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

Reply to Recommendation[1]: Recommendation 1913 (2010)
Committee of Ministers

1. The Committee of Ministers has carefully examined Parliamentary Assembly Recommendation 1913 (2010) on "The necessity to take additional international legal steps to deal with sea piracy". It has brought the recommendation to the attention of their governments and has also communicated it to the European Committee on Crime Problems (CDPC) and to the Committee of Legal Advisors on Public International Law (CAHDI), for information and possible comments.[2]

2. The Committee of Ministers agrees that it is necessary for the international community to combat piracy effectively as it is seriously threatening shipping traffic and the safety of people and goods. It considers that the United Nations remains the most appropriate institution to discuss the issue of piracy and its legal framework, given the global scope of the law of the sea.

3. The Committee underlines the importance of the existing legal instruments in this field, in particular the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS). Articles 100 to 111 of the convention provide mechanisms of dissuasion and rules on the legal action to be taken following the arrest of persons suspected of piracy on the high seas. The UNCLOS, a large part of which reflects customary law, is the legal reference in this field given that 162 states or entities, 42 of which are Council of Europe member states, are party to it. The Committee of Ministers encourages those member states which are not yet party to consider ratifying or acceding to this instrument. It also draws member states' attention to the importance of bringing their national legislation on combating piracy into line with the related provisions of the UNCLOS so as to enable, as appropriate, the exercise of national criminal jurisdiction.[3]

4. The Committee of Ministers notes that experience in the fight against piracy has shown that there are a number of difficult legal issues involved in case of anti-piracy measures taken by naval ships far away from their home state. Furthermore, protection of piracy victims should be duly considered.

5. Concerning the specific situation in Somalia, mentioned in the Parliamentary Assembly's recommendation, the Committee of Ministers evokes the resolutions taken in this context[4] by the UN Security Council pursuant to Chapter 7 of the UN Charter, and in particular welcomes the Security Council's latest Resolution 1976 (2011). It further notes that the UN Security Council has expressed its intention to remain seized of this matter. The Committee also welcomes the work of the Contact Group on Piracy off the Coast of

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1. adopted at the 1118th meeting of the Ministers' Deputies (6 July 2011)
2. Comments received from these committees are attached to the present reply.
3. The Committee of Ministers notes the relevance of the 1958 Geneva Convention on the High Seas – which defines piracy in almost identical terms to those used in the UNCLOS – to states which are not party to the UNCLOS. Certain other international texts may also be relevant to the fight against piracy, such as the 1988 International Maritime Organisation (IMO) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the SUA Convention), the 1979 International Convention against the Taking of Hostages, the 2000 United Nations Convention against Transnational Crime, the IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships (Resolution A.922(22)) and the Djibouti Code of Conduct to repress acts of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden.

Somalia, including its Working Group 2 on legal issues, as well as the report of the United Nations Secretary General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia[5] and the appointment in the context of that report of Mr Jack Lang as Special Adviser on Legal Issues related to Piracy off the Coast of Somalia. As noted by the President of the Security Council, the report provides a solid base for future work in order to enhance international, regional and national co-operation in bringing pirates to justice. The Committee of Ministers also notes the recent adoption of the report of the United Nations Secretary General on the modalities for the establishment of specialised Somali anti-piracy courts.

6. The Committee of Ministers observes furthermore that UNODC runs assistance programmes in the region, in particular in favour of Kenya, Seychelles and the Puntland and Somaliland regions of Somalia. Kenya and Seychelles also benefit from assistance provided by the European Union and the states that have concluded transfer arrangements with them. The assistance provided by the European Union and these states is principally delivered under the UNODC Counter-Piracy Programme, although some of them also provide substantial assistance on a bilateral basis. The Committee of Ministers notes that sustainable financing is needed to maintain efficiency of the Counter-Piracy Trust Fund's important work, and encourages member states to take active participation in these efforts.

