INTERNATIONAL MARITIME ORGANIZATION

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Circular letter No.3180
17 May 2011

To: All IMO Member States
United Nations and specialized agencies
Intergovernmental organizations
Non-governmental organizations in consultative status
Liberation movements

Subject: **Circular letter concerning information and guidance on elements of international law relating to piracy**

1 The Legal Committee, at its ninety-eighth session (4-8 April 2011), under the item "Piracy" of its agenda, considered a number of documents which identify the key elements that may be included in national law to facilitate full implementation of international conventions applicable to piracy, in order to assist States in the uniform and consistent application of the provisions of these conventions. The documents had been submitted by the IMO Secretariat, the UN Division for Ocean Affairs and the Law of the Sea (UN-DOALOS), the UN Office on Drugs and Crime (UNODC) and the Government of Ukraine. The Committee agreed that these documents might be useful to States which were either developing national legislation on piracy, or reviewing existing legislation on piracy and requested the Secretariat to issue them under cover of a Circular letter.

The following documents are attached at annex to this Circular letter:

- "Piracy: elements of national legislation pursuant to the United Nations Convention on the Law of the Sea, 1982" (documents LEG 98/8/1 and LEG 98/8/3), submitted by the UN Division for Ocean Affairs and the Law of the Sea (UN-DOALOS).

- "Establishment of a legislative framework to allow for effective and efficient piracy prosecutions" (document LEG 98/8/2), submitted by the UN Office on Drugs and Crime (UNODC).

- "Uniform and consistent application of the provisions of international conventions relating to piracy" (document LEG 98/8), submitted by the IMO Secretariat.

- "Establishment of a legislative framework to allow for effective and efficient piracy prosecutions" (document LEG 98/8/4), submitted by Ukraine.

2 The Committee stressed that these documents do not constitute definitive interpretations of the instruments referred to therein. In particular, they should not be considered as limiting, in any way, the possible interpretations by States Parties of the provisions of those instruments.

3 The information contained in these documents might also be supplemented by reference to other materials, including relevant commentary by legal experts and judicial opinions which may be available.

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ANNEX

INTERNATIONAL MARITIME ORGANIZATION

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LEGAL COMMITTEE
98th session
Agenda item 8

LEG 98/8/1
18 February 2011
Original: ENGLISH

PIRACY

Piracy: elements of national legislation pursuant to the United Nations Convention on the Law of the Sea, 1982

Submitted by the United Nations Division for Ocean Affairs and the Law of the Sea (UN-DOALOS)

SUMMARY

Executive summary:	This document intends to assist States in the uniform and consistent application of the provisions of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) relating to piracy, by setting forth the elements which could be included in national legislation on piracy pursuant to UNCLOS
Strategic direction:	6.2
High-level action:	6.2.1
Planned output:	6.2.1.3, 6.2.1.4, 6.2.1.5
Action to be taken:	Paragraph 19
Related document:	LEG 96/8/1/3

Introduction

1 The 1982 United Nations Convention on the Law of the Sea (UNCLOS or the Convention) provides the legal framework for the repression of piracy under international law.[1] Many of the provisions of the Convention, and in particular those relating to the repression of piracy, are considered to also reflect customary international law.[2]

2 Piracy affects the international community as a whole. For this reason, article 100 of UNCLOS provides that "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".

[1] The General Assembly has frequently emphasized that "the Convention sets out the legal framework within which all activities in the oceans and seas must be carried out". See, e.g., General Assembly resolution 65/37 of 7 December 2010, preamble. As at February 2011, the number of States Parties to UNCLOS is 161, including the European Union.

[2] The Security Council has repeatedly reaffirmed "that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 […] sets out the legal framework applicable to combating piracy […] as well as other ocean activities". See, e.g., Security Council resolution 1950 (2010), preamble.

Adoption of national legislation relating to piracy pursuant to the provisions of UNCLOS is an important step that States can take in order to enable themselves to co-operate effectively in the repression of piracy.

3 The Security Council has 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"[3] and called upon "all States to criminalize piracy under their domestic law".[4] Moreover, States that have already enacted national legislation on piracy may wish to review it to ensure the implementation of the relevant provisions of UNCLOS. Indeed, a number of States have recently updated their national legislation on piracy.[5]

4 The General Assembly of the United Nations has also called upon "States to take appropriate steps under their national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy …"[6] and has urged all States to combat piracy actively*, inter alia*, by adopting measures and by adopting national legislation in co-operation with the International Maritime Organization (IMO).[7]

5 This document has been prepared by the Division for Ocean Affairs and the Law of the Sea (UN-DOALOS) of the United Nations Office of Legal Affairs, in co-operation with IMO and the United Nations Office on Drugs and Crime (UNODC) to serve as a resource for States interested in adopting new legislation on piracy or reviewing existing legislation.[8] It is intended to assist States in the uniform and consistent application of the provisions of UNCLOS relating to piracy, by setting forth the elements which could be included in national legislation on piracy pursuant to UNCLOS.[9]

6 This document, read together with document LEG 98/8/3, focuses on the following elements of national legislation on piracy pursuant to UNCLOS:

- universal jurisdiction;
- the definition of the crime of piracy;
- criminalization (penalties);
- enforcement measures;
- liability and compensation provisions;

3 See Security Council resolution 1918(2010), preamble.

4 Security Council resolution 1950(2010), paragraph 13.

5 Copies of national legislation on piracy provided by States to UN-DOALOS and the IMO Secretariat are available on the website of UN-DOALOS at: www.un.org/Depts/los/piracy/piracy.htm.

6 See General Assembly resolution 65/37 of 7 December 2010, paragraph 86.

7 Ibid., paragraph 85.

8 As per their respective mandates and areas of expertise, UN-DOALOS has prepared a section on UNCLOS, IMO has prepared a section on the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and its Protocols, and UNODC has prepared a section on the 2000 United Nations Convention on Transnational Organized Crime and other instruments under its purview.

9 UN-DOALOS serves as secretariat to UNCLOS. It has a mandate to undertake efforts to promote better understanding of the Convention in order to ensure its effective implementation and to ensure its uniform and consistent application (see General Assembly resolution 52/26 of 26 November 1997, at paragraphs 11 and 12). For further information see www.un.org/Depts/los/index.htm.

- retention or loss of nationality of a pirate ship or aircraft; and
- international co-operation.[10]

This document addresses only the first three elements, while the remaining four elements are addressed in document LEG 98/8/3.

(a) Universal jurisdiction

7 UNCLOS provides for universal jurisdiction over those who commit acts of piracy. Article 105 of UNCLOS states that:

> "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."

8 Given the nature of the crime of piracy under international law, no jurisdictional link need exist between the State exercising jurisdiction and the suspected offender(s), pirate ship(s)/aircraft, victim(s) or victim ship(s)/victim aircraft. Therefore, since piracy provides an independent basis for jurisdiction under international law, as reflected in UNCLOS, no other basis of jurisdiction (e.g., territoriality, nationality or passive personality) is required. States may therefore adopt national legislation that implements the relevant provisions of UNCLOS concerning the repression of piracy on the basis of universal jurisdiction.

