APPENDICES

to the background working paper on

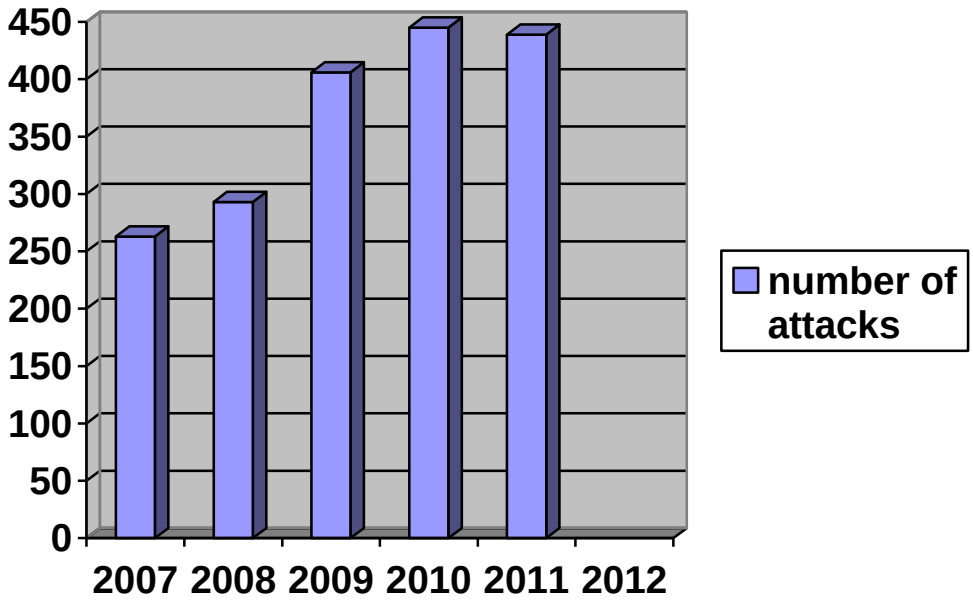
SEA PIRACY

APPENDIX I

SEA PIRACY

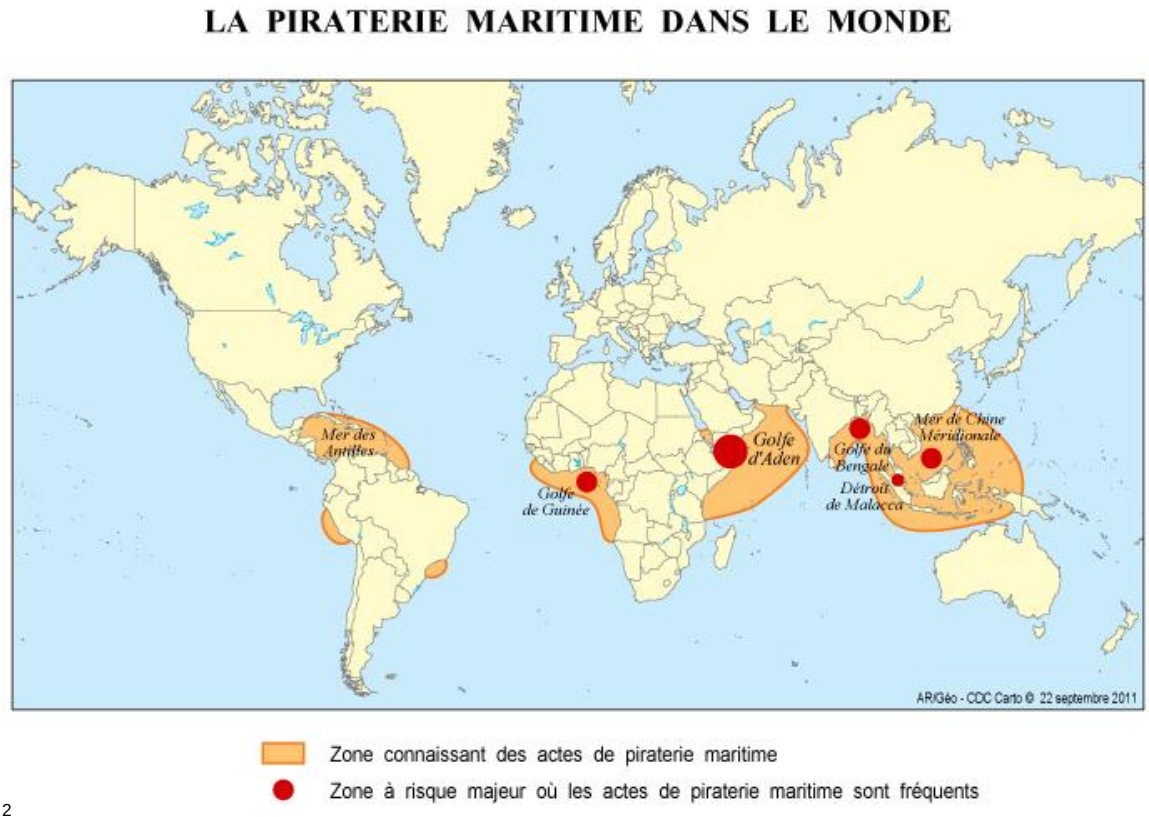
Number of cases of sea piracy over the years: [1]

Year	2007	2008	2009	2010	2011	2012
Number of attacks	263	293	406	445	439	Unknown number



[1] ICC International Maritime Bureau, « Piracy and armed Robbery against ships, Report for the Period of 1 January – 30 June 2012 ».

Nationality of the offenders:



[2]

Most of the pirates come from South Asia. For example, they may be from the Sea of China or the coasts of Indonesia or Bangladesh, where the attacks are mainly concentrated around Chittagong.[3]

However, they do not come exclusively from Asia. Africa is one of the main haunts of pirates They can be located in Africa or in the Arabian Peninsula, for example the Gulf of Guinea and the Nigerian coasts or the coast of Tanzania or the Gulf of Aden in Somalia.[4]

Some pirates come from South America for example Brazil or Peru. The Caribbean Sea is thus very dangerous as well.

But the most important group of pirates is the Somali group. Somali piracy began after the regime of the dictator Barre collapsed in 1991. The fishermen realized that piracy was much more lucrative than fishing. Many of them thus graduated to piracy.[5]

[2] Website of the French Ministry of Foreign and European Affairs
[3] Website of the French Ministry of Foreign and European Affairs
[4] Website of the French Ministry of Foreign and European Affairs
[5] Combating maritime piracy, Council on foreign relations, Christopher Alessi

Nationality of the attacked ships:

Table extracted from the report of ICC International Maritime Bureau, « Piracy and armed Robbery against ships, Report for the Period of 1 January – 30 June 2012 ».

Flag State	2007	2008	2009	2010	2011	2012
Algeria					1	
Antigua Barbuda	3	8	12	6	9	2
Austria					1	
Bahamas	1	3	9	3	7	12
Barbados		1			1	
Belgium			1		2	
Belize		1				
Bermuda				1		
Bolivia						1
Brazil	1		1	1		
Bulgaria						
Cambodia	1					
Canary Island		1				
Cayman Island			1	1	1	1
China	1		1		2	
Comoros	1				2	1
Croatia			1			1
Curacao				3		2
Cyprus	5	9	8	1		1
Denmark	3	1	2			4
Dominica Republic						
Egypt	1		3			
Ethiopia			1	2	1	1
France		3	1	1	2	
Germany		1	5		3	2
Gibraltar	1	2	1		1	2
Greece			5		6	3
Guyana	1					
Honduras	1			5		
Hong Kong	3	2	12	5	11	11
India	3	1	4	2	4	4
Indonesia	1	1	1	1	4	
Iran				2		
Isle of Man	1	4	1	3	2	3
Italy			6	1	5	3
Jamaica						
Japan					1	
Jordan	1					

Liberia	12	7	22	28	29	33
Libya			1		2	
Lithuania				1		
Luxembourg	1				1	
Malta	4	2	16		19	
Marshall Islands	8	10	18	10	28	9
Myanmar	1	1		18	3	
Mongolia						
Netherlands Antilles				3		
Netherlands	2	2	2	3		1
Nigeria		1	1			
North Korea				4		
Norway	1	3	4	2	5	2
Oman	1					3
Pakistan				2		
Panama	20	26	14	40	42	26
Philippines	2		4	1	2	4
Portugal		1				
Qatar		2				
Russia	1			1		
Saudi Arabia				1		
Seychelles Islands				2	1	
Singapore	12	12	9	15	21	24
South Korea	3		2	1		1
Spain				1	2	1
St. Kitts and Nevis	2		2	1		1
St. Vincent Grenadines	5	3	3	5	2	
Suriname		1				
Switzerland	1					
Taiwan		1	1	1		
Tanzania		2		1		
Thailand	1	2	1	2	1	1
Togo				1	1	
Turkey	2	2	1	4	3	1
Tuvalu						1
UAE		3	1		5	
Ukraine			1	3		
United Kingdom	3		1	2	3	1
USA	1		4		3	1
Vanuatu	2			3	1	
Vietnam			2	5	3	
Yemen				1	5	3
Total for 6 months	127	126	114	240	266	127
Total year end	239	263	293	406	439	

How to sentence pirates?:

1) Applicable law:

There is no internationally-recognised instrument that condemns piracy. However the *Convention of the United Nations on the Law of the Sea* gives a general definition.

"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:
(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).

Seizure of a pirate ship or aircraft
On the high seas, or in any other place outside the jurisdiction of any State, every"[6]

Every state must co-operate with other states in order to repress piracy. This is the meaning of the Article 100 of the Convention:

"*Article 100*

Duty to cooperate 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."[7]

[6] United Convention of the United Nations on the Law of the Sea
[7] United Convention of the United Nations on the Law of the Sea

APPENDIX II

Parliamentary **Assembly**
Assemblée parlementaire

Parliamentary Assembly
Assemblée parlementaire
COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Recommendation 1913 (2010)
Necessity to take additional international legal steps to deal with sea piracy

1. The Parliamentary Assembly refers to its Resolution 1722 (2010) "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. 5) 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 and consider creating, provided all existing disadvantages in this field are removed, a special mechanism (either international, or with international participation) for the prosecution of persons suspected of piracy.

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, the North Atlantic Treaty Organization (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.

1. *Assembly debate* on 28 April 2010 (14th Sitting) (see Doc. 12194, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Holovaty). *Text adopted by the Assembly* on 28 April 2010 (15th Sitting).

APPENDIX III

"The necessity to take additional international legal steps to deal with sea piracy" – Parliamentary Assembly Recommendation 1913 (2010)

(Reply adopted by the Committee of Ministers on 6 July 2011 at the 1118th meeting of the Ministers' Deputies)

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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.[1]

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.[2]

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[3] 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 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[4] 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.[5] 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-coordinating 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.[6]

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[7] 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.[8] 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.

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[9] 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.[10]

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.

[1] Comments received from these committees are attached to the present reply.

[2] 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.

[3] 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.

[4] Reference S/2010/394.

[5] Resolution 1950 (2010) of the UN Security Council, paragraph 15-17.

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

[7] Reference S/2010/394.

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

[9] 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.

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

APPENDIX IV

Parliamentary Assembly
Assemblée parlementaire

Parliamentary Assembly
Assemblée parlementaire
COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Doc. 12193

1 April 2010

Piracy – a crime and a challenge for democracies

Report

Political Affairs Committee

Rapporteur: Mrs. Birgen KELEŞ, Turkey, Socialist Group

Summary

In recent years, piracy has reached unprecedented importance and has become nearly endemic in some stretches of sea, seriously threatening the security of commercial shipping and the safety of crews and passengers.

Even if military deterrence has managed to reduce the ratio of successful attacks off the coast of Somalia, the main worldwide hotspot, it cannot provide a long-term solution as the root causes of piracy are ashore. A comprehensive approach is needed to address instability, lack of governance and poverty in Somalia and other countries which generate piracy, as well as to ensure effective prosecution of pirate suspects, in compliance with human rights standards.

A. Draft resolution

1. The Parliamentary Assembly is concerned at the upsurge of piracy, which has become endemic in some stretches of sea, causes an economic loss of billions of dollars every year, great human suffering, with people being kidnapped, injured, traumatised or killed and may serve to finance extremist or terrorist groups. This phenomenon is directly related to the inability of the coastal state to enforce police control in its territorial waters or their proximity, due to lack of good governance.

2. Since 2009, the sea off the coast of Somalia has become the main hotspot worldwide with pirate activities expanding from Somali territorial waters to the Gulf of Aden, Kenya, Madagascar, the Seychelles and Tanzania and pirates using increasingly sophisticated weapons and technology.

3. So far, the main emphasis of the counter-piracy framework has been on military deterrence: 45 countries have dispatched warships off the coast of Somalia to escort merchant vessels flying their flags or vessels in which they have a particular interest, due to the nationality of the crew or the nature of the cargo on board.

4. States have started to co-operate and set up collective security systems, with a view to deterring, defending against and disrupting pirate attacks against ships, irrespective of their flag. In this context, the Assembly commends the efforts undertaken by NATO and the European Union, since 2008, with a number of successive military operations, which have made it possible to deliver safely thousands of tons of humanitarian aid to the Somali civilian population, thwart dozens of pirate attacks and provide assistance to victims.

5. Military deterrence has managed to reduce the ratio of successful attacks off the coast of Somalia from 1 out of 3 in 2006 to 1 out of 6 in 2009. At the same time, the capacity of commercial ships to avoid or escape pirate attacks on their own has increased considerably, making them less and less reliant on private security firms.

6. The Assembly is convinced, however, that military deterrence cannot provide a long-term solution to the problem of piracy as its root causes are ashore. A comprehensive approach is needed to address poverty, instability and lack of governance in Somalia and other countries which generate piracy.

7. The practice of some Council of Europe member states to set free pirate suspects is a matter of concern. A comprehensive approach to piracy requires ensuring effective prosecution as an integral part of any credible deterrence effort and as a way to demonstrate genuine political commitment to enforcing the rule of law.

