PIRACY


Submitted by the United Nations Division for Ocean Affairs and the Law of the Sea (UN-DOALOS)

SUMMARY

Executive summary: This document intends to assist States in the uniform and consistent application of the provisions of the United Nations Convention on the Law of the Sea, 1982 (UNCLOS) relating to piracy, by setting forth the elements which could be included in national legislation on piracy pursuant to UNCLOS.

Strategic direction: 6.2

High-level action: 6.2.1

Planned output: 6.2.1.3, 6.2.1.4, 6.2.1.5

Action to be taken: Paragraph 19

Related document: LEG 96/8/1/3

Introduction

1. The 1982 United Nations Convention on the Law of the Sea (UNCLOS or the Convention) provides the legal framework for the repression of piracy under international law.\(^1\) Many of the provisions of the Convention, and in particular those relating to the repression of piracy, are considered to also reflect customary international law.\(^2\)

2. Piracy affects the international community as a whole. For this reason, article 100 of UNCLOS provides that "all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State".

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\(^1\) The General Assembly has frequently emphasized that "the Convention sets out the legal framework within which all activities in the oceans and seas must be carried out". See, e.g., General Assembly resolution 65/37 of 7 December 2010, preamble. As at February 2011, the number of States Parties to UNCLOS is 161, including the European Union.

\(^2\) The Security Council has repeatedly reaffirmed "that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 […] sets out the legal framework applicable to combating piracy […] as well as other ocean activities". See, e.g., Security Council resolution 1950 (2010), preamble.
Adoption of national legislation relating to piracy pursuant to the provisions of UNCLOS is an important step that States can take in order to enable themselves to co-operate effectively in the repression of piracy.

3 The Security Council has noted with concern "that the domestic law of a number of States lacks provisions criminalizing piracy and/or procedural provisions for effective criminal prosecution of suspected pirates" and called upon "all States to criminalize piracy under their domestic law". Moreover, States that have already enacted national legislation on piracy may wish to review it to ensure the implementation of the relevant provisions of UNCLOS. Indeed, a number of States have recently updated their national legislation on piracy.

4 The General Assembly of the United Nations has also called upon "States to take appropriate steps under their national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy …" and has urged all States to combat piracy actively, inter alia, by adopting measures and by adopting national legislation in co-operation with the International Maritime Organization (IMO).

5 This document has been prepared by the Division for Ocean Affairs and the Law of the Sea (UN-DOALOS) of the United Nations Office of Legal Affairs, in co-operation with IMO and the United Nations Office on Drugs and Crime (UNODC) to serve as a resource for States interested in adopting new legislation on piracy or reviewing existing legislation. It is intended to assist States in the uniform and consistent application of the provisions of UNCLOS relating to piracy, by setting forth the elements which could be included in national legislation on piracy pursuant to UNCLOS.

6 This document, read together with document LEG 98/8/3, focuses on the following elements of national legislation on piracy pursuant to UNCLOS:

- universal jurisdiction;
- the definition of the crime of piracy;
- criminalization (penalties);
- enforcement measures;
- liability and compensation provisions;

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3 See Security Council resolution 1918(2010), preamble.
5 Copies of national legislation on piracy provided by States to UN-DOALOS and the IMO Secretariat are available on the website of UN-DOALOS at: www.un.org/Depts/los/piracy/piracy.htm.
6 See General Assembly resolution 65/37 of 7 December 2010, paragraph 86.
7 Ibid., paragraph 85.
8 As per their respective mandates and areas of expertise, UN-DOALOS has prepared a section on UNCLOS, IMO has prepared a section on the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention) and its Protocols, and UNODC has prepared a section on the 2000 United Nations Convention on Transnational Organized Crime and other instruments under its purview.
9 UN-DOALOS serves as secretariat to UNCLOS. It has a mandate to undertake efforts to promote better understanding of the Convention in order to ensure its effective implementation and to ensure its uniform and consistent application (see General Assembly resolution 52/26 of 26 November 1997, at paragraphs 11 and 12). For further information see www.un.org/Depts/los/index.htm.
• retention or loss of nationality of a pirate ship or aircraft; and
• international co-operation.10

This document addresses only the first three elements, while the remaining four elements are addressed in document LEG 98/8/3.

