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## The necessity to take additional international legal steps to deal with sea piracy

### Report<sup>1</sup>

Committee on Legal Affairs and Human Rights

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### Summary

Modern-day piracy, especially off the coast of Somalia, has become endemic: heavily-armed gangs in fast boats are ranging further and further offshore in search of tankers and other large ships, kidnapping the crews and freeing them only when large ransoms are paid.

This report by the Committee on Legal Affairs and Human Rights looks at this new threat from a legal point of view, while the Political Affairs Committee has prepared a report on the political aspects of the issue. Any Council of Europe member states combating these pirates are bound by the European Convention on Human Rights and any bilateral agreements on how to treat them – for example with Kenya and the Seychelles – should comply with international human rights standards.

In the meantime, the Committee of Ministers should conduct a study of member states' practice in dealing with pirates – including any national laws that apply – and prepare a code of conduct on how they should be treated during any action on the high seas, capture, transfer or trial. It could also look at whether international laws need to be updated to meet the needs of police operations on the high seas. However if prosecutions are necessary, they should be handled by states alone. The United Nations, the African Union, NATO and the European Union should work together to develop a common strategy for combating piracy, but it must be one that is fully in line with international law.

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1. Reference to committee: [Doc 11947](#), Reference 3585 of 26 June 2009



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## A. Draft recommendation

1. The Parliamentary Assembly refers to its Resolution ... (2010) on piracy – a crime and a challenge for democracies, in which it stresses that no legal response to the phenomenon of piracy is possible unless it is supported by a firm political commitment to do so. Acts of piracy, especially those off the coast of Somalia, have become endemic and combating this phenomenon necessitates a concerted effort in strict conformity with international legal standards.
2. The Assembly urges Council of Europe member states to ensure that all agreements on the treatment of suspected pirates, their transfer and trial, including those concluded by the European Union and certain Council of Europe member states with Kenya and the Seychelles, comply with international human rights standards. It recalls, in this connection, that Council of Europe member states involved in anti-piracy action off the coast of Somalia are bound by the provisions of the European Convention on Human Rights (ETS No. 005) and other relevant international instruments.
3. The Assembly recommends that the Committee of Ministers, with the help of a newly mandated expert group or through an already existing mechanism:
  - 3.1. conduct an in-depth study on member states' practice in dealing with suspected pirates and the state of national criminal law concerning the repression and prosecution of acts of piracy;
  - 3.2. prepare, according to existing international guidelines, a code of conduct on how to deal with suspected pirates in full compliance with international human rights standards in order to ensure the harmonisation of national criminal legislation on the subject of combating sea piracy;
  - 3.3. promote the conclusion of international agreements clearly specifying state responsibility for the prosecution of pirates and the elaboration of common procedures to be followed for this purpose;
  - 3.4. seek appropriate ways in which the existing international legal framework can be adapted to face current needs of policing at sea;
4. The Assembly further recommends that the Committee of Ministers enhance co-operation in combating sea piracy with other international organisations, including the United Nations, the African Union, NATO and the European Union, with a view to eradicating this phenomenon off the Somali coast, while ensuring full observance of the requirements stemming from the European Convention on Human Rights and other pertinent international legal instruments.

## B. Explanatory memorandum by Mr Holovaty, rapporteur

### 1. Introduction

#### 1.1. My mandate

1. The present report stems from a motion for a resolution on “the necessity to take additional international legal steps to deal with sea piracy” (Doc. 11947), tabled by Mr Konstantin Kosachev (Russian Federation, EDG) and other members of the Parliamentary Assembly. On 11 September 2009, the Committee on Legal Affairs and Human Rights appointed me as rapporteur.

2. In the framework of this mandate, I have studied the possible legal avenues aimed at combating sea piracy off the Somali coast, bearing in mind the high number of incidents that have taken place in this region in the last few years. I will focus mainly on the issue of prosecuting persons suspected of piracy

3. Nevertheless, in this context, I should also specify that I will not deal extensively with issues already covered by another report prepared by the Political Affairs Committee, namely on “Piracy – a crime and a challenge for democracies” (Rapporteur: Mrs Birgen Keleş, Turkey, SOC) (Doc. 12193).

4. Consequently, my report focuses on the current legal provisions on piracy and the proposals to modify them and enhance co-operation at the European level to combat this phenomenon more effectively. The broader aspects of sea piracy in this region, including its roots, the political situation in Somalia and the neighbouring states and the anti-piracy actions carried out by international and European organisations, will therefore not be dealt with (see Mrs Keleş’s mandate).

#### 1.2. Aim of this report

5. In 2009, the Piracy Reporting Centre of the International Maritime Bureau of the International Chamber of Commerce reported a total of 406 cases of piracy and armed robbery. 2009 is also the third successive year that the number of reported incidents has increased after 239, 263 and 293 incidents were reported in 2006, 2007 and 2008 respectively.<sup>2</sup>

6. According to the International Maritime Bureau, the total number of incidents attributed to the Somali pirates in 2009 stands at 217, with 47 vessels hijacked and 867 crewmembers taken hostage. Somalia accounts for more than half of the 2009 figures, with the attacks continuing to remain opportunistic in nature.<sup>3</sup>

7. In comparison with 2008, the number of incidents in 2009 has almost doubled: in 2008, Somali pirates attacked 111 vessels. Nevertheless, the number of successful hijackings was proportionately less (42), which could be attributed to a large extent to the increased presence and coordination of the international navies.<sup>4</sup> However, 2009 has seen a significant shift in the geographical location of attacks off Somalia. While the 2008 attacks predominantly took place in the Gulf of Aden, in 2009 more vessels were targeted along the east coast of Somalia. Since October 2009, increased activity has been observed in the Indian Ocean.<sup>5</sup>

8. Despite the active political efforts by the international community and the presence of naval forces of several states, including some European states, off the coast of Somalia, acts of piracy and armed robbery in this region continue to pose a serious threat to seafarers and passengers. The safety of shipping is put in jeopardy and this leads to substantial economic losses for many states. According to experts, total damage caused by piracy amounts to billions of dollars, including expenses for strengthening protection of ships, huge growth of expenses for insurance of ships and cargoes as well as overseas transportation of cargoes by longer shipping routes. Annually, about 20 000 cargo ships use the seaways between Europe, Asia and Africa, including through the Gulf of Aden, carrying almost 30 % of Europe’s oil and gas needs.

9. In 2009, Somali pirates managed to obtain around 100 million US dollars in ransom payments.<sup>6</sup> The average ransom paid by ship owners rose from 1 million to 2 millions US dollars.<sup>7</sup>

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2. [www.icc-ccs.org/index.php?option=com\\_content&view=article&id=385:2009-worldwide-piracy-figures-surpass-400&catid=60:news&Itemid=51](http://www.icc-ccs.org/index.php?option=com_content&view=article&id=385:2009-worldwide-piracy-figures-surpass-400&catid=60:news&Itemid=51)

3. See above.

4. Since August 2008, warships have been sent to the Gulf of Aden to protect shipping. There are now on average over 20 warships in the region at any time. D. Guilfoyle, *Counter-piracy law enforcement and human rights*, ‘International and Comparative Law Quarterly’, January 2010, vol. 59, part 1, p. 141.

5. See footnote 1.

10. These payments are *inter alia* aimed at purchasing arms and updating means of hijacking merchant ships. Experts do not exclude that part of the above payments is used to support terrorism and extremism. Pirate attacks pose a special threat to deliveries of international humanitarian aid to the countries of Eastern Africa, including Somalia. High probability of oil tankers' explosions during the pirates' attacks poses a serious ecological threat to the region, especially in cases when ships carry dangerous chemical and radioactive materials.

11. The currently binding instruments of international law, such as the United Nations Convention on the Law of the Sea of 1982<sup>8</sup> (hereinafter "UNCLOS"), contain a legal basis for international co-operation aimed at combating piracy off the Somali coast. However, the states involved in active operations against piracy, when calling the arrested people to account, have to face a certain number of legal, administrative and technical problems that sometimes lead to the impossibility of criminal prosecution of suspected pirates.

12. Several international organisations,<sup>9</sup> including the United Nations,<sup>10</sup> NATO<sup>11</sup> and the European Union,<sup>12</sup> have already taken steps to deal with piracy off the Somali coast. However, these are mainly military deterrence measures and specific action aimed at securing the transportation of food aid for Eastern Africa.