9 Universal jurisdiction in respect of piracy under UNCLOS is an exception to the principle of exclusive flag State jurisdiction over ships on the high seas.[11]

Element: National legislation on piracy may provide for the exercise of universal jurisdiction regardless of the nationality of the suspected offender(s), pirate ship(s)/aircraft, victim(s) or victim ship(s)/aircraft, pursuant to article 105 of UNCLOS as read with other relevant provisions of UNCLOS concerning the repression of piracy.

(b) Definition of the crime of piracy

10 Article 101 of UNCLOS sets out the definition of piracy under international law. It states:

> "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:

[10] These elements could be incorporated into national legislation in the manner most appropriate to the legal system of the State concerned. In some cases, additional elements or clarifications could also be incorporated to the extent that they would not be at variance with the corresponding provisions of UNCLOS.

[11] See articles 92 and 94 of UNCLOS.

(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 This definition is almost identical to that contained in the 1958 Convention on the High Seas,[12] and is generally considered to reflect customary international law.[13] It should be noted that the definition set forth in article 101 should be read in conjunction with other provisions of UNCLOS, in particular articles 58(2), 102 and 103 thereof (see below).

(i) Geographic scope

12 As regards the geographic scope for the definition of piracy, article 101(a) (i) refers to acts committed "on the high seas" while article 101(a) (ii) refers to acts committed "in a place outside the jurisdiction of any State".[14] Article 101 of UNCLOS should be read in conjunction with article 58(2), which provides that "articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part." Thus, the geographic scope of article 101(a) should be read to include the exclusive economic zone of any State.[15] Accordingly, when the acts set forth in article 101(a) are committed beyond the territorial sea of any State, they are considered acts of piracy under the Convention.

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12 United Nations, Treaty Series, vol. 450, p. 11, article 15.

13 For example, the definition of piracy contained in UNCLOS has been incorporated into a number of international instruments, such as the 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) and the 2009 Djibouti Code of Conduct. It has also been incorporated into a number of IMO documents, such as the Code of Practice for the investigation of crimes of piracy and armed robbery against ships (IMO Assembly resolution A.1025(26)).

14 With regard to the meaning of the phrase "in a place outside the jurisdiction of any State", the International Law Commission (ILC), in its Commentary to article 39, which was the basis for article 101 of UNCLOS, stated "[i]n considering as "piracy" acts committed in a place outside the jurisdiction of any State, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting terra nullius or on the shores of an unoccupied territory. But the Commission did not wish to exclude acts committed by aircraft within a larger unoccupied territory, since it wished to prevent such acts committed on ownerless territories from escaping all penal jurisdiction." Document A/CN.4/104, at p. 282.

15 Subparagraphs (b) and (c) of article 101 respectively on voluntary participation in the operation of a pirate ship or aircraft and incitement and intentionally facilitating an act of piracy, do not explicitly set forth any particular geographic scope. It is also important to distinguish piracy from armed robbery against ships. The latter is defined by IMO Assembly resolution A.1025(26) on the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ship adopted on 2 December 2009. According to article 2.2 of this Code, "Armed robbery against ships" means any of the following acts:

> "1. any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, **within a State's internal waters, archipelagic waters and territorial sea**;
>
> 2. any act of inciting or of intentionally facilitating an act described above" (emphasis added).

(ii) Private ends requirement

13 Article 101(a) of UNCLOS, requires that, in order to constitute piracy "any illegal acts of violence or detention, or any act of depredation," be committed "for private ends". It is noteworthy that the International Law Commission (ILC), in its 1956 draft Articles concerning the Law of the Sea with commentaries (Commentary),[16] stated that "[t]he intention to rob (animus furandi) is not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain."[17]

(iii) Two ship requirement

14 In order to constitute an act of piracy under UNCLOS, an attack on a ship must originate from another private ship or aircraft. The ILC pointed out, in its Commentary that:

> "acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy."[18]

(iv) Definition of a pirate ship or aircraft

15 It should be noted that piracy, as set out in article 101(b), includes "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". The definition of the term "pirate ship or aircraft" is set out in article 103 of UNCLOS as follows:

> "a ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act."

(v) Incitement and facilitation

16 Article 101(c) includes in the definition of piracy "any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)." Thus, the inchoate offence of inciting any of the acts covered in subparagraph (a) or (b) or intentionally facilitating any of the acts covered in these paragraphs would also constitute piracy.[19]

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16 The ILC's Articles concerning the Law of the Sea formed the basis for the provisions of the 1958 Convention on the High Seas, which in turn formed the basis of the UNCLOS provisions on piracy. The drafting of the provisions of UNCLOS closely follows that of the original ILC Articles. The ILC's commentaries to its Articles may therefore be useful in understanding the meaning of these provisions.

17 See the ILC's Commentary to article 39 (A/CN.4/104, at p. 282).

18 Ibid.

19 States may wish to consider including in their penal codes other offences related to piracy, such as attempt to commit piracy, conspiracy to commit piracy, and aiding and abetting piracy in their national legislation. However, to the extent that such crimes do not fall within the scope of the definition of piracy set forth in UNCLOS, they would have to be based on other traditional bases of jurisdiction under international law.

(vi) Piracy by a warship, Government ship or Government aircraft whose crew has mutinied

17 Pursuant to article 101(a), piracy may only be committed by a private ship or aircraft. Thus, a Government ship or aircraft cannot be deemed to commit an act of piracy. However, article 102 provides an exception to this in situations where such a ship's crew has mutinied and taken control of the ship or aircraft. Article 102 provides that "[t]he acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft."

Element: National legislation on piracy may reflect the definition of piracy contained in article 101 of UNCLOS, taking into account articles 58 (2), 102 and 103. The core components of the definition are: (a) the geographic scope (which includes the high seas and areas beyond the jurisdiction of any State, as well as the exclusive economic zone); (b) the private ends requirement; (c) the two ship requirement; (d) the definition of pirate ship or aircraft; (e) the offences of incitement and facilitation; and (f) the distinction between private or government ship/aircraft.

(c) Criminalization (penalties)

18 In the exercise of universal jurisdiction as set out above, article 105 of UNCLOS provides that "[t]he courts of the State which carried out the seizure [of a pirate ship or aircraft] 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." States may, therefore, provide for piracy to constitute a criminal offence under their national legislation, and set forth the applicable penalties, taking into account the nature of the offence.[20]

Element: National legislation on piracy may criminalize (acts of) piracy and establish the applicable penalties commensurate with the severity of the offences, in order to ensure the effective implementation of article 105 of UNCLOS. National legislation may also set forth a procedure under which national courts may determine the action to be taken with regard to seized ships, aircraft or property, subject to the rights of third parties acting in good faith.

Action requested of the Legal Committee

19 The Legal Committee is invited to note the information provided in this document and to comment or decide as it deems appropriate.

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[20] In its Commentary on article 43, which formed the basis for this provision, the ILC stated that it "did not think it necessary to go into details concerning the penalties to be imposed and the other measures to be taken by the courts". See A/CN.4/104, at page 283.

