

Circular letter No.3180

ANNEX



E

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

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.

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

- (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.

12

(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

- (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



E

(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 aircraft² 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" or that eaship os

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

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.

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

- (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 group¹, either by criminalizing the agreement with one or more other persons to commit a serious offence² 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 5.1(b)e12(5 Tw[Organi1 th.00set 02 il .itio.001)-8.4dt)-9.i5(Aror in)-5gfit anhe ime

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,

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 something¹¹ 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

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

(fore perhas been overy guidanc (to) n-defn. 2087 Title 1 on the sub and magis trial eleven, to tt

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.

¹⁸ Organized Crime Convention, Article 12.

¹⁹ The Organized Crime Convention applies to all transnational serious crimes committed by organized

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.

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".

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

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.



E

LEGAL COMMITTEE
98th session
Agenda item 8

LEG 98/8/4
25 February 2011
Original: ENGLISH

PIRACY

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

Submitted by Ukraine

SUMMARY

<i>Executive summary:</i>	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
<i>Strategic direction:</i>	6.2
<i>High-level action:</i>	6.2.1
<i>Planned output:</i>	6.2.1.3, 6.2.1.4, 6.2.2.3, 6.2.2.4, 6.2.2.5
<i>Action to be taken:</i>	Paragraph 8
<i>Related documents:</i>	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. Planned

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

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.
