PIRACY


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 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" for suspecting that a ship is engaged in piracy⁴, 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).

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.”

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.

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

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, 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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11 See footnote 10 above.
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.