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LEGAL COMMITTEE  
96th session  
Agenda item 7

LEG 96/7  
20 August 2009  
Original: ENGLISH

## PIRACY: REVIEW OF NATIONAL LEGISLATION

### Note by the Secretariat

#### SUMMARY

<i>Executive summary:</i>	This document provides a general comment on national legislation on piracy provided so far in response to Circular letter No.2933
<i>Strategic direction:</i>	1.1, 6.2
<i>High-level action:</i>	1.1.1, 6.2.2
<i>Planned output:</i>	1.1.1.1, 6.2.2.1, 6.2.2.2
<i>Action to be taken:</i>	Paragraph 4
<i>Related documents:</i>	LEG 95/9/3 and Circular letter No.2933

1 The Committee was informed, at its ninety-fifth session, that the Secretariat was reviewing the national legislation on piracy received in response to Circular letter No.2933, dated 23 December 2008, attached at annex, in order to facilitate an assessment of the legal situation, in particular regarding the capture, prosecution and extradition of alleged offenders, and that it planned to submit a synopsis of the replies to the Committee at this session, (documents LEG 95/9/3 and LEG 95/10, paragraph 9(c).12).

2 As at 20 August 2009, replies had been received from: Argentina, Australia, Azerbaijan, Bahamas, Barbados, Brazil, Chile, China, Colombia, Ecuador, Estonia, Greece, Guatemala, Iran (Islamic Republic of), Italy, Japan, Mexico, Morocco, New Zealand, Peru, the Philippines, the Republic of Korea, the Russian Federation, Sri Lanka, Thailand, the United States, and Uruguay, and from Hong Kong, China. Some replies to the Circular letter provided a summary of the national law rather than the text of current legislation.

3 An analysis by the Secretariat of the legislation received shows the following preliminary conclusions:

- Only a few countries fully incorporate the definition of piracy contained in article 101 of the United Nations Convention on the Law of the Sea (UNCLOS) as well as a jurisdictional framework based upon the concept of universal jurisdiction regulated by UNCLOS as the right of all States Parties.

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- Most legislation received regulate some elements of UNCLOS' definition of piracy. In most cases, piracy is not addressed as an independent, separate offence with its own jurisdictional framework but is subsumed within more general categories of crimes, such as robbery, kidnapping, abduction, violence against persons, etc. In such cases, prosecution and punishment can only take place in accordance with a jurisdictional scope that is inevitably more restricted than the scope of universal jurisdiction regulated in UNCLOS as the right of all States Parties.
- In some cases, domestic legislation, rather than defining all the elements of the offence of piracy as part of their criminal law, simply makes reference to piracy as defined by international law, UNCLOS or otherwise. This generic approach may present obstacles for adequate prosecution and punishment in countries where criminal law requires as a condition for enforcement that all elements of any offence are described in detail in the legislation.
- Most States Parties to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) have in place legislation implementing the compulsory establishment of jurisdiction regulated in article 6, paragraph 1 of this Convention. This compulsory jurisdictional framework, together with the list of offences prescribed by the SUA Convention, effectively ensures prosecution and punishment in connection with many piracy incidents. However, the lack of establishment of facultative jurisdiction authorized in article 6, paragraph 2 of SUA and the lack of precise rules regulating universal jurisdiction inevitably lead to loopholes, as a result of which some piracy incidents may remain unpunished.

#### **Action requested of the Legal Committee**

4 The Legal Committee is invited to take note of the information in this document and to comment as appropriate.

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LEGAL COMMITTEE  
96th session  
Agenda item 13

LEG 96/13  
14 October 2009  
Original: ENGLISH

**REPORT OF THE LEGAL COMMITTEE ON THE WORK  
OF ITS NINETY-SIXTH SESSION**

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CLIMATE CHANGE:  
THE MARITIME CONNECTION

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6.16 The Committee approved the draft resolution in document LEG 96/WP.6 with the modifications contained in paragraph 6.15 and, in light of the advice of the Secretariat to the effect that, although an Assembly resolution and a Legal Committee resolution would have the same legal value, an Assembly resolution would carry more weight and, in view of the opinion of the overwhelming majority of delegations which intervened on this issue, decided to submit the draft resolution, reproduced in annex 4 to this report, to the twenty-fifth extraordinary session of the Council for consideration and, thereafter, for submission to the twenty-sixth regular session of the Assembly for adoption.

6.17 The Committee decided to maintain the Correspondence Group, which would continue its work on the implementation of the Bunkers Convention.