13. Considering the extent of the problem, the Council of Europe, and in particular its Parliamentary Assembly, may also play a role in this area. Thus, it is crucial for the Assembly to reflect on the legal avenues to deal with sea piracy, including effective prosecution of alleged pirates. The Assembly should consider, first of all, whether it would be useful to establish a special mechanism, international or with international participation, to prosecute persons suspected of piracy. In this context, special attention should be given to the pros and cons of setting up a special international tribunal.<sup>13</sup> Since this idea does not seem to be widely accepted,<sup>14</sup> alternative avenues should also be considered.

14. The Assembly may play an important role in promoting European and international co-operation in the area of combating sea piracy and harmonising national legislation as far as provisions on prosecuting pirates are concerned.

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6. If unpublicised pay-offs are included, some by Spain's government. *Somalia's pirates: A long war of the waters*, "The Economist", 9-15 January 2010, p. 36.

7. See above.

8. For the text of UNCLOS see [www.un.org/Depts/los/convention\\_agreements/texts/unclos/closindx.htm](http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm).

9. For more information, see, for instance, the report of 2 December 2009 of the European Security and Defence Assembly, Assembly of Western European Union, *European Maritime Surveillance*, Document A/2051, available at: [www.assembly-weu.org/en/documents/sessions\\_ordinaires/rpt/2009/2051.php](http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2009/2051.php).

10. In 2008, the United Nations Security Council adopted several resolutions concerning piracy:

1814 concerning the provision of escorts for the World Food Programme vessels;

1816 giving warships the right of hot pursuit of pirates into Somali territorial waters;

1838 on the creation of a Maritime Security Patrol Area (MSPA) in the Gulf of Aden, leading to the establishment of an International Recommended Transit Corridor (IRTC);

1846, extending [Resolution 1816](#) for a further 12 months, enabling the implementation of Operation Atalanta.

In addition, in January 2009, a contact group on piracy in Somalia was set up at the United Nations headquarters.

11. Since 2008, NATO has been active in this theatre, with a number of successive operations. The two standing maritime groups (SNMG 1 and 2) have been made available for specific periods in order to participate in the surveillance of Somali waters and escort ships of the World Food Programme. Since August 2009, Operation Ocean Shield has included action to assist the states of the region in developing their own counter-piracy capabilities. See above, Document A/2051, paragraphs 90-91.

12. In 2008, the European Union set up a coordination cell in Brussels for the fight against piracy off the Somali coast (EU NAVCO), aimed at coordinating the resources made available by the member states for the escort of vulnerable ships. In November 2008, EU NAVCO's activities were incorporated into an operation called EU NAVFOR Somalia-Operation Atalanta. Moreover, the European Commission and the Council adopted a number of comprehensive measures covering several aspects, such as assistance to Somalia, improving the legal and judicial framework and regional co-operation (see the Joint Somalia Policy Paper, July 2009).

13. Such a proposal has been made by the Dutch government, supported by Russia and Germany. The international tribunal could then be established following a United Nations Security Council resolution; B. van Ginkel, *Editorial: Pioneering for Piracy Solutions: An international tribunal is no panacea!* 'Newsletter. School of Human Rights Research', vol. 13, issue 3, September 2009, p. 1. This idea was supported amongst others by the Prime Minister of the Russian Federation, Dmitri Medvedev, <http://english.ruvr.ru/2009/11/20/2365401.html>.

14. See also, for instance: B. van Ginkel, *op.cit.*, p. 1; D. Guilfoyle, *op. cit.*, pp. 168-169.

15. The problems concerning the law relating to piracy fall into five main categories: i) problems arising from the current legal provisions on piracy; ii) problems arising from criminal law issues, iii) problems arising from civil law issues; iv) problems arising from international law issues; v) problems concerning the relationship between anti-piracy action and action against other crimes at sea. This report will mainly focus on the legal problems arising from issues of international and criminal law.

16. In any event, it should be pointed out that any solution to prosecute persons suspected of piracy more effectively should also ensure that their fundamental rights, and in particular the right to a fair trial and the prohibition of torture and ill-treatment, are respected. In the view of many experts, the agreements concluded on the transfer of captured pirates between Kenya<sup>15</sup> and the Seychelles<sup>16</sup> and European Union countries<sup>17</sup> raise doubts in this respect.<sup>18</sup>

17. On 16 November 2009, in the framework of the preparation of this report, I took part in the hearing on "Piracy – a crime and a challenge for democracies" organised by the Political Affairs Committee in Brussels. Several experts (including those representing NATO, the European Union and the International Maritime Bureau) provided valuable information on the current policies to combat sea piracy and on the scale of this phenomenon.<sup>19</sup>

## 2. Legal framework on combating sea piracy

### 2.1. Provisions of the United Nation Convention on the Law of the Sea (UNCLOS)

18. The legal framework for action against piracy has remained essentially unchanged since the eighteenth century. It is no longer fully appropriate to satisfy the practical needs of policing at sea.

19. The provisions on piracy set out in Part VII of the 1982 United Nations Convention on the Law of the Sea bind the states parties and are generally considered to reflect the rules of customary international law which bind all states.

20. According to Article 101 of UNCLOS, piracy includes:

- 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:
  - b. 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;
- c. any act of voluntary participation in the operation of a pirate ship or aircraft;
- d. any act of inciting or facilitating (a) or (b).<sup>20</sup>

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15. Exchange of Letters between the European Union and the Government of Kenya on the conditions and modalities for the transfer of persons suspected of having committed acts of piracy and detained by the European Union-led naval force (EUNAVFOR), and seized property in the possession of EUNAVFOR, from EUNAVFOR to Kenya and for their treatment after such transfer; available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:079:0049:0059:EN:PDF>.

16. Exchange of Letters between the European Union and the Republic of Seychelles on the conditions and modalities for the transfer of suspected pirates and armed robbery from EUNAVFOR to the Republic of Seychelles and for their treatment after such transfer; available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:315:0037:0043:EN:PDF>.

17. Such agreements have been also concluded with Kenya by certain states, including Denmark, the United Kingdom and the United States; D. Guilfoyle, *op. cit.*, p. 151.

18. B. van Ginkel, *op.cit.* p. 1.

19. I also wish to express my appreciation for the help obtained from Professor Vaughan Lowe QC, Chichele Professor of Public International Law, Oxford University, and Commander Andrew Murdoch, Director Naval Legal Services-International Law, the UK Royal Navy. A background paper prepared by them served as the principal source of this explanatory memorandum.

20. The significance of the inclusion of 'participation' and 'incitement or facilitation' of piracy has received little attention. The focus on piratical attacks themselves, while entirely reasonable, has distracted attention away from the criminal matrix in which piracy takes place.

21. Thus a 'pirate ship' is a private ship<sup>21</sup> which is intended by those who are in dominant control of it to be used for the purpose of committing an act of piracy, or which has been used to commit such an act and is still under pirate control.<sup>22</sup> Piracy must be committed from one vessel against another, and since pirates act *for private ends*,<sup>23</sup> politically-motivated acts cannot be piracy.<sup>24</sup>

22. A distinction is made between acts of "piracy" and "armed robbery at sea". An act of piracy may be committed on the high seas (Article 101 a)(i)) or in a place outside the jurisdiction of any state (Article 101 a)(ii)). The latter possibility remains rather theoretical.<sup>25</sup> The high seas, for the purposes of the rules on piracy, are those waters that lie beyond the seaward limit of the territorial sea,<sup>26</sup> which may extend out to 12 nautical miles from the coastal state.<sup>27</sup> The notion of "high seas" in the meaning of this provision includes also that of the exclusive economic zone.<sup>28</sup> Acts within the territorial sea which would amount to piracy if undertaken on the high seas are regarded as 'armed robbery at sea' and are subject to the primary jurisdiction of the coastal state in whose waters the acts take place.<sup>29</sup>

23. As an exception to the basic principle that ships on the high seas are subject to the exclusive jurisdiction of the state whose flag they fly,<sup>30</sup> warships and other authorised ships on government service of any State<sup>31</sup> may, on the high seas, visit any vessel that they have reasonable ground for suspecting is engaged in piracy<sup>32</sup> and they may seize pirate ships (and pirate aircraft).<sup>33</sup>

24. According to Article 100, all UNCLOS States Parties<sup>34</sup> are obliged to co-operate to the fullest possible extent in the repression of piracy on the high seas.

