

CONTACT GROUP

ON PIRACY OFF THE COAST OF SOMALIA

مجموعة الاتصال الخاصة بالقرصنة قبالة السواحل الصومالية • Groupe de contact sur la piraterie au large de la Somalie
Grupo de Contacto sobre la Piratería frente a costas de Somalia • 打击索马里海域海盗联络组
Контактная группа по борьбе с пиратством у берегов Сомали

4th MEETING OF WORKING GROUP 2 ON LEGAL ISSUES, COPENHAGEN 26-27 NOVEMBER 2009

Chairman's Conclusions

These conclusions are the sole responsibility of the chairman of the Working Group. They constitute a summary of the outcome of the discussion at the meeting of the Working Group in Copenhagen on 26 – 27 November 2009 and will form the basis for the report of the Chair to the Contact Group Meeting in New York in January 2010.

Based on the initial tasking by the Contact Group on Piracy off the Coast of Somalia (“CGPCS”) at its meeting in New York on 14 January 2009 and the request from the Contact Group at its meeting in New York on 10 September 2009 that the Working Group continue its work along the lines listed in the Chair’s conclusions from the 3rd Meeting on 26-27 August, the Working Group continued its efforts to provide specific, practical and legally sound guidance to CGPCS on legal issues related to the fight against piracy, including to ensure the prosecution of suspected pirates.

With a view to fulfilling this task the Working Group agreed that the way forward was to continue developing a full set of practical tools (checklists, guidelines, templates, compilations) with the aim of providing practical support to States and organizations in their efforts to ensure prosecution. The WG2 toolbox is available on the Contact Group web-site.

National prosecution

States and organizations reported on progress in national efforts to facilitate prosecution of pirates, including recent incidents/cases of piracy off the Coast of Somalia, relevant bilateral arrangements and agreements, and lessons learned. The interventions demonstrated that a substantive number of piracy attacks have been prevented and a large number of pirates apprehended. The Working Group shared information on on-going piracy-cases and delegations encouraged continuous exchange of relevant information including legal arguments presented by prosecuting states in on-going court cases. Without interfering with these cases, the Working Group agreed to upload relevant public documents used in court cases as well as other relevant information on a specific part of the CGPCS’ web-site and to explore other ways of communicating such documents electronically.

States and organizations expressed their deep gratitude to Kenya for the crucial efforts undertaken by Kenya in prosecuting pirates. At the same time interventions pointed to the need for other

countries to share the burden of prosecution. The Working Group welcomed the recent transfer agreement concluded between the Seychelles and the EU. Interventions showed general progress in ensuring prosecution, including through introduction of new or updated legislation in a number of States allowing universal jurisdiction for prosecution of pirates.

The exchange of lessons learned, however, also demonstrated that challenges remain, including with regard to addressing the need to ensure that witnesses of piracy attacks would be present during court cases. Among the initial suggestions put forward to address this challenge were:

- Creating contractual obligations, compensation and incentives (employment contracts) to facilitate the appearance of seafarers as witnesses
- Using video conferences or depositions in court cases
- Creating mobile court units comprising judges, prosecutors and defence attorneys visiting witnesses
- Close cooperation between the courts in countries of prosecution and Industry
- Ensuring safety and financial support for witnesses
- Explore further the possibility of creating a victim awareness guide dealing with procedures with regard to appearing in courts in connection with piracy cases.

Industry representatives stated their intention to remind ship-owners of the importance to secure the testimony of seafarers in court. Furthermore, the Working Group agreed on the need to coordinate closely on this issue with Working Group 3.

In addition the issue of flag states consent to authorize embarkation of military detachments on merchant vessels was raised. The Chair asked delegations to review national procedures and encouraged States to be forthcoming in response to specific requests for flag state consent.

Evidentiary Standards

The Working Group continued exploring issues relevant to collection of evidence in piracy incidents in order to assist States and organizations in complying with relevant evidentiary standards. States and organizations shared information on systems to support piracy investigations through provision of mutual legal assistance, based on a presentation by UNODC highlighting the way MLA's may be used in piracy cases. The Chair invited States to revisit national legislation on MLA with a view to ensure that these procedures were available.

The United States presented the Working Group with an explanatory note to accompany the template on evidentiary standards. The note is annexed to these conclusions and will be placed on the CGPCS web-page.

