


2011

Would the right of hot pursuit enable third States to apprehend pirates in the territorial waters of another State without its consent?

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**THIS MEMORANDUM IS A PRODUCT OF BAKER & MCKENZIE
WORKING IN PARTNERSHIP WITH PILPG AND THE
PILPG HIGH LEVEL WORKING GROUP ON PIRACY**

OBJECT AND PURPOSE: Legal memorandum to provide assistance to the Kenya Piracy Court and other cooperating state courts and to help to lay the groundwork for a Security Council-created Regional Piracy Court.

ISSUE: Would the right of hot pursuit enable third States to apprehend pirates in the territorial waters of another State without its consent?

**PREPARED BY: BAKER & MCKENZIE
MAY 2011**

I.	INTRODUCTION	5
A.	ISSUE	5
B.	SUMMARY OF CONCLUSION.....	5
II.	FACTUAL BACKGROUND	5
III.	LEGAL DISCUSSION	6
A.	UNCLOS	6
B.	UN SECURITY COUNCIL RESOLUTIONS.....	9
IV.	CONCLUSION	10

INDEX TO SOURCES – QUESTION 5

BOOKS

LAW REVIEWS AND ARTICLES

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MISCELLANEOUS

2. “International Maritime Organization” online:
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3. IMO, Reports on Acts of Piracy and Armed Robbery Against Ships, Annual Report 2009, Ref. T2-MSS/2.11.4.1; MSC.4/Circ.152 (29 March 2010) at annex 2.
4. S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008).
5. S.C. Res. 1846, U.N. Doc. S/RES/1846 (2008).
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9. “Kenya ends agreement with EU to prosecute suspected Somali pirates” online:
<http://www.cnn.com/2010/WORLD/africa/10/04/kenya.eu.pirates/index.html?iref=allsearch> (visited May 13, 2011).

10. “Kenya opens fast-track piracy court in Mombasa” online:
[Http://www.bbc.co.uk/news/10401413](http://www.bbc.co.uk/news/10401413) (visited 4/11/2011).

I. INTRODUCTION

A. Issue

You have asked that we assist the PILPG High Level Working Group (PILPG) on various piracy issues to provide assistance to the Kenya Piracy Court and other cooperating state courts and to help to lay the groundwork for a Security Council-created Regional Piracy Court.¹

We have been asked to provide our opinion with respect to the following question 5 : Would the right of hot pursuit enable third States to apprehend pirates in the territorial waters of another State without its consent?

B. Summary of Conclusion

The short answer is no. If a State exercises the right of hot pursuit, it must cease its pursuit as soon as the ship pursued enters the territorial sea of that ship's flag State or any other State.

II. FACTUAL BACKGROUND

Kenya is the southern neighbor of Somalia, where the increasing incidence of hijackings of ships off of Somalia's coast has plagued maritime traffic. The International Maritime Organization² reported that in 2009, in the Indian Ocean, there were 48 successful acts of piracy and armed robbery against ships, 204 attempts, 668 crew members taken hostage, and 4 crew members were killed.³

¹ Memorandum to Angela Vigil, Baker & McKenzie, from Brett Ashley Edwards, PILPG dated March 7, 2011.

² The IMO is the agency of the United Nations that sets standards that regulate shipping and drafts Conventions such as the Safety of Life at Sea Convention. IMO, in which 169 member States participate, was formed shortly after the sinking of the Titanic in 1914. See http://en.wikipedia.org/wiki/International_Maritime_Organization (visited 4/23/11).

³ IMO, Reports on Acts of Piracy and Armed Robbery Against Ships, Annual Report 2009, Ref. T2-MSS/2.11.4.1; MSC.4/Circ.152 (29 March 2010) at annex 2.