INTERNATIONAL MARITIME ORGANIZATION

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LEGAL COMMITTEE
98th session
Agenda item 8

LEG 98/8/3
18 February 2011
Original: ENGLISH

PIRACY

Piracy: elements of national legislation pursuant to the United Nations Convention on the Law of the Sea, 1982

Submitted by the Division for Ocean Affairs and the Law of the Sea (UN-DOALOS)

SUMMARY

Executive summary:	This document intends to assist States in the uniform and consistent application of the provisions of the United Nations Convention on the Law of the Sea (UNCLOS) relating to piracy, by setting forth the elements which could be included in national legislation on piracy pursuant to UNCLOS
Strategic direction:	6.2
High-level action:	6.2.1
Planned output:	6.2.1.3, 6.2.1.4, 6.2.1.5
Action to be taken:	Paragraph 18
Related document:	LEG 98/8/1

1 Document LEG 98/8/1 addresses only the first three elements of the crime of piracy; the remaining four elements are addressed in this document.

(a) Enforcement measures

2 Article 105 of UNCLOS sets forth the specific actions which States may take to repress piracy on the high seas or in any other place outside the jurisdiction of any State. Pursuant to article 58(2), the geographic scope of article 105 should be read to include the exclusive economic zone of any State (see document LEG 98/8/1 (Part 1), paragraph 12).

3 The provisions of article 105 should also be read in conjunction with other relevant provisions of UNCLOS, in particular articles 100 to 107. The enforcement measures set out in article 105 are limited by the provisions of article 106 (see below). It is important to note that, in carrying out enforcement measures, States remain subject to other relevant rules of international law, including applicable international human rights law.

(i) Jurisdiction in respect of enforcement measures

4 Article 105 stipulates that every State may (1) seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates; (2) arrest the persons on board; and (3) seize the property on board. The courts of the seizing State 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.

5 Thus, in accordance with article 105, enforcement actions may be carried out by every State, regardless of the nationality of the suspected offender(s), pirate ship(s)/aircraft, victim(s) or victim ship(s)/victim aircraft. States therefore have universal jurisdiction in respect of enforcement measures to repress piracy. As noted above (paragraph 9 of part 1), this is an exception to the principle of exclusive flag State jurisdiction over ships on the high seas.[1]

(ii) Ships and aircraft entitled to carry out enforcement measures

6 According to article 107 of UNCLOS, a seizure may only be carried out by (a) warships or military aircraft[2] or (b) other ships and aircraft "clearly marked and identifiable as being on government service and authorized to that effect."[3]

(iii) The right of visit

7 In accordance with the terms of article 110 of UNCLOS, where there are "reasonable grounds" for suspecting that a ship is engaged in piracy[4], warships or military aircraft or other ships or aircraft "clearly marked and identifiable as being on government service" and duly authorized to that effect, may carry out the following actions:

- verify the ship's right to fly its flag; and

- if suspicion remains after the documents have been checked, proceed to a further examination on board the ship, which must be carried out with all possible consideration.

8 The right of visit constitutes an exception to the principle of exclusive flag State jurisdiction over ships in the high seas as set out in articles 92 and 94 of UNCLOS. Pursuant to article 110, there is no right of visit in respect of ships which are entitled to complete immunity in accordance with articles 95 and 96 of UNCLOS (i.e. warships and ships owned or operated by a State and used only on government non-commercial service).

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1 See articles 92 and 94 of UNCLOS.

2 Article 29 of UNCLOS defines a warship as a "ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.

3 The ILC, in its Commentary on article 45 states: "[c]learly this article does not apply in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defence, overpowers the pirate ship and subsequently hands it over to a warship or to the authorities of a coastal State. This is not a 'seizure' within the meaning of this article". See A/CN.4/104, at page 283. The phrase "clearly marked and identifiable as being on government service" is used in articles 107, 110, 111 and 224 of UNCLOS.

4 The provisions of this article also apply to cases where there is "reasonable ground for suspecting that […] the ship is engaged in the slave trade, the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109, the ship is without nationality; or though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship."

Element: National legislation on piracy may incorporate the necessary provisions to authorize the enforcement measures set forth in article 105 of UNCLOS. In addition, in accordance with article 110 of UNCLOS, national legislation may authorize warships or military aircraft or other ships or aircraft "clearly marked and identifiable as being on government service" and duly authorized to that effect, to implement the right of visit where there are reasonable grounds for suspecting that a foreign ship is engaged in piracy.

(b) Liability and compensation provisions

9 Article 106 of UNCLOS provides that "where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure."[5]

10 Moreover, in relation to the right of visit, article 110(3) provides that "[i]f the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them" the owner of the ship shall be compensated by the boarding State for any loss or damage that may have been sustained."[6]

11 Articles 106 and 110 should be read in conjunction with article 300[7] on good faith and abuse of rights, as well as with article 304 which contains general provisions on responsibility and liability for damage.[8]

Element: National legislation on piracy may include provisions relating to liability and compensation for cases of seizure without adequate grounds and unfounded exercise of the right of visit, pursuant to articles 106 and 110 of UNCLOS.

(c) Retention or loss of nationality of a pirate ship or aircraft

12 According to article 104 of UNCLOS, retention or loss of nationality of a pirate ship or aircraft is determined by the law of the State of the ship. A pirate ship does not automatically lose its nationality,[9] as article 104 states:

> "[a] ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality is derived."

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5 The ILC Commentary states, with regard to the corresponding article (article 44), that this article "penalises the unjustified seizure of ships on grounds of piracy" and also applies to all acts of interference as mentioned in relation to the provision relating to the exercise of the right of visit. A/CN.4/104, p. 283.

6 See ILC Commentary to article 46, A/CN.4/104, p. 284 ("The State to which the warship belongs must compensate the merchant ship for any delay caused by the warship's action, not only where the ship was stopped without reasonable grounds but in all cases where suspicion proves unfounded and the ship committed no act calculated to give rise to suspicion. This severe penalty seems justified in order to prevent the right of visit being abused.")

7 Article 300 states that, "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."

8 Article 304 states that "[t]he provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law."

9 See articles 91 and 92 of UNCLOS.

Element: National legislation on piracy may, in accordance with article 104 of UNCLOS, determine whether a ship flying its flag engaged in acts of piracy loses its nationality.

(d) International co-operation

13 Article 100 of UNCLOS stipulates that "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."

14 It is important to note that article 100 does not specify the forms or modalities of co-operation States should undertake. The International Law Commission, in its Commentary which formed the basis for article 100 of UNCLOS, observed as follows:

> "any State having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law. Obviously, the State must be allowed a certain latitude as to the measures it should take to this end in any individual case."[10]

Further, the implementation of article 100 is subject to the good faith requirement in article 300 of UNCLOS.[11]

15 Since, in the context of piracy, States are co-operating outside of their territorial sea, international co-operation is crucial for the effective implementation of the legal framework relating to piracy, including arrests, boarding, seizure of goods and/or vessels, collection of evidence, procurement of witnesses, prosecutions, custody of suspected and convicted pirates, transfers and extradition. Such co-operation is also essential in any deterrent or preventive measures undertaken by States.