8. The Assembly acknowledges that a number of hurdles prevent the effective prosecution of pirate suspects, the main being that the majority of pirate attacks take place in a state's territorial waters: in such cases, according to international law, the sole responsibility for apprehension and prosecution lies with the coastal state, as the principle of universal jurisdiction does not apply, with the exception of Somalia by virtue of Resolution 1851 (2008) of the United Nations Security Council.

9. In addition, some Council of Europe member states are reluctant to enforce prosecution, on the grounds that their domestic legislation is obsolete, unclear or unsuitable to fit the reality of today's piracy. Furthermore, in the case of international operations or when a number of countries are involved, there are no clear rules on which state should undertake prosecution, and in which order of precedence.

10. The Assembly notes that the European Union has signed agreements with the governments of Kenya and the Seychelles for the transfer and prosecution of persons suspected of having committed acts of piracy on the high seas and apprehended by navies of the European Union Naval Force (EU NAVFOR); the Netherlands, the United Kingdom and the United States have done likewise. The Assembly regrets that these arrangements do not seem appropriate to deal with the size and the scale of the problem.

11. While acknowledging that the transfer of pirate suspects to a third country is not per se unlawful, and that geographical proximity with the theatre of pirate attacks is important in order to facilitate further investigations, collect evidence and hear witnesses, the Assembly recalls that Council of Europe member states must ensure the compliance of all the agreements which they conclude with the European Convention on Human Rights and other relevant human rights instruments. It also recalls that they could be held responsible for breaches of the Convention, for instance when transferring individuals to a country where they might be subjected to torture or inhuman and degrading treatment or where they would not be given a fair trial.

12. The Assembly also recalls that compliance with the European Convention of Human Rights is mandatory for Council of Europe member states when exercising extraterritorial jurisdiction: thus, they must abide by the relevant provisions of the Convention in the course of apprehension, detention on board or transfer of pirate suspects irrespective of where they take place.

13. Although lack of transparency surrounds the solution of most piracy cases, especially those involving protracted kidnappings, there are grounds to believe that the majority of them end with the payment of ransoms. Council of Europe member states should introduce clear policies and legislation to address this issue, in order to avoid further encouraging piracy and the use of ransom payments to finance extremist or terrorist groups.

14. In the light of these considerations, the Assembly, as regards military deterrence:

14.1. encourages Council of Europe member states to provide naval escort to ships crossing areas at risk of piracy;

14.2. asks NATO, the European Union and countries concerned to renew and strengthen their anti-piracy operations off the coast of Somalia.

15. As regards prosecution, the Assembly calls on Council of Europe member states to:

15.1. modernise and develop a common and more relevant domestic legal framework in order to criminalise the act of piracy wherever it takes place and ensure prosecution in Council of Europe member states, or introduce appropriate legislation where it does not exist;

15.2. introduce legal provisions to allow the apprehension, transfer and prosecution of pirate suspects apprehended in Somali territorial waters or on Somali territory, pursuant to Resolution 1851 (2008) of the United Nations Security Council;

15.3. draw up rules on the treatment of pirate suspects while on board their military ships, ensuring full compliance with the European Convention on Human Rights and other relevant international human rights instruments;

15.4. step up international co-operation and agree on clear rules for identifying the state responsible for prosecution of pirate suspects;

15.5. seek appropriate ways in which the existing international legal framework can be adapted to face current needs of policing at sea.

16. The Assembly calls on Council of Europe member states and the European Union to:

16.1. conclude agreements with third countries on the transfer and prosecution of pirate suspects and ensure that these agreements comply fully with the European Convention on Human Rights and other relevant international human rights instruments;

16.2. monitor closely the treatment of pirate suspects after their transfer to a third country, in particular as regards detention conditions, availability of a fair trial, absence of torture and inhuman and degrading treatment or capital punishment.

17. Finally, as regards the elaboration of a comprehensive counter-piracy framework, the Assembly calls on Council of Europe member states to:

17.1. support the efforts of the Federal Transitional Government of Somalia as well as of the international community, in particular the United Nations and the European Union, to restore peace and stability in Somalia;

17.2. step up assistance to Somalia, directly or through the World Food Programme, the United Nations High Commissioner for Refugees and other human rights and humanitarian organisations;

17.3. establish clear policies and legislation against the payment of ransoms, and ensure compliance by both private actors and state authorities;

17.4. enhance international co-operation in order to identify the criminal networks, based in Somalia or outside, which mastermind pirate attacks and ensure that they are brought to justice;

17.5. investigate whether ransom payments are used to finance extremist or terrorist groups and, if so, take all necessary action to stop this and prevent it from occurring.

B. Explanatory memorandum, by Mrs. Keleş, Rapporteur

I. Introduction

1. Maritime piracy was believed to have largely disappeared in modern times, or at least to have fallen to levels that did not demand considerable attention. Contrary to this assumption, in recent years piracy has reached unprecedented importance and has become nearly endemic in some stretches of sea, seriously threatening the security of commercial shipping and the safety of crews and passengers.

2. Worldwide, the economic loss due to piracy amounts to more than US$16 billion a year.[1] In addition, thousands of hostages are taken and hundreds of sailors are injured, traumatised, or killed.

3. There are also other potential risks:

- pirates could, deliberately or not, cause environmental disasters, for instance when attacking ships carrying oil, dangerous chemicals or explosives – which is more and more frequent;

- the prices of some goods – such as oil and manufactured products – could increase, as a result of the rise in the insurance premiums paid for crossing certain hotspots;

- the gains of piracy might be used to finance terrorist groups or, in the light of the success of piracy, terrorists might decide to take advantage of the vulnerability of merchant shipping and use pirate techniques to target it.

4. It is not surprising, therefore, that in recent years piracy has attracted growing attention by governments, international organisations and other actors, with a view to setting up a meaningful counter-piracy framework.

5. Amongst international parliamentary assemblies, the European Parliament has been a pioneer in addressing the issue, with a far-reaching resolution on piracy at sea adopted in 2008.[2] Since then, piracy has constantly featured in the agenda of European Parliament committees and political groups, with the organisation of various hearings and other initiatives. In June 2009, the European Security and Defence Assembly adopted Recommendation 840 on the role of the European Union in combating piracy, which focuses on military deterrence efforts while suggesting several measures to strengthen prosecution.[3] In November 2009, the NATO Parliamentary Assembly adopted Resolution 375 in a comprehensive and co-coordinated response to piracy off the coast of Somalia.[4]

6. In the course of 2009, three motions were tabled by members of the Parliamentary Assembly of the Council of Europe. One by myself, on piracy and hostage-taking on the high sea;[5] another one underlying the challenges that counter-piracy poses to democracies, namely as regards the role of private security firms, tabled by Mr. Wodarg;[6] and a third one, tabled by Mr. Kosachev, focusing on the necessity to take additional international legal steps to deal with sea piracy.[7] The former two were merged and referred to the Political Affairs Committee, where I was elected Rapporteur; while the third one was referred to the Committee on Legal Affairs and Human Rights (Rapporteur: Mr. Holovaty).

7. In a concern not to duplicate the work of others but to ensure synergy, I have tried to approach the issue of piracy from an angle where the Council of Europe can have an added value. In this report, therefore, I shall focus on rule of law and policy aspects, basing myself, amongst others things, on the Hearing on Modern Day Piracy, organised by the Political Affairs Committee on 17 November 2009, in Brussels. I shall not dwell on strictly legal issues, which will be covered by Mr. Holovaty's report.

2. Overview of the phenomenon

2.1. Definitions

8. According to the 1982 United Nations Convention on the Law of the Sea (UNCLOS), [8] which has been ratified by 160 states with the important exception of the United States of America, piracy is defined as:

"(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:

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 inciting or intentionally facilitating an act described in sub-paragraph (a) or (b)."

9. The legal definition of piracy is more restrictive than the notion of piracy which is used in common language, as the former refers only to acts committed on the high seas (the possibility of other places outside the jurisdiction of any state being only theoretical). Attacks taking place within the territorial waters of a given country, instead, from a legal point of view should be referred to as armed robbery at sea.

10. In this present report, however, I will use the expression piracy in its common usage and I will specify where it takes place in order to make a distinction. It is important to note that 80% of reported piracy attacks occur inside territorial waters.[9]

2.2. A phenomenon on the rise[10]

11. The most comprehensive collection of data on sea piracy is compiled by a private industry organisation, the International Maritime Bureau of the International Chamber of Commerce (ICC-IMB), which also issues periodic reports, through its Piracy Reporting Centre (IMB PRC).The trend observed indicates a quantitative and a qualitative upsurge of the phenomenon:

- in 2009, 406 actual or attempted attacks took place in the world. As a comparison, there were 293 in 2008, 263 in 2007 and 239 in 2006;

- these attacks have become increasingly sophisticated and dangerous for the safety of people: during the 406 actual or attempted attacks in 2009, 153 ships were boarded, 49 were hijacked and 120 were fired upon; 1 052 crew members were taken hostage, 68 were injured in the various incidents and 8 were killed.

12. All kinds of ships were targeted: not only bulk carriers, containers and tankers but also fishing vessels, yachts and passenger ships.

13. These figures, however alarming, do not reflect the entire size of the phenomenon, as many attacks against commercial ships – possibly even 50%[11] – are not reported, according to the ICC-IMB. The lengthy and cumbersome nature of the investigations – sometimes also involving the authorities of the coastal state – often deter shipping companies from reporting them, and so does the fear of losing customers.

2.3. Main hotspots

14. Piracy is a worldwide phenomenon the frequence of which is directly related to the inability of the coastal state to enforce police control off its coast, due to lack of good governance. The main hotspots are the coastal waters off South-East Asia – especially the Straits of Malacca – West Africa, the Indian Ocean and the Gulf of Aden, South America and the Caribbean Islands.

3. The case of Somalia

3.1. The extent of the problem

15. Over the last year, there has been a dramatic increase in piracy and armed robbery at sea off the coast of Somalia, with an expansion of their geographical scope from Somali territorial waters to the Gulf of Aden, Kenya, Madagascar, the Seychelles and Tanzania.[12]

16. Pirates are believed to be using mother vessels which can proceed far out to sea and then launch smaller boats to attack and hijack passing vessels.

17. Out of the 406 actual or attempted attacks which took place in 2009, 217 were off the coast of Somalia, and involved 47 hijackings, 867 crew members were taken hostage, and four killed. In 2008, the number of actual or attempted attacks in this area was 111; in 2007, 31; in 2006, 10.[13]

18. A significant shift in the area of attacks off Somalia was seen in 2009. While the 2008 attacks were predominantly focused in the Gulf of Aden, 2009 witnessed more vessels being targeted off the coastal villages of Eyl and Garaad in Puntland, and the coastal villages of Hobyo and Harardhere in the central area of Somalia.[14] Since October 2009, increased activity has been observed in the Indian Ocean with 33 incidents reported, including 13 hijackings.

19. The surge in the phenomenon of piracy off the coast of Somalia raises great concerns due to:

- the importance of this stretch of sea for commercial shipping, with one third of the world's cargo going through the Gulf of Aden;

- the fact that, unlike in other regions of the world, Somali pirates have proved able to seize huge vessels and to take and keep their crews hostage, even for protracted periods, with a view to obtaining a ransom; and

- the fact that piracy disrupts the delivery of food and other humanitarian assistance on which the Somali population is strongly reliant.

3.2. The response of the UN Security Council

20. The gravity of this situation has led the UN Security Council, acting under Chapter VII of the UN Charter (threats to international peace and security), to adopt five resolutions on piracy off the coast of Somalia over a period of only six months.[15]

21. In these texts, the UN Security Council:

- calls on regional and international organisations that have the capacity to do so to take part actively in the fight against piracy and armed robbery by deploying naval vessels and military aircraft;

- invites all states and regional organisations fighting piracy off the coast of Somalia to conclude special arrangements with countries willing to take custody of pirates in order to embark law enforcement officials from the latter countries to facilitate investigation and prosecution;

- encourages the setting up of an international co-operation mechanism and the creation of a centre for information exchange;

- decides that, until the end of 2009, states and regional organisations co-operating in the fight against piracy and armed robbery at sea off the coast of Somalia may undertake all the necessary measures that are appropriate for the purpose of suppressing acts of piracy and armed robbery at sea, on the territory of Somalia, in respect of the relevant humanitarian and human rights law.[16]

22. This last decision by the UN Security Council should be seen in the context of a precise request addressed to the UN Secretary General by the Transitional Federal Government of Somalia (TFG), calling for the assistance of the international community in fighting piracy.[17]

3.3. The root causes of piracy in Somalia

23. In order to understand why piracy has taken root in Somalia, the political and socio-economic conditions of the country should be kept in mind.

24. Since the ousting of the Barre regime in the early 1990s, Somalia has been in a state of civil war, marked by inter-clan fighting and random banditry, with no central government being able to exert control over the whole Somali territory. At the moment, the TFG – the internationally-recognised government of Somalia – is present in Mogadishu but controls only a few districts of the capital; it is engaged in a war against extremist Islamist groups linked to al Qaeda such as *al-Shabaab* and *Hizbul-Islam* which control the south of the country. The only parts of relative calm are Somaliland and Puntland, two regions that have declared their independence (which is not recognised by the international community) and are engaged in fighting against Islamist groups.

25. In this situation, local warlords set up their own coast guard which started levying taxes and fines on ships they managed to board. This rapidly evolved to piracy.[18] At the same time, taking advantage of the collapse of state power, trawlers from other countries started to fish in Somali waters unhindered, jeopardising the livelihood of local fishermen who did not have many other alternatives than to turn to piracy to ensure their own survival.