## 2.2. Other international legal instruments

25. Acts amounting to piracy may, depending on the specific circumstances, also amount to offences under other legal instruments, such as the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (hereinafter "SUA Convention")<sup>35</sup> and the 1979 Convention Against the Taking of Hostages.<sup>36</sup>

26. The potential relevance of the SUA Convention has been reiterated in successive United Nations Security Council Resolutions concerning piracy off Somalia.<sup>37</sup> This was due to the fact that this Convention imposes obligations on the states parties to create criminal offences, establish jurisdiction, and accept delivery of persons responsible for (or suspected of) seizing or exercising control over a ship by the threat or use of force or any other form of intimidation. While the widely ratified SUA Convention does not criminalise piracy as

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21. Article 101(a).

22. Article 103.

23. There is no clear basis for action against a foreign government ship which appears to be being used for piratical purposes; and there is some uncertainty as to what constitutes 'private ends' in contexts such as a civil war.

24. D. Guilfoyle, *op. cit.*, p. 143.

25. It seems that this term refers mainly *terra nullius*, that is to say territories which are not subject to the jurisdiction of any state. However, according to certain authors, the said provision may be also applicable to territories of "failed States", where no jurisdiction is being exercised. See, for instance, S. Karagiannis, *La sécurité maritime et l'Union européenne. L'exemple de la lutte contre la piraterie au large des côtes somaliennes*, to be published, probably in April 2010, in J. Auvret-Finck, *L'Union européenne et la lutte contre le terrorisme : état des lieux et perspectives*, Bruxelles Larcier.

26. Articles 86 and 58. The 'territorial sea' is sometimes called 'territorial waters'. The terms are interchangeable.

27. Article 3. A small number of states claim territorial seas of different (and almost always narrower) breadths.

28. D. Guilfoyle, *op. cit.*, p. 144.

29. The United Nations Security Council has, through successive Resolutions (1816(2008) and 1846(2008)) provided, with the consent of Somalia, an *ad hoc* legal framework which allows states co-operating with Somalia's Transitional Federal Government ('TFG') to tackle armed robbery in the territorial sea of Somalia in the same manner as is permitted on the high seas.

30. Article 92.

31. Article 107.

32. Article 110.

33. Article 105. However, the issue of seizing pirate aircraft remains largely theoretical.

34. As of 1 January 2010, 160 States are Parties to this Convention. The United States of America and a few member states of the Council of Europe (Andorra, Azerbaijan, Liechtenstein, San Marino and Turkey) have not acceded to it, see: [www.un.org/Depts/los/reference\\_files/status2010f.pdf](http://www.un.org/Depts/los/reference_files/status2010f.pdf).

35. <http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf>.

36. <http://treaties.un.org/doc/db/Terrorism/english-18-5.pdf>.

37. See [http://nti.org/e\\_research/official\\_docs/inventory/pdfs/aptmaritime.pdf](http://nti.org/e_research/official_docs/inventory/pdfs/aptmaritime.pdf). See also the 2005 SUA Protocol: [www.unhcr.org/refworld/pdfid/49f58c8a2.pdf](http://www.unhcr.org/refworld/pdfid/49f58c8a2.pdf).

such, the SUA Convention offences do overlap with conduct that would also amount to piracy. For instance, much of the criminal activity off Somalia consists of violent attacks from one vessel against another; and such acts can constitute both SUA Convention offences and piracy.

27. The SUA Convention, however, does not provide the same enforcement rights, such as the right to board suspect vessels, that are available under UNCLOS for tackling piracy. The lack of enforcement powers undermines the practical utility of the SUA Convention and partly explains why states have relied on the UNCLOS piracy framework.<sup>38</sup>

### 3. Arrest/transfer and prosecution of pirates

#### 3.1. Categorisation of pirates

28. Piracy is a crime of universal jurisdiction and pirates are criminals. Those suspected of committing acts of piracy should be categorised as 'suspected criminals'.

29. Pirates are not *per se* 'individuals taking a direct part in hostilities' in an armed conflict,<sup>39</sup> who could for that reason be targeted with lethal force. Although United Nations Security Council Resolution (hereinafter 'UNSCR') 1851,<sup>40</sup> authorising action against pirates in Somalia, refers to the obligation to take only such measures as are consistent with International Humanitarian Law (hereinafter 'IHL'<sup>41</sup>), that does not imply that pirates are as a matter of law combatants and that action against them falls within the framework of IHL.<sup>42</sup>

30. Pirates are not *per se* terrorists.<sup>43</sup> They are not terrorists if their piratical acts are committed without a 'terrorist' purpose; and presently there is no evidence that such a purpose is operative among pirates. However, acts amounting to piracy *may* fall into the scope of application of the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and the 1979 Convention Against the Taking of Hostages.<sup>44</sup> While these Conventions may have relevance in terms of the options available to prosecutors, UNCLOS is regarded as the legal framework for combating piracy.<sup>45</sup>

#### 3.2. Rules and practice

31. There is no international police force for the high seas, nor any international jurisdiction or criminal procedure to prosecute pirates. The legal framework for carrying out police activities at sea is defined by each state at the national level.<sup>46</sup> A police action at sea aiming at capturing pirates (for instance, visiting a ship, opening fire on a pirate vessel, retaking a hijacked ship by force, detention on board) is therefore part of a

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38. Furthermore, despite the obligation to enact SUA offences within domestic law, many States have still not done so; OP 14 of UNSC Resolution 1897 (30 November 2009) urges States Parties to the SUA Convention to fully implement their relevant obligations under the Convention.

39. Neither the Geneva Conventions nor Additional Protocol I contain any definition of the expression 'armed conflict', but the following guidance has been given: (a) 'any difference arising between States and leading to the intervention of members of the armed forces is an armed conflict (Pictet, *Commentary*, vol III, 23), (b) 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups within a State' (*Prosecutor v Tadic* (1996) 105 ILR 419, 488).

40. UNSC Resolution 1851 (2008) OP 6.

41. Also known as the 'Law of War' or the 'Law of Armed Conflict'.

42. UNSC Resolution 1851 refers only to *applicable* IHL. Its significance is that *if* an international or a non-international armed conflict exists in which the pirates and the states involved in the counter-piracy operations are participating, so that IHL does become applicable, pirates will be entitled (along with all other persons) to the protections afforded by IHL and by international human rights law. If one applies the generally accepted legal threshold for when an armed conflict exists, it is apparent that the counter-piracy operations off Somalia do not amount to an 'armed conflict'.

43. If pirates are categorised as terrorists, as defined by national terrorism legislation, then facilitating or making ransom payments to secure the release of the ship or its crew or passengers or cargo may well amount to a criminal offence under terrorism financing legislation.

44. Offences under these Conventions (and other legal instruments) are often treated as terrorist offences, even though a terrorist motive does not form an express element of the crimes established by these Treaties; See, for example, the 2005 Council of Europe Convention on the Prevention of Terrorism, Article 1(1).

45. Preamble paragraph in UNSC Resolutions 1816(2008), 1838(2008), 1846(2008) and 1851(2008).

46. Report of 4 June 2009 of the European Security and Defence Assembly, Assembly of Western European Union, *The role of the European Union in combating piracy*, Document A/2037, paragraph 52. This document is available at: [www.assembly-weu.org/en/documents/sessions\\_ordinaires/rpt/2009/2037.php?](http://www.assembly-weu.org/en/documents/sessions_ordinaires/rpt/2009/2037.php?)

legal procedure and should be carried out under the supervision of a judicial authority. Thus, it involves the implementation of the domestic criminal law and procedure of each intervening state and any international interference at this level could affect the legality of such action.<sup>47</sup>

32. According to Article 105 of UNCLOS, states may exercise their right of repression against piracy and in so doing are entitled to seize the ship and to arrest the pirates and bring them to justice. 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 or property, subject to the rights of third parties acting in good faith.<sup>48</sup>

33. As a matter of international law there may be several states that have jurisdiction to prosecute pirates: the flag state of the pirate ship or of the seizing ship; the national state of the pirates themselves; perhaps the national state of the victims of the piratical acts, according to the doctrine of 'passive personality' jurisdiction; and, if piracy is regarded as a crime subject to universal jurisdiction,<sup>49</sup> any other state within the jurisdiction of whose courts the pirates appear or are brought. International law does not establish any order of priority between the claims (or the obligations) of these states to prosecute. In practice, the seizing state (Article 105 of UNCLOS) is allowed to prosecute if it so wishes. According to Article 100 of UNCLOS, states still have 'a certain latitude' to co-operate in suppressing piracy by means other than prosecution<sup>50</sup>. Burden-sharing is thus a political, not a legal issue.<sup>51</sup>

34. UNCLOS provisions do not permit the seizure of a pirate ship and arrest of the pirates in the territorial sea of a state other than that of the flag state of the seizing ship. Pirate ships may thus obtain immunity from arrest by fleeing into a nearby territorial sea. Piratical attacks in territorial waters have similar immunity from international action if the coastal state is unable or unwilling to police its waters and does not consent to international action in its waters.