16 The Security Council has emphasized "the need for strengthened cooperation of States, regional and international organizations"[12] in achieving the goal of prosecuting suspected pirates. Similarly, the General Assembly has recognized "the crucial role of international cooperation at the global, regional, subregional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy … through bilateral and multilateral instruments and mechanisms."[13]

17 In order to implement the duty to co-operate, States may, for example, include in their national legislation provisions on mutual assistance in criminal matters, extradition and transfer of suspected, detained and convicted pirates. States may also conclude bilateral and multilateral agreements or arrangements in order to facilitate such cooperation.

Element: National legislation should in accordance with article 100, include provisions relating to international cooperation.

Action requested of the Legal Committee

18 The Legal Committee is invited to note the information provided in this document and in its annex and to comment or decide as it deems appropriate.

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10 See Document A/CN.4/104, at p. 282.

11 See footnote 10 above.

12 Security Council resolution 1950(2010), paragraph 14.

13 General Assembly resolution A/65/37 of 7 December 2010, paragraph 82.

ANNEX

ELEMENTS OF NATIONAL LEGISLATION ON PIRACY PURSUANT TO THE PROVISIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, 1982

1 National legislation on piracy may provide for the exercise of universal jurisdiction regardless of the nationality of the suspected offender(s), pirate ship(s)/aircraft, victim(s) or victim ship(s)/aircraft, pursuant to article 105 of UNCLOS as read with other relevant provisions of UNCLOS concerning the repression of piracy.

2 National legislation on piracy may reflect the definition of piracy contained in article 101 of UNCLOS, taking into account articles 58(2), 102 and 103. The core components of the definition are: (a) the geographic scope (which includes the high seas and areas beyond the jurisdiction of any State, as well as the exclusive economic zone); (b) the private ends requirement; (c) the two ship requirement; (d) the definition of pirate ship or aircraft; (e) the offences of incitement and facilitation; and (f) the distinction between private or government ship/aircraft.

3 National legislation on piracy may criminalize acts of piracy and establish the applicable penalties commensurate with the severity of the offences, in order to ensure the effective implementation of article 105 of UNCLOS. National legislation may also set forth a procedure under which national courts may determine the action to be taken with regard to seized ships, aircraft or property, subject to the rights of third parties acting in good faith.

4 National legislation on piracy may incorporate the necessary provisions to authorize the enforcement measures set forth in article 105 of UNCLOS. In addition, in accordance with article 110 of UNCLOS, national legislation may authorize warships or military aircraft or other ships and aircraft "clearly marked and identifiable as being on government service and authorized to that effect" to implement the right of visit where there are "reasonable grounds" for suspecting that a foreign ship is engaged in piracy.

5 National legislation on piracy may include provisions relating to liability and compensation for cases of seizure without adequate grounds and unfounded exercise of the right of visit, pursuant to articles 106 and 110 of UNCLOS.

6 National legislation on piracy may, in accordance with article 104 of UNCLOS, determine whether a ship flying its flag engaged in acts of piracy loses its nationality.

7 National legislation on piracy should in accordance with article 100, include provisions relating to international cooperation.

INTERNATIONAL MARITIME ORGANIZATION

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LEGAL COMMITTEE
98th session
Agenda item 8

LEG 98/8/2
18 February 2011
Original: ENGLISH

PIRACY

Establishment of a legislative framework to allow for effective and efficient piracy prosecutions

Submitted by the United Nations Office on Drugs and Crime (UNODC)

SUMMARY

Executive summary:	This document provides an overview of the conventions which are within UNODC's competence and may contribute to an effective legal framework for conducting piracy prosecutions, i.e. the United Nations Convention on Transnational Organized Crime, 2000 (OCC) and the International Convention against the Taking of Hostages, 1979 (Hostage Convention)
Strategic direction:	6.2
High-level action:	6.2.1
Planned output:	6.2.1.3, 6.2.1.4, 6.2.2.3, 6.2.2.4, 6.2.2.5
Action to be taken:	Paragraph 12
Related documents:	LEG 98/8, LEG 98/8/1 and LEG 98/8/1/Add.1

Background

1 As a part of its Counter-Piracy Programme, the United Nations Office on Drugs and Crime (UNODC) has provided assistance to States, upon request, to establish a legislative framework that allows for effective and efficient piracy prosecutions. UNODC has not developed model legislation on piracy, but has provided customized assistance based on the specific legal system and practice of the country. In particular, the assistance of UNODC is tailored to the country's legal tradition, which may be common law, civil law, Islamic law or a combination of these traditions. The legislative practice of the State, that is, whether the State employs a criminal code and a code of criminal procedure, enacts separate statutes, employs secondary pieces of legislation such as regulations, and/or relies on common law principles set out in binding case law, is also taken into account.

2 An effective legislative regime for the prosecution of piracy requires a number of key legal elements that are both substantive and procedural. In general, these would include the following subjects, which are addressed in more detail below:

(i) criminalization;
(ii) jurisdiction;
(iii) participation, conspiracy and attempts;
(iv) detention and arrest at sea;
(v) trials;
(vi) identifying, tracing, freezing, seizing and confiscating criminal assets; and
(vii) international co-operation.

Criminalization

3 The basis for prosecution must obviously be the criminalization of the alleged conduct. The offence that is to be prosecuted must be clearly defined, established as a criminal offence and subjected to an appropriate penalty. The definition of piracy in international law is set out in article 101 of the United Nations Convention on the Law of the Sea (UNCLOS) (see documents LEG 98/8/1 and LEG 98/8/1/Add.1). There are a number of offences set out in other international conventions that may be relevant to acts of piracy off the coast of Somalia. Document LEG 98/8 sets out the key elements of the Convention on the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (SUA Convention) that may complement the piracy provisions of UNCLOS. The 1979 International Convention against the Taking of Hostages (Hostage Convention) requires States to criminalize the taking of hostages. Article 1 defines the offence of taking of hostages, as follows:

> "Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages."

4 In accordance with articles 1 and 2 of the Hostage Convention, States are required to criminalize hostage-taking, as well as attempts to commit or participate in hostage-taking, and to make these offences "punishable by appropriate penalties which take into account the grave nature of those offences". The United Nations Convention on Transnational Organized Crime (Organized Crime Convention) (OCC) also sets out offences that could be relevant to acts of piracy. Article 5 of the Convention requires States Parties to criminalize, as a distinct offence, the participation in an organized criminal group[1], either by criminalizing the agreement with one or more other persons to commit a serious offence[2] and/or by criminalizing the conduct of a person who, with knowledge of the aim of the group to commit criminal activities, either takes an active part in the criminal activities of an organized criminal group or takes part in non-criminal activities in the knowledge that the participation will contribute to the criminal aim of the organized criminal group.[3] The OCC also requires States

[1] Organized Crime Convention, Article 2(a): "'Organized criminal group' shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit". The activities of the groups that commit piracy off the coast of Somalia would generally fall within this definition.