(a) Universal jurisdiction

7 UNCLOS provides for universal jurisdiction over those who commit acts of piracy. Article 105 of UNCLOS states that:

"on the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith."

8 Given the nature of the crime of piracy under international law, no jurisdictional link need exist between the State exercising jurisdiction and the suspected offender(s), pirate ship(s)/aircraft, victim(s) or victim ship(s)/victim aircraft. Therefore, since piracy provides an independent basis for jurisdiction under international law, as reflected in UNCLOS, no other basis of jurisdiction (e.g., territoriality, nationality or passive personality) is required. States may therefore adopt national legislation that implements the relevant provisions of UNCLOS concerning the repression of piracy on the basis of universal jurisdiction.

9 Universal jurisdiction in respect of piracy under UNCLOS is an exception to the principle of exclusive flag State jurisdiction over ships on the high seas.11

Element: National legislation on piracy may provide for the exercise of universal jurisdiction regardless of the nationality of the suspected offender(s), pirate ship(s)/aircraft, victim(s) or victim ship(s)/aircraft, pursuant to article 105 of UNCLOS as read with other relevant provisions of UNCLOS concerning the repression of piracy.

(b) Definition of the crime of piracy

10 Article 101 of UNCLOS sets out the definition of piracy under international law. It states:

"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:

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10 These elements could be incorporated into national legislation in the manner most appropriate to the legal system of the State concerned. In some cases, additional elements or clarifications could also be incorporated to the extent that they would not be at variance with the corresponding provisions of UNCLOS.

11 See articles 92 and 94 of UNCLOS.
(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."

11 This definition is almost identical to that contained in the 1958 Convention on the High Seas, and is generally considered to reflect customary international law. It should be noted that the definition set forth in article 101 should be read in conjunction with other provisions of UNCLOS, in particular articles 58(2), 102 and 103 thereof (see below).

(i) Geographic scope

12 As regards the geographic scope for the definition of piracy, article 101(a) (i) refers to acts committed "on the high seas" while article 101(a) (ii) refers to acts committed "in a place outside the jurisdiction of any State". Article 101 of UNCLOS should be read in conjunction with article 58(2), which provides that "articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part." Thus, the geographic scope of article 101(a) should be read to include the exclusive economic zone of any State. Accordingly, when the acts set forth in article 101(a) are committed beyond the territorial sea of any State, they are considered acts of piracy under the Convention.

13 For example, the definition of piracy contained in UNCLOS has been incorporated into a number of international instruments, such as the 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) and the 2009 Djibouti Code of Conduct. It has also been incorporated into a number of IMO documents, such as the Code of Practice for the investigation of crimes of piracy and armed robbery against ships (IMO Assembly resolution A.1025(26)).
14 With regard to the meaning of the phrase "in a place outside the jurisdiction of any State", the International Law Commission (ILC), in its Commentary to article 39, which was the basis for article 101 of UNCLOS, stated "[i]n considering as "piracy" acts committed in a place outside the jurisdiction of any State, the Commission had chiefly in mind acts committed by a ship or aircraft on an island constituting terra nullius or on the shores of an unoccupied territory. But the Commission did not wish to exclude acts committed by aircraft within a larger unoccupied territory, since it wished to prevent such acts committed on ownerless territories from escaping all penal jurisdiction." Document A/CN.4/104, at p. 282.
15 Subparagraphs (b) and (c) of article 101 respectively on voluntary participation in the operation of a pirate ship or aircraft and incitement and intentionally facilitating an act of piracy, do not explicitly set forth any particular geographic scope. It is also important to distinguish piracy from armed robbery against ships. The latter is defined by IMO Assembly resolution A.1025(26) on the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ship adopted on 2 December 2009. According to article 2.2 of this Code, "Armed robbery against ships" means any of the following acts:

1. any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea;

2. any act of inciting or of intentionally facilitating an act described above" (emphasis added).
(ii) Private ends requirement