The international community applauded when, on June 24, 2010, Kenya announced that it was opening a fast-track piracy court in Mombasa, a major Kenyan port serving the international shipping industry.⁴ However, this favorable development suffered a setback when, on November 9, 2010, the high court of Mombasa ruled that Kenya did not have jurisdiction outside its national waters in a case that resulted in the release of nine suspected Somali pirates.⁵ The basis for the ruling was the adoption of a penal code measure that limited Kenya's jurisdiction to prosecute piracy to incidents occurring in its territorial waters. That decision is on appeal.⁶ In April of 2010 Kenya's foreign minister announced that Kenya would not accept any more Somali pirate cases.⁷

III. LEGAL DISCUSSION

A. UNCLOS

Under international law, all States have a general obligation to assist in the repression of piracy. There is no current body of customary international law however dealing with the right of a State to enter the territorial waters of another State. Instead, one must look to current treaties. Specifically, Article 100 of the United Nations Convention on the Law of Sea ("UNCLOS")⁸ provides, "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas *or in any other place outside the jurisdiction of any State.*"⁹ Moreover, on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a

⁴ <http://www.bbc.co.uk/news/10401413> (visited 4/11/2011).

⁵ <http://jurist.org/paperchase/2010/Kenya-court-rules-no-jurisdiction-over-international-piracy-cases>. (visited 4/11/2011).

⁶ As reported in an email from Michael Scharf to Tom Campbell April 22, 2011.

⁷ Kenya had originally entered into an agreement with the European Union to accept the transfer of persons suspected of having committed acts of piracy. This included a commitment to conduct criminal trials. Official Journal of the European Union, 25.3.2009. Kenya invoked the termination clause based on its determination that it had not been provided with adequate support. See <http://www.cnn.com/2010/WORLD/africa/10/04/kenya.eu.pirates/index.html?iref=allsearch> (visited May 13, 2011). Kenya is using the suspension of its piracy court to renegotiate what assistance it gets. Earlier the United Nations had urged other nations to provide support to Kenya to erect a high security courtroom, and donate \$9.3 million to fund piracy trials.

⁸ All references to "Article" or "Art." in this discussion of Question 5 refer to an article of the United Nations Convention on the Law of the Sea.

⁹ Art. 100 (emphasis added).

ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board.¹⁰ Generally, piracy is defined as any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers or a private ship or a private aircraft committed on the high seas or in a place outside the jurisdiction of any State.¹¹

Despite these rights and responsibilities, a State does not have the duty under the UNCLOS to combat piracy in its own jurisdiction and is precluded from combating piracy in the jurisdiction of another State without such other State's consent. The UNCLOS places certain restrictions on the ability of the ships of one State to traverse through the territorial sea of another State. As further discussed below, these restrictions prevent a State from apprehending pirates in the territorial sea of another State *without its consent*.

UNCLOS is, in essence, a codification of customary international law. Article 111, Section 1 of UNCLOS grants a coastal State the right of hot pursuit to apprehend pirates and other criminals in certain limited circumstances. The right of hot pursuit allows warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service to pursue a ship that has violated the laws and regulations of the coastal State.¹² The pursuit must commence when the foreign ship or one of its boats is within the pursuing State's internal waters, archipelagic waters, the territorial sea or the contiguous zone of the pursuing State, and pursuit may only be continued outside the territorial sea or contiguous zone if the pursuit has not been interrupted.¹³ Moreover, the pursuit may only be commenced after visual or auditory signals to stop have been given at a distance which enables it to be seen or heard by the foreign ship.¹⁴

For purposes of the UNCLOS, a State's internal waters are those waters on the landward side of its coastline.¹⁵ In the opposite direction from its coastline is the State's territorial sea. The expanse of the territorial sea is established by the State, but it may not

¹⁰ Art. 105.

¹¹ Art. 101.

¹² Art. 111, § 5.

¹³ Art. 111, § 1.

¹⁴ Art. 111, § 4.

¹⁵ Art. 7 .

exceed 12 nautical miles from the coastline.¹⁶ A state may also establish a contiguous zone beyond the territorial sea to either (1) prevent infringement of its customs, fiscal, immigration or sanitary laws within its territory or its territorial sea or (2) punish any such infringement.¹⁷ The contiguous zone cannot extend beyond 24 nautical miles from the coastline. Finally, archipelagic waters are the interconnecting waters of a group of island as determined under Article 47 of the UNCLOS.¹⁸