[2] Organized Crime Convention, Article 5(a)(i): "Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group." This offence reflects the typical common law offence of conspiracy to commit a crime. A serious crime is defined in the Convention in Article 2(b) as "conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty".

[3] Organized Crime Convention, Article 5(a)(ii).

to criminalize organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crimes involving an organized criminal group.[4]

5 Another offence which could be relevant to the activities of those involved in piracy off the coast of Somalia may be found in article 6 of the OCC, which requires States Parties to criminalize the conversion or transfer of proceeds of crime for the purpose of concealing or disguising their illicit origin and the concealment or disguise of the true nature or source of proceeds of crime. States are also required to criminalize the acquisition, possession or use of proceeds of crime and the participation or attempt to commit any of these offences, subject to the basic concepts of their legal systems.[5] Pursuant to article 11 of the OCC, States are required to impose penalties for the offences under both articles 5 and 6 that take into account the gravity of the offence. Of the approximately 500 piracy convictions secured around the world in the last two years, all have relied upon domestic enactments of UNCLOS or on domestic criminal law offences unrelated to any other international convention or treaty.

Jurisdiction

6 In order to prosecute offences domestically, the criminal legislation of the State must provide for jurisdiction over the offences. In general, international conventions that contain criminal provisions also place an obligation on States to establish jurisdiction over the offences. The extent of the obligation varies depending on the nature of the crime. As noted in the documents submitted by the Secretariat (document LEG 98/8) and the Division for Ocean Affairs and the Law of the Sea (DOALOS) (documents LEG 98/8/1 and Add.1), piracy is an offence of universal jurisdiction. Under UNCLOS, States may, but are not required to, assume jurisdiction over any acts of piracy that are committed on the high seas or in any other place outside the jurisdiction of any State.[6] States that adopt universal jurisdiction for piracy offences are thus able to prosecute any acts of piracy that occur on the high seas (i.e. outside the territorial waters of any State). The SUA Convention, the Hostage Convention and the OCC provide for more common jurisdictional bases which require a link to the jurisdiction in question. All of the Conventions require States Parties to establish jurisdiction over the offences set out in the Convention in those cases where there is a territorial link to the conduct, that is, when the offence is committed in the territory, including the territorial waters, of the State, or on board a vessel or aircraft that is flagged or registered in the State.[7] The Conventions further require States to establish criminal jurisdiction in those cases where the State refuses to extradite a person to another State.[8] The SUA Convention and the Hostage Convention also require States to establish jurisdiction over

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4 Organized Crime Convention, Article 5(b).

5 Organized Crime Convention, Article 6(a) and (b): *(a)* (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action; (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime; *(b)* Subject to the basic concepts of its legal system: (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime; (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

6 UNCLOS, Article 105.

7 SUA Convention, Article 6(1)(a) and (b); Hostage Convention, article 5(1)(a); Organized Crime Convention, Article 5(1).

8 SUA Convention, article 6(4); Hostage Convention, Article 5(2); Organized Crime Convention, Article 15(3) and (4) and Article 16(10). Note that under the Organized Crime Convention, the mandatory obligation arises only in those cases where the State refuses to extradite the person sought on the basis of nationality and, in all other cases, the Convention merely provides that States may assume jurisdiction when they have refused to extradite a person.

offences committed by their nationals.[9] Under the OCC, the establishment of jurisdiction on the basis of the nationality of the offender is optional.[10] The Hostage Convention further requires States to establish jurisdiction over those cases where the offence was committed in order to compel the State in question to do or refrain from doing something[11] while this is an optional jurisdictional basis under the SUA Convention.[12] The international conventions also provide for optional bases for jurisdiction that a State may adopt in accordance with its domestic practice. In addition to those optional jurisdictional bases already outlined above, these bases include when the victim of the offence is a national of the State Party,[13] when the act is committed by a stateless person with habitual residence in the State Party,[14] or when acts were committed outside the territory with a view to committing a crime within its territory.[15] The international conventions also provide that their enumeration of both mandatory and optional jurisdictional bases does not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.[16] Domestic legal systems generally address one further aspect of jurisdiction in providing which domestic court has jurisdiction to try cases relating to a particular offence. In general, such provisions provide that a particular level of court has jurisdiction over crimes of a particular degree of seriousness and that the court in a particular territory will have jurisdiction over offences tried within that territory. Since piracy crimes are committed outside the territorial jurisdiction of the State, it will be important that the domestic law is sufficiently clear as to which court will have domestic jurisdiction over piracy prosecutions.

Participation, conspiracy and attempts

7 In addition to criminalizing the direct conduct of the crime, it is also important that all modes of participation in the offence, such as organizing, instigating, aiding and abetting, facilitating and counselling, are also criminalized. The criminalization of such acts is vital in combating any kind of organized crime, as not all of the criminals will be directly involved in carrying out the act itself. As already noted above, all of the obligations to criminalize offences in international crime and terrorism conventions include an obligation to criminalize such participation. The second obligation relates to the criminalization of conspiracy and attempts to commit offences. In order to be able to successfully prosecute serious crimes such as piracy, it is critical that States are also able to prosecute criminal acts before they are successfully executed. The general interpretation of UNCLOS article 101(b) and (c) is that it does allow for the prosecution of acts preparatory to a full attack. However, many national jurisdictions will require that point to be made explicitly in domestic criminal law if it is to provide a proper base for a prosecution.

Detention and arrest at sea

8 Many of the prosecutions of piracy suspects that have taken place in regional countries have commenced with the apprehension of suspected pirates on the high seas by naval authorities from another State and then the transfer of the suspected pirates to the regional country to undertake prosecutions. Consideration must be given as to how the

9 SUA Convention, Article 6(1)(c); Hostage Convention, article 5(1)(b).

10 Organized Crime Convention, Article 15(2)(b).

11 Hostage Convention, Article 5(1)(c).

12 SUA Convention, Article 6(2)(c).

13 SUA Convention, Article 6(2)(b); Hostage Convention, Article 5(1)(d); Organized Crime Convention, Article 15(2)(a).

14 SUA Convention, Article 6(2)(a); Hostage Convention, Article 5(1)(b); Organized Crime Convention, Article 15(2)(b).

15 Organized Crime Convention, Article 15(2)(c).

16 SUA Convention, Article 6(5); Hostage Convention, Article 5(3); Organized Crime Convention, Article 15(6).

apprehension by foreign naval forces will be viewed in accordance with the law of the country that accepts the transfer of the suspected pirates for prosecution. In other cases, national authorities have apprehended themselves, either on land, in their territorial waters or beyond. In order to assist police, coast guard or naval authorities to apprehend suspected pirates on the high seas, domestic legislation may provide for the exercise of police powers such as arrest, search and seizure and investigation beyond the State's territorial waters. Because it can take days or even weeks for a ship that has apprehended piracy suspects to return to port, a number of human rights and procedural concerns arise that may need to be addressed through domestic legislation. Most States have a requirement within their criminal procedural laws to bring a person that has been arrested before a judge or magistrate within a short period of time. This period may be set out in specific terms, such as 24 or 48 hours, or it may be set out more generally, requiring that the person appear before a judge within a reasonable period of time. Some legal provisions expressly allow for the circumstances to be taken into account in assessing the time that was reasonable. States will need to consider how these provisions will impact on the ability of their law enforcement agencies to apprehend pirates at sea. Some States judge that there is no arrest at sea and that domestic criminal law protections are not engaged until transfer to authorities on land. Others judge that the suspects are in arrest from the point of apprehension and have provided for specific procedures that allow persons arrested at sea to appear before a judge while still at sea, perhaps with access to a defence lawyer, using videoconference, telephone or radio technology.