## 7 PIRACY: REVIEW OF NATIONAL LEGISLATION

7.1 The Secretariat introduced documents LEG 96/7, LEG 96/7/Corr.1 and LEG 96/7/1 containing, respectively, general comments on the national legislation on piracy submitted in response to Circular letter No.2933, and information on developments relating to Working Group 2 (on legal and judicial issues) of the Contact Group on Piracy off the coast of Somalia (CGPCS Working Group 2).

7.2 In connection with the information received on national legislation the Secretariat noted that:

- only a few countries fully incorporate the definition of piracy, contained in article 101 of the United Nations Convention on the Law of the Sea (UNCLOS), as well as a jurisdictional framework based upon the concept of universal jurisdiction regulated by UNCLOS;
- in most cases, piracy is not addressed as an independent, separate offence with its own jurisdictional framework, but is subsumed within more general categories of crime, such as robbery, kidnapping, abduction, violence against persons, etc. In such cases, prosecution and punishment can only take place in accordance with a jurisdictional scope that is, inevitably, more restricted than the scope of universal jurisdiction regulated in UNCLOS;
- in some cases, domestic legislation, rather than defining all the elements of the offence of piracy as part of its criminal law, simply makes reference to piracy as defined by international law, UNCLOS or otherwise. This generic approach may present obstacles for adequate prosecution and punishment in countries where criminal law requires, as a condition for enforcement, that all elements of any offence are described in detail in the legislation; and
- most States Party to the 1988 SUA Convention have legislation in place implementing the compulsory establishment of jurisdiction regulated in article 6.1 of this Convention. However, the lack of establishment of facultative (or optional) jurisdiction authorized in article 6.2, coupled with the lack of precise rules regulating universal jurisdiction, can inevitably lead to loopholes, as a result of which, some piracy incidents may remain unpunished.

7.3 In connection with the developments in CGPCS Working Group 2, the Secretariat advised that:

- the Working Group's task was to provide specific, practical and legally sound guidance to Contact Group members on legal issues related to the fight against piracy, including the prosecution of suspected pirates. With a view to fulfilling this task, the Working Group agreed that the way forward was to develop a full set of practical tools (checklists, guidelines, templates, compilations) with the aim of providing support to States and organizations participating in the anti-piracy effort;
- material developed by the Working Group included a compilation of the international legal basis for prosecution of suspected pirates, as well as generic templates on evidence collection, ship-rider agreements, obtaining flag State consent in cases where a military vessel protection detachment is to be embarked on merchant ships, and MoU on the conditions of transfer of suspected pirates. These templates, as well as other guidance, will be placed on the Contact Group website when it is established;
- the Working Group agreed terms of reference for an International Trust Fund to help defray the expenses associated with prosecution of suspected pirates;
- the Working Group agreed that the establishment of an international piracy court was premature at this stage; and
- at its last meeting, held in New York on 10 September 2009, the CGPCS had approved these terms of reference and asked Working Group 2 to continue its work, including its discussions on the issue of an international, regional or other mechanism for the prosecution of suspected pirates.

7.4 In response to questions raised by delegations, the Secretariat provided details on the efforts undertaken by IMO and UNODC to ensure that legislative data collected by both organizations was shared and analysed in order to ensure that activities of both organizations did not overlap. The Secretariat also invited countries which needed to do so, to request IMO's advice and assistance in the drafting of legislation within the framework of the Organization's Technical Co-operation Programme.

7.5 The Director of the Maritime Safety Division (MSD) provided information on the activities of the CGPCS since its formation earlier this year and the most recent activities of the MSC and the NAV Sub-Committee regarding the issue of piracy. He also gave an update on the number of piracy incidents in waters off Somalia in 2009, and stated that four ships and 99 seafarers were currently held hostage. He praised the efforts of naval vessels to protect ships navigating in the waters off the Gulf of Aden and the western Indian Ocean. He referred to the adoption by the MSC of updated guidance and recommendations on the suppression of piracy, including specific guidance on piracy and armed robbery against ships in waters off the coast of Somalia, which include the industry-developed Best Management Practices (MSC.1/Circ.1332).

The Director of MSD highlighted the importance of the Djibouti Code of Conduct to repress acts of piracy and armed robbery against ships, which had come into effect on 29 January 2009 and which had so far been signed by 10 countries in the region. He emphasized IMO's determination to implement a programme of capacity-building activities funded through the IMO Djibouti Code Trust Fund, a multi-donor trust fund established through the substantial financial contributions from Japan and Norway, noting also that the Netherlands had indicated a willingness to contribute.