35. A gap between Articles 100 and 105 of UNCLOS is that no express rule governs the transfer of suspected pirates from a seizing state to a nearby port state. Nonetheless, any state could accept such a transfer and assert universal jurisdiction over such received suspects.<sup>52</sup> While a seizing state cannot exercise its own judicial powers in foreign territory, nothing precludes a 'receiving' state exercising its independent jurisdiction.<sup>53</sup>

36. Prosecution entails substantial burdens. The prosecuting state needs, among other things, to: accommodate the accused; collate evidence and instruct prosecuting (and perhaps defence) counsel; perhaps secure translation facilities; perhaps arrange for the transportation, attendance, and accommodation of witnesses; perhaps accommodate convicted persons during their period of imprisonment; and perhaps repatriate prisoners during or at the end of their period of imprisonment. The scale of this burden should not be underestimated nor should the willingness of states to accept that burden be overestimated.

37. In most cases it is likely to be desirable for prosecutions to be mounted in a coastal state with an efficient system of criminal justice that meets international standards, close to the bases from which the alleged pirates operate.

- a. 'Efficient' because the system plainly needs to be able to cope with the cases and because delays entail costs, particularly if the attendance of witnesses (such as arresting officers) is necessary. Similarly, the ability of the accused, of witnesses and of prosecuting authorities to understand one another's language is a significant aid to the efficient administration of justice.
- b. International standards must be met both as a matter of elementary decency in the framing of policy and because arresting officers may be bound by national or international legal instruments (such as the European Convention on Human Rights) not to hand over prisoners in circumstances where they may face inhuman treatment.

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47. *Ibid*, paragraphs 54-55.

48. Article 105, second sentence.

49. Which is not what UNCLOS Article 105 says: it speaks only of the right of the seizing State to prosecute. But see L. Reydams, *Universal Jurisdiction* (2003), pp. 57-58.

50. D. Guilfoyle, *op. cit.*, p. 144.

51. *Ibid*, p. 145.

52. *Ibid*, p. 144.

53. *Ibid*, p. 145.

- c. Closeness to the alleged pirate bases is important because on-shore accomplices and witnesses, and additional evidence (which may be sought after the arrest but before the trial), are likely to be found near the bases. It is important also to recognise that the families of accused persons and of prisoners may need to visit and support them: unnecessary disruption of the lives of innocent people dependent upon alleged or convicted pirates should be avoided.

### **3.3. Implications for human rights**

38. If a seizing state decides to try suspect pirates before its own court<sup>54</sup> or an equally competent jurisdiction<sup>55</sup>, no special difficulty arises. However, in case of captured suspect pirates in the Gulf of Aden, their detention, transfer and prosecution in a regional state (such as Kenya or the Seychelles) all raise human rights law questions.<sup>56</sup>

39. In dealing with suspected pirates, states are always bound by obligations arising under applicable treaties on human rights' protection, such as the United Nations Convention against Torture (hereinafter "CAT"),<sup>57</sup> the 1951 Geneva Refugee Convention,<sup>58</sup> the International Covenant on Civil and Political Rights (hereinafter "ICCPR")<sup>59</sup> or the European Convention on Human Rights (hereinafter "ECHR").<sup>60</sup>

40. The Council of Europe member states must take into account the requirements stemming from the European Convention on Human Rights and in particular those for fair trial, the prohibition of torture and inhumane or degrading treatment and punishment and the non-application of the death penalty. As a result they cannot hand over captured pirates for trial to any country that does not meet the ECHR criteria.<sup>61</sup>

41. Human rights law imposes constraints upon the authority of arresting officers: the officer is obliged to treat all persons, in all circumstances, in accordance with applicable minimum legal standards.

42. The transfer of suspected pirates to states in the region raises a number of human rights issues: the legal authority to detain suspect pirates at sea and the need to bring them promptly before a judicial authority; *non-refoulement* and their transfer to states in the region for prosecution and the application of fair-trial rights in such transfers and, in the ECHR context, the right to an effective remedy to challenge such a transfer.<sup>62</sup>

## **4. Possible solutions for dealing with sea piracy**

### **4.1. Establishing an international tribunal to deal with persons suspected of sea piracy**

43. It has been suggested that the setting up of an international court to try persons suspected of sea piracy off the Somalian coast would be the best solution to combat this phenomenon,<sup>63</sup> because of its extent and the deficiencies in the legal systems of states, including coastal states, in the region.

44. There exist, however, a number of counter-arguments to this proposal, namely that such an international court would neither be efficient nor practical and, most of all, would be costly to set up.

45. International criminal tribunals have been useful in circumstances where there are many factually complex and controversial cases arising out of a single episode or inter-connected facts and, because of acute political divisions and/or inadequate respect for the rule of law within a state, there is concern that national authorities and courts may not be effective and fair in the prosecution of those accused of serious

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54. For instance, as the United States and France have done.

55. For instance, Denmark sent suspects it captured after an attack on a Netherlands-Antilles registered vessel for trial in the Netherlands.

56. D. Guilfoyle, *op. cit.*, p. 152. For a more detailed analysis, see this article, *Ibid*, pp. 159-168.

57. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984; available at: [www.un.org/documents/ga/res/39/a39r046.htm](http://www.un.org/documents/ga/res/39/a39r046.htm).

58. Convention relating to the Status of Refugees, adopted in Geneva on 28 July 1951; available at: [www.unhcr.org/3b66c2aa10.html](http://www.unhcr.org/3b66c2aa10.html).

59. International Covenant on Civil and Political Rights, adopted on 16 December 1966, available at: [www.un.org/millennium/law/iv-4.htm](http://www.un.org/millennium/law/iv-4.htm).

60. The UNSC resolutions also require counter-piracy action to be taken consistently with "applicable" international human rights law or "in conformity with international law"; D. Guilfoyle, *op. cit.*, p. 151.

61. Report of 4 June 2009 of the European Security and Defence Assembly, Assembly of Western European Union, *The role of the European Union in combating piracy*, see above.

62. D. Guilfoyle, *op. cit.*, p. 159.

63. This idea was supported amongst others by the Prime Minister of the Russian Federation, Dmitri Medvedev, <http://english.ruvr.ru/2009/11/20/2365401.html>.

offences. That is not the case in relation to piracy. So far, no state has a powerful political constituency that supports pirates and seeks to impede their prosecution and punishment. There are states where the legal system suffers from some combination of under-resourcing, inefficiency and corruption. But the creation of an international court would do little or nothing to improve the national legal systems and is an inefficient way of dealing with their deficiencies.

46. The disadvantages of establishing an international court are many:

- a. *Delay.* It would require an international conference to create the Court, which would be certainly lengthy. It took a decade to adopt the Statute of the International Criminal Court (hereinafter "ICC"), and another four years for it to enter into force.
- b. *Cost.* The ICC budget for 2009 is €101,229,900. The two-year budget of the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY") for 2008-2009 was \$342 332 300. It is difficult to see how the creation of a new international court would be cost-effective.
- c. *Practicality.* An international court for piracy would have to make arrangements for the travel and accommodation of accused persons, witnesses and others. Interpretation into one or more official languages would be necessary. Evidence would have to be taken to the court and would have to be presented in conformity with the court's rules on evidence, which may differ significantly from the rules on evidence in the regions from which the accused are brought. Persons convicted would have to be imprisoned somewhere, in accordance with conditions concerning sentencing and imprisonment that are laid down by the court.
- d. *Misdirection of effort.* The primary aim must be to prevent piracy rather than to put alleged pirates on trial. An international court focuses on public trials rather than on local law-enforcement measures. Piratical acts at sea are only one element in the chain of criminality. Pirates operate from bases onshore. The proceeds of crime are handled onshore. Suspects, and those who aid or assist them, are likely to be found onshore. Strengthening the local onshore law-enforcement measures would be necessary even if trials were subsequently consigned to an international court.