INTERPOL made a detailed presentation on the role of law enforcement in the context of fighting piracy, including INTERPOL's tools and services with regard to international police cooperation in the specific context of maritime piracy. INTERPOL also provided the Working Group with an

overview of INTERPOL's activities in this field. INTERPOL encouraged states to review the functioning of national procedures concerning cooperation with INTERPOL.

UNODC reported back to the Working Group on lessons learned from UNODC's legal assessments in the region. The Chair called on States and Organization to forward updated information to UNODC on relevant legislation in order for the UNODC to produce an updated version of the report on questionnaires relating to legal and practical challenges in regard to prosecution of suspected pirates to be distributed at a later stage. The Chair noted that UNODC, OLA and IMO continue to coordinate efforts in compiling piracy legislation.

Mechanism for prosecution of suspected pirates

The Chairman noted that the CGPCS at its meeting on 10 September had asked the Working Group to continue its discussions on basis of the Chair's discussion-paper, the Chair's consultations with the African Union Commission and states in the region and input from interested participants, noting the invitation from the Netherlands to an expert meeting on 20-21 October 2009.

The Netherlands reported on the Hague meeting and concluded that few States and organizations supported the establishment of a full-fledged international or regional hybrid court. Instead many States and organizations pointed to the need to support existing mechanisms of prosecution through capacity building.

Portugal presented the attached non-paper on the establishment of a "Somali Special Chamber for the Prosecution of Pirates and other related offences off the Coast of Somalia" within the Somali court system, but possibly located in a third country.

The WG2 Chair presented his findings from consultations with States and Organizations in the region. The Chair's consultations with regional partners generally pointed to the need to view piracy in the broader context of the situation in Somalia, and the need to ensure that the counter-piracy efforts in the legal field are coordinated with other activities in regard to both Somalia and other States in the region. Ultimately the aim would be to enable Somalia to apprehend and prosecute the pirates herself. Until the situation in Somalia had been stabilized there was, however, agreement amongst States and organizations in the region that prosecution of pirates should continue to take place in other appropriate venues. States and organizations advocated that focus should be on supporting existing mechanisms to prosecute pirates through capacity building or other assistance. The exact kind of support should depend on the needs of States in the region willing to prosecute and should add value to the already existing mechanisms. It was stressed that the necessary capacity building efforts should be undertaken swiftly and to the extent needed, including where appropriate through direct funding. Furthermore, the serious and pressing need of burden sharing between all affected States and organizations was highlighted and the pressing need for further states to accept pirates for prosecution. The possibility of transferring prisoners from the prosecuting state to imprisonment in a third State was emphasized as one possible way of burden sharing.

The Chair noted that States and organizations continue to have different views on the need to establish additional mechanism for prosecution and that it was for the CGPCS to take appropriate decision on this matter. The Working Group agreed that the discussion regarding models for such an alternative should be undertaken without prejudice to the position of States and organizations on the need for such a mechanism.

The subsequent discussion in the Working Group showed that the most feasible model would be a specialized/dedicated piracy chamber established within the existing domestic criminal justice system of one or more States and located in one or more States willing and able to undertake prosecution, including Somalia when this becomes possible. It was furthermore the understanding that international elements – if required – could be added both through international financial support and/or through technical assistance (*inter alia* secondment of international personnel). Given the recommended model involves prosecution under national law the scope of international assistance, including provision of international staff, would depend on the desire of the regional state to receive it.

The Chair will report the above to the CGPCS.

Regional aspects

Rob Bowman from the Embassy of the United States in Nairobi reported on the practical legal challenges, including in the field of evidence that piracy cases pose to regional states. The Chair would distribute the presentation as further inspiration for states in their efforts to ensure efficient handling of these practical legal challenges.

Counter Piracy Programme Coordinator, Alan Cole, UNODC, Nairobi, made a presentation on UNODC's project on Criminal Justice Programme in Puntland and Somaliland as well as on the question of post-trial deportation. Many States stressed the need for assistance to prosecuting states in this field.

UNODC updated the Working Group on the establishment of the CGPCS Trust Fund to help defray the expenses associated with prosecution of suspected pirates as well as other activities related to implementing GGPCS objectives regarding combating piracy in all its aspects. The update was based on the extraordinary Meeting of CGPCS held in New York on 13 November 2009 and ongoing consultations in New York. Detailed practical information (account number etc.) on the transfer of amounts to the fund would be circulated as soon as possible in order to facilitate contributions in the current fiscal year.