7. The Committee of Ministers notes with grave concern that, according to UN findings, Somali sea piracy has developed links with money laundering and organised crime on a transnational level.[6] The Committee of Ministers is well aware of and underlines the importance of strengthening international co-operation in launching prosecutions against persons suspected of piracy, as well as those who illicitly plan, organise, finance or unlawfully profit from piracy. It notes that important initiatives have already been taken at international level, as reflected also in the recommendation of the Assembly, such as the proposed initiative to establish a special mechanism for prosecution of persons suspected of sea piracy. The Committee of Ministers encourages member states to take an active part in these initiatives, and in their implementation, as well as to conclude further bilateral or regional agreements or to develop joint strategies, while taking into account existing international law and the demands of national legal systems.

8. In light of the UN's leading role on the subject of sea piracy and the present budgetary situation in the Council of Europe, the Committee of Ministers will not at this stage instruct the steering committees concerned to undertake any major work in this field or set up any new structure for this purpose. However, it will continue, as will the CAHDI and, as regards criminal law matters, the CDPC, to follow the situation closely and if further issues arise on this subject, the Committee of Ministers will invite these committees to consider possibilities for co-ordinating the position of Council of Europe member states on these issues at the international level and possible other steps to aid the international effort of combating sea piracy.

9. In relation to the treatment of suspected pirates, the Committee of Ministers reaffirms that Council of Europe member states are required to fulfil their obligations under different international human rights instruments, in particular the European Convention on Human Rights. These concern, *inter alia*, the right to a fair trial, the prohibition of torture and inhuman or degrading treatment, the non-application of the death penalty and respect for the rights of detainees. In this regard, the Committee of Ministers refers to the well-established case law of the European Court of Human Rights.[7]

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4. Resolutions 1816 (2008), 1838 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1918 (2010), 1950 (2010), 1976 (2011) of the UN Security Council and Statement by the President of the Security Council S/PRST/2010/16 of 25 August 2010.
5. Reference S/2010/394.
6. Resolution 1950 (2010) of the UN Security Council, paragraph 15-17
7. See, *inter alia*, recently Medvedyev and others v. France judgment of 29 March 2010 [GC], No. 3394/03, paragraphs 64-65.

Appendix 1 to the reply – Comments by the European Committee on Crime Problems (CDPC)

1. At its 1085th meeting on 26 May 2010, the Committee of Ministers' Deputies communicated the Parliamentary Assembly's Recommendation 1913 (2010) on "The necessity to take additional legal steps to deal with sea-piracy" to the CDPC for information and possible comments.

2. The CDPC welcomes the opportunity to provide an opinion on the important issue of combating sea-piracy.

3. The Committee notes that there exist various international legal instruments and guidelines dealing with the issue of prevention and combating of acts of violence against ships on the high seas or their passengers: the International Maritime Organisation's (IMO's) Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ('SUA Convention' of 1988 and the 2005 Protocol thereto; the United Nations' ('UN') Convention on the Law of the Sea ('UNCLOS') of 1982, articles 101-107, as well as the IMO's Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships (Resolution A.922(22)) specifically dealing with piracy in the waters off Somalia there is the ('IMO') Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden.

4. Both the United Nations Security Council and the Contact Group on Piracy off the Coast of Somalia deal with sea-piracy and related issues on a regular basis. In his report to the Security Council of 26 July 2010 (doc. S/2010/394) on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia, the Secretary General of the UN has outlined a number of options concerning the establishment of regional or international tribunals to try persons alleged to have committed acts of piracy. The Committee also notes that UNODC runs assistance programmes in the region, in particular in favour of Kenya, Seychelles and the Puntland and Somaliland regions of Somalia. Kenya and Seychelles also benefit from assistance provided by the European Union and the states that have concluded transfer arrangements with them. The assistance provided by the European Union and these states is principally delivered under the UNODC Counter-Piracy Programme, although some of them also provide substantial assistance on a bilateral basis.

5. The Committee further notes the existence of the Regional Co-operation Agreement on Combating Piracy and Armed Robbery against Ships in Asia ('RECAAP').

6. The Committee stresses that bringing alleged pirates to justice is an important element of the overall efforts of the international anti-piracy coalition. To ensure, without delay, criminal investigation and prosecution of persons suspected of committing acts of piracy and of financing or otherwise assisting in the preparation of such acts would enhance the effectiveness of combating piracy. Impunity, on the contrary, as in any other criminal activity, encourages more individuals to get involved.

