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Under International Law, what Conventions or customary international law best address modern acts of piracy?

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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 #1: Under International Law, what Conventions or customary international law best address modern acts of piracy?

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

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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:

Under International Law, should states look to the UN Convention on the Law of the Sea (UNCLOS), the Maritime Terrorism Convention (SUA), or customary international law to best address modern acts of piracy? To the extent that both Conventions are applicable, what are the differences in the substantive law and procedures?

SUMMARY OF CONCLUSION

B. Summary of Conclusion

UNCLOS provides authority for Kenya to prosecute alleged pirates, but its grant of authority has severe limitations. Under UNCLOS, the act of piracy must occur on the high seas and it must involve two ships. In addition, an argument can be made that the country seeking to exercise jurisdiction ought to be the state seizing the suspects.

However, a permissive grant of jurisdiction resulting from use of the word ‘may’ in article 105, read together with UNCLOS article 100, arguably creates a broader

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

prosecutorial authority for states seeking to prosecute those seized outside of their jurisdiction.

The SUA Convention offers a broader grant of authority than UNCLOS in several respects. First, it does not require the involvement of two ships, and it is not restricted to acts on the high seas because it includes acts occurring where a ship is navigating to or from the territorial sea of a single state. Second, it offers broad prosecutorial jurisdiction to states. The Convention applies to offenders found in a state's territory. As a result, the SUA Convention can be invoked to prosecute pirates and does not have the limitations that UNCLOS presents.

Customary international law offers the broadest grant of authority. Under customary international law, states have "universal jurisdiction" to prosecute pirates. This is based on the doctrine that pirates are universally condemned as enemies of all mankind.

Because pirates act without pretense of a state's authority, any nation has the right to arrest and prosecute pirates in its domestic courts, provided that the accused is under the personal jurisdiction of the court.

FACTUAL BACKGROUND

Kenya is the southern neighbor of Somalia. Mombasa, one of Kenya's largest cities, is a major port serving the international shipping industry. Consequently, the rising incidence of ship hijackings off of Somalia's coast has plagued maritime traffic and affected the port's operations. In April 2010, Kenya's foreign minister announced that Kenya would not accept any additional Somali pirate cases. This led to the United Nations' effort to urge other nations to provide assistance to Kenya to erect a high security courtroom,

resulting in international donations totalling \$9.3 million to fund piracy trials. On June 24, 2010, Kenya announced that it was opening a fast-track piracy court in Mombasa, a move well-received by the international community.²

However, on November 9, 2010, the High Court of Mombasa ruled that Kenya did not have jurisdiction outside its national waters, resulting in the release of nine suspected Somali pirates at the conclusion of their trial.³ The basis for the ruling was the adoption of a penal code measure that limited Kenya's jurisdiction over piracy in its territorial waters.

LEGAL DISCUSSION

A. United Nations Convention of the Law of the Sea (UNCLOS)

The *United Nations Convention on the Law of the Sea*⁴ (“UNCLOS”) provides authority for Kenya to prosecute alleged pirates. However, its grant of authority has severe limitations. Under UNCLOS, the act of piracy must occur on the high seas, the act of piracy must be one involving two ships, and arguably Kenya should be the state seizing the suspects.

² “Kenya opens fast-track piracy court in Mombasa”, *BBC News* (24 June 2010), online: BBC Online <<http://www.bbc.co.uk/news/10401413>> and Jeffrey Gettleman, “The West Turns to Kenya as Piracy Criminal Court”, *New York Times* (23 April 2009), online: New York Times <<http://www.nytimes.com/2009/04/24/world/africa/24kenya.html>>.

³ Julia Zebley, “Kenya court rules no jurisdiction over international piracy cases” *Jurist* (9 November 2010) online: Jurist Legal News and Research Services <<http://jurist.org/paperchase/2010/11/kenya-court-rules-no-jurisdiction-over-international-piracy-cases.php>>.

⁴ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397.

UNCLOS is a Convention between states (nations). As of November 15, 2010, 161 states had ratified the Convention.⁵ Although the United States has not ratified UNCLOS, it is a party to the *Convention on the High Seas*.⁶ Of note, important provisions including the definition of piracy, the duty to cooperate to repress piracy, and the jurisdiction of the state carrying out the seizure to prosecute pirates originally appear in the *Convention on the High Seas*⁷ and were thereafter included verbatim in UNCLOS. Furthermore, it is generally accepted that UNCLOS has been codified as part of customary international law.⁸ Kenya ratified UNCLOS on March 2, 1989.⁹

UNCLOS defines the rights and responsibilities of states in their use of the world's oceans. UNCLOS gives states jurisdiction over piracy in the high seas, exclusive economic zones of coastal states and any place beyond the jurisdiction of any state. It allows, and indeed encourages, states-parties to arrest individuals participating in piracy on the high seas out of the jurisdiction of any state.