#### **4.2. Establishing "hybrid" courts**

47. The disadvantages of establishing an international court might be reduced by creating a 'hybrid' or 'internationalised' court: that is to say, not a single international court sitting at its own seat, but special courts created within national legal systems, staffed by a mixture of national and international judges and which would apply a mixture of national and international rules.<sup>64</sup>

48. If, however, cases are effectively investigated and prosecuted, there seems no real advantage in creating a two-tier criminal law system, singling out piracy from among other crimes of violence and theft and putting it before a special court.

49. Therefore solutions other than establishing special courts should be considered. One should in particular look into other forms of interstate co-operation.

#### **4.3. Agreements on the prosecuting state**

50. Given the burdens upon the prosecuting state and the need for procedures for arrest to conform with the requirements of the prosecuting state's legal system, it is highly desirable that 'prosecuting states' and 'arresting states' enter into express agreements setting out their respective rights and responsibilities. Such agreements could be bilateral or regional but, given divergences in national criminal justice systems, it is unlikely that a global agreement would be an effective way of dealing with the matter. An express international agreement would not necessarily<sup>65</sup> preclude *ad hoc* agreements concerning the handling of particular cases.

51. Such agreements may well require consequential amendments in national law in order to give the national courts jurisdiction over suspected pirates arrested outside the jurisdiction of the courts by foreign law-enforcement officers.

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64. Such courts have been established in Sierra Leone and in Cambodia, for example: See [www.amnestyusa.org/international\\_justice/pdf/InternationalTribunalsfactsheet.pdf](http://www.amnestyusa.org/international_justice/pdf/InternationalTribunalsfactsheet.pdf).

65. The element of caution arises from the fact that some national courts might regard an arrest or prosecution as unlawful if it was based upon an *ad hoc* agreement to depart from the terms of an express international agreement setting out agreed procedures for arrest and prosecution, and did so in a manner that appeared to override rights of the accused person.

52. When several states indicate a willingness to prosecute, preference should be given to those that are party to an international agreement to that effect which is currently in force, because that agreement is likely to set out clear procedures to be followed and it is also likely that procedures for practical co-operation and assistance between the authorities of the various states will have been established.

53. Between states parties to such agreements, the state best meeting the criteria on bearing prosecution burden (such as accommodation of the accused, collating evidence, instructing prosecuting and defence counsel) should ordinarily be the prosecuting state (see paragraph 36 above).

54. The facilities on the arresting vessel are also a relevant factor, but it is one that is probably better addressed by the making of arrangements for the temporary detention and transmission of accused persons and of evidence, so that an arresting police vessel can, if necessary,<sup>66</sup> off-load those persons and return to law-enforcement duties. This is another matter best addressed through express international agreements.

55. An agreement between the arresting and prosecuting states offers as much of an assurance as can reasonably be expected that there will be no refusal to prosecute cases that fall within the agreement. Because that possibility cannot be entirely eliminated, it is important that the arresting state enact laws under which it could itself prosecute the suspected offenders.

56. If the receiving state is unwilling to enter into a legally-binding transfer agreement, it may be prepared to enter into a non-binding Memorandum of Understanding in similar terms.<sup>67</sup>

#### **4.4. Reinforcing international co-operation in the area of prosecuting persons suspected of sea piracy**

57. Piracy is inextricably intertwined with other crimes of violence, theft, fraud, and handling of stolen property. It may also be linked to other criminal activity such as illicit dealings in narcotics or weapons. Harmonisation of procedures and reinforcement of existing mechanisms for co-operation between police, prosecutors and courts offer the best and most efficient prospect for improving the record of prevention and prosecution of piracy.

58. In several areas reinforced co-operation between states would be advantageous in this respect. States could, for example, conclude agreements on:

- a. procedures to be followed on approaching, boarding and detaining foreign ships and those upon them;
- b. procedures for recording arrests and searches of ships in a manner acceptable as evidence in court;
- c. procedures for the transfer of suspects to custody in a suitable coastal state;
- d. procedures for the transfer of suspects for trial in a suitable state;
- e. procedures for dealing with the transfer / repatriation of victims of crime, including crews of attacked ships, and for dealing with matters such as asylum applications;
- f. arrangements for 'shipriders' (that is to say, law-enforcement officials of coastal states exercising domestic powers from foreign warships).<sup>68</sup>

59. There are already significant international initiatives which have generated co-operative procedures and considerable experience in dealing with the problems of anti-piracy action. The best examples are those of the International Contact Group on Piracy<sup>69</sup> and the United Nations Office on Drugs and Crime (hereinafter "UNODC") Counter-Piracy Programme.<sup>70</sup> For instance, a regional UNODC programme on piracy trials presently assists in 'training prosecutors, locating and producing witnesses, facilitating international legal co-operation..., finding defence lawyers for pirates and bringing prison conditions up to international standards'.<sup>71</sup>

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66. It may not be possible for the police vessel to accommodate the arrested persons for more than a short time.

67. A Memorandum of Understanding would have much the same effect as a binding agreement, but the consequences of its breach or termination would be different: see A. Aust, *Modern Treaty Law and Practice* (2<sup>nd</sup> ed., 2007), ch. 3.

68. Therefore, if the trial is to be conducted, for instance, in Kenya, it could simplify matters if a Kenyan official made arrests and gathered evidence.

69. [www.unodc.org/easternafrika/en/piracy/index.html?ref=menuaside](http://www.unodc.org/easternafrika/en/piracy/index.html?ref=menuaside); [www.state.gov/r/pa/prs/ps/2010/01/136263.htm](http://www.state.gov/r/pa/prs/ps/2010/01/136263.htm).

70. [www.unodc.org/documents/easternafrika/piracy/UNODC\\_Counter\\_Piracy\\_Programme.pdf](http://www.unodc.org/documents/easternafrika/piracy/UNODC_Counter_Piracy_Programme.pdf).

71. D. Guilfoyle, *op. cit.*, p. 159.

60. Similarly, the International Maritime Organisation has provided guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships;<sup>72</sup> and the shipping industry has agreed upon guidelines for “Industry Best Management Practices”<sup>73</sup> to assist companies and ships in avoiding piracy attacks, deterring attacks and delaying successful attacks in the Gulf of Aden and off the Coast of Somalia.

#### 4.5. Harmonisation of national legislation

##### 4.5.1. Definition of offences: piracy and armed robbery in the territorial sea of Somalia

61. Harmonisation of national criminal laws may also offer an efficient prospect for improving the record of prevention and prosecution of piracy.

62. In 2008, the United Nations Security Council noted that the lack of domestic legislation was a factor that has “hindered more robust international action against the pirates off the coast of Somalia and in some cases led to pirates being released without facing justice”.<sup>74</sup> In 2009, in its [Resolution 1897](#), the Security Council noted with concern that limited capacity and domestic legislation “to facilitate the custody and prosecution of suspected pirates after their capture” was a problem, which in some cases has “led to pirates being released without facing justice, regardless of whether there is sufficient evidence to support prosecution”.<sup>75</sup> In the same resolution the Security Council stressed the need for “states to criminalize piracy under their domestic law and to favourably consider the prosecution, in appropriate cases, of suspected pirates, consistent with applicable international law”.

63. The problems off Somalia have revealed a number of shortfalls in states’ domestic laws for dealing with piracy, among them:

- a. Piracy is not considered as an offence;
- b. Offences of piracy with requirements for a national nexus or with limited geographical scope;<sup>76</sup>
- c. Offences which only partially reflect the UNCLOS definition, for example by excluding criminal liability for inciting or of intentionally facilitating acts of piracy;
- d. Offences of piracy contained within pre-UNCLOS legislation. Such provisions may not be appropriate if the ingredients of the offence are not defined with sufficient clarity.