26. Piracy, therefore, represents big business for the local warlords and is the main source of income for ordinary people. It is not unusual for villagers to help the pirates guard the kidnapped ships and crews once they are brought back to shore, in the hope of receiving a part of the ransom. According to some reports, even the Somali Diaspora is involved in supporting pirates at home, by helping them get sophisticated equipment, intervening as intermediaries, etc.[19]

27. The population of Somalia totals nearly 10 million, with a life expectancy of less than fifty years; the average age is seventeen. The country lacks the most elementary health and welfare structures; famine and perennial droughts condemn people to live on less than two dollars a day.[20] More than 1.3 million people live in a situation of internal displacement.[21] Violence and human rights violations are everyday occurrences. In the parts under their control, Islamist groups have imposed the strictest interpretation of Sharia Law;[22] the situation of women in these areas is a matter of special concern.

28. Somalis are greatly reliant on external food and humanitarian assistance. However, the provision of such assistance is hindered by piracy at sea and, overland, by attacks against aid workers, abductions and threats from armed groups, which has often led to the temporary closure of World Food Programme offices and the suspension of humanitarian services.

29. In November 2009, *al-Shabaab* posed “11 conditions” to humanitarian NGOs and UN agencies working in the areas under its control, such as that they: stop interfering with Islam, sack all their female staff and pay a tax of US$20 000 every six months. At the end of February 2010, *al-Shabaab* banned the activities of the World Food Programme altogether.

3.4. The role of the international community

30. After about 15 failed peacemaking processes, a new attempt to reach a negotiated peace settlement in Somalia has been under way since May 2008: the Djibouti peace process is a UN-led initiative which enjoys the support of major external actors within the region and outside, including Ethiopia, the League of Arab States and the United States. The Djibouti process, however, faces important challenges, namely:

- how to address the security concerns of other countries in the region, such as Ethiopia;

- how to involve all the important actors in the Somali crisis, including Islamist groups, civil society, business, local councils and the Somali Diaspora;

- how to overcome divisions and disagreements between the actors currently party to the process itself.

31. Some observers point out the limitations of the Djibouti process:

- its focus has so far been on resolving the situation in South and central Somalia, the parts of the country where the conflict has been raging on for the past two decades. However, this approach fails to take into account the situations of Somaliland and Puntland, which are in many ways a result of the Somali crisis;

- it neglects the issue of justice: since the beginning of the civil war, alongside the collapse of the state, Somalis have endured serious human rights violations including killing, rape and torture, without any mechanism to bring perpetrators to justice. This has led to the prevalence of a culture of impunity.

32. At the moment, the only international presence in Somalia is the military branch of the African Union Mission in Somalia (AMISOM), which conducts a peace support operation in order to stabilise the security situation and create a safe and secure environment in preparation for the transition to the UN.

33. Politically, a special role is played by the International Contact Group for Somalia, an informal group initiated by the United States to promote peace and reconciliation and involving Italy, Norway, Sweden, the United Kingdom, Tanzania, the European Commission and the presidency of the European Union Council. Some 45 states and seven international organisations, including the International Maritime Organization and the European Union, are working together in a contact group on piracy off the coast of Somalia, in order to develop and implement anti-piracy measures.

34. The European Union (EU) has progressively increased its involvement: the International Conference in support of the Somali Security Institutions and the African Union Mission in Somalia, held in Brussels on 23 April 2009, represented an important contribution towards the establishment of the Somali security forces and the civilian Somali police force; in July 2009, the EU Council decided to step up the EU's engagement for promoting peace and development in Somalia. To this end, it has studied possibilities for the EU to contribute to international efforts, including in the security field. On 17 November 2009, the EU Council approved a crisis management concept on a possible European Security and Defense Policy (ESDP) operation to contribute to the training of the Transitional Federal Government Security Forces and requested further planning work.

35. The EU overall support to Somalia for 2009 amounted to €180 million, with most projects focusing on humanitarian assistance and strengthening of the rule of law, in particular police and justice. The joint strategy paper for Somalia for 2008-13 provides an overall allocation of €215.8 million, covering three main sectors of co-operation: governance, education and rural development. The issue of the security of maritime routes is also included in the European Commission's 2009-11 indicative programme.

4. A political choice: giving priority to deterrence

36. The response to the problem of piracy has so far mainly been a military one: various navies, such as those of Turkey, France, Russia, United Kingdom, China, India and the United States – the list comprises 45 countries – have dispatched warships in a number of hotspots with the purpose of escorting the merchant vessels flying their flag or in which they have a particular interest, due to the nationality of the crew or the nature of the cargo on board.

37. In some cases, such as off the coast of Somalia/in the Gulf of Aden, states have started to co-operate and set up collective security systems, with a view to deterring, defending against and disrupting pirate attacks against ships, irrespective of their flag. This is the case, in particular, of NATO, the European Union and a coalition of states:

4.1. NATO[23]

38. NATO has been active in this theatre since 2008, with a number of successive operations:

- the mission Allied Provider (12 October-12 December 2008) which, in addition to performing deterrence tasks, successfully escorted eight convoys transporting 30 thousand tons of humanitarian aid of the World Food Programme towards Somalia and thwarted six pirate attacks;

- the operation Allied Protector (March-August 2009), which enabled 43 ships to be escorted, including seven chartered vessels of the World Food Programme. NATO units responded to 46 emergency calls, thwarting pirate attacks or providing assistance to victims;

- the operation Ocean Shield, which is still ongoing. NATO ships patrol the Horn of Africa along the so-called Internationally Recommended Transit Corridor, in close company support[24] (as opposed to escorting) of humanitarian convoys and other ships. Until mid-November 2009, NATO had conducted close company support to 38 ships and disrupted 22 pirate attacks.

4.2. The European Union[25]

39. EU NAVFOR Somalia – Operation Atalanta (since December 2008*)* is the European Union's first ever naval operation. Its mandate is to contribute to:

- the protection of vessels of the World Food Programme;

- the protection of vulnerable vessels sailing in the Gulf of Aden and off the Somali coast;

- employ the necessary measures, including the use of force, to deter, prevent and intervene in order to bring to an end acts of piracy and armed robbery which may be committed in the areas where they are present.

40. Atalanta operates in a zone comprising the south of the Red Sea, the Gulf of Aden and part of the Indian Ocean, including the Seychelles, which represents an area comparable to that of the Mediterranean.

41. Although scheduled for an initial period of twelve months, the operation has been extended until December 2010. During this period, up to 12 EU ships will operate at any one time. At present, eight EU member states are making a permanent operational contribution to the operation: Belgium, France, Germany, Greece, Italy, Luxembourg, Netherlands and Spain.

42. Since the beginning of the operation, 50 WFP vessels have been escorted, allowing the delivery of more than 267 000 metric tons of food into Somalia.

43. In a recent development, at their informal meeting of 24 February 2010 in Palma de Mallorca, the EU Ministers for Defence agreed that, from the end of March 2010, the scope of Operation Atalanta would be expanded to include the blockade of the three main Somali ports where pirates are based, in order to prevent them from launching attacks and neutralising mother ships.

4.3. Coalitions of states

44. The United States and a coalition of states have dispatched the operation CTF-151, a multinational task force with the aim to deter, disrupt and suppress piracy off the coast of Somalia in order to protect global maritime security and secure freedom of navigation for the benefit of all countries.

4.4. Results

45. Military deterrence, although not sufficient to solve the problem of piracy, has had a tangible impact on reducing it:

- while in 2006 one out of three pirate attacks was successful, the ratio fell to one out of six in 2009;

- since 2008, no one single attempted attack against a WFP ship has been successful;

- the capacity of commercial ships to avoid or escape pirate attacks has increased enormously, also thanks to the information, intelligence and know-how made available by military operations active in areas at risk. It is estimated that 70% of pirate attacks are defeated by commercial ships themselves.

46. However, it can be noted at the same time that, during attacks, more and more violence is involved, with pirates tending to fire indiscriminately to intimidate the crew and using more powerful weapons.

5. The involvement of private security firms

47. In an attempt to strengthen the security of commercial shipping, shipping companies have started to hire private security companies (PSCs) to ensure the protection of ships crossing dangerous hotspots. This represents a new and potential lucrative market for security firms which are scaling down operations in Iraq, as a result of Iraq's improving security situation and of the removal of immunity from prosecution by the United States.

48. British firms dominate security work off the coast of Somalia and in the Gulf of Aden, but American companies occupy an increasing share of the market. Not all PSCs provide their staff

with lethal weapons: some of them rely on tactics that can be as simple as greasing or electrifying hand rails, putting barbed wire around the freeboard or installing high-pressure fire hoses directed at vulnerable areas of the ship; sometimes they carry high-tech weapons, which stun, disorient or produce painful sounds.

49. Insurance companies play a role in the success of maritime PSCs: pirate attacks have driven up insurance premiums 10 times for ships crossing the Gulf of Aden but some insurers are prepared to reduce charges of 40% if boats hire their own security.

50. The recourse to PSCs has been severely criticised by relevant international organisations and experts, as it might lead to an armed race at sea with pirates and crews having recourse to more and more powerful weapons.

51. In addition, there are complex legal issues surrounding a civilian vessel carrying arms or armed guards, which would become even more complex if someone was injured or killed. Most flag states do not allow arms to be carried on board their merchant vessels; merchant vessels normally have the right of innocent passage through the territorial waters of a coastal state but this is based on the assumption that they are not armed and that they do not pose any threat. In addition, the law of the coastal state may well forbid the possession or use of unlicensed arms in its territorial waters.

52. As the ICC International Maritime Bureau affirms, "on balance, there is little to be gained and much to lose from having private armed security on board a few vessels" transiting high risk areas.[26]

6. Apprehension and prosecution: legal and political challenges

53. In customary international law, piracy is such a serious crime that it is liable to universal jurisdiction: any country can apprehend pirates on the high seas – where no state exercises its exclusive jurisdiction – and prosecute them under its legislation.[27]

54. This rule of international law, which arose as a response to the need to eradicate piracy in the 17th, 18th and 19th centuries, should still be applicable now. And yet, nowadays pirates hardly ever end up in court: in most cases, even when they could be apprehended, they are left free. Although the totality of scholars recognise that "the law on piracy is 100 % clear"[28], states prove to be reluctant to apply the principle of universal jurisdiction, due to practical, legal and political considerations.

6.1. Territorial waters as the main theatre for piracy attacks

55. The first, factual consideration is that the majority of pirate attacks take place in territorial waters. In this stretch of sea, which UNCLOS extended to 12 nautical miles from the coast in 1982, the principle of universal jurisdiction does not apply.

56. In its territorial waters, a state has the sole responsibility to apprehend and prosecute pirates under its legislation. This is, however, wishful thinking, since sea piracy is concentrated in countries which are not able or willing to tackle the problem.

57. As mentioned earlier, however, this limitation enshrined in international law has been temporarily suspended in the case of Somalia, on the basis of UN Security Council Resolution 1851 (2008) affording states the right of hot pursuit on Somali territory and following a specific request from the Somali authorities.

6.2. Difficulty in identifying pirates before they attack

58. Even in international waters, states are very cautious as regards apprehension because it is not so easy to identify pirates before they attack: when pirates see a naval frigate coming, they throw their weapons, boarding ladder, and even satellite telephones into the sea. Once ashore, they can easily re-equip themselves and set out to sea again. The ransoms, often several million dollars, are enough to comfortably pay for new equipment.

59. The difficulty of this identification is well exemplified by the case of an Indian military ship which, in November 2008, thinking of sinking a pirate vessel in the Gulf of Aden, sank instead a Thai fishing trawler that had been captured by pirates, killing 15 of its innocent crew.[29]

6.3. The rights of apprehended suspected pirates

60. Furthermore, the law has evolved since the time of the buccaneers: while centuries ago captured pirates were normally executed on the spot and without a trial, nowadays a legitimate issue arises of what rights should be granted to the suspected pirates while they are kept in custody and on what legal basis they should be held. Amongst the issues to be clarified are whether they should have access to legal assistance, to an interpreter, to the asylum procedure. In addition, when it comes to multilateral military operations such as those under NATO and EU command, there are often no guidelines on the detention of civilians on board, including the arrest of potential criminals.

6.4. Absence or obsolete character of domestic law criminalising piracy

61. Domestic law is often silent about these problems, precisely because piracy was considered as something belonging to history and hardly any country has modern criminal legislation on piracy or sea-robbery.

62. The *Comité Maritime International* (CMI), a non-governmental international organisation with the objective of contributing to the unification of maritime law, tried to respond to this challenge by producing, in 2001, guidelines for legislation to be used by states as a basis to adapt their domestic law. This work was later revised in co-operation with the International Maritime Organization (IMO) and resulted, in 2007, in a proposal called *Maritime Criminal Acts, Draft Guidelines for National Legislation*. These guidelines cover all forms of maritime violence, with a view to ensuring their prosecution and punishment by one or more states.

6.5. Difficulty in identifying the relevant jurisdiction

63. Individual cases can be extremely complex: for instance: “A vessel flying a Panamanian flag is carrying a shipment from Japan. The cargo is insured in Germany, the crew comes from the Philippines and the Netherlands. The vessel has been boarded on the high seas by Indonesian pirates. Which law applies?”[30]

64. This kind of complexity and the ambiguities of the law often make it possible for pirates to escape prosecution.

6.6. Unwillingness to undertake prosecution

65. It can certainly be argued that a number of states do not wish to see hundreds of pirates serving prison sentences in their prisons and standing trial in their courts.

66. The alternative of apprehending suspected pirates and then extraditing them to their countries of nationality, on the other hand, which would be possible under international law, is not viable: first of all, extradition should be requested by the country of nationality of the pirate, and secondly, such countries of origin often have a poor human rights record and sometimes even enforce capital punishment (extradition would therefore raise a number of questions under the European Convention on Human Rights and other human rights instruments).

67. As regards countries such as Somalia, concerned to keep asylum requests to a minimum, some states might be reluctant to take pirates home to submit them to a trial, fearing that they would apply for asylum, or would argue that their return is impossible due to the situation in the country.