⁵ Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations “Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 15 November 2010” online: United Nations <http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm>. These states include China (1996), Germany (1994), the United Kingdom (1997), Canada (2003) and Russia (1997).
⁶ See United Nations, “Convention on the High Seas: Status as of 13-05-2011”, online: United Nations Treaty Collections <http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtdsg_no=XXI-2&chapter=21&lang=en#Participants>. “[T]he definition of piracy *jure gentium* in Article 15 of the [CHS], based as it was on the work of the International Law Commission, and now confirmed and repeated word for word in the Convention on the Law of the Sea 1982, must be regarded as having great authority.”
Oppenheim, Vol. I, pp. 746-747, cited in D. J. Harris, *Cases and Materials on International Law*, 5th ed. (London : Sweet & Maxwell, 1998) at 432.

⁷ *Convention of the High Seas*, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82, arts. 14, 15, 19.

⁸ R. Chuck Mason, “Piracy: A Legal Definition” (2010), online: Congressional Research Service <<http://www.fas.org/sgp/crs/misc/R41455.pdf>>.

⁹ Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations “Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements as at 15 November 2010” online: United Nations <http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm>.

Article 100 of UNCLOS sets forth a duty to cooperate in the repression of piracy:¹⁰

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.

Article 101 defines piracy as follows:

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).¹¹

In addition to the duty to cooperate, Article 105 addresses seizures and arrests and gives states which carried out the seizure the authority to prosecute.

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 ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.¹²

¹⁰ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397, art. 100; this provision is adopted from art. 14 of the *Convention of the High Seas*, 29 April 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

¹¹ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397, art. 101; adopted from Article 15 of the *Convention of the High Seas*.

¹² *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397, art. 105. This provision is adopted from Article 19 of the *Convention of the High Seas*, 29 April 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82.

Only warships or other clearly marked government ships or aircrafts may be used in the seizure of pirate vessels.¹³

Pursuant to Article 58, the duties and rights of all States parties respecting piracy apply to the exclusive economic zones of coastal states.

However, there are three severe limitations under UNCLOS. First, the definition of piracy extends only to attacks on ships *on the high seas*. Many piratical acts occur in territorial or coastal waters. The second is that while states have authority to prosecute suspected pirates where they have *carried out the seizure*, UNCLOS does not provide prosecutorial authority to said states against suspects seized by third parties. Also, the seizure must be carried out by a warship or other clearly marked government ship or aircraft. Third, the definition requires the involvement of *two ships* and does not embrace a piratical act from a raft or an attack from dockside.

In summary, UNCLOS may give Kenya or cooperating states the jurisdiction to adjudicate piracy suspects that have been seized by that state's or another state's authorities, where the seizure occurred on the high seas by a clearly marked government ship or aircraft, and two ships were involved. It has been raised in defence that UNCLOS does not provide any authority to prosecute suspected pirates captured by other states and turned over to Kenyan or cooperating authorities.

¹³ *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 397, art. 107.

B. Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA)

The *Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation*¹⁴ (SUA) offers an alternative basis for prosecuting piracy, though it was not designed for that specific purpose.

Following the 1985 hijacking of the *Achille Lauro*,¹⁵ the International Maritime Organization (IMO)¹⁶ was invited to prepare a convention on appropriate measures to deal with the threat of terrorism aboard and against ships. The result was the SUA, which today has 157 state parties.¹⁷

Terrorists and pirates have different goals. Pirates usually are seeking ransom or stealing the cargo or, perhaps, even the ship. It is a business carried on in view of a profit.

Terrorists are engaged in acts against a state or population. The SUA was designed to address acts of terrorism. However, its broad grant of authority has been construed to authorize the prosecution of pirates.

The offences under the SUA are enumerated under Article 3, which states:

Any person commits an offence if that person unlawfully and intentionally:

(a) seizes or exercises control over a ship by force or threat thereof.

¹⁴ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988).

¹⁵ The *Achille Lauro* was a cruise ship hijacked by the Palestinian Liberation Army. By hijacking the ship, and taking the crew and passengers hostage, the PLA sought to coerce the release of Palestinian prisoners held by Israel. One passenger, Leon Kling-Hoffer, a wheelchair-bound German tourist, was murdered and tossed overboard during the ordeal. See *Lauro Lines s.r.l. v. Chasser*, [1989] 490 U.S. 495.