Trials

9 In general, the prosecution of suspected pirates has been supported by testimonial evidence from the victims of any attack and the crew of any vessel that participated in the apprehension or arrest of the suspected pirates, the photographic evidence taken of the attack, and equipment used such as weapons, satellite telephones, global positioning systems, ladders, and forensic evidence. States may need to review their legislation relating to the admission of these types of evidence. Regional States that accept the transfer of suspected pirates for prosecution such as Kenya and the Seychelles have also produced a handover guidance to naval authorities on their evidentiary requirements in order to ensure that the naval authorities collect evidence and prepare the case in a way that will ensure admissibility at trial. Given the particular difficulties associated with ensuring the attendance of witnesses to provide testimony at trial, many suggestions have been made that States should consider allowing the testimony of witnesses via videoconference. The use of videoconference to facilitate witness testimony is increasingly allowed by law in some countries, although this must be consistent with the principles of the domestic system, including human rights standards.[17] States may also want to explore the admission of witness testimony in other forms, particularly where the content of the evidence in undisputed. In addition to the admission of evidence, a number of issues relating to trial procedures and due process may need to be considered. In order to ensure that human rights standards are respected, it is particularly important that persons suspected of committing serious crimes such as piracy are provided with an adequate defence. Where the suspected persons are not able to afford their own counsel, a State will need to consider providing legal aid to allow them to be adequately defended. Similarly, States should ensure that their criminal justice system is able to provide for the interpretation in the language of accused persons who do not speak the language of the State that is conducting the prosecution. The testimony of foreign witnesses may also require interpretation.

[17] The use of videoconference to provide testimony or expert evidence through mutual legal assistance is specifically encouraged in Article 16(18) of the Organized Crime Convention. See also: Report of the Secretariat to the Conference of the Parties to the United Nations Convention on Transnational Organized Crime on the Expert Group Meeting on the Technical and Legal Obstacles to the Use of Videoconferencing, 20 October 2010, CTOC/COP/2010/CRP.8.

Identifying, tracing, freezing, seizing and confiscating criminal assets

10 It is clear that piracy off the coast of Somalia is extremely lucrative and that very large sums of illicit funds are being made by pirate groups. The OCC requires States to adopt legislation that allows them to confiscate proceeds of crime and property, equipment or instrumentalities used to commit transnational organized crimes. Further, in order to ensure that such confiscation is possible, States must also adopt measures allowing them to identify, trace, freeze or seize such assets.[18]

International co-operation

11 In order to prosecute suspected pirates effectively, States may also be required to rely on international co-operation. The OCC, with its 158 States parties and broad application,[19] may provide the legal basis necessary to effect such co-operation. Article 18 of the OCC sets out a broad and flexible regime for mutual legal assistance that requires States to "afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings".[20] The provisions of the Convention are sufficiently detailed as to be a sort of "mini-treaty" on mutual legal assistance. Mutual legal assistance may be required to obtain evidence for piracy prosecutions where coercive or invasive measures are needed, when evidence needs to be in a particular form to be admissible, or when countries refuse to co-operate on informal basis. Article 13 of the OCC provides for international co-operation for the purposes of confiscation, essentially a form of mutual legal assistance. A complement to article 12 that requires States to establish domestic regimes to confiscate proceeds of crime, article 13 requires States to co-operate with other States to confiscate proceeds of crime and other instrumentalities within their territory and to assist in the identification, tracing, freezing or seizing of such assets. Article 16 of the OCC relates to the extradition of suspects for prosecution and of convicted persons for the enforcement of their sentences. It provides that the offences covered by the OCC must be deemed to be included in existing extradition agreements and that the Convention may also serve as a treaty basis to permit extradition.[21] Article 17 of the Convention encourages States Parties to consider entering into bilateral or multilateral agreements that allow for the transfer of sentenced persons to complete their sentences, usually in their country of nationality.

Action requested of the Legal Committee

12 The Legal Committee is invited to note the information provided in this document and to comment or decide as it deems appropriate.

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18 Organized Crime Convention, Article 12.

19 The Organized Crime Convention applies to all transnational serious crimes committed by organized criminal groups. Because all three of these terms are defined broadly in the Convention (Article 2), the Convention has a very broad scope of application and would certainly apply to the crimes being committed by pirates off the coast of Somalia. The application of the Convention is widened even further for international cooperation. It may be used as the basis for a mutual legal assistance request on proof only of reasonable grounds to suspect that the crime is transnational and committed by an organized criminal group. For extradition, the very fact that the person sought is found in another country satisfies the transnationality requirement (Articles 18(1) and 16(1)).

20 Organized Crime Convention, Article 18(1).

21 Organized Crime Convention, Article 16(3) – (6).

INTERNATIONAL MARITIME ORGANIZATION

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LEGAL COMMITTEE
98th session
Agenda item 8

LEG 98/8
18 February 2011
Original: ENGLISH

PIRACY

Uniform and consistent application of the provisions of international conventions relating to piracy

Note by the Secretariat

SUMMARY

Executive summary:	This document summarizes the key elements of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation that complement the provisions of the United Nations Convention on the Law of the Sea, 1982 regarding piracy
Strategic direction:	6.2
High-level action:	6.2.1
Planned output:	6.2.1.1, 6.2.1.3, 6.2.1.4, 6.2.1.5
Action to be taken:	Paragraph 31
Related documents:	None

1 At its ninety-seventh session, the Secretariat provided the Legal Committee with its review of national legislation on piracy submitted by Member States in response to Circular letter No.2933 of 23 December 2008. The Secretariat confirmed its observation, made at the Committee's ninety-sixth session, that the implementing legislation is not currently harmonized, and that this factor, coupled with the uneven incorporation into national law of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) definition of piracy, might have an adverse effect on the process of prosecution.

2 While the Secretariat will continue to collect and collate any further legislation received from Member States for inclusion in the database established by the UN Office of Legal Affairs, Division for Ocean Affairs and the Law of the Sea (DOALOS), any further assessments are unlikely to yield different results.

3 The Secretariat has consulted with DOALOS and with the UN Office on Drugs and Crime (UNODC) in an effort to co-operate more effectively in addressing the problem of piracy. In this regard, the three agencies have agreed to identify the key elements that may be included in national law to facilitate full implementation of international conventions applicable to piracy, in order to assist States in the uniform and consistent application of the provisions of these conventions.