6.7. Prosecution by a directly-affected state

68. Having said that, a few countries have recently shown great resolve in prosecuting pirates.

69. To give some examples, on several occasions, France apprehended Somali pirates and took them to France, where they are now awaiting trial. For instance:

- in April 2008, French commando forces captured six pirates in Somali territory (following the authorisation for hot pursuit provided by the latest UN Security Council resolution on piracy), who had been responsible for the capture of the luxury yacht *Le Ponant* off the coast of Somalia;

- in September 2008, an elite frogman commando unit stormed the *Amel Super Maramu* sailboat, freed the hostages – Mr and Mrs Delanne – and captured six pirates;

- in May 2009, the commando squad Hubert stormed the yacht *Tanit*, taken hostage by Somali pirates. The skipper was killed during the operation. Six pirates were captured.

70. In April 2009, the trial of a Somali pirate involved in the hijacking of the *Maersk Alabama* started in New York. He is accused of "the crime of piracy as defined by the law of nations", which was included in the US criminal code in 1819. The last time that someone was found guilty of piracy under this article, he was sentenced to death by hanging.

71. In May 2009, five Somali pirates stood trial in the Netherlands for having tried to hijack the ship *Samanyolu,* flying a Dutch flag. Following the failure of their attempt, they had been rescued at sea by a Danish ship, and extradited from Denmark to the Netherlands.

72. This trial caused a great deal of controversy: first of all, because according to some press reports the pirates did not show any fear of the punishment; on the contrary they declared their wish to remain in a Dutch prison, where they would be safer and better treated than in Somalia.[31] Secondly, it was the first time that the criminal code provision on piracy was ever applied, and thirdly, because the arbitrariness of justice against piracy was made apparent by the fact that, while these five were standing trial, another nine had been set free one month before by a Dutch ship, despite having been caught while trying to attack a Yemenite ship.

73. In November 2009, for the first time a Spanish prosecutor issued an indictment against two Somali pirate suspects, captured in the framework of the seizure of the trawler *Alakrana* and 33 members of its crew. The charges were illegal detention, criminal association and armed robbery. Earlier that year, a Spanish court surrendered a group of Somali pirates to Kenya, after trying to bring them to Spain.

6.8. Prosecution by a third state

74. Despite these examples, at least with regard to Somalia, the main avenue chosen to ensure the prosecution of acts of piracy seems to be the conclusion of bilateral agreements with third states, which agree to exercise their jurisdiction. Such agreements have been concluded by the European Union with Kenya (March 2009)[32] and the Seychelles (November 2009),[33] in order to ensure the transfer, detention and prosecution of pirates apprehended on the high seas by EU NAVFOR, and between Kenya and, respectively, the United Kingdom, the Netherlands and the United States.

75. At the informal meeting of EU defence ministers in Palma de Mallorca (24-25 February 2010), it was agreed to improve the application of the agreements that exist with Kenya and the Seychelles and to conclude similar agreements with other countries in the region, such as Tanzania, Mauritius and South Africa.

76. When the agreement with Kenya was concluded, some commentators hinted that it should be seen as deterrent measures, given the poor human rights record of Kenya, the inefficiency and lack of independence of its judiciary, its penitentiary conditions and the reported cases of torture and ill-treatment in detention.[34]

77. As of November 2009, 74 suspected pirates had been handed over to Kenya under the agreement with the EU.[35] Trials are under way.

78. The political decision, taken not only by some European states but also by the European Union, to deliver people who are in their custody to a country where the functioning of justice and the protection of human rights are questionable, raises fundamental political issues, and possibly also legal ones under the European Convention on Human Rights.

7. The ransom

79. Although the conclusion of piracy cases is surrounded by a lack of transparency, it seems that in most cases ransoms are paid to secure the liberation of the ship and its crew. On average, in Somalia, they range from US$1 to 3 million. As a matter of fact, a new economy flourishes all over the world, with security companies, lawyers and specialised negotiators gaining profits for their involvement in solving piracy cases. London seems to have become the hub for firms that help ship owners deal with the legal aspects of paying the ransom and engage private security contractors to negotiate with pirates and carry out the ransom drop.

80. Furthermore, there is no clarity on what happens to the money which is delivered as ransom payments: as all transactions are in cash it is nearly impossible to follow a trail. It seems, however, that pirates make tens of thousands of dollars rather than millions because piracy has developed into a mini-economy, employing hundreds of people, all of whom take a share of the ransom. Maritime intelligence experts say that they have no real proof of money laundering and that the way in which the money is shared is unlikely to attract large criminal networks.

81. Some analysts report that pirates give as much as 50% of their revenues to the Islamist *al-Shabaab* militias in the areas under its control. This is not, however, supported by evidence and *al-Shabaab* has always taken a position against piracy. There have been consistent reports that officials from the breakaway region of Puntland – which is the heartland of Somali piracy – get a share. It seems that members of the Harardhere pirate group are linked to the trafficking of arms from Yemen to the Somali towns of Harardhere and Hobyo, which have long been two of the main points of entry for arms shipment destined for armed groups in Somalia and Ethiopia.

82. Some European governments have explicit policies and/or legislation prohibiting the payment of ransoms. Other countries, instead, such as the United Kingdom, do not have specific rules on the matter but the authorities advise against paying. As expressed by the German Chancellor Angela Merkel after a ransom of €2.7 million was paid for the liberation of the cargo ship *Hansa Stanger* and its crew, the main argument against giving in to ransom requests is that this encourages further acts of piracy.

83. The issue of whether to give in or not to ransom requests becomes particularly controversial in the case of private yachts. For instance, in the case of *Le Ponant,* the capture of the pirates happened only after a ransom of supposedly US$2 million had been paid and the crew freed. The six pirates who are now standing trial in France were found in possession of only US$200 000, which indicates that some pirates managed to get away with the rest of the money.

8. Concluding remarks and recommendations

84. The response of European and other democracies to piracy, so far, has mainly been military and focusing on deterrence. The military response has been successful, to some extent, and has reduced the ratio of successful pirate attacks. It cannot, however, provide a long-term solution to the problem as the root causes of piracy are ashore. A comprehensive approach is needed to address poverty, instability and lack of governance in countries where the phenomenon is endemic, such as Somalia.

85. In addition, effective prosecution should be considered as an integral part of any credible deterrence effort. States which want to tackle the phenomenon of piracy, therefore, should:

- modernise the relevant domestic legal framework or introduce it where it does not exist;

- introduce clear rules to identify the state responsible for prosecution, for instance through the conclusion of an international agreement;

- ensure that the fight against piracy is conducted in full respect of human rights and the rule of law.

86. The statement adopted by the G8 summit in L'Aquila, calling for a strengthened criminal justice system to prosecute pirate suspects, is a positive development and a sign that European countries realise the urgency of the problem.

87. The role that the Council of Europe, as a European-wide standard-setting organisation, could play in achieving these objectives is worth further reflection. For instance, the Council of Europe could:

- propose guidelines for domestic legislation to be used by member states, along the lines recommended by the *Comité Maritime International*;

- in the context of its activities in the field of international criminal law, draft a framework convention on the prevention and suppression of piracy and robbery at sea, including clear rules on how to identify the state responsible for prosecution;

- conduct an in-depth study on member states' recent practice in dealing with suspected pirates and elaborate guidelines on how to ensure that future cases are dealt with in a manner which is consistent with member states' obligations under the European Convention on Human Rights and other Council of Europe instruments, including at the

stage of the apprehension and of the transfer to the authorities of the country which will be in charge of prosecution.

88. It is apparent, however, that no legal response will be possible unless supported by a firm political will to address the phenomenon of piracy. To this end, the members of the Parliamentary Assembly should make full use of their dual mandate and, in the light of the findings of the present report, exercise attentive scrutiny on their governments on the way in which piracy cases are handled, in particular as regards:

- bilateral agreements reached with third countries for the prosecution of pirates, in order to avoid the risk that people who are kept under the custody of European authorities are handed over to countries which cannot ensure a fair trial, the protection of human rights standards or contrary to other international obligations;

- the policy or practice of allowing pirates to go free and its consequence on the credibility and effectiveness of counter-piracy measures;

- the issue of the payment of the ransom, by the state or by private actors;

- the need to regulate (or explicitly forbid) the recourse to private security companies on board commercial ships.

*** * ***

Reporting Committee: Political Affairs Committee.

Reference to Committee: Doc. 11803 and Doc. 11837, Reference 3531 of 29 May 2009

Draft resolution unanimously adopted by the committee on 18 March 2010

Members of the Committee: Mr Björn **von Sydow** (Chairman), Mr Dariusz **Lipiński** (Vice-Chairman), Mr Konstantin Kosachev (Vice-Chairman) (alternate: Mr Alexander **Pochinok**), Mr Michael Aastrup Jensen (Vice-Chairman), Mr Françis Agius, Mr Alexander Babakov (alternate: Mr Sergey **Markov**), Mr Viorel Badea, Mr Denis **Badré**, Mrs Theodora Bakoyannis (alternate: Mr Miltiadis **Varvitsiotis**), Mr Andris Bērzinš, Mr Erol Cebeci, Mr Lorenzo Cesa, Mr Titus **Corlătean**, Ms Anna **Čurdová**, Mr Hendrick **Daems**, Mr Pol van den Driessche, Ms Josette Durrieu, Mr Frank Fahey (alternate: Mr Patrick **Breen**), Mr Piero Fassino (alternate: Mr Andrea **Rigoni**), Mr Hans Franken, Mr György **Frunda**, Mr Jean-Charles Gardetto, Mr Marco Gatti, Mr Michaël Glos, Mr Andreas **Gross**, Mr Michael **Hancock**, Mr Davit **Harutyunyan**, Mr Norbert **Haupert**, Mr Joachim Hörster, Mrs Sinikka **Hurskainen**, Mr Tadeusz **Iwiński**, Mr Bakir Izetbegović, Mr Miloš **Jevtić**, Mrs Birgen **Keleş**, Mr Victor Kolesnikov, Mr Jean-Pierre Kucheida, Ms Darja Lavtižar-Bebler, Mr Göran **Lindblad**, Mr Marian Lupu, Mr Gennaro Malgieri, Mr Dick Marty, Mr Frano Matušić, Mr Silver Meikar (alternate: Mr Andres **Herkel**), Mr Dragoljub Mićunović, Mr Jean-Claude **Mignon**, Mr Aydin Mirzazada, Mr Juan Moscoso del Prado Hernández, Ms Lilja Mósesdóttir, Mr João Bosco Mota Amaral, Mrs Olga Nachtmannová, Mr Gebhard Negele, Mrs Miroslava **Nemcova**, Mr Zsolt Németh, Mr Fritz Neugebauer (alternate: Mr Franz Eduard **Kühnel**), Mr Aleksandar Nikoloski, Mr Maciej **Orzechowski**, Mr Johannes Pflug, Mr Ivan Popescu, Mr Christos Pourgourides, Mr John Prescott (alternate: Mr John **Austin**), Mr Gabino **Puche**, Mr Lluis Maria **de Puig**, Mr Amadeu Rossell Tarradellas, Mr Ilir Rusmali, Mr Predrag Sekulić, Mr Samad Seyidov, Mr Leonid **Slutsky**, Mr Petro Symonenko, Mr Zoltán Szabó (alternate: Mr Mátyás **Eörsi**), Mr Mehmet **Tekelioğlu**, Mr Han Ten Broeke, Mr Zhivko Todorov, Lord **Tomlinson**, Mr Latchezar Toshev, Mr Petré **Tsiskarishvili**, Mr Mihai Tudose, Mr Ilyas Umakhanov, Mr José **Vera Jardim**, Mr Luigi Vitali, Mr Konstantinos **Vrettos**, Mrs Katrin Werner, Mrs Karin S. **Woldseth**, Mr David **Wilshire**, Ms Gisela Wurm, Mr Emanuelis Zingueris.

Ex-officio: Mrs Anne **Brasseur**, Mr Tiny Kox, Mr Luca **Volonté**

NB: The names of the members who took part in the meeting are printed in **bold**

Secretariat of the committee: Mrs Chatzivassiliou, Mr Ary, Mr Chevtchenko, Mrs Sirtori-Milner

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[24]. The concept of "close company support" implies that ships are accompanied for a short stretch of sea and then handed over to the close company support of another ship, instead of being escorted by one single ship to destination.

[25]. Presentation by Commander David Lintern, EU NAVFOR Atalanta, Liaison Officer to the EU, Hearing on Modern Day Piracy, 17 November 2009.

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APPENDIX V

Convention on the High Seas
1958

Done at Geneva on 29 April 1958. Entered into force on 30 September 1962. United Nations, *Treaty Series*, vol. 450, p. 11, p. 82.

Convention on the High Seas
Done at Geneva on 29 April 1958

The States Parties to this Convention,

Desiring to codify the rules of international law relating to the high seas,

Recognizing that the United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1958, adopted the following provisions as generally declaratory of established principles of international law,

Have agreed as follows:

Article 1

The term “high seas” means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.

Article 2

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:

(1) Freedom of navigation;
(2) Freedom of fishing;
(3) Freedom to lay submarine cables and pipelines;
(4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas.

Article 3

1. In order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea coast should have free access to the sea. To this end States situated between the sea and a State having no sea coast shall by common agreement with the latter, and in conformity with existing international conventions, accord:

(a) To the State having no sea coast, on a basis of reciprocity, free transit through their territory; and

(b) To ships flying the flag of that State treatment equal to that accorded to their own ships, or to the ships of any other States, as regards access to seaports and the use of such ports.

1. States situated between the sea and a State having no sea coast shall settle, by mutual agreement with the latter, and taking into account the rights of the coastal State or State of transit and the special conditions of the State having no sea coast, all matters relating to freedom of transit and equal treatment in ports, in case such States are not already parties to existing international conventions.

Article 4

Every State, whether coastal or not, has the right to sail ships under its flag on the high seas.

Article 5

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly.

There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

Article 6

1. Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, 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.