64. The question arises as to whether states are obliged to have offences of piracy in their national law. Article 100 obliges states only to “... co-operate to the fullest possible extent in the repression of piracy ...”.<sup>77</sup> While Article 100 could therefore be interpreted as requiring states to have adequate national law to prosecute piracy, there is, as the Security Council has noted, little state practice in support of such a conclusion. One option is for the Security Council to oblige states to enact domestic legislation in respect of piracy, as it has done in respect of terrorist activities; but failing this it seems unlikely that states are obliged to have or to create offences of piracy in their law.<sup>78</sup>

65. If states were to take the necessary steps to ensure that their domestic laws provide for the prosecution of piracy and the whole range of offences connected with piracy in the UNCLOS Article 101 definition, this would facilitate international co-operation by providing more prosecution options. Some states have already amended, or are in the process of amending, their criminal law in respect of piracy.<sup>79</sup>

72. MSC.1/Circ.1334 (23 June 2009), available at [www.imo.org/home.asp?topic\\_id=362](http://www.imo.org/home.asp?topic_id=362)

73. [www.intertanko.com/templates/Page.aspx?id=46772](http://www.intertanko.com/templates/Page.aspx?id=46772).

74. Preamble, UNSC [Resolution 1851](#) (16 December 2008).

75. Preamble, UNSC [Resolution 1897](#) (30 November 2009).

76. For example, the offence of piracy under Tanzanian law requires a nexus to Tanzania, in that the pirates must be Tanzanian or the vessel concerned must be registered in Tanzania (Article 66 of the Penal Code of 1981).

77. The International Law Commission, however, noted in its commentary on the draft of the equivalent provision in the 1958 High Seas Convention, that “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” [1956] II YbILC, 282; [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/8\\_1\\_8\\_2\\_1956.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf) (Article 38). This latitude might, for instance, permit a state to say that it can prosecute piracy under its laws on robbery, assault, etc.

78. Operative paragraph 14 of UNSC [Resolution 1897](#) (30 November 2009) urges states to fully implement their relevant obligations under UNCLOS. Operative paragraph 16 requests that all states contributing through the CGPCS to the fight against piracy off the coast of Somalia report on their efforts to establish jurisdiction and co-operation in the investigation and prosecution of piracy.

66. If states define the offence(s) of piracy consistently with UNCLOS, which confines piracy to the high seas, acts of armed robbery at sea within Somali territorial waters would not be covered. To prosecute such acts, states would have to extend their laws concerning piracy to cover, exceptionally, equivalent acts within the territorial waters of Somalia. It is believed that no state has yet done so. With a lack of an effective criminal justice system in Somalia, there is currently no viable option for the prosecution of acts of armed robbery at sea in Somali national waters, despite the enforcement powers that are provided to states under UNSC [Resolution 1846](#) (and successor [Resolution 1897](#)).

67. While the existence of offences of piracy will provide the opportunity to prosecute, a state will still not be obliged to prosecute. Decisions to prosecute are driven by policy; and unless policies change, there will in many cases remain a reluctance to prosecute an incident of piracy in the absence of a clear national nexus.

#### 4.5.2. Law enforcement legislation

68. To enable successful criminal prosecutions to take place, evidence must be collected, handled and exhibited, and suspects arrested and detained, in a manner that is acceptable to the rules and procedures of the criminal justice system that is undertaking the prosecution. Harmonisation of rules of evidence would improve co-operation between states and reduce the risk of evidence being inadmissible. Where this is not possible, those persons actually engaged in capturing pirates with a view to transferring them to a foreign criminal justice system for prosecution must be aware of, and be trained in complying with, the receiving state's procedures.<sup>80</sup>

69. If states intend to capture suspected pirates with a view to their prosecution, whether in the seizing state or in another state following a transfer, they must ensure that their officials have sufficient authority under their national law to do so.

70. Further, where suspects are detained, even with a view to transfer to another state for prosecution, human rights law may require national judicial oversight of the detention. Several states that are prepared to detain suspected pirates on their warships, and are subject to the ECHR, have introduced, or are in the process of introducing, judicial oversight mechanisms for the period suspects are held onboard in light of the European Court of Human Rights' judgment in the case of *Medvedyev v. France*.<sup>81</sup>

#### 4.5.3. Prohibition of ransom payments

71. It is also necessary to ensure that anti-piracy legislation works in the context of other national laws. For example, if pirates are classified by national law as terrorists it is likely that it will be unlawful to make ransom payments to them, because anti-terrorism legislation will usually prohibit the making or facilitation of payments to terrorists. Such laws may bind not only ship-owners and cargo-owners but also banks through whose facilities international payments are made. Making ransom payments to pirates illegal, and thereby disrupting pirates' revenue, may be<sup>82</sup> a desirable course of action.<sup>83</sup> If existing anti-terrorism legislation does not achieve such a prohibition, because pirates lack a 'terrorist purpose', new national legislation may be required to prohibit payments.

72. An attempt to prohibit ransom payments under national law will only be effective if introduced internationally. To ensure consistency between such laws it would be necessary to reach an international agreement on the precise scope and nature of such measures.

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79. In 2009, Kenya replaced its old law of piracy and incorporated the UNCLOS definition. Sections 369 and 371 of the Kenyan Merchant Shipping Act 2009 repealed Section 69 of the Kenyan Penal Code which read "Any person who, in territorial waters or upon the high seas, commits any act of piracy jure gentium is guilty of the offence of piracy." See [www.kenyalaw.org/Downloads/Acts/The\\_Merchant\\_Shipping\\_Act\\_2009.pdf](http://www.kenyalaw.org/Downloads/Acts/The_Merchant_Shipping_Act_2009.pdf); France, Belgium and Denmark are also revising their laws.

80. This is currently achieved through provision of evidence gathering guidelines agreed with the prosecuting authorities in the receiving state.

81. Such as France, Belgium, Italy and Spain (non-exhaustive). *Medvedyev and others v. France*, Application No. 3394/03, 10 July 2008,

<http://cmiskp.echr.coe.int/tkp197/view.asp?>

[item=1&portal=hbkm&action=html&highlight=medvedyev&sessionid=49773024&skin=hudoc-en](http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=medvedyev&sessionid=49773024&skin=hudoc-en).

82. Some people, particularly in the shipping industry, argue that it is not desirable to prohibit all payments of ransoms. A ransom may appear in some circumstances to be the quickest and safest way of resolving a particular incident of piracy.

83. Section 8.1.3, Piracy off the Somali Coast, Workshop commissioned by the Special Representative of the Secretary General of the United Nations to Somalia, Ambassador Ahmedou Ould-Abdallah, Nairobi, 10-21 November 2008, Final *Nairobi Report*, available at: [www.imcsnet.org/imcs/docs/somalia\\_piracy\\_intl\\_experts\\_report\\_consolidated.pdf](http://www.imcsnet.org/imcs/docs/somalia_piracy_intl_experts_report_consolidated.pdf).

73. If ransom payments are not prohibited, efforts could be made to make action against pirate assets more effective. While the difficulties of tracking the money are considerable, and national law would be required to achieve any freezing or seizure, there is already considerable international experience in dealing with the proceeds of crime.

#### **4.6. Monitoring human rights observance and reinforcing the judicial system of coastal states and states in the region**

74. As concerns the need to ensure the proper treatment of persons delivered to prosecuting states, there is no real alternative to the monitoring of the treatment of persons after they have been handed over. In practice this might be secured by, for example, an express agreement on consular access to the individual before, during, and after the trial. The essential point is that a state handing over an arrested person for trial or detention is not absolved of all responsibility for that person at the moment when he or she is handed over; and whatever the strict legal position in any given state it is not desirable that the continuing responsibility should be regarded as being discharged by merely obtaining written assurances from the receiving state that the person will be treated properly.

75. The observations above apply to cases where persons are transferred to Kenya, the Seychelles or to any other state. In addition, in the European Union Exchange of Letters with Kenya, specific provision is made for the European Union to be provided with information and records on persons transferred under the arrangement with Kenya, including their physical condition. Furthermore, representatives of the European Union and EUNAVFOR, as well as national and international humanitarian agencies, have access to transferred persons in custody.<sup>84</sup> The standards of treatment, prosecution and trial of transferred persons under the European Union Exchange of Letters are derived from the International Covenant on Civil and Political Rights.