4 This document summarizes the key elements of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) that complement the UNCLOS provisions regarding piracy. Some references are also made to the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Protocol), in respect of boarding provisions and additional offences introduced by the Protocol.

Key elements of the SUA Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988, which may complement the UNCLOS provisions regarding piracy

Types of acts

5 As the SUA Convention was developed following the **Achille Laura** incident, in which a vessel was hijacked and a hostage was killed, the view might be taken that it deals only with incidents related to terrorist acts. It should be noted, however, that the sole reference to terrorism is to be found in the preambular paragraphs of the Convention, which refer to United Nations General Assembly resolution 40/61 which, *inter alia*, invites IMO to "study the problem of terrorism aboard or against ships with a view to making recommendations on appropriate measures." The text of the Convention contains no express reference to terrorist attacks or terrorist motives.

6 The preamble also refers to IMO Assembly resolution A.584(14), the text of which notes, with great concern, the danger to passengers and crews resulting from an increasing number of incidents involving piracy, armed robbery and other unlawful acts against or on board ships, and which calls for the development of measures to prevent unlawful acts which threaten the safety of ships and the security of passengers.

7 Additionally, the record of decisions of the Conference which adopted the SUA Convention (document SUA/CONF/RD/1, annex 3) includes the statement of one observer delegation[1] who makes reference to piracy and states in this connection that "the draft Convention and the Protocol would now make all acts on the high seas punishable offences and States are requested either to punish or extradite persons guilty of such offences."

8 In light of the above, it is reasonable to conclude that the Convention deals not only with acts related to terrorism but also, more generally, with unlawful acts which threaten the safety of ships and the security of passengers. In this regard, the Secretariat's review of national legislation, referred to in paragraph 1 above, indicates that a number of Member States have included provisions of the SUA Convention in their legislation on piracy.

Offences (article 3)

9 Article 3 of the SUA Convention defines the relevant Convention offences. While it does not explicitly refer to acts of piracy as such or to the definition of piracy contained in article 101 of UNCLOS, many of the acts listed in article 3.1 contain the basic elements which typically fall within the crime of piracy.[2]

[1] Mr. Satya Nandan, Under Secretary-General, Special Representative of the Secretary-General of the United Nations for the Law of the Sea, Office for Ocean Affairs and the Law of the Sea.

[2] It goes without saying that the other elements of the crime of piracy, e.g., that it takes place on the high seas and be for private ends, and involve a pirate ship, must also be satisfied.

10 So, for example, article 3.1 (a) and (b) provides as follows:

> 3.1 Any person commits an offence if that person unlawfully and intentionally:
>
> (a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
>
> (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.

11 In view of the fact that the SUA Convention creates separate offences from those defined in article 101 of UNCLOS, this provides the prosecuting State with the option to prosecute either pursuant to the provisions of UNCLOS or under the SUA Convention, provided that these offences are explicitly included in the that State's criminal Code.

12 Other offences listed in article 3.1, paragraphs (c), (d), (f) and (g), as well as in article 3.2, could also fall within an act of piracy under UNCLOS.

13 Article 3.2 of the SUA Convention considers the acts of attempting, abetting and threatening to carry out the offences listed in article 3.1 also to be crimes under the Convention. The terminology employed in article 101(c) of UNCLOS, namely "inciting" and "intentionally facilitating" acts of piracy, is somewhat different although some of the concepts may overlap, for example, "facilitating" and "abetting".

Private ends

14 Pursuant to article 101 of UNCLOS, an act of piracy requires that it be committed for private ends, such as extracting a ransom. Acts that are politically motivated, i.e. done with the objective of intimidating a population or of compelling a Government or an international organization to do, or to abstain from doing any act, will not be acts of piracy.

15 By comparison, the main requirement for an offence under the SUA Convention is that the person acts "unlawfully and intentionally". The scope of this element is wide enough to include both politically motivated acts and those committed for private ends, and may facilitate prosecution in a broader range of offences.

16 In this connection, it should be noted that, in addition to the crimes defined in the SUA Convention, the SUA Protocol has established several new offences aimed at combating terrorism, most of which include, as a mandatory element, the "terrorist motive" (i.e. "when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act"). Such acts would not, therefore, qualify as acts of piracy, unless committed also for private ends (i.e. dual purposes acts).

Endanger safety of vessels

17 Offences under article 3.1 (b) to (f) of the SUA Convention involve acts that endanger the safety of navigation of the ship. Therefore, if the person committing one of these offences does not thereby endanger the safe navigation of a vessel, the Convention will not be applicable to that offence.

18 However, this rule is not applicable to the offence created under article 3.1 (a), since the wording of this paragraph does not require proof that the safety of navigation of the vessel is endangered. Considering that piracy generally involves attacks endangering, or

likely to endanger, safety of navigation, this requirement of article 3 should not be an impediment to the application of the SUA Convention offences to acts of piracy.

Geographical scope of application (article 4)

19 Pursuant to the provisions of UNCLOS, acts of piracy are essentially confined to acts on the high seas (including the EEZ). By comparison, article 4.1 of the SUA Convention provides that it will apply "if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State or the lateral limits of its territorial sea with adjacent States".

20 Notwithstanding article 4.1, the SUA Convention will also apply when the offender or alleged offender is found in the territory of a State Party other than the State referred to in that article. Accordingly, the only case in which the SUA Convention would not apply is where the offence was committed solely within a single State's territorial sea and the suspected offender was subsequently found within that coastal State's territory. The territorial scope of the SUA Convention is therefore wider than UNCLOS in so far as it covers piracy-related acts in the EEZ and the high seas, as well as in territorial waters in the circumstances defined in article 4.1.

Criminalization (Penalties) (article 5)

21 The SUA Convention obliges States Parties to make the offences set forth in article 3 punishable by appropriate penalties, although it does not prescribe specific penalties for any of the offences, merely providing these should be "appropriate [taking] into account the grave nature of those offences". By comparison, article 105 of UNCLOS is less prescriptive than SUA in that it empowers, but does not oblige, States to provide for piracy to constitute a criminal offence under the national legislation and to establish appropriate penalties.

Jurisdiction (article 6)

22 Article 6 of the SUA Convention provides as follows:

> 1 Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 when the offence is committed:
>
> (a) against or on board a ship flying the flag of the State at the time the offence is committed; or
>
> (b) in the territory of that State, including its territorial sea; or
>
> (c) by a national of that State.
>
> 2 A State Party may also establish its jurisdiction over any such offence when:
>
> (a) it is committed by a stateless person whose habitual residence is in that State; or
>
> (b) during its commission a national of that State is seized, threatened, injured or killed; or

(c) it is committed in an attempt to compel that State to do or abstain from doing any act.

23 The Convention, accordingly, sets out certain pre-conditions (or jurisdictional "links") pursuant to which a State Party either must or may establish its jurisdiction over the offences laid down under article 3 and therefore has a restricted application.