Article 7

The provisions of the preceding articles do not prejudice the question of ships employed on the official service of an intergovernmental organization flying the flag of the organization.

Article 8

1. Warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

2. For the purposes of these articles, the term “warship” means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.

Article 9

Ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.

Article 10

1. Every State shall take such measures for ships under its flag as are necessary to ensure safety at sea with regard, inter alia, to:

(a) The use of signals, the maintenance of communications and the prevention of collisions;

(b) The manning of ships and labour conditions for crews taking into account the applicable international labour instruments;

(c) The construction, equipment and seaworthiness of ships.

2. In taking such measures each State is required to conform to generally accepted international standards and to take any steps which may be necessary to ensure their observance.

Article 11

1. In the event of a collision or of any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such persons except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licence shall alone be competent, after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State which issued them.

3. No arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the flag State.

Article 12

1. Every State shall require the master of a ship sailing under its flag, insofar as he can do so without serious danger to the ship, the crew or the passengers:

(a) To render assistance to any person found at sea in danger of being lost;

(b) To proceed with all possible speed to the rescue of persons in distress if informed of their need of assistance, insofar as such action may reasonably be expected of him;

(c) After a collision, to render assistance to the other ship, her crew and her passengers and, where possible, to inform the other ship of the name of his own ship, her port of registry and the nearest port at which she will call.

2. Every coastal State shall promote the establishment and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and — where circumstances so require — by way of mutual regional arrangements cooperate with neighbouring States for this purpose.

Article 13

Every State shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for that purpose. Any slave taking refuge on board any ship, whatever its flag, shall ipso facto be free.

Article 14

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.

Article 15

Piracy consists of any of the following acts:

(1) Any illegal acts of violence, 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:

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

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

(2) 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;

(3) Any act of inciting or of intentionally facilitating an act described in subparagraph 1 or subparagraph 2 of this article.

Article 16

The acts of piracy, as defined in article 15, 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.

Article 17

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 15. 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 18

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 19

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 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 20

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 21

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

Article 22

1. Except where acts of interference derive from powers conferred by treaty, a warship which encounters a foreign merchant ship on the high seas is not justified in boarding her unless there is reasonable ground for suspecting:

(a) That the ship is engaged in piracy; or

(b) That the ship is engaged in the slave trade; or

(c) That 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 subparagraphs (a), (b) and (c) above, 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.

Article 23

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 or 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 24 of the Convention on the Territorial Sea and the Contiguous Zone, 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 ceases as soon as the ship pursued enters the territorial sea of its own country or of a third State.

3. 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 as a mother ship are within the limits of the territorial sea, or as the case may be within the contiguous zone. 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.

4. The right of hot pursuit may be exercised only by warships or military aircraft, or other ships or aircraft on government service specially authorized to that effect.

5. Where hot pursuit is effected by an aircraft:

(a) The provisions of paragraphs 1 to 3 of this article shall apply mutatis mutandis;

(b) The aircraft giving the order to stop must itself actively pursue the ship until a ship or 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 on the high seas 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.

6. 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 enquiry 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 high seas, if the circumstances rendered this necessary.

7. Where a ship has been stopped or arrested on the high seas 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.

Article 24

Every State shall draw up regulations to prevent pollution of the seas by the discharge of oil from ships or pipelines or resulting from the exploitation and exploration of the seabed and its subsoil, taking account of existing treaty provisions on the subject.

Article 25

1. Every State shall take measures to prevent pollution of the seas from the dumping of radioactive waste, taking into account any standards and regulations which may be formulated by the competent international organizations.

2. All States shall cooperate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radioactive materials or other harmful agents.

Article 26

1. All States shall be entitled to lay submarine cables and pipelines on the bed of the high seas.

2. Subject to its right to take reasonable measures for the exploration of the continental shelf and the exploitation of its natural resources, the coastal State may not impede the laying or maintenance of such cables or pipelines.

3. When laying such cables or pipelines the State in question shall pay due regard to cables or pipelines already in position on the seabed. In particular, possibilities of repairing existing cables or pipelines shall not be prejudiced.

Article 27

Every State shall take the necessary legislative measures to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury.

Article 28

Every State shall take the necessary legislative measures to provide that, if persons subject to its jurisdiction who are the owners of a cable or pipeline beneath the high seas, in laying or repairing that cable or pipeline, cause a break in or injury to another cable or pipeline, they shall bear the cost of the repairs.

Article 29

Every State shall take the necessary legislative measures to ensure that the owners of ships who can prove that they have sacrificed an anchor, a net or any other fishing gear, in order to avoid injuring a submarine cable or pipeline, shall be indemnified by the owner of the cable or pipeline, provided that the owner of the ship has taken all reasonable precautionary measures beforehand.

Article 30

The provisions of this Convention shall not affect conventions or other international agreements already in force, as between States Parties to them.

Article 31

This Convention shall, until 31 October 1958, be open for signature by all States Members of the United Nations or of any of the specialized agencies, and by any other State invited by the General Assembly of the United Nations to become a Party to the Convention.

Article 32

This Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 33

This Convention shall be open for accession by any States belonging to any of the categories mentioned in article 31. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 34

1. This Convention shall come into force on the thirtieth day following the date of deposit of the twenty- second instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each State ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such State of its instrument of ratification or accession.

Article 35

1. After the expiration of a period of five years from the date on which this Convention shall enter into force, a request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request.

Article 36

The Secretary-General of the United Nations shall inform all States Members of the United Nations and the other States referred to in article 31:

(a) Of signatures to this Convention and of the deposit of instruments of ratification or accession, in accordance with articles 31, 32 and 33;

(b) Of the date on which this Convention will come into force, in accordance with article 34;

(c) Of requests for revision in accordance with article 35.

Article 37

The original of this Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who hall send certified copies thereof to all States referred to in article 31.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Convention.

DONE at Geneva, this twenty-ninth day of April one thousand nine hundred and fifty-eight.

APPENDIX VI

United Nations Convention on the Law of the Sea
10 December 1982, 1833 UNTS 396

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, commit- ted for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(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).

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 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.

APPENDIX VII

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation

10 March 1988, 1678 U.N.T.S. 221

ARTICLE 3

1. Any person commits an offence if that person unlawfully and intentionally:
   a. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
   b. performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
   c. destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
   d. places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
   e. destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
   f. communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
   g. injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

2. Any person also commits an offence if that person:
   a. attempts to commit any of the offences set forth in paragraph 1;
   b. abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
   c. threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, sub- paragraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question.

ARTICLE 4

1. This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States.

2. In cases where the Convention does not apply pursuant to paragraph 1, it nevertheless applies when the offender or the alleged offender is found in the territory of a State Party other than the State referred to in paragraph 1.

ARTICLE 5

Each State Party shall make the offences set forth in article 3 punishable by appropriate penalties which take into account the grave nature of those offences.

ARTICLE 6

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 when the offence is committed:
   a. against or on board a ship flying the flag of the State at the time the offence is committed; or

b. in the territory of that State, including its territorial sea; or c. by a national of that State.

2. A State Party may also establish its jurisdiction over any such offence when:
   a. it is committed by a stateless person whose habitual residence is in that State; or
   b. during its commission a national of that State is seized, threatened, injured or killed; or
   c. it is committed in an attempt to compel that State to do or abstain from doing any act.

3. Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General of the International Maritime Organization (hereinafter referred to as "the Secretary-General"). If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in article 3 in cases where the alleged of- fender is present in its territory and it does not extradite him to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.

5. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law.

ARTICLE 7

1. Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the offender or the alleged offender is present shall, in accordance with its law, take him into custody or take other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary inquiry into the facts, in accordance with its own legislation.

3. Any person regarding whom the measures referred to in paragraph 1 are being taken shall be entitled to:
   a. communicate without delay with the nearest appropriate representative of the State of which he is a national or which is otherwise entitled to establish such communication or, if he is a stateless person, the State in the territory of which he has his habitual residence;
   b. be visited by a representative of that State.

4. The rights referred to in paragraph 3 shall be exercised in conformity with the laws and regulations of the State in the territory of which the offender or the alleged offender is present, subject to the proviso that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under paragraph 3 are intended.

5. When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with article 6, paragraph 1 and, if it considers it advisable, any other interested States, of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary inquiry contemplated in paragraph 2 of this article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction.

ARTICLE 8

1. The master of a ship of a State Party (the "flag State") may deliver to the authorities of any other State Party (the "receiving State") any person who he has reasonable grounds to believe has committed one of the offences set forth in article 3.

2. The flag State shall ensure that the master of its ship is obliged, whenever practicable, and if possible before entering the territorial sea of the receiving State carrying on board any person whom the master intends to deliver in accordance with paragraph 1, to give notification to the authorities of the receiving State of his intention to deliver such person and the reasons therefore.

3. The receiving State shall accept the delivery, except where it has grounds to consider that the Convention is not applicable to the acts giving rise to the delivery, and shall proceed in accordance with the provisions of article 7. Any refusal to accept a delivery shall be accompanied by a statement of the reasons for refusal.

4. The flag State shall ensure that the master of its ship is obliged to furnish the authorities of the receiving State with the evidence in the master's possession which pertains to the alleged offence.

5. A receiving State which has accepted the delivery of a person in accordance with paragraph 3 may, in turn, request the flag State to accept delivery of that person. The flag State shall consider any such request, and if it accedes to the request it shall proceed in accordance with article 7. If the flag State declines
a request, it shall furnish the receiving State with a statement of the reasons therefor.

ARTICLE 9

Nothing in this Convention shall affect in any way the rules of international law pertaining to the competence of States to exercise investigative or enforcement jurisdiction on board ships not flying their flag.

ARTICLE 10

1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was com- mitted in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.

Any person regarding whom proceedings are being carried out in connection with any of the offences set forth in article 3 shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided for such proceedings by the law of the State in the territory of which he is present.

ARTICLE 11

1. The offences set forth in article 3 shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider
this Convention as a legal basis for extradition in respect of the offences set forth in article 3. Extradition shall be subject to the other conditions provided by the law of the requested State Party.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in article 3 as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.

4. If necessary, the offences set forth in article 3 shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in a place within the jurisdiction of the State Party requesting extradition.

5. A State Party which receives more than one request for extradition from States which have established jurisdiction in accordance with article 6[1] and which decides not to prosecute shall, in selecting the State to which the offender or alleged offender is to be extradited, pay due regard to the interests and responsibilities of the State Party whose flag the ship was flying at the time of the commission of
the offence.

6. In considering a request for the extradition of an alleged offender pursuant to this Convention, the requested State shall pay due regard to whether his rights as set forth in article 7, paragraph 3, can be effected in the requesting State.

7. With respect to the offences as defined in this Convention, the provisions of all extradition treaties and arrangements applicable between States Parties are modified as between States Parties to the extent that they are incompatible with this Convention.

ARTICLE 12

1. State Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in article 3, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2. States Parties shall carry out their obligations under paragraph 1 in conformity with any treaties on mutual assistance that may exist between them. In the absence of such treaties, States Parties shall afford each other assistance in accordance with their national law.

ARTICLE 13

1. States Parties shall co-operate in the prevention of the offences set forth in article 3, particularly by:
a. taking all practicable measures to prevent preparations in their respective territories for the commission of those offences within or outside their territories;
b. exchanging information in accordance with their national law, and co-ordinating administrative and other measures taken as appropriate to prevent the commission of offences set forth in article 3.

2. When, due to the commission of an offence set forth in article 3, the passage of a ship has been delayed or interrupted, any State Party in whose territory the ship or passengers or crew are present shall be bound to exercise all possible efforts to avoid a ship, its passengers, crew or cargo being unduly detained or delayed.

ARTICLE 14

Any State Party having reason to believe that an offence set forth in article 3 will be committed shall, in accordance with its national law, furnish as promptly as possible any relevant information in its possession to those States which it believes would be the States having established jurisdiction in accordance with article 6.

ARTICLE 15

1. Each State Party shall, in accordance with its national law, provide to the Secretary-General, as promptly as possible, any relevant information in its possession concerning:

a. the circumstances of the offence;
b. the action taken pursuant to article 13, paragraph 2;
c. the measures taken in relation to the offender or the alleged offender and, in particular, the results of any extradition proceedings or other legal proceedings.

2. The State Party where the alleged offender is prosecuted shall, in accordance with its national law, communicate the final outcome of the proceedings to the Secretary-General.

The information transmitted in accordance with paragraphs 1 and 2 shall be communicated by the Secretary-General to all States Parties, to Members of the International Maritime Organization (hereinafter referred to as “the Organization”), to the other States concerned, and to the appropriate international inter- governmental organizations.