¹⁶ See “Introduction to IMO”, International Maritime Organization online : <www.imo.org>. The IMO is the United Nations’ specialized agency with responsibility for the safety and security of shipping, and the prevention of marine pollution by ships.

¹⁷ International Maritime Organization “Status of Conventions”, online: <http://www.imo.org/About/Conventions/StatusOfConventions/Documents/Summary%20of%20Status.xls>.

(b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship

(c) destroys a ship or causes damage to a ship or its cargo which is likely to endanger the safe navigation of that ship

(d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy the ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship

(e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship

(f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship

(g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

The SUA Convention offers a broader grant of authority than UNCLOS in several respects. It does not require the involvement of two ships, and it is not restricted to acts on the high seas because it includes acts occurring where a ship is navigating to or from the territorial sea of a single state.¹⁸ It also extends prosecutorial jurisdiction beyond the state that makes the seizure. The Convention applies to offenders found in a territory of a state-party.¹⁹

Furthermore, there is a positive obligation in Article 12 for state parties to assist each other with criminal proceedings relating to the offences in Article 3 of the SUA.

The SUA Convention grants states the power to prosecute individuals charged with piracy. This authority is exemplified by the United States Court of Appeals for the 9th Circuit decision, *United States v. Shi*.²⁰ The Court relied extensively on the SUA Convention to afford the U.S. government jurisdiction to prosecute a foreign national

¹⁸ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988), art. 4.

¹⁹ *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988), art. 6.

²⁰ *United States v. Shi*, 525 F.3d 709 (9th Cir. 2008).

who seized control of a ship and fatally stabbed members of its crew in 2002. The accused was arrested and indicted for violating 28 U.S.C. § 2280, which proscribes certain acts of violence that endanger maritime navigation. This statute also codifies the United States' obligations under the SUA Convention.

Following his conviction, Shi appealed and challenged the constitutionality of the U.S. statute. The 9th Circuit held the provision to be constitutional on the basis that it was a valid exercise of the “define and punish” power granted to Congress under Article I, Section 8, Clause 10 of the Constitution. The Court also held the provision to be a valid exercise of Congress' power under the Constitution's “necessary and proper” clause.²¹ Moreover, the judgment went beyond simply relying on the SUA and 28 U.S.C. § 2280 by holding that the district court had “universal jurisdiction”:

Universal jurisdiction is based on the premise that offenses against all states may be punished by any state where the offender is found....Accordingly, it allows a state to claim jurisdiction over such an offender even if the offender's acts occurred outside its boundaries and even if the offender has no connection to the state.²²

The court concluded that the acts committed by Shi constituted piracy. The court held that, “[a] pirate can be tried by any state,” citing *United States v. Smith*²³ and quoting Sir Edward Coke, who argued that a pirate is the enemy of the human race.²⁴

C. Customary International Law

As *United States v. Shi* suggests, customary international law offers the broadest grant of authority for the prosecution of individuals accused of piracy.

²¹ U.S. Const. art. I, §. 8, cls. 10 and 18.

²² *United States v. Shi*, 525 F.3d 709 (9th Cir. 2008) at 722-23.

²³ *United States v. Smith*, 18 U.S. 153 (1820).

²⁴ The Avalon Project, *Blackstone's Commentaries on the Laws of England – Book the Fourth – Chapter the Fifth: Of Offences Against the Law of Nations*, online: Yale Law School Lillian Goldman Law Library <http://avalon.law.yale.edu/18th_century/blackstone_bk4ch5.asp>.

The Supreme Court of the United States discussed the scope of the SUA Convention and customary international law in *Sosa v. Alvarez-Machain*.²⁵ The Court held that Alvarez-Machain could not sue under the Federal Tort Claims Act (FTCA) or the Alien Tort Statute (ATS) to recover damages resulting from his abduction in Mexico by Sosa.²⁶

Justice Souter explained that the FTCA exception for claims “[a]rising in a foreign country” barred the action because the abduction occurred in Mexico. The Court rejected the “headquarters doctrine” – the rationale that where the planning for the abduction occurred in the United States, there was an illegal act in the U.S. that could trigger the application of the FTCA.

With regard to the ATS claim, the Court held that the statute is only jurisdictional: “[I]t does no more than vest federal courts with jurisdiction neither creating nor authorizing the courts to recognize any particular right of action.”²⁷ In addressing the issue of whether there was a right of action that Alvarez-Machain could invoke, the Court explained the scope of the jurisdiction granted under the ATS:

[W]e think at the time of enactment that jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.²⁸

The Court supported this reasoning by expounding upon *the law of nations*, paying particular reference to what the Founders meant when they granted Congress the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences

²⁵ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

²⁶ Alvarez had been indicted for his alleged role in the torture and murder of Drug Enforcement Agency (D.E.A.) agent Enrique Camarena-Salazar in 1985. In 1990, Alvarez was indicted in California. When efforts to extradite him were fruitless, the D.E.A. helped plan his abduction. Alvarez was tried in 1992, and acquitted. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) at 697-98.