76. The establishment of a sound judicial and penal system meeting modern standards is, however, much the most effective way of ensuring respect for human rights. The UNODC is channeling investment, mainly from states participating in counter-piracy operations, to improve the standards of prosecutions, court facilities and prison conditions in those states in the region that have been willing to prosecute pirates.<sup>85</sup>

### **5. Recommended developments in international law**

#### **5.1. Revision of UNCLOS provisions?**

77. There are constraints on action against pirates that arise from the wording of the UNCLOS provisions. For example, piracy is defined so that (i) it must arise from acts on the high seas,<sup>86</sup> and not within the territorial sea (generally 12 nautical miles wide) of a coastal state, and (ii) must be committed by persons on board one ship against another ship,<sup>87</sup> and must be committed for private ends. Thus, (i) attacks within the territorial sea do not amount in law to piracy, (ii) the 'hijacking' of a ship by persons on board does not amount to piracy, and (iii) there might be a question whether an attack on a whaling ship by a protest vessel would amount to piracy.

78. If the relevant provisions of UNCLOS were being drafted today there would be a powerful argument for drafting them differently and more widely. It is, however, generally accepted that there is no practical possibility of states agreeing to revise the UNCLOS in the foreseeable future. One reason for this is that an amendment of any one provision would be likely to precipitate demands for the revision of many other provisions; another reason is that there is no enthusiasm internationally for a large-scale review of UNCLOS at this time.

79. Any undesirable constraints arising from the UNCLOS provisions on piracy can be addressed in one of the two ways indicated below.

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84. see <http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2009:079:SOM:en:HTML>.

85. [www.unodc.org/easternafrica/en/piracy/index.html?ref=menuaside](http://www.unodc.org/easternafrica/en/piracy/index.html?ref=menuaside).

86. Or in the 200-mile exclusive economic zone beyond the territorial sea of a coastal state: see UNCLOS Article 58.

87. Thus 'hijackings' of ships, as in the case of the *Achille Lauro*, do not constitute piracy.

## 5.2. Reinforcing means of combating sea piracy on the basis of UNCLOS provisions

### 5.2.1. Interpretative declarations

80. First, states might address ambiguities and uncertainties in the UNCLOS provisions by making declarations of their understanding of the proper interpretation of the provision. States might, for example, unilaterally or collectively declare that they will treat attacks on whaling ships by protest vessels as amounting to piracy. If the announced interpretations are accepted without objection by other states, that interpretation will come to be accepted as the proper interpretation of UNCLOS. If other states do object, a process of negotiation *via* diplomatic exchanges is likely to result in the identification of an acceptable compromise position.<sup>88</sup>

81. Interpretative declarations are useful for establishing interpretations of legal instruments that can be accommodated within the wording of the instrument. If it is necessary to establish a legal right that plainly goes beyond any reasonable interpretation of existing legal instruments, it would be necessary either to amend the instruments or to adopt an ancillary agreement.

82. In the present context an expanded definition of 'private ends', and possibly even a definition of piracy that obviates the need for the involvement of two ships (attacker and victim), might be established by interpretative declaration. A joint declaration by all or most states in a region, and by major maritime powers,<sup>89</sup> would be particularly influential in developing the law.

### 5.2.2. Ancillary agreements

83. The second way in which states might address deficiencies in the UNCLOS provisions is by concluding ancillary agreements which either clarify or add to the UNCLOS provisions.<sup>90</sup>

84. The limitation of piracy to activity on the high seas is, however, closely tied to the exclusivity of the sovereignty of the coastal state over its territorial sea. No state may take law-enforcement action in the territorial sea of another state without the consent of the coastal state. Particularly in the light of the request by the international community for Somali consent to law-enforcement actions against pirates in the Somali territorial sea (including the pursuit of pirates through Somali territorial sea) it would be practically impossible to amend this element of the definition of piracy by means of interpretative declarations.

85. It follows that it would in practice be necessary to conclude new international agreements with coastal states in order to amend the existing rules of the Law of the Sea concerning piracy. Since it is also necessary in practice to conclude such agreements in order to address the need for co-operation between arresting and coastal states, the crimes at sea against which the coastal state permits 'arresting states' to act could be defined in those agreements; and those definitions could include 'piratical' attacks within the territorial sea within the category of crimes covered by those agreements.

## 6. Conclusions

86. Combating sea piracy off the Somali coast raises numerous legal issues and different models of action might be considered in this context. However, establishing an international court to try cases of piracy offences committed in this region would, in particular, imply considerable costs. Moreover, its existence could be detrimental to the process of strengthening local justice systems. When such a court inevitably closes down, its accumulated experience will be dispersed as international staff return home and will not contribute to the building of a sound local judicial system.

87. The model of an 'international' chamber within the courts of a state in the region seems to be more attractive, since it would allow the application of clearly established rules of procedures and evidence by such courts. Although the same observation as the one concerning the return of international staff also applies

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88. One example of an interpretative declaration of this kind is the joint USA-USSR declaration on the 'uniform interpretation' meaning of 'innocent passage' under the UNCLOS, adopted at Jackson Hole in 1988; see: [www.imli.org/legal\\_docs/docs/A15.DOC](http://www.imli.org/legal_docs/docs/A15.DOC). That statement has come to be regarded as an accurate statement of the proper interpretation of UNCLOS Article 19.

89. There are regular meetings of the Major Maritime Powers.

90. For example, the 1988 Convention on the Suppression of Unlawful Acts against the Safety of Navigation was an agreement made following the hijacking of the *Achille Lauro* incident, designed to fill the gap created by the 'two-ship' rule.

here, it is also probable that their experience might be used beforehand in the training of local court staff and local lawyers. However, as piracy is often related to other criminal law offences and/or crimes, there would be no real added value in creating a two-tier system, singling out piracy from other offences and crimes.

88. Thus the recent experience in combating sea piracy demonstrates that the best solutions in this respect are those which are based on co-operation between states.

89. Political will is always needed to prosecute pirates. As international law does not oblige the seizing states to prosecute pirates, in the absence of bilateral and multilateral agreements, the risk of refusal to prosecute acts of piracy remains. Thus, states should be invited to conclude express agreements, which would define the obligations and rights of the prosecuting and arresting states.

90. Reinforcing co-operation in the field of criminal law, including criminal law procedures, is another option in combating piracy. The conclusion of 'shipriders' agreements should be also envisaged in this context.

91. The conclusion of transfer agreements with states in the region, such as Kenya and the Seychelles, raises serious human rights issues. However, these agreements do contain some guarantees as to the monitoring of human rights' observance (in particular conditions of detention and procedural guarantees during trial), although it remains to be seen whether they are put into practice. States concluding similar transfer agreements should always promote monitoring clauses in the latter and should co-operate with each other as far as the enforcement of the said guarantees is concerned (for instance, through the exchange of information on the current state of human rights in the states concerned).

92. Moreover, states should align their legislation on combating piracy with the requirements of UNCLOS. One area in which there is still a lot to be done is the definition of piracy offences in national legislation. The lack of express criminalisation of piracy in certain states is flagrant and, although Article 100 of UNCLOS does not absolutely imply an obligation to incorporate the UNCLOS definition of piracy into the national criminal law system, it would be preferable if all States Parties to UNCLOS were to align their respective legislation with Article 101 of UNCLOS. Furthermore, harmonisation of national laws on the payment of ransoms would also be useful.

93. The international law framework also needs to be modified if it is to serve modern needs effectively. However, there is no practical possibility of revising the UNCLOS in the foreseeable future. Adoption of a new treaty on policing at sea, based on agreed mechanisms for obtaining any necessary flag or coastal state consent, is a possibility. A multilateral declaration to which states may adhere, setting out a more liberal understanding of the manner in which the current rules should be interpreted and applied, is another possibility.

94. Whatever steps may be taken, it is imperative that attention be paid to the need to coordinate developments in international law with the demands of national legal systems, in the fields of both criminal and civil law, and to the question of the need to modify national laws and practices. This is a subject which could be studied by a newly mandated expert group or through an already existing mechanism, such as the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI).

## Appendix

### Relevant provisions of the United Nations Convention on the Law of the Sea

#### PART VII

#### HIGH SEAS

#### SECTION 1. General Provisions

##### *Article 86*

##### *Application of the provisions of this Part*

The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58.