APPENDIX VIII

Resolution 1846 (2008)
Adopted by the Security Council at its 6026th meeting on 2 December 2008

The Security Council,

Recalling its previous resolutions concerning the situation in Somalia, especially resolutions 1814 (2008), 1816 (2008) and 1838 (2008),

Continuing to be gravely concerned by the threat that piracy and armed robbery at sea against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, to international navigation and the safety of commercial maritime routes, and to other vulnerable ships, including fishing activities in conformity with international law,

Reaffirming its respect for the sovereignty, territorial integrity, political independence and unity of Somalia,

Further reaffirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 ("the Convention"), sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities,

Taking into account the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government ("TFG") to interdict pirates or patrol and secure either the international sea lanes off the coast of Somalia or Somalia's territorial waters,

Taking note of the requests from the TFG for international assistance to counter piracy off its coasts, including the 1 September 2008 letter from the President of Somalia to the Secretary-General of the United Nations expressing the appreciation of the TFG to the Security Council for its assistance and expressing the TFG's willingness to consider working with other States and regional organizations to combat piracy and armed robbery at sea off the coast of Somalia, the 20 November 2008 letter conveying the request of the TFG that the provisions of resolution 1816 (2008) be renewed, and the 20 November request of the Permanent Representative of Somalia before the Security Council that the renewal be for an additional 12 months,

Further taking note of the letters from the TFG to the Secretary-General providing advance notification with respect to States cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia and from other Member States to the Security Council to inform the Council of their actions, as requested in paragraphs 7 and 12 of resolution 1816 (2008), and encouraging those cooperating States, for which advance notification has been provided by the TFG to the Secretary-General, to continue their respective efforts,

Expressing again its determination to ensure the long-term security of World Food Programme (WFP) maritime deliveries to Somalia,

Recalling that in its resolution 1838 (2008) it commended the contribution made by some States since November 2007 to protect (WFP) maritime convoys, and the establishment by the European Union (EU) of a coordination unit with the task of supporting the surveillance and protection activities carried out by some member States of the European Union off the coast of Somalia, as well as other international and national initiatives taken with a view to implementing resolutions 1814 (2008) and 1816 (2008),

Emphasizing that peace and stability within Somalia, the strengthening of State institutions, economic and social

development and respect for human rights and the rule of law are necessary to create the conditions for a full eradication of piracy and armed robbery at sea off the coast of Somalia,

Welcoming the signing of a peace and reconciliation Agreement ("the Djibouti Agreement") between the TFG and the Alliance for the Re-Liberation of Somalia on 19 August 2008, as well as their signing of a joint ceasefire agreement on 26 October 2008, noting that the Djibouti Agreement calls for the United Nations to authorize and deploy an international stabilization force, and further noting the Secretary-General's report on Somalia of 17 November 2008, including his recommendations in this regard,

Commending the key role played by the African Union Mission to Somalia (AMISOM) in facilitating delivery of humanitarian assistance to Somalia through the port of Mogadishu and the contribution that AMISOM has made towards the goal of establishing lasting peace and stability in Somalia, and recognizing specifically the important contributions of the Governments of Uganda and Burundi to Somalia,

Welcoming the organization of a ministerial meeting of the Security Council in December 2008 to examine ways to improve international coordination in the fight against piracy and armed robbery off the coast of Somalia and to ensure that the international community has the proper authorities and tools at its disposal to assist it in these efforts,

Determining that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reiterates* that it condemns and deplores all acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia;

2. *Expresses* its concern over the finding contained in the 20 November 2008 report of the Monitoring Group on Somalia that escalating ransom payments are fuelling the growth of piracy off the coast of Somalia;

3. *Welcomes* the efforts of the International Maritime Organization ("IMO") to update its guidance and recommendations to the shipping industry and to Governments for preventing and suppressing piracy and armed robbery at sea and to provide this guidance as soon as practicable to all Member States and to the international shipping community operating off the coast of Somalia;

4. *Calls upon* States, in cooperation with the shipping industry, the insurance industry and the IMO, to issue to ships entitled to fly their flag appropriate advice and guidance on avoidance, evasion, and defensive techniques and measures to take if under the threat of attack or attack when sailing in the waters off the coast of Somalia;

5. *Further calls upon* States and interested organizations, including the IMO, to provide technical assistance to Somalia and nearby coastal States upon their request to enhance the capacity of these States to ensure coastal and maritime security, including combating piracy and armed robbery at sea off the Somali and nearby coastlines;

6. *Welcomes* initiatives by Canada, Denmark, France, India, the Netherlands, the Russian Federation, Spain, the United Kingdom, the United States of America, and by regional and international organizations to counter piracy off the coast of Somalia pursuant to resolutions 1814 (2008), 1816 (2008) and 1838 (2008), the decision by the North Atlantic Treaty Organization (NATO) to counter piracy off the Somalia coast, including by escorting vessels of the WFP, and in particular the decision by the EU on 10 November 2008 to launch, for a period of 12 months from December 2008, a naval operation to protect WFP maritime convoys bringing humanitarian assistance to Somalia and other vulnerable ships, and to repress acts of piracy and armed robbery at sea off the coast of Somalia;

7. *Calls upon* States and regional organizations to coordinate, including by sharing information through bilateral channels or the United Nations, their efforts to deter acts of piracy and armed robbery at sea off the coast of

Somalia in cooperation with each other, the IMO, the international shipping community, flag States, and the TFG;

8. *Requests* the Secretary-General to present to it a report, no later than three months after the adoption of this resolution, on ways to ensure the long-term security of international navigation off the coast of Somalia, including the long- term security of WFP maritime deliveries to Somalia and a possible coordination and leadership role for the United Nations in this regard to rally Member States and regional organizations to counter piracy and armed robbery at sea off the coast of Somalia;

9. *Calls upon* States and regional organizations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, consistent with this resolution and relevant inter national law, by deploying naval vessels and military aircraft, and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery off the coast of Somalia, or for which there is reasonable ground for suspecting such use;

10. *Decides* that for a period of 12 months from the date of this resolution States and regional organizations cooperating with the TFG in the fight against piracy and armed robbery at sea off the coast of Somalia, for which advance notification has been provided by the TFG to the Secretary-General, may:
(a) Enter into the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant inter- national law; and (b) Use, within the territorial waters of Somalia, in a manner consistent with such action permitted on the high seas with respect to piracy under relevant international law, all necessary means to repress acts of piracy and armed robbery at sea;

11. *Affirms* that the authorizations provided in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under the Convention, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law; and *affirms further* that such authorizations have been provided only following the receipt of the 20 November letter conveying the consent of the TFG;

12. *Affirms* that the measures imposed by paragraph 5 of resolution 733 (1992) and further elaborated upon by paragraphs 1 and 2 of resolution 1425 (2002) do not apply to supplies of technical assistance to Somalia solely for the purposes set out in paragraph 5 above which have been exempted from those measures in accordance with the procedure set out in paragraphs 11 (b) and 12 of resolution 1772 (2007);

13. *Requests* that cooperating States take appropriate steps to ensure that the activities they undertake pursuant to the authorization in paragraph 10 do not have the practical effect of denying or impairing the right of innocent passage to the ships of any third State;

14. *Calls upon* all States, and in particular flag, port and coastal States, States of the nationality of victims and perpetrators of piracy and armed robbery, and other States with relevant jurisdiction under international law and national legislation, to cooperate in determining jurisdiction, and in the investigation and prosecution of persons responsible for acts of piracy and armed robbery off the coast of Somalia, consistent with applicable international law including international human rights law, and to render assistance by, among other actions, providing disposition and logistics assistance with respect to persons under their jurisdiction and control, such victims and witnesses and persons detained as a result of operations conducted under this resolution;

15. *Notes* that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (“SUA Convention”) provides for 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 force or threat thereof or any other form of intimidation; urges States parties to the SUA Convention to fully implement their obligations under said Convention and cooperate with the Secretary-General and the IMO to build judicial capacity for the successful prosecution of persons suspected of piracy and armed robbery at sea off the coast of Somalia;

16. *Requests* States and regional organizations cooperating with the TFG to inform the Security Council and the

Secretary-General within nine months of the progress of actions undertaken in the exercise of the authority provided in paragraph 10 above;

17. *Requests* the Secretary-General to report to the Security Council within 11 months of adoption of this resolution on the implementation of this resolution and on the situation with respect to piracy and armed robbery in territorial waters and the high seas off the coast of Somalia;

18. *Requests* the Secretary-General of the IMO to brief the Council on the basis of cases brought to his attention by the agreement of all affected coastal States, and duly taking into account the existing bilateral and regional cooperative arrangements, on the situation with respect to piracy and armed robbery;

19. *Expresses* its intention to review the situation and consider, as appropriate, renewing the authority provided in paragraph 10 above for additional periods upon the request of the TFG;

20. *Decides* to remain seized of the matter.

APPENDIX IX

Resolution 1851 (2008)
Adopted by the Security Council at its 6046th meeting on 16 December 2008

The Security Council,

Recalling its previous resolutions concerning the situation in Somalia, especially resolutions 1814 (2008), 1816 (2008), 1838 (2008), 1844 (2008), and 1846 (2008),

Continuing to be gravely concerned by the dramatic increase in the incidents of piracy and armed robbery at sea off the coast of Somalia in the last six months, and by the threat that piracy and armed robbery at sea against vessels pose to the prompt, safe and effective delivery of humanitarian aid to Somalia, and noting that pirate attacks off the coast of Somalia have become more sophisticated and daring and have expanded in their geographic scope, notably evidenced by the hijacking of the M/V Sirius Star 500 nautical miles off the coast of Kenya and subsequent unsuccessful attempts well east of Tanzania,

Reaffirming its respect for the sovereignty, territorial integrity, political independence and unity of Somalia, including Somalia's rights with respect to offshore natural resources, including fisheries, in accordance with international law,

Further reaffirming that international law, as reflected in the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities,

Again taking into account the crisis situation in Somalia, and the lack of capacity of the Transitional Federal Government (TFG) to interdict, or upon interdiction to prosecute pirates or to patrol and secure the waters off the coast of Somalia, including the international sea lanes and Somalia's territorial waters,

Noting the several requests from the TFG for international assistance to counter piracy off its coast, including the letter of 9 December 2008 from the President of Somalia requesting the international community to assist the TFG in taking all necessary measures to interdict those who use Somali territory and airspace to plan, facilitate or undertake acts of piracy and armed robbery at sea, and the 1 September 2008 letter from the President of Somalia to the Secretary-General of the UN expressing the appreciation of the TFG to the Security Council for its assistance and expressing the TFG's willingness to consider working with other States and regional organizations to combat piracy and armed robbery off the coast of Somalia,

Welcoming the launching of the EU operation Atalanta to combat piracy off the coast of Somalia and to protect vulnerable ships bound for Somalia, as well as the efforts by the North Atlantic Treaty Organization, and other States acting in a national capacity in cooperation with the TFG to suppress piracy off the coast of Somalia,

Also welcoming the recent initiatives of the Governments of Egypt, Kenya, and the Secretary-General's Special Representative for Somalia, and the United Nations Office on Drugs and Crime (UNODC) to achieve effective measures to remedy the causes, capabilities, and incidents of piracy and armed robbery off the coast of Somalia, and emphasizing the need for current and future counter-piracy operations to effectively coordinate their activities,

Noting with concern that the lack of capacity, domestic legislation, and clarity about how to dispose of pirates after their capture, 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, and reiterating that the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation ("SUA Convention") provides for 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 force or threat thereof or any other form of intimidation,

Welcoming the report of the Monitoring Group on Somalia of 20 November 2008 (S/2008/769), and noting the role piracy may play in financing embargo violations by armed groups,

Determining that the incidents of piracy and armed robbery at sea in the waters off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region,

Acting under Chapter VII of the Charter of the United Nations,

1. *Reiterates* that it condemns and deplores all acts of piracy and armed robbery against vessels in waters off the coast of Somalia;

Calls upon States, regional and international organizations that have the capacity to do so, to take part actively in the fight against piracy and armed robbery at sea off the coast of Somalia, in particular, consistent with this resolution, resolution 1846 (2008), and international law, by deploying naval vessels and military aircraft and through seizure and disposition of boats, vessels, arms and other related equipment used in the commission of piracy and armed robbery at sea off the coast of Somalia, or for which there are reasonable grounds for suspecting such use;

3. *Invites* all States and regional organizations fighting piracy off the coast of Somalia to conclude special agreements or arrangements with countries willing to take custody of pirates in order to embark law enforcement officials ("ship-riders") from the latter countries, in particular countries in the region, to facilitate the investigation and prosecution of persons detained as a result of operations conducted under this resolution for acts of piracy and armed robbery at sea off the coast of Somalia, provided that the advance consent of the TFG is obtained for the exercise of third state jurisdiction by ship riders in Somali territorial waters and that such agreements or arrangements do not prejudice the effective implementation of the SUA Convention;

4. *Encourages* all States and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to establish an international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia's coast; and recalls that future recommendations on ways to ensure the long-term security of international navigation off the coast of Somalia, including the long-term security of WFP maritime deliveries to Somalia and a possible coordination and leadership role for the United Nations in this regard to rally Member States and regional organizations to counter piracy and armed robbery at sea off the coast of Somalia are to be detailed in a report by the Secretary-General no later than three months after the adoption of resolution 1846;

5. *Further encourages* all states and regional organizations fighting piracy and armed robbery at sea off the coast of Somalia to consider creating a centre in the region to coordinate information relevant to piracy and armed robbery at sea off the coast of Somalia, to increase regional capacity with assistance of UNODC to arrange effective ship rider agreements or arrangements consistent with UNCLOS and to implement the SUA Convention, the United Nations Convention against Transnational Organized Crime and other relevant instruments to which States in the region are party, in order to effectively investigate and prosecute piracy and armed robbery at sea offences;

6. In response to the letter from the TFG of 9 December 2008, encourages Member States to continue to cooperate with the TFG in the fight against piracy and armed robbery at sea, notes the primary role of the TFG in rooting out piracy and armed robbery at sea, and decides that for a period of twelve months from the date of adoption of resolution 1846, States and regional organizations cooperating in the fight against piracy and armed robbery at sea off the coast of Somalia for which advance notification has been provided by the TFG to the Secretary General may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea, pursuant to the request of the TFG, provided, however, that any measures undertaken pursuant to the authority of this paragraph shall be undertaken consistent with applicable international humanitarian and human rights law;

7. *Calls on* Member States to assist the TFG, at its request and with notification to the Secretary-General, to

strengthen its operational capacity to bring to justice those who are using Somali territory to plan, facilitate or undertake criminal acts of piracy and armed robbery at sea, and stresses that any measures undertaken pursuant to this paragraph shall be consistent with applicable international human rights law;

8. *Welcomes* the communiqué issued by the International Conference on Piracy around Somalia held in Nairobi, Kenya, on 11 December 2008 and encourages Member States to work to enhance the capacity of relevant states in the region to combat piracy, including judicial capacity;

9. *Notes* with concern the findings contained in the 20 November 2008 report of the Monitoring Group on Somalia that escalating ransom payments are fuel- ling the growth of piracy in waters off the coast of Somalia, and that the lack of enforcement of the arms embargo established by resolution 733 (1992) has per- mitted ready access to the arms and ammunition used by the pirates and driven in part the phenomenal growth in piracy;

10. *Affirms* that the authorization provided in this resolution apply only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of Member States under international law, including any rights or obligations under UNCLOS, with respect to any other situation, and underscores in particular that this resolution shall not be considered as establishing customary international law, and affirms further that such authorizations have been provided only following the receipt of the 9 December 2008 letter conveying the consent
of the TFG;

11. *Affirms* that the measures imposed by paragraph 5 of resolution 733 (1992) and further elaborated upon by paragraphs 1 and 2 or resolution 1425 (2002) shall not apply to weapons and military equipment destined for the sole use of Member States and regional organizations undertaking measures in accordance with paragraph 6 above;

12. *Urges* States in collaboration with the shipping and insurance industries, and the IMO to continue to develop avoidance, evasion, and defensive best practices and advisories to take when under attack or when sailing in waters off the coast of Somalia, and further urges States to make their citizens and vessels available for forensic investigation as appropriate at the first port of call immediately following an act or attempted act of piracy or armed robbery at sea or release from captivity;

13. *Decides* to remain seized of the matter.