The IMO presented States with an update on Working Group 2 aspects of the Djibouti Code of Conduct implementation based on the sub-regional workshop on implementation of the Djibouti Code of Conduct in the Seychelles on 12-16 October 2009.

The United Kingdom presented the Working Group with an update on recent WG1 activities in regard to regional counter-piracy capability development in east Africa and The Gulf of Aden, including enabling capabilities in the judicial and penal/detention sectors. The Working Group welcomed the work taken forward by Working Group 1 and the United Kingdom, and stressed the need for continued close cooperation between the working groups.

Apprehension and Detention

Based on a presentation by the United Kingdom the Working Group continued its discussion of the use of force in a maritime law enforcement context. The UK presented a discussion paper underlining the law enforcement character of counter-piracy operations. An executive summary of this paper is annexed to these conclusions and forwarded to the Contact Group where it may serve as inspiration to participants.

Canada made an informal presentation on detention and human rights considerations in order for the Working Group to continue its deliberation on this issue. The working Group noted, that counter piracy operations in this regard give rise to a number of complicated legal questions and that there is a need to continue the deliberations on this issue in order to ensure that States and organizations are fully aware of these issues and possible ways of addressing them.

Future action

Based on a suggestion from Egypt at the latest CGPCS Meeting in New York on 10 September 2009 to produce a catalogue of CGPCS accomplishments so far, the Working Group noted the Groups' accomplishments to date. The attached list of WG2 accomplishments will be forwarded to CGPCS.

The Contact Group is invited to urge members to make use of the legal tool box when establishing national guidelines, practices and procedures etc.

Furthermore, the Contact Group is invited to task the Working Group to:

- Report back to the Contact Group at its next meeting on the further progress made by States in their efforts to facilitate prosecution of pirates, including on the basis of an exchange of information about relevant Standard Operating Procedures,
- Further explore the issue of ensuring the appearance of witnesses in court cases, including in cooperation with Working Group 3,
- Explore other relevant contractual issues in cooperation with the other working groups,
- Further explore issues relation to detention of suspected pirates, including relevant human rights standards,

- Further explore the issue of assistance to prosecuting states with regard to post-trial deportation of apprehended pirates,
- Invite the UNODC to continue gathering information on relevant national legal systems and practical challenges in regard to prosecution,
- Continue to explore the possibility of enhancing already existing mechanism for prosecution in close cooperation with Working Group 1, and – in accordance with any decision taken by the CGPCS in this regard – revert to the question of additional mechanisms for prosecution of suspected pirates.

ANNEX

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List of WG2 Accomplishments

Continuous **exchange of information** on legal challenges arising from piracy off the Coast of Somalia, including in regard to the need to update relevant national legislation.

A thorough examination on the possibilities for establishing an additional **mechanism for the prosecution** of suspected pirates.

The establishment of an **international legal network**, consisting of legal experts from close to 50 states and organizations, focused on fighting piracy in all its aspects.

The WG2 have developed a set of practical legal tool – gathered in a “**legal toolbox**” available i.a. on the Contact Group website - containing:

- **Checklist** of steps states might take to ensure that they are able to prosecute suspected pirates - closing possible gaps in national legislation, procedures etc.
- List of **impediments** to prosecution that have made prosecution efforts less effective than necessary
- **UNODC report** on legal and practical challenges with regard to prosecution in CGPCS States, including information on relevant national legal systems.
- **Terms of reference for the International Trust Fund** to help defray expenses associated with prosecution of suspected pirates as well as other activities related to implementing CGPCS objectives regarding combating piracy in all its aspects.

- A **compilation of the international legal basis for prosecution** of suspected pirates: *“Treaty Jurisdiction over Pirates: A Compilation of Legal Texts with Introductory Notes”*, by Dr. Douglas Guilfoyle, University College London.
- A generic template on **evidentiary standards**, accompanied by an explanatory note.
- A generic template for and discussion paper on **“ship rider”** agreements.
- A general template for obtaining **flag state consent** when placing military personnel on commercial vessels flagged to other States.
- A generic template for drafting a Memorandum of Understanding on the **conditions of transfer** of suspected pirates and/or armed robbers as well as seized property.