24 In respect of jurisdiction, there is, accordingly, an important distinction between the crime of piracy defined under UNCLOS and offences under the Convention, since under article 105 of UNCLOS no jurisdictional link is necessary between the State exercising jurisdiction and the suspected offender(s), pirate ship(s) or victim(s). Piracy is considered to be a crime against mankind and a pirate is considered the enemy of every State. Universal jurisdiction exists, pursuant to which the offender may be arrested and punisshed by any State.

Custody and related measures (article 7)

25 Article 7.1 of the SUA Convention provides as follows:

> 1 Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the offender or the alleged offender is present shall, in accordance with its law, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

26 Upon taking an alleged offender into its custody, the State Party is required immediately to notify other States Parties which have established jurisdiction over the alleged offence under article 6.1 and, if it considers it advisable, any other interested States, of the fact that such person is in custody and of the circumstances which warrant his detention. It is also obliged to report, furthermore, on any of its findings related to its preliminary enquiry into the facts pursuant to article 7.2. These notifications and reporting obligations are fully in accord with the duty of all States to co-operate to the fullest extent in the repression of piracy set out in article 100 of UNCLOS. Accordingly, they offer important procedural rules to complement and reinforce the UNCLOS provisions.

Delivery of alleged offender (article 8)

27 This article authorizes the master of a ship of a State Party ("the flag State") to deliver a person believed to have committed an offence under the SUA Convention to another State Party ("the receiving State"). The receiving State is obliged to accept delivery of the person except where it has grounds for considering that the Convention is not applicable, but may also, in turn, request the flag State to accept delivery of the person. Articles 7 and 8 also prescribe procedures to be followed in applying article 8.

Prosecute or extradite (articles 10 and 11)

28 In respect of offences to which article 6 applies, a State Party must, under article 10, either extradite an offender or alleged offender found in its territory, or prosecute such person without delay. In respect of article 3 offences, the person concerned must be guaranteed fair treatment and enjoyment of all rights and guarantees as are provided by the State in such cases.

29 Article 11 provides that article 3 offences are deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties. The article contains further detailed rules relating to extradition, depending on whether or not an extradition treaty exists between the States concerned, including a provision that, with respect to offences defined in SUA, all extradition treaties and arrangements applicable between States Parties are modified to the extent that they are incompatible with the SUA Convention.

30 These articles complement the universal jurisdiction principles contained in UNCLOS.

Action requested of the Legal Committee

31 The Legal Committee is invited to note the information provided in this document and to comment or decide as it deems appropriate.

INTERNATIONAL MARITIME ORGANIZATION

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LEGAL COMMITTEE
98th session
Agenda item 8

LEG 98/8/4
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PIRACY

Establishment of a legislative framework to allow for effective and efficient piracy prosecutions

Submitted by Ukraine

SUMMARY

Executive summary:	This document provides comments on the analysis by the United Nations Office on Drugs and Crime (UNODC) in document LEG 98/8/2, with regard to those instruments which serve as a basis for prosecuting pirates, and on developing further national legislation and international instruments to combat piracy
Strategic direction:	6.2
High-level action:	6.2.1
Planned output:	6.2.1.3, 6.2.1.4, 6.2.2.3, 6.2.2.4, 6.2.2.5
Action to be taken:	Paragraph 8
Related documents:	LEG 98/8/2 and LEG 97/15

Background

1 The ninety-seventh session of the Legal Committee, while examining questions concerning revision of national legislation related to piracy, decided that there was a need for all States to have a comprehensive legal regime to prosecute pirates, consistent with international law. The United Nations Office on Drugs and Crime (UNODC) has submitted document LEG 98/8/2 to the ninety-eighth session of the Legal Committee. This document provides an analysis of international legal instruments in this sphere: the United Nations Convention on the Law of the Sea, 1982 (UNCLOS), the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988 (SUA Convention), the International Convention against the Taking of Hostages, 1979 and the United Nations Convention on Transnational Organized Crime, 2000. Together, these instruments create the necessary legal basis for apprehending pirates: whether directly, through committing the crime of piracy, or on the aggregate of committed crimes.

2 It should be recalled that United Nations General Assembly resolution A/RES/65/37 encourages States to ensure effective implementation of international law applicable to combatting piracy, as reflected in UNCLOS, and calls upon States to take appropriate steps under their national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy, also taking into account other relevant instruments that are consistent with the Convention.

3 Experience of fighting piracy in the recent past demonstrates the growing importance of co-operation among States, including joint/coordinated utilization of means and forces to ensure law and order at sea and also close co-operation in apprehending pirates. The latter requires a great degree of uniformity in the provisions of national legislation dedicated to the prosecution of acts of piracy.

Discussion

4 The results of the analysis provided in document LEG 98/8/2 correctly identify areas of legislation which provide for apprehending and prosecuting pirates and armed robbers. The international instruments analysed in the document serve to align and draw together national legislation through the mechanism of implementation. For the main part, this should be done via criminalizing certain activities, adopting legislation which provides for establishing jurisdiction over crimes and prescribing legal actions against assets obtained by criminal activity. The provisions of the instruments which serve as a basis for co-operation are formulated in a manner to provide a certain degree of flexibility in the process of implementation. This, however, influences the susceptibility of national legislation with respect to the needs dictated by international co-operation in areas regulated by a treaty.

5 Bearing in mind the above, it should be noted that paragraph 7 of document LEG 98/8/2 refers to criminalizing participation, conspiracy and attempts in relation to crimes reflected in the United Nations Convention on Transnational Organized Crime, 2000. It might be beneficial to have further elaboration on the crime of piracy in the light of these categories. Also, it should be noted, that preventive measures taken to arrest persons suspected of committing, or attempting to commit, the crime of piracy, are limited by legal uncertainty, unless it is clear that "participation", "conspiracy" and "attempts", are essential elements for the crime of piracy. It is doubtful that the national legislation of various States and court practice in this area create a basis for uniform application of these elements, especially when the persons are to be tried in foreign States. Thus, clear and specific definitions, explanations and instructions are needed in applying these elements, first and foremost for law-enforcing units and naval ships involved in combatting piracy at sea.

6 It is important to find solutions for recognition by one State of a criminal investigation by another State and its admissibility in court proceedings. Also, the need to have an agreed approach with regard to procedures related to the preservation of evidence, including photo and film recording, usage of radar surveillance records, etc., must be addressed. Paragraph 9 of document LEG 98/8/2 reflects areas where national legislation needs to be improved with respect to the above mentioned. It is also important to ensure seamless international co-operation with respect to them.

7 In conclusion, it should be noted that further improvement is needed in the areas identified in document LEG 98/8/2 and also in this document. Ukraine proposes two options to achieve this:

Option A: development of a multilateral instrument which will meet the need to combat piracy in a specific region. In the case of piracy off the coast of Somalia, such an instrument may be developed within the framework of implementation of the Djibouti Code of Conduct. The instrument should envisage the possibility for participation of the States outside the region (those providing naval forces, flag States, etc.).

Option B: development of model legislation which addresses the relevant subjects.

Action requested of the Legal Committee

8 The Legal Committee is invited to note the content of this document and to comment or decide as it deems appropriate.