APPENDIX X

UN CHARTER (1945) - CHAPTER 7

CHAPTER VII: ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40

In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43

1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.
3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44

When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfilment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45

In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46

Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47

1. There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament.
2. The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work.
3. The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently.
4. The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

Article 48

1. The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.
2. Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49

The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

Article 50

If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

APPENDIX XI

2005 PROTOCOL TO THE CONVENTION FOR THE SUPPRESSION OF UNLAWFUL ACTS AGAINST THE SAFETY OF MARITIME NAVIGATION

Adopted in London, United Kingdom on 14 October 2005

[http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=49f58c8a2&page=search]

Preamble

THE STATES PARTIES to this Protocol,

BEING PARTIES to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation done at Rome on 10 March 1988,

ACKNOWLEDGING that terrorist acts threaten international peace and security,

MINDFUL of resolution A.924(22) of the Assembly of the International Maritime Organization requesting the revision of existing international legal and technical measures and the consideration of new measures in order to prevent and suppress terrorism against ships and to improve security aboard and ashore, and thereby to reduce the risk to passengers, crews and port personnel on board ships and in port areas and to vessels and their cargoes,

CONSCIOUS of the Declaration on Measures to Eliminate International Terrorism, annexed to United Nations General Assembly resolution 49/60 of 9 December 1994, in which, inter alia, the States Members of the United Nations solemnly reaffirm their unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustifiable, wherever and by whomever committed, including those which jeopardize the friendly relations among States and peoples and threaten the territorial integrity and security of States,

NOTING United Nations General Assembly resolution 51/210 of 17 December 1996 and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism annexed thereto,

RECALLING resolutions 1368 (2001) and 1373 (2001) of the United Nations Security Council, which reflect international will to combat terrorism in all its forms and manifestations, and which assigned tasks and responsibilities to States, and taking into account the continued threat from terrorist attacks,

RECALLING ALSO resolution 1540 (2004) of the United Nations Security Council, which recognizes the urgent need for all States to take additional effective measures to prevent the proliferation of nuclear, chemical or biological weapons and their means of delivery,

RECALLING FURTHER the Convention on Offences and Certain Other Acts Committed on Board Aircraft, done at Tokyo on 14 September 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971; the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973; the International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979; the Convention on the Physical Protection of Nuclear Material, done at Vienna on 26 October 1979 and amendments thereto adopted on 8 July 2005; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988; the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988; the Convention on the Marking of Plastic Explosives for the Purpose of Detection, done at Montreal on 1 March 1991; the International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997; the International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999, and the International Convention for the Suppression of Acts of Nuclear Terrorism adopted by the General Assembly of the United Nations on 13 April 2005,

BEARING IN MIND the importance of the United Nations Convention on the Law of the Sea done at Montego Bay, on 10 December 1982, and of the customary international law of the sea,

CONSIDERING resolution 59/46 of the United Nations General Assembly, which reaffirmed that international co-operation as well as actions by States to combat terrorism should be conducted in conformity with the principles of the Charter of the United Nations, international law and relevant international conventions, and resolution 59/24 of the United Nations General Assembly, which urged States to become parties to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol, invited States to

participate in the review of those instruments by the Legal Committee of the International Maritime Organization to strengthen the means of combating such unlawful acts, including terrorist acts, and also urged States to take appropriate measures to ensure the effective implementation of those instruments, in particular through the adoption of legislation, where appropriate, aimed at ensuring that there is a proper framework for responses to incidents of armed robbery and terrorist acts at sea,

CONSIDERING ALSO the importance of the amendments to the International Convention for the Safety of Life at Sea, 1974, and of the International Ship and Port Facility Security (ISPS) Code, both adopted by the 2002 Conference of Contracting Governments to that Convention, in establishing an appropriate international technical framework involving co-operation between Governments, Government agencies, national and local administrations and the shipping and port industries to detect security threats and take preventative measures against security incidents affecting ships or port facilities used in international trade,

CONSIDERING FURTHER resolution 58/187 of the United Nations General Assembly, which reaffirmed that States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law,

BELIEVING that it is necessary to adopt provisions supplementary to those of the Convention, to suppress additional terrorist acts of violence against the safety and security of international maritime navigation and to improve its effectiveness,

HAVE AGREED as follows:

ARTICLE 1

For the purposes of this Protocol:
1 "Convention" means the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988.
2 "Organization" means the International Maritime Organization (IMO).
3 "Secretary-General" means the Secretary-General of the Organization.

ARTICLE 2

Article 1 of the Convention is amended to read as follows:

Article 1

1 For the purposes of this Convention:
(a) "ship" means a vessel of any type whatsoever not permanently attached to the sea-bed, including dynamically supported craft, submersibles, or any other floating craft.
(b) "transport" means to initiate, arrange or exercise effective control, including decision-making authority, over the movement of a person or item.
(c) "serious injury or damage" means:
(i) serious bodily injury; or
(ii) extensive destruction of a place of public use, State or government facility, infrastructure facility, or public transportation system, resulting in major economic loss; or
(iii) substantial damage to the environment, including air, soil, water, fauna, or flora.
(d) "BCN weapon" means:
(i) "biological weapons", which are:
(1) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; or
(2) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.
(ii) "chemical weapons", which are, together or separately:
(1) toxic chemicals and their precursors, except where intended for:
(A) industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; or

(B) protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons; or

(C) military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare; or

(D) law enforcement including domestic riot control purposes,

as long as the types and quantities are consistent with such purposes;

(2) munitions and devices specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (ii)(1), which would be released as a result of the employment of such munitions and devices;

(3) any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (ii)(2).

(iii) nuclear weapons and other nuclear explosive devices.

(e) "toxic chemical" means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(f) "precursor" means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.

(g) "Organization" means the International Maritime Organization (IMO).

(h) "Secretary-General" means the Secretary-General of the Organization.

2 For the purposes of this Convention:

(a) the terms "place of public use", "State or government facility", "infrastructure facility", and "public transportation system" have the same meaning as given to those terms in the International Convention for the Suppression of Terrorist Bombings, done at New York on 15 December 1997; and

(b) the terms "source material" and "special fissionable material" have the same meaning as given to those terms in the Statute of the International Atomic Energy Agency (IAEA), done at New York on 26 October 1956.

ARTICLE 3

The following text is added as article 2bis of the Convention:

Article 2bis

1. Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international human rights, refugee and humanitarian law.

2. This Convention does not apply to the activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law.

3. Nothing in this Convention shall affect the rights, obligations and responsibilities under the Treaty on the Non-Proliferation of Nuclear Weapons, done at Washington, London and Moscow on 1 July 1968**,** the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, done at Washington, London and Moscow on 10 April 1972, or the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, done at Paris on 13 January 1993**,** of States Parties to such treaties.

ARTICLE 4

1 The chapeau of article 3, paragraph 1 of the Convention is replaced by the following text:

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

2 Article 3, paragraph 1(f) of the Convention is replaced by the following text:

(f) communicates information which that person knows to be false, thereby endangering the safe navigation of a ship.

3 Article 3, paragraph 1(g) of the Convention is deleted.

4 Article 3, paragraph 2 of the Convention is replaced by the following text:

2. Any person also commits an offence if that person threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraphs 1 (b), (c), and (e), if that threat is likely to endanger the safe navigation of the ship in question.

5 The following text is added as article 3bis of the Convention:

Article 3bis

1. Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally:

(a) when the purpose of the act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act:

(i) uses against or on a ship or discharges from a ship any explosive, radioactive material or BCN weapon in a manner that causes or is likely to cause death or serious injury or damage; or

(ii) discharges, from a ship, oil, liquefied natural gas, or other hazardous or noxious substance, which is not covered by subparagraph (a)(i), in such quantity or concentration that causes or is likely to cause death or serious injury or damage; or

(iii) uses a ship in a manner that causes death or serious injury or damage; or

(iv) threatens, with or without a condition, as is provided for under national law, to commit an offence set forth in subparagraph (a)(i),

(ii) or (iii); or

(b) transports on board a ship:

(i) any explosive or radioactive material, knowing that it is intended to be used to cause, or in a threat to cause, with or without a condition, as is provided for under national law, death or serious injury or damage for the purpose of intimidating a population, or compelling a government or an international organization to do or to abstain from doing any act; or

(ii) any BCN weapon, knowing it to be a BCN weapon as defined in article 1; or (iii) any source material, special fissionable material, or equipment or material especially designed or prepared for the processing, use or production of special fissionable material, knowing that it is intended to be used in a nuclear explosive activity or in any other nuclear activity not under safeguards pursuant to an IAEA comprehensive safeguards agreement; or

(iv) any equipment, materials or software or related technology that significantly contributes to the design, manufacture or delivery of a BCN weapon, with the intention that it will be used for such purpose.

2. It shall not be an offence within the meaning of this Convention to transport an item or material covered by paragraph 1(b)(iii) or, insofar as it relates to a nuclear weapon or other nuclear explosive device, paragraph 1(b)(iv), if such item or material is transported to or from the territory of, or is otherwise transported under the control of, a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons where:

(a) the resulting transfer or receipt, including internal to a State, of the item or material is not contrary to such State Party's obligations under the Treaty on the Non-Proliferation of Nuclear Weapons and,

(b) if the item or material is intended for the delivery system of a nuclear weapon or other nuclear explosive device of a State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, the holding of such weapon or device is not contrary to that State Party’s obligations under that Treaty.

The following text is added as article 3ter of the Convention:

Article 3ter

Any person commits an offence within the meaning of this Convention if that person unlawfully and intentionally transports another person on board a ship knowing that the person has committed an act that constitutes an offence set forth in article 3, 3bis or 3quater or an offence set forth in any treaty listed in the Annex, and intending to assist that person to evade criminal prosecution.

7 The following text is added as article 3quater of the Convention:

Article 3quater

Any person also commits an offence within the meaning of this Convention if that person:

(a) unlawfully and intentionally injures or kills any person in connection with the commission of any of the offences set forth in article 3, paragraph 1, article 3bis, or article 3ter; or
(b) attempts to commit an offence set forth in article 3, paragraph 1, article 3bis, paragraph 1(a)(i), (ii) or (iii), or subparagraph (a) of this article; or
(c) participates as an accomplice in an offence set forth in article 3, article 3bis, article 3ter, or subparagraph (a) or (b) of this article; or
(d) organizes or directs others to commit an offence set forth in article 3, article 3bis, article 3ter, or subparagraph (a) or (b) of this article; or
(e) contributes to the commission of one or more offences set forth in article 3, article 3bis, article 3ter or subparagraph (a) or (b) of this article, by a group of persons acting with a common purpose, intentionally and either:
(i) with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence set forth in article 3, 3bis or 3ter; or
(ii) in the knowledge of the intention of the group to commit an offence set forth in article 3, 3bis or 3ter.

ARTICLE 5

1 Article 5 of the Convention is replaced by the following text:
Each State Party shall make the offences set forth in articles 3, 3bis, 3ter and 3quater punishable by appropriate penalties which take into account the grave nature of those offences.

2 The following text is added as article 5bis of the Convention:

Article 5bis
1. Each State Party, in accordance with its domestic legal principles, shall take the necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable when a person responsible for management or control of that legal entity has, in that capacity, committed an offence set forth in this Convention. Such liability may be criminal, civil or administrative.
2. Such liability is incurred without prejudice to the criminal liability of individuals having committed the offences.
3. Each State Party shall ensure, in particular, that legal entities liable in accordance with paragraph 1 are subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions. Such sanctions may include monetary sanctions.

ARTICLE 6

1 The chapeau of article 6, paragraph 1 of the Convention is replaced by the following text:
1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles 3, 3bis, 3ter and 3quater when the offence is committed:
2 Article 6, paragraph 3 of the Convention is replaced by the following text:
3. Any State Party which has established jurisdiction mentioned in paragraph 2 shall notify the Secretary-General. If such State Party subsequently rescinds that jurisdiction, it shall notify the Secretary-General.
3 Article 6, paragraph 4 of the Convention is replaced by the following text:
4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences set forth in articles 3, 3bis, 3ter and 3quater in cases where the alleged offender is present in its territory and it does not extradite the alleged offender to any of the States Parties which have established their jurisdiction in accordance with paragraphs 1 and 2 of this article.

ARTICLE 7

The following text is added as the Annex to the Convention:
ANNEX
1. Convention for the Suppression of Unlawful Seizure of Aircraft, done at The Hague on 16 December 1970.
2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 23 September 1971.
3. Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973.
4. International Convention against the Taking of Hostages, adopted by the General Assembly of the United Nations on 17 December 1979.

5. Convention on the Physical Protection of Nuclear Material, done at Vienna on 26 October 1979.
6. Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal on 24 February 1988.
7. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988.
8. International Convention for the Suppression of Terrorist Bombings, adopted by the General Assembly of the United Nations on 15 December 1997.
9. International Convention for the Suppression of the Financing of Terrorism, adopted by the General Assembly of the United Nations on 9 December 1999.