7. Some CDPC delegations consider that existing international instruments are for now sufficient, and that what it is needed is more action-orientated tactics and, for those countries facing specific legal problems, a thorough review of national relevant laws with the aim of assessing whether or not those existing instruments are properly implemented on a more global scale than that possible within Council of Europe member states' geographic scope.

8. The Committee is of the opinion that a further review is required in order to determine if existing ad hoc arrangements to deal with piracy in national and international waters, including the aforementioned RECAAP, should be further supported by a detailed and consistent international legal framework prescribing the criminalisation of acts of piracy at sea and providing a firm basis for co-operation between participating states with regard to criminal law and administrative measures in order to effectively combat piracy at sea, including by ensuring that alleged pirates are brought to justice.

9. In the view of the Committee, the current international legal framework could at the very least be examined to determine the extent to which it may be insufficient, with particular regard to the following:

– While UNCLOS provides for a clear definition of acts of piracy, it does not require states to criminalise acts of piracy or armed robbery;

– UNCLOS also does not contain any provisions on international co-operation in the fight against piracy or armed robbery;

– UNCLOS, however, includes a provision allowing other states than the flag state to seize a pirate ship or a ship taken by pirates and arrest and prosecute the pirates;

– The SUA Convention and its 2005 Protocol are not specifically directed at acts of piracy for private ends (as defined in article 101 of UNCLOS); not all acts of piracy can be considered to fall under the provisions of the SUA Convention and its 2005 Protocol;

– The 2005 SUA Protocol foresees, where applicable, a mechanism to request a flag state's authorisation to stop, board and search a ship, its cargo and persons on board and a mechanism to request the flag state's consent to exercise jurisdiction including seizure, forfeiture, arrest and prosecution;

– There may be uncertainty as to the application of the SUA Convention in the fight against piracy at sea and in particular the applicability of its provision on jurisdiction in case pirates are captured by warships patrolling the sea.

10. In addition, experience in the fight against piracy has shown that there are a number of difficult legal issues involved in case of anti-piracy measures taken by naval ships far away from their home state. In particular, this applies to the questions of detention of pirates (detention periods, needs and possibilities for judicial review) and transfer of pirates to other states that may agree to accept the detained persons for the purpose of criminal investigation and prosecution.

11. The CDPC is of the opinion that an in-depth review should be undertaken on the basis of reliable data and in close co-operation with other relevant international organisations and experts in the field to evaluate current legal difficulties that arise in the fight against piracy and that may call for a comprehensive international criminal law instrument against piracy at sea.

12. The Committee considers on a preliminary basis that such an instrument may deal with the following elements regarding international criminal law:

– provide a clear definition of 'piracy at sea';

– criminalise acts of piracy and those closely related to piracy;

– establish a clear jurisdictional framework for the efficient international co-ordination of policing, investigation, apprehension, transfer or extradition and prosecution in piracy cases;

– where necessary, establish means to protect suspects in case they are being transferred to third countries for the purpose of criminal prosecution, as well as for victims and witnesses in piracy cases;

– establish rules on the collection of evidence that will facilitate their admissibility.

13. The Committee believes that a small expert team should be set up, working under the auspices of the CDPC in close co-operation with the CAHDI and the Committee of Ministers, to further study the needs for such an international legal instrument and the feasibility for its development in the framework of the Council of Europe.

Appendix 2 to the reply – Comments by the Committee of Legal Advisors on Public International Law (CAHDI)

1. On 26 May 2010, the Ministers' Deputies communicated Parliamentary Assembly Recommendation 1913 (2010) to the Committee of Legal Advisors on Public International Law (CAHDI) for information and possible comments by 20 September 2010.

2. In its recommendation, the Assembly recommends that the Committee of Ministers, with the help of a newly mandated expert group or through an already existing mechanism:

– 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;

– 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;

– 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;

– seek appropriate ways in which the existing international legal framework can be adapted to face current needs of policing at sea and consider creating, provided all existing disadvantages in this field are removed, a special mechanism (international or with international participation) for the prosecution of persons suspected of piracy.