If a State exercises the right of hot pursuit, it must cease its pursuit as soon as the ship pursued enters the territorial sea of that ship's flag State or any other State. Specifically, the UNCLOS provides that "[t]he right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State."¹⁹ A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft because the ship's nationality can only be revoked by the State from which it is derived.²⁰ Moreover, if a ship is stopped or arrested outside the territorial sea in unjustified circumstances, it must be compensated for any loss or damage that may have been sustained.²¹

While within a coastal State's territorial sea, the pursuing ships of other States only have the right of innocent passage.²² Passage is considered to be "innocent" so long as it is not prejudicial to the peace, good order or security of the coastal State.²³ Moreover, certain actions are specifically considered to be prejudicial to the coastal State and, thus, do not constitute innocent passage.²⁴ For example, the UNCLOS identifies the following actions, among others, as prejudicial to the coastal State: (1) any threat or use of force against the sovereignty, territorial integrity, or political independence of the

¹⁶ Art. 3.

¹⁷ Art. 33.

¹⁸ Pursuant to Articles 56-58, each coastal State also has limited jurisdiction over an exclusive economic zone, relating to exploring and exploiting, conserving and managing the natural resources, and similar activities. A coastal State's exclusive economic zone shall not extend beyond 200 nautical miles from the coastline of such State. Article 58 provides that all States generally may navigate a coastal State's exclusive economic zone and have the same freedoms as such States have on the high seas, provided such navigation and freedoms do not conflict with the coastal State's rights and jurisdiction over the exclusive economic zone as provided in Article 56.

¹⁹ Art. 111, § 3.

²⁰ Art. 104.

²¹ Art. 111, § 8.

²² See Art. 17.

²³ Art. 19, § 1.

²⁴ Art. 19, § 2.

coastal State; (2) exercise or practice with weapons of any kind; (3) launching, landing or taking on board of any aircraft; or (4) launching, landing or taking on board of any military device; and “any other activity not having a direct bearing on *passage*.”²⁵ The term “passage” generally is limited solely to traversing such territorial sea of the coastal State or proceeding to or from a port facility.²⁶

B. UN Security Council Resolutions

In response to the recent acts of piracy and armed robbery off the coast of Somalia, the United Nations Security Council (“Security Council”) issued several resolutions, pursuant to which it authorized and urged States to enter the territorial sea of Somalia for the purpose of repressing acts of piracy and armed robbery and to use all necessary means to repress such acts of piracy and armed robbery.²⁷

Although the Security Council provided such authorization, Resolution 1816 (as extended) specifically provides that the authorization “applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the [UNCLOS].” Moreover, Resolution 1816 “underscores in particular that [the authorization] shall not be considered as establishing customary international law” and that the authorization was provided only after receiving consent of the current governing body of Somalia.²⁸ Therefore, the Security Council’s authorization coupled with Somalia’s express consent to the resolution, reaffirms the fundamental principle of international law that a State cannot exercise the right of hot pursuit in another State’s territorial sea absent that State’s consent.

²⁵ Art. 19, §§ 2(a), (b), (e), (f), (l) (emphasis added).

²⁶ Art. 18. It appears that a State exercising its right of hot pursuit could enter the territorial waters of another State to follow a pirate ship; however, such pursuit would be prohibited if any actions by the pursuing State constituted anything other than “innocent” passage. Accordingly, if the pirate ship fired upon the pursuing ship, the pursuing ship likely would be unable to retaliate because of the prohibition on using weapons. See Art. 19, § 2(b). Additionally, if the pirate ship stopped its passage and remained in the territorial waters of the other State, it appears the pursuing ship would have to continue traversing through the territorial waters because otherwise its activities likely would not have a direct bearing on passage. See Art. 19, § 2(l).

²⁷ See U.N. Security Council Resolution 1816, ¶ 7. See also Resolution 1846 (2008), Resolution 1897 (2009), and Resolution 1950 (2010).

²⁸ See, e.g., Resolution 1816, ¶ 9.

IV. CONCLUSION

There is nothing in customary international law or international conventions that permit a State to rely on any the right of hot pursuit to apprehend pirates in the territorial sea of another State without its consent. Such right of hot pursuit must be found in a UN Resolution which, from examples to date must be with respect to a specific State, and must have that State's specific permission.