²⁷ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) at 712.

²⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) at 712.

against the Law of Nations.”²⁹ Citing Blackstone, the Court explained that the Founders would have understood the “law of nations” to include three specific offenses that had been addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy. Therefore, claims arising from such offences would have been cognizable under the ATS. Because Alvarez-Machain’s claim was different, he did not have a cognizable ATS claim.

A highly relevant case to consider with regard to how the customary law applies to pirates is *United States v. Hasan*. The District Court for the Eastern District of Virginia denied a motion to dismiss an indictment for piracy holding that a seizure attempt not resulting in a robbery was still piracy. “Universal jurisdiction” could then be invoked.³⁰

The Court addressed two issues when considering the motion to dismiss. As to its jurisdiction, the Court relied on the doctrine of universal jurisdiction, noting that any nation has the right to arrest and prosecute pirates in domestic courts as they are “enemies of all mankind”.

With regard to whether an attack on a vessel that does not result in an actual taking of property constitutes piracy, the court was confronted with the decision in *United States v. Smith*, in which the Supreme Court stated that piracy as defined by the law of nations was

²⁹ U.S. Const. art. I, §. 8, cl. 10.

³⁰ The defendants in the case stood accused of attacking a vessel assumed to be a merchant ship, which turned out to be the *USS Nicholas*, an American frigate. The defendants were pursued, captured, and brought to stand trial for piracy in the U.S. – *United States v. Hasan*, 747 F. Supp. 2d 642 (2010). It is worth noting that a similar case out of the Eastern District of Virginia, *United States v. Said*, reached a different conclusion at trial regarding a motion to dismiss a piracy indictment. For additional commentary regarding the distinctions between the *Hasan* and *Said* rulings see R. Chuck Mason, “Piracy: A Legal Definition” (2010), online: Congressional Research Service <<http://www.fas.org/sgp/crs/misc/R41455.pdf>> at 6-7.

“robbery upon the sea”.³¹ However, the court observed that it was not clear whether that definition was used because the facts in that case warranted it or whether it was intended to limit piracy to robberies. In any event, the court held that the law of nations was to be assessed at the time of the violation and not frozen in time.

The Court also considered the definition of piracy articulated in UNCLOS and the *Convention on the High Seas*³² as evidence of customary international law. This review persuaded the Court to rule that acts of violence (i.e., attempts) were included in the customary international law of piracy.

Furthermore, the Court in *Hasan* discussed a decision in a criminal case prosecuted in Kenya in 2009 where Somali suspects were captured by the U.S. Navy on the high seas and brought to Kenya.³³ The Kenyan court of first instance relied on the definition of piracy in UNCLOS. On appeal, the Kenyan High Court affirmed the ruling, but went further in holding that even if the Convention had not been ratified, the Magistrate was bound to apply the relevant international norms.³⁴

CONCLUSION

This analysis concludes that to best address modern acts of piracy the Kenya Piracy Court and/or cooperating states can rely on the SUA and the *Convention of the High Seas* as

³¹ *United States v. Smith*, 18 U.S. 153 (1820) at 162.

³² As of 9 February 2010, 63 states are listed as parties to the 1958 Convention on the High Seas. See Centre for International Law, *1958 Convention on the High Seas*, online: National University of Singapore <<http://cil.nus.edu.sg/1958/1958-convention-on-the-high-seas/>>. The United States is party to the Convention. See Katie Smith Matison, “The Big Business of Maritime Piracy and the Modern Corsair: Dead Men Tell No Tales”, online: (2010) *Journal of Transportation Law, Logistics and Policy* at p. 376 <http://www.lanepowell.com/wp-content/uploads/2010/11/Matison_JTLP_2.pdf>.

³³ *Ahmed v Republic*, Crim. App. Nos. 198, 199, 201, 203, 204, 205, 207 & 207 of 2008 (H.C.K. 12 May 2009) cited in *United States v. Hasan*, 747 F. Supp. 2d 642 (2010) at 618.

³⁴ *Ahmed* at 10-11 cited in *United States v. Hasan*, 747 F. Supp. 2d 642 (2010) at 618.

main sources to prosecute pirates. Both Conventions can be supported by customary international law, but we have a concern that basing authority solely on customary international law may cause some courts in certain jurisdictions to question the extent to which customary international law applies.