13 Article 101(a) of UNCLOS, requires that, in order to constitute piracy "any illegal acts of violence or detention, or any act of depredation," be committed "for private ends". It is noteworthy that the International Law Commission (ILC), in its 1956 draft Articles concerning the Law of the Sea with commentaries (Commentary), stated that "[t]he intention to rob (animus furandi) is not required. Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain."\(^{17}\)

(iii) Two ship requirement

14 In order to constitute an act of piracy under UNCLOS, an attack on a ship must originate from another private ship or aircraft. The ILC pointed out, in its Commentary that:

"acts committed on board a ship by the crew or passengers and directed against the ship itself, or against persons or property on the ship, cannot be regarded as acts of piracy."\(^{18}\)

(iv) Definition of a pirate ship or aircraft

15 It should be noted that piracy, as set out in article 101(b), includes "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". The definition of the term "pirate ship or aircraft" is set out in article 103 of UNCLOS as follows:

"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."\(^{18}\)

(v) Incitement and facilitation

16 Article 101(c) includes in the definition of piracy "any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)." Thus, the inchoate offence of inciting any of the acts covered in subparagraph (a) or (b) or intentionally facilitating any of the acts covered in these paragraphs would also constitute piracy.\(^{19}\)

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\(^{16}\) The ILC's Articles concerning the Law of the Sea formed the basis for the provisions of the 1958 Convention on the High Seas, which in turn formed the basis of the UNCLOS provisions on piracy. The drafting of the provisions of UNCLOS closely follows that of the original ILC Articles. The ILC's commentaries to its Articles may therefore be useful in understanding the meaning of these provisions.

\(^{17}\) See the ILC's Commentary to article 39 (A/CN.4/104, at p. 282).

\(^{18}\) Ibid.

\(^{19}\) States may wish to consider including in their penal codes other offences related to piracy, such as attempt to commit piracy, conspiracy to commit piracy, and aiding and abetting piracy in their national legislation. However, to the extent that such crimes do not fall within the scope of the definition of piracy set forth in UNCLOS, they would have to be based on other traditional bases of jurisdiction under international law.
(vi) Piracy by a warship, Government ship or Government aircraft whose crew has mutinied

17 Pursuant to article 101(a), piracy may only be committed by a private ship or aircraft. Thus, a Government ship or aircraft cannot be deemed to commit an act of piracy. However, article 102 provides an exception to this in situations where such a ship's crew has mutinied and taken control of the ship or aircraft. Article 102 provides that "[t]he acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft."

Element: National legislation on piracy may reflect the definition of piracy contained in article 101 of UNCLOS, taking into account articles 58 (2), 102 and 103. The core components of the definition are: (a) the geographic scope (which includes the high seas and areas beyond the jurisdiction of any State, as well as the exclusive economic zone); (b) the private ends requirement; (c) the two ship requirement; (d) the definition of pirate ship or aircraft; (e) the offences of incitement and facilitation; and (f) the distinction between private or government ship/aircraft.

(c) Criminalization (penalties)

18 In the exercise of universal jurisdiction as set out above, article 105 of UNCLOS provides that "[t]he courts of the State which carried out the seizure [of a pirate ship or aircraft] 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." States may, therefore, provide for piracy to constitute a criminal offence under their national legislation, and set forth the applicable penalties, taking into account the nature of the offence.20

Element: National legislation on piracy may criminalize (acts of) piracy and establish the applicable penalties commensurate with the severity of the offences, in order to ensure the effective implementation of article 105 of UNCLOS. National legislation may also set forth a procedure under which national courts may determine the action to be taken with regard to seized ships, aircraft or property, subject to the rights of third parties acting in good faith.

Action requested of the Legal Committee

19 The Legal Committee is invited to note the information provided in this document and to comment or decide as it deems appropriate.

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20 In its Commentary on article 43, which formed the basis for this provision, the ILC stated that it "did not think it necessary to go into details concerning the penalties to be imposed and the other measures to be taken by the courts". See A/CN.4/104, at page 283.