duress would throw captured slaves overboard to drown in order to avoid arrest and forfeitures. In reaction, subsequently negotiated treaty amendments between prosecuting states added “equipment clauses” allowing warship seizures of vessels with hatch gratings, shackles, excessive water kegs, and large quantities of foodstuffs such as millet or rice. Relying upon overwhelming maritime dominance, as well as economic subsidies and trade concessions, Britain engaged in unending diplomatic efforts throughout the nineteenth century to ban the slave trade and allow inspections and seizures of flagged vessels from Europe or the Americas that were suspected of transporting slaves.

Both complementing and paralleling British anti-slavery legislation, prior to the nineteenth century, the U.S. government had used its authority under the Commerce Clause to enact domestic legislation banning maritime slave trade aboard American ships. The Slave Trade Act of 1794 prohibited the outfitting of American-flagged vessels for transporting slaves. The Act Prohibiting Importation of Slaves of 1807.

31. HANNIS TAYLOR, A TREATISE ON INTERNATIONAL PUBLIC LAW 236 (1901).
32. Slave Trade Act, 1824, 5 Geo. 4, c. 113 (Eng.).
33. OFFICE OF LORD HIGH ADMIRAL, GENERAL INSTRUCTIONS FOR COMMANDERS OF HER MAJESTY’S SHIPS AND VESSELS EMPLOYED IN THE SUPPRESSION OF THE SLAVE TRADE (1844).
34. U.S. CONST. art. I, §8, cl. 3.
36. The Act Prohibiting Importation of Slaves of 1807, 2 Stat. 426 (1807), signed into law by President Thomas Jefferson on March 2, 1807, did not take effect until January 1, 1808 (the first date authorized under Article I, Section 9 of the United States Constitution).
banned all further importation of slaves into the continental United States, and the 1820 Supplement to the Piracy Act of 1819 defined slavery as “piracy.” 37 The Supplement further authorized the President to employ the U.S. Navy to “to seize all vessels navigated under our flag engaged in that trade.” 38 Under U.S. law, foreign ships found with slaves in American waters could be seized as lawful prizes, and even domestic vessels transporting slaves from one American port to another were required to register “negro or mullato” passengers with port authorities. 39 Not only were slave traders “pirates,” they were subject to being hanged as pirates. 40 Well before the Webster-Ashburton Treaty of 1842 41 between Britain and the United States, maritime slaving was not merely unlawful commerce, but a fully developed jus cogens principle of international law. 42

As “pirate ships,” suspected slave vessels could lawfully be stopped and inspected in international waters by warships from any nation under “the customs and usages of civilized nations.” 43 Obviously, without the lawful authority to actually board and inspect suspected slave ships, naval containment efforts of the African coast, by either Great Britain or the United States, would have been fruitless.

III. CURRENT LIMITATIONS TO SEIZURES OF PIRATE VESSELS

Longstanding customary international law and the United Nations Convention on the Law of the Sea (UNCLOS) 44 protect the principles of freedom of navigation and innocent passage. Except by special convention, or in time of war, interference by military vessels with commercial vessels engaged in lawful pursuits violates the sovereignty of the flag
state of the vessel in question.\textsuperscript{45} While UNCLOS provides for the right of states to suppress (and prosecute) piracy occurring in international waters,\textsuperscript{46} any interference by warships on the high seas must be exercised with scrupulous regard to the rights of other sovereign states and their citizens thereon. Articles 105 (and 107) of UNCLOS authorize naval vessels to seize pirate vessels and make arrests on the high seas (or outside the flag nation’s jurisdiction), but only if another (merchant) ship has been “taken by piracy” or is “under the control of pirates.”\textsuperscript{47} Article 110(2), authorizes the boarding of ships and inspections of papers and cargo, but no provision of Article 110 actually authorizes seizure or capture of suspected pirate vessels even when armed and equipped for no other viable purpose except piracy.\textsuperscript{48}

The United Nations Security Council has already determined on several occasions that Somali piracy is “a threat to international peace and security” under Chapter VII, Article 42 of the UN Charter.\textsuperscript{49} Article 42 specifically provides for “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.”\textsuperscript{50} Security Council Resolution 1816\textsuperscript{51} authorized designated state parties to engage in hot pursuit as well as to enter and patrol Somali territorial waters “in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law.”\textsuperscript{52} Security Council Resolution 1851 authorized “all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery

at sea.” On these principles, Security Council authorization could easily expand current authority to encompass the right of designated state parties (i.e., those already engaged in counter-piracy operations) to “inspect and seize” vessels found “armed, equipped and prepared” for piratical attacks on the high seas (or even within Somali waters, with the consent of that government). Appropriately staffed and qualified independent juridical tribunals could protect due process rights by determining whether seized vessels should be forfeited or destroyed or whether and when compensation is paid to innocent parties. Furthermore, as Security Council Resolutions are normally limited in time, place, and manner of implementation, there would be no concomitant need to modify existing treaties or seek clarification between conflicting definitions of “piracy” under various treaties or customary international law.

IV. CONCLUSION

Unless multi-national naval forces, acting under United Nations mandates, are allowed to inspect and seize (or scuttle54) pirate vessels armed, equipped, and prepared for piracy (i.e., modern-era ‘equipment clauses’55) piratical activities in the Indian Ocean will never be fully, or at least effectively, suppressed. While criminalization and prosecution of pirates (regionally and domestically)56—especially of those who have engaged in violence—should remain an important international concern, putting every Somali pirate in jail is unrealistic as well as impractical. On the other hand, seized vessels, especially larger sea-going motherships, are difficult and expensive for pirates to replace. Like the slave ship seizures of the nineteenth century, without their Zodiac boats and mother-ships, Somali pirates would be forced to revert to traditional fishing or simply stay on shore. By taking a diplomatic lead in this field, the United States could facilitate an effective multi-national regime under United Nations auspices capable of clearing the Indian Ocean of pirates and sea robbers.


54. Even before the end of the Napoleonic Wars, the Royal Navy was ordered to destroy ships after valuation and condemnation by Prize Courts because they were most often repurchased, refitted and returned to sea for slaving. See TOM HENDERSON WELLS, THE SLAVE SHIP WANDERER (1967).


America’s extensive intelligence capabilities and technologies such as unmanned reconnaissance aircraft could leverage this force at greatly reduced costs. Cooperative ships-boarding efforts could be modeled upon current boarding and inspection programs such as the (counter-drug) Joint Interagency Task Force in Central and South America,\(^57\) the (counter WMD) Proliferation Security Initiative (PSI)\(^58\) and 1995 UN Fish Stocks Agreement.\(^59\) Similar anti-piracy arrangements with partners in Asia might also lead to positive results in that region, especially if criminal jurisdiction issues could be resolved. Piracy like that practiced off the coast of Somalia is not a modern problem, but modern navies empowered with carefully limited authority to interdict and seize easily identifiable pirate vessels could effectively protect maritime commerce from this scourge.


\(^{58}\) Initiated in 2003, the PSI involves 98 nations around the world (including Russia); see also Fabio Spadi, Bolstering the Proliferation Security Initiative at Sea: A Comparative Analysis of Ship-boarding as a Bilateral and Multilateral Implementing Mechanism, 75 NORDIC JOUR. INT. L. 249 (2006).