##### *Article 87*

##### *Freedom of the high seas*

1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law. It comprises, *inter alia*, both for coastal and land-locked States:

- a. freedom of navigation;
- b. freedom of overflight;
- c. freedom to lay submarine cables and pipelines, subject to Part VI;
- d. freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
- e. freedom of fishing, subject to the conditions laid down in section 2;
- f. freedom of scientific research, subject to Parts VI and XIII.

2. These freedoms shall be exercised by all States with due regard for the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities in the Area.

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##### *Article 90*

##### *Right of navigation*

Every State, whether coastal or land-locked, has the right to sail ships flying its flag on the high seas.

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##### *Article 92*

##### *Status of ships*

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

2. A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality.

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#### *Article 100*

##### *Duty to co-operate in the repression of piracy*

All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

#### *Article 101*

##### *Definition of piracy*

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:
  - b.
    - 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;
  - c. 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;
  - d. any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

#### *Article 102*

##### *Piracy by a warship, government ship or government aircraft whose crew has mutinied*

The 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.

#### *Article 103*

##### *Definition of a pirate ship or aircraft*

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.

#### *Article 104*

##### *Retention or loss of the nationality of a pirate ship or aircraft*

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 was derived.

#### *Article 105*

##### *Seizure of a pirate ship or aircraft*

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.

#### *Article 106*

##### *Liability for seizure without adequate grounds*

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.

#### Article 107

##### *Ships and aircraft which are entitled to seize on account of piracy*

A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

#### Article 108

##### *Illicit traffic in narcotic drugs or psychotropic substances*

1. All States shall co-operate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions.

2. Any State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in narcotic drugs or psychotropic substances may request the co-operation of other States to suppress such traffic.

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#### Article 110

##### *Right of visit*

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters on the high seas a foreign ship, other than a ship entitled to complete immunity in accordance with articles 95 and 96,<sup>91</sup> is not justified in boarding it unless there is reasonable ground for suspecting that:

- a. the ship is engaged in piracy;
- b. the ship is engaged in the slave trade;
- c. the ship is engaged in unauthorized broadcasting and the flag State of the warship has jurisdiction under article 109;
- d. the ship is without nationality; or
- e. though flying a foreign flag or refusing to show its flag, the ship is, in reality, of the same nationality as the warship.

2. In the cases provided for in paragraph 1, the warship may proceed to verify the ship's right to fly its flag. To this end, it may send a boat under the command of an officer to the suspected ship. If suspicion remains after the documents have been checked, it may proceed to a further examination on board the ship, which must be carried out with all possible consideration.

3. If the suspicions prove to be unfounded, and provided that the ship boarded has not committed any act justifying them, it shall be compensated for any loss or damage that may have been sustained.

4. These provisions apply *mutatis mutandis* to military aircraft.

5. These provisions also apply to any other duly authorized ships or aircraft clearly marked and identifiable as being on government service.

#### Article 111

##### *Right of hot pursuit*

1. The hot pursuit of a foreign ship may be undertaken when the competent authorities of the coastal State have good reason to believe that the ship has violated the laws and regulations of that State. Such pursuit must be commenced when the foreign ship or one of its boats is within the internal waters, the archipelagic

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91. Articles 95 and 96 affirm the immunity of warships (Article 95) and ships owned or operated by a State and used only on government non-commercial service (Article 96).

waters, the territorial sea or the contiguous zone of the pursuing State, and may only be continued outside the territorial sea or the contiguous zone if the pursuit has not been interrupted. It is not necessary that, at the time when the foreign ship within the territorial sea or the contiguous zone receives the order to stop, the ship giving the order should likewise be within the territorial sea or the contiguous zone. If the foreign ship is within a contiguous zone, as defined in article 33, the pursuit may only be undertaken if there has been a violation of the rights for the protection of which the zone was established.

2. The right of hot pursuit shall apply *mutatis mutandis* to violations in the exclusive economic zone or on the continental shelf, including safety zones around continental shelf installations, of the laws and regulations of the coastal State applicable in accordance with this Convention to the exclusive economic zone or the continental shelf, including such safety zones.

3. The right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State.

4. Hot pursuit is not deemed to have begun unless the pursuing ship has satisfied itself by such practicable means as may be available that the ship pursued or one of its boats or other craft working as a team and using the ship pursued as a mother ship is within the limits of the territorial sea, or, as the case may be, within the contiguous zone or the exclusive economic zone or above the continental shelf. The pursuit may only be commenced after a visual or auditory signal to stop has been given at a distance which enables it to be seen or heard by the foreign ship.

5. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

6. Where hot pursuit is effected by an aircraft:

- a. the provisions of paragraphs 1 to 4 shall apply *mutatis mutandis*;
- b. the aircraft giving the order to stop must itself actively pursue the ship until a ship or another aircraft of the coastal State, summoned by the aircraft, arrives to take over the pursuit, unless the aircraft is itself able to arrest the ship. It does not suffice to justify an arrest outside the territorial sea that the ship was merely sighted by the aircraft as an offender or suspected offender, if it was not both ordered to stop and pursued by the aircraft itself or other aircraft or ships which continue the pursuit without interruption.

7. The release of a ship arrested within the jurisdiction of a State and escorted to a port of that State for the purposes of an inquiry before the competent authorities may not be claimed solely on the ground that the ship, in the course of its voyage, was escorted across a portion of the exclusive economic zone or the high seas, if the circumstances rendered this necessary.

8. Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

*Reporting committee:* Committee on Legal Affairs and Human Rights

*Reference to committee:* Doc 11947, Reference 3585 of 26 June 2009

*Draft recommendation* unanimously adopted by the Committee on 16 March 2010

*Members of the Committee:* Mr Christos **Pourgourides** (Chairperson), Mr Christopher **Chope**, Mr Christoph Strässer, Mr Serhiy **Holovaty** (Vice-Chairpersons), Ms Marieluise Beck, Ms Marie-Louise Bemelmans-Videc, Mr Petru **Călian**, Ms Ingrida **Circene**, Ms Ann Clwyd, Mr Agustín **Conde Bajén**, Mr Telmo Correia, Mr Joe Costello (alternate: Mr Terry **Leyden**), Mr Arcadio Díaz Tejera, Ms Lydie Err (alternate: Ms Anne **Brasseur**), Mr Renato Farina, Mr Valeriy **Fedorov**, Mr Joseph Fenech Adami, Ms Mirjana Ferić-Vac, Mr György **Frunđa**, Mr Jean-Charles Gardetto, Mr József Gedei, Ms Svetlana Goryacheva (alternate: Mr Nikolay **Shaklein**), Mr Neven Gosović, Ms Carina Hägg, Mr Holger Haibach, Ms Gultakin Hajibayli, Mr Johannes Hübner, Mr Michel **Hunault**, Mr Rafael Huseynov, Mr Shpetim Idrizi, Mr Aliosman Imamov, Mr Željko Ivanji, Ms Kateřina Jacques, Mr Mogens Jensen, Mr András Kelemen, Ms Kateřina **Konečná**, Mr Franz Eduard **Kühnel**, Ms Darja Lavtižar-Bebler, Mr Pietro **Marcenaro**, Ms Milica **Marković**, Mr Dick Marty (alternate: Mr Andreas **Gross**), Ms Ermira Mehmeti Devaja, Mr Akaki Minashvili, Mr Philippe **Monfils**, Mr Felix Mūri, Mr Philippe Nachbar, Mr Vitalie Nagacevski, Mr Adrian Năstase (alternate: Mr Tudor **Panțiru**), Ms Anna Ntalara (alternate: Ms Elsa **Papadimitriou**), Ms Steinunn Valdís Óskarsdóttir, Mr Yüksel **Özden**, Mr Valery Parfenov (alternate: Mr Sergey **Markov**), Mr Peter Pelegrini, Ms Marietta **de Pourbaix-Lundin**, Mr Valeriy Pysarenko, Mr Janusz **Rachoń**, Ms Mailis **Reps**, Ms Marie-Line Reynaud (alternate: Mr René **Rouquet**), Mr François

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N.B.: The names of the members who took part in the meeting are printed in bold

*Secretariat of the committee:* Mr Drzemczewski, Mr Schirmer, Ms Szklanna, Ms Heurtin