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 it from the waters 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.

3. The CAHDI examined the above-mentioned recommendation at its 40th meeting (Tromsø, 16-17 September 2010) and adopted the following comments on aspects of the recommendation which are of particular relevance to the mandate of the CAHDI (public international law).

4. From the outset, the CAHDI agrees that it is necessary for the international community to combat piracy effectively as it is seriously threatening shipping traffic and the safety of people and goods. The CAHDI takes note of the work of the Contact Group on Piracy off the Coast of Somalia, including its Working Group 2 on Legal Issues, as well as the recent report of the United Nations Secretary General on possible options to further the aim of prosecuting and imprisoning persons responsible for acts of piracy and armed robbery at sea off the coast of Somalia[8] and the appointment of Mr Jack Lang as Special Adviser on Legal Issues related to Piracy off the Coast of Somalia. As noted by the President of the Security Council, the report provides a solid base for future work in order to enhance international, regional and national co-operation in bringing pirates to justice. The CAHDI considers that, as in the past, the United Nations remains the most appropriate institution to discuss the issue of piracy and its legal framework, given the global scope of the law of the sea.

5. The CAHDI first wishes to underline the importance of the existing legal instruments in this field, in particular the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS). Articles 100 to 111 of the Convention provide mechanisms of dissuasion and rules on the legal action to be taken following the arrest of persons suspected of piracy on the high seas.

6. The UNCLOS, a large part of which reflects customary law, is the legal reference in this field given that 160 states or entities, 42 of which are Council of Europe member states, are party to the Convention.[9] The CAHDI therefore recommends that the Ministers' Deputies invite the Council of Europe member states which have not yet done so to consider the ratification or accession to this instrument. The Committee also draws states' attention to the importance of bringing their national legislation on combating piracy into line with the related provisions of the UNCLOS so as to enable, as appropriate, the exercise of national criminal jurisdiction.

8. Reference S/2010/394.

9. State of signatures and ratifications at the date of 16 September 2010. See following link for further details: http://treaties.un.org.

7. Furthermore, the CAHDI notes the relevance of the 1958 Geneva Convention on the High Seas – which defines piracy in almost identical terms to those used in the UNCLOS – to states which are not party to the UNCLOS. Certain other international texts may also be relevant to the fight against piracy. In this context, the CAHDI refers to the 1988 International Maritime Organisation Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (the SUA Convention), the 1979 International Convention against the Taking of Hostages, the 2000 United Nations Convention against Transnational Crime and the Djibouti Code of Conduct to repress acts of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden.

8. Concerning the specific situation in Somalia, mentioned in the Parliamentary Assembly's recommendation, the CAHDI evokes the resolutions taken in this context[10] by the UN Security Council pursuant to Chapter 7 of the UN Charter. The CAHDI further takes note of the fact that the UN Security Council has expressed its intention to remain seized of this matter.

9. The CAHDI underlines that Council of Europe member states are required to fulfil their obligations under different international human rights instruments, in particular the European Convention on Human Rights. These concern, *inter alia*, the right to a fair trial, the prohibition of torture and inhuman or degrading treatment, the non-application of the death penalty and respect for the rights of detainees. In this regard, the CAHDI refers to the well-established case law of the European Court of Human Rights.[11]

10. Finally, the CAHDI would underline the importance for states to strengthen international co-operation in launching prosecutions against persons suspected of piracy. In this connection, it notes that important initiatives have already been taken at international level and that these are reflected in the recommendation of the Parliamentary Assembly. Moreover, the Committee can but encourage member states and international organisations to conclude further bilateral or regional agreements or to develop joint strategies, while taking into account the existing international law and the demands of national legal systems.

10. Resolutions 1816 (2008), 1838 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1918 (2010) of the UN Security Council and Statement by the President of the Security Council S/PRST/2010/16 of 25 August 2010.

11. See, *inter alia*, recently Medvedyev and others v. France judgment of 29 March 2010 [GC], No. 3394/03, paragraphs 64-65.