A regional meeting would be held in Seychelles, in October this year, to discuss the general action programme for the implementation of the Djibouti Code over the coming three years and a project team would be established next year. Key issues in the implementation process included:

- establishing information sharing centres;
- developing associated protocols and mechanisms of co-ordination;
- establishing necessary national rules and regulations for anti-piracy activities;
- establishing a regional training centre in Djibouti under Resolution 3 of the Report of the Djibouti Meeting;
- developing practical guidance to implement the ship rider concept; and
- providing a regional system for monitoring the maritime situation using modern technology.

He noted that extra care had been taken to ensure that the activities financed by the IMO Djibouti Code Trust Fund would not overlap with those of the CGPCS International Trust Fund and, in this context, the IMO Secretariat would participate in the implementation Board of the International Trust Fund to ensure co-operation and non-duplication with IMO activities.

7.6 The Committee noted the information provided by the Secretariat, including that provided by the Director, MSD, and commended the work done by IMO, the CGPCS and other organizations, on the prevention and punishment of acts of piracy. It expressed satisfaction at the growing number of participants in the Djibouti Code. Several references were made with respect to the process of elaboration of new anti-piracy legislation, with the object of ensuring an effective application of the principle of extra-territoriality.

7.7 One delegation indicated that, in accordance with the Best Management Practices adopted by IMO, its Government reserves to public authorities the right to use force and firearms for the suppression of piracy.

7.8 The following comments were also made:

- piracy should be considered a high priority issue and the Committee should remain seized of it;
- many issues needed to be further explored, including national and regional prosecution mechanisms, including the establishment of regional courts. The establishment of an international tribunal did not, however, seem to be a viable alternative;
- in the case of piracy in waters off the coast of Somalia, it should not be forgotten that the crisis had been provoked in the first place more by the unstable political situation on land than by the absence of viable legal mechanisms to fight piracy;
- article 105 of UNCLOS provides that any States may seize a pirate ship and decide upon the penalties to be imposed. If the seizing ship decides not to do so, it could waive this right in favour of another State in accordance with the obligation to co-operate imposed by article 100. It would be better to qualify such a jurisdiction as quasi-universal;

- IMO's work should be carefully co-ordinated with that of UNODC in a spirit of mutual co-operation, particularly in connection with the establishment of an appropriate legal framework;
- Working Group 2 was not empowered to compel any particular action, but played an important role in ensuring that all affected States have the necessary tools to bring pirates to justice. The Group was at present addressing many subjects crucial to international co-operation in combating piracy, such as elaboration of national criminal law, establishment of jurisdiction, ship rider agreements and international mechanisms for prosecuting pirates;
- the efforts undertaken by IMO and UNODC with regard to the compilation and analysis of national legislation should provide the basis for the preparation of model law or guidelines; and
- States which have not done so, should ratify, or accede to the SUA Convention in order to strengthen their anti-piracy legislation.

7.9 The observer delegation of the International Transport Workers' Federation (ITF) expressed frustration at the fact that more than 10 years after the initiation of discussions on piracy in the Malacca Strait, on the whole problems still persisted. In relation to crews taken as hostages, support to families of hostages, conditions of release and post-hostage period, the delegation pleaded for a mandatory solution to ensure that seafarers are provided with the support needed in such situations.

7.10 The observer delegation of the Comité Maritime International (CMI) reminded the Committee that the CMI had previously submitted, for its consideration, model law and guidelines based on responses to questionnaires sent by 54 maritime law associations, which were available on the CMI website. This data indicated that few countries have a specific law of piracy, which was sometimes treated as a part of national criminal law without extra-territorial reach. The delegation suggested that model law could be based on the CMI work and indicated the CMI's readiness to co-operate with this exercise.

7.11 The Secretary-General thanked those States providing naval ships to the anti-piracy effort off the coast of Somalia and highlighted the importance of the agreements concluded by the Government of Kenya with the United States, the United Kingdom and the European Union to ensure arrest and prosecution of pirates. He also thanked those States participating in the Djibouti meeting for their work in adopting the Djibouti Code and its subsequent implementation, as well as the donors that had provided significant resources to help capacity-building pursuant to the Code.

He requested delegations of States Members of the UN Security Council to seek support for the extension of the mandate to enter Somali territorial waters in resolution 1851, due to expire in December.

He also looked forward to a high-level participation of Member States at the ceremony due to take place in the margins of the forthcoming session of the Assembly to pay tribute to the naval forces participating in anti-piracy effort off the coast of Somalia. He emphasized the need to address the problems faced by seafarers due to incidents of piracy, as an issue of particular importance, against the background of next year's World Maritime Day theme, namely, "2010: Year of the Seafarer".