ARTICLE 8

1 Article 8, paragraph 1 of the Convention is replaced by the following text:
1. The master of a ship of a State Party (the "flag State") may deliver to the authorities of any other State Party (the "receiving State") any person who the master has reasonable grounds to believe has committed an offence set forth in article 3, 3bis, 3ter, or 3quater.

2 The following text is added as article 8bis of the Convention:

Article 8bis
1. States Parties shall co-operate to the fullest extent possible to prevent and suppress unlawful acts covered by this Convention, in conformity with international law, and shall respond to requests pursuant to this article as expeditiously as possible.
2. Each request pursuant to this article should, if possible, contain the name of the suspect ship, the IMO ship identification number, the port of registry, the ports of origin and destination, and any other relevant information. If a request is conveyed orally, the requesting Party shall confirm the request in writing as soon as possible. The requested Party shall acknowledge its receipt of any written or oral request immediately.
3. States Parties shall take into account the dangers and difficulties involved in boarding a ship at sea and searching its cargo, and give consideration to whether other appropriate measures agreed between the States concerned could be more safely taken in the next port of call or elsewhere.
4. A State Party that has reasonable grounds to suspect that an offence set forth in article 3, 3bis, 3ter or 3quater has been, is being or is about to be committed involving a ship flying its flag, may request the assistance of other States Parties in preventing or suppressing that offence. The States Parties so requested shall use their best endeavours to render such assistance within the means available to them.
5. Whenever law enforcement or other authorized officials of a State Party ("the requesting Party") encounter a ship flying the flag or displaying marks of registry of another State Party ("the first Party") located seaward of any State's territorial sea, and the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence set forth in article 3, 3bis, 3ter or 3quater, and the requesting Party desires to board

(a) it shall request, in accordance with paragraphs 1 and 2 that the first Party confirm the claim of nationality, and

(b) if nationality is confirmed, the requesting Party shall ask the first Party (hereinafter referred to as "the flag State") for authorization to board and to take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence set forth in article 3, 3bis, 3ter or 3quater has been, is being or is about to be committed, and

(c) the flag State shall either:

(i) authorize the requesting Party to board and to take appropriate measures set out in subparagraph (b), subject to any conditions it may impose in accordance with paragraph 7; or

(ii) conduct the boarding and search with its own law enforcement or other officials; or

(iii) conduct the boarding and search together with the requesting Party, subject to any conditions it may impose in accordance with paragraph 7; or

(iv) decline to authorize a boarding and search.

The requesting Party shall not board the ship or take measures set out in subparagraph (b) without the express authorization of the flag State.

(d) Upon or after depositing its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is granted authorization to board and search the ship, its cargo and persons on board, and to

question the persons on board in order to locate and examine documentation of its nationality and determine if an offence set forth in article 3, 3bis, 3ter or 3quater has been, is being or is about to be committed, if there is no response from the first Party within four hours of acknowledgement of receipt of a request to confirm nationality.

(e) Upon or after depositing its instrument of ratification, acceptance, approval or accession, a State Party may notify the Secretary-General that, with respect to ships flying its flag or displaying its mark of registry, the requesting Party is authorized to board and search a ship, its cargo and persons on board, and to question the persons on board in order to determine if an offence set forth in article 3, 3bis, 3ter or 3quater has been, is being or is about to be committed.

The notifications made pursuant to this paragraph can be withdrawn at any time.

6. When evidence of conduct described in article 3, 3bis**,** 3ter or 3quater is found as the result of any boarding conducted pursuant to this article, the flag State may authorize the requesting Party to detain the ship, cargo and persons on board pending receipt of disposition instructions from the flag State. The requesting Party shall promptly inform the flag State of the results of a boarding, search, and detention conducted pursuant to this article. The requesting Party shall also promptly inform the flag State of the discovery of evidence of illegal conduct that is not subject to this Convention.

7. The flag State, consistent with the other provisions of this Convention, may subject its authorization under paragraph 5 or 6 to conditions, including obtaining additional information from the requesting Party, and conditions relating to responsibility for and the extent of measures to be taken. No additional measures may be taken without the express authorization of the flag State, except when necessary to relieve imminent danger to the lives of persons or where those measures derive from relevant bilateral or multilateral agreements.

8. For all boardings pursuant to this article, the flag State has the right to exercise jurisdiction over a detained ship, cargo or other items and persons on board, including seizure, forfeiture, arrest and prosecution. However, the flag State may, subject to its constitution and laws, consent to the exercise of jurisdiction by another State having jurisdiction under article 6.

9. When carrying out the authorized actions under this article, the use of force shall be avoided except when necessary to ensure the safety of its officials and persons on board, or where the officials are obstructed in the execution of the authorized actions. Any use of force pursuant to this article shall not exceed the minimum degree of force which is necessary and reasonable in the circumstances.

10. Safeguards:

(a) Where a State Party takes measures against a ship in accordance with this article, it shall:

(i) take due account of the need not to endanger the safety of life at sea;

(ii) ensure that all persons on board are treated in a manner which preserves their basic human dignity, and in compliance with the applicable provisions of international law, including international human rights law;

(iii) ensure that a boarding and search pursuant to this article shall be conducted in accordance with applicable international law;

(iv) take due account of the safety and security of the ship and its cargo;

(v) take due account of the need not to prejudice the commercial or legal interests of the flag State;

(vi) ensure, within available means, that any measure taken with regard to the ship or its cargo is environmentally sound under the circumstances;

(vii) ensure that persons on board against whom proceedings may be commenced in connection with any of the offences set forth in article 3, 3bis, 3ter or 3quater are afforded the protections of paragraph 2 of article 10, regardless of location;

(viii) ensure that the master of a ship is advised of its intention to board, and is, or has been, afforded the opportunity to contact the ship's owner and the flag State at the earliest opportunity; and

(ix) take reasonable efforts to avoid a ship being unduly detained or delayed.

(b) Provided that authorization to board by a flag State shall not per se give rise to its liability, States Parties shall be liable for any damage**,** harm or loss attributable to them arising from measures taken pursuant to this article when:

(i) the grounds for such measures prove to be unfounded**,** provided that the ship has not committed any act justifying the measures taken; or

(ii) such measures are unlawful or exceed those reasonably required in light of available information to implement the provisions of this article. States Parties shall provide effective recourse in respect of such damage, harm or loss.

(c) Where a State Party takes measures against a ship in accordance with this Convention, it shall take due account of the need not to interfere with or to affect:

(i) the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; or

(ii) the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the ship.

(d) Any measure taken pursuant to this article shall be carried out by law enforcement or other authorized officials from warships or military aircraft, or from other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect and, notwithstanding articles 2 and 2bis, the provisions of this article shall apply.

(e) For the purposes of this article "law enforcement or other authorized officials" means uniformed or otherwise clearly identifiable members of law enforcement or other government authorities duly authorized by their government. For the specific purpose of law enforcement under this Convention, law enforcement or other authorized officials shall provide appropriate government-issued identification documents for examination by the master of the ship upon boarding.

11. This article does not apply to or limit boarding of ships conducted by any State Party in accordance with international law, seaward of any State's territorial sea, including boardings based upon the right of visit, the rendering of assistance to persons, ships and property in distress or peril, or an authorization from the flag State to take law enforcement or other action.

12. States Parties are encouraged to develop standard operating procedures for joint operations pursuant to this article and consult, as appropriate, with other States Parties with a view to harmonizing such standard operating procedures for the conduct of operations.

13. States Parties may conclude agreements or arrangements between them to facilitate law enforcement operations carried out in accordance with this article.

14. Each State Party shall take appropriate measures to ensure that its law enforcement or other authorized officials, and law enforcement or other authorized officials of other States Parties acting on its behalf, are empowered to act pursuant to this article.

15. Upon or after depositing its instrument of ratification, acceptance, approval or accession, each State Party shall designate the authority, or, where necessary, authorities to receive and respond to requests for assistance, for confirmation of nationality, and for authorization to take appropriate measures. Such designation, including contact information, shall be notified to the Secretary-General within one month of becoming a Party, who shall inform all other States Parties within one month of the designation. Each State Party is responsible for providing prompt notice through the Secretary-General of any changes in the designation or contact information.

ARTICLE 9

Article 10, paragraph 2 is replaced by the following text:

2 Any person who is taken into custody, or regarding whom any other measures are taken or proceedings are being carried out pursuant to this Convention, shall be guaranteed fair treatment, including enjoyment of all rights and guarantees in conformity with the law of the State in the territory of which that person is present and applicable provisions of international law, including international human rights law.

ARTICLE 10

1 Article 11, paragraphs 1, 2, 3 and 4 are replaced by the following text:

1. The offences set forth in articles 3, 3bis, 3ter and 3quater shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.

2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, the requested State Party may, at its option, consider this Convention as a legal basis for extradition in respect of the offences set forth in articles 3, 3bis, 3ter and 3quater. Extradition shall be subject to the other conditions provided by the law of the requested State Party.

3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offences set forth in articles 3, 3bis, 3ter and 3quater as extraditable offences between themselves, subject to the conditions provided by the law of the requested State Party.

4. If necessary, the offences set forth in articles 3, 3bis, 3ter and 3quater shall be treated, for the purposes of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in a place within the jurisdiction of the State Party requesting extradition.

2 The following text is added as article 11bis, of the Convention:

Article 11bis
None of the offences set forth in article 3, 3bis, 3ter or 3quater shall be regarded for the purposes of extradition or mutual legal assistance as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.

3 The following text is added as article 11ter of the Convention:

Article 11ter
Nothing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 3, 3bis, 3ter or 3quater or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinion or gender, or that compliance with the request would cause prejudice to that person's position for any of these reasons.

ARTICLE 11

1 Article 12, paragraph 1 of the Convention is replaced by the following text:
1. States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in articles 3, 3bis, 3ter and 3quater, including assistance in obtaining evidence at their disposal necessary for the proceedings.

2 The following text is added as article 12bis of the Convention:

Article 12bis
1. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for the investigation or prosecution of offences set forth in article 3, 3bis, 3ter or 3quater may be transferred if the following conditions are met:
   (a) the person freely gives informed consent; and
   (b) the competent authorities of both States agree, subject to such conditions as those States may deem appropriate.
2. For the purposes of this article:
   (a) the State to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State from which the person was transferred;
   (b) the State to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States;
   (c) the State to which the person is transferred shall not require the State from which the person was transferred to initiate extradition proceedings for the return of the person;
   (d) the person transferred shall receive credit for service of the sentence being served in the State from which the person was transferred for time spent in the custody of the State to which the person was transferred.
3. Unless the State Party from which a person is to be transferred in accordance with this article so agrees, that person, whatever that person's nationality, shall not be prosecuted or detained or subjected to any other restriction of personal liberty in the territory of the State to which that person is transferred in respect of acts or convictions anterior to that person's departure from the territory of the State from which such person was transferred.

ARTICLE 12

Article 13 of the Convention is replaced by the following text:
1. States Parties shall co-operate in the prevention of the offences set forth in articles 3, 3bis, 3ter and 3quater, particularly by:
   (a) taking all practicable measures to prevent preparation in their respective territories for the commission of those offences within or outside their territories;

(b) exchanging information in accordance with their national law, and co-ordinating administrative and other measures taken as appropriate to prevent the commission of offences set forth in articles 3, 3bis, 3ter and 3quater.

2. When, due to the commission of an offence set forth in article 3, 3bis, 3ter or 3quater, the passage of a ship has been delayed or interrupted, any State Party in whose territory the ship or passengers or crew are present shall be bound to exercise all possible efforts to avoid a ship, its passengers, crew or cargo being unduly detained or delayed.

ARTICLE 13

Article 14 of the Convention is replaced by the following text:

Any State Party having reason to believe that an offence set forth in article 3, 3bis, 3ter or 3quater will be committed shall, in accordance with its national law, furnish as promptly as possible any relevant information in its possession to those States which it believes would be the States having established jurisdiction in accordance with article 6.

ARTICLE 14

Article 15, paragraph 3 of the Convention is replaced by the following text:

3. The information transmitted in accordance with paragraphs 1 and 2 shall be communicated by the Secretary-General to all States Parties, to Members of the Organization, to other States concerned, and to the appropriate international intergovernmental organizations.

ARTICLE 15

Interpretation and application

1. The Convention and this Protocol shall, as between the Parties to this Protocol, be read and interpreted together as one single instrument.

2. Articles 1 to 16 of the Convention, as revised by this Protocol, together with articles 17 to 24 of this Protocol and the Annex thereto, shall constitute and be called the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 (2005 SUA Convention).

ARTICLE 16

The following text is added as article 16bis of the Convention:

Final clauses of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005

The final clauses of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 2005 shall be articles 17 to 24 of the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. References in this Convention to States Parties shall be taken to mean references to States Parties to that Protocol.

FINAL CLAUSES

ARTICLE 17

Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open for signature at the Headquarters of the Organization from 14 February 2006 to 13 February 2007 and shall thereafter remain open for accession.

2. States may express their consent to be bound by this Protocol by:

(a) signature without reservation as to ratification, acceptance or approval; or

(b) signature subject to ratification, acceptance or approval, followed by ratification, acceptance or approval; or

(c) accession.

3. Ratification, acceptance, approval or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General.

4. Only a State which has signed the Convention without reservation as to ratification, acceptance or approval, or has ratified, accepted, approved or acceded to the Convention may become a Party to this Protocol.

ARTICLE 18

Entry into force

1. This Protocol shall enter into force ninety days following the date on which twelve States have either signed it without reservation as to ratification, acceptance or approval, or have deposited an instrument of ratification, acceptance, approval or accession with the Secretary-General.
2. For a State which deposits an instrument of ratification, acceptance, approval or accession in respect of this Protocol after the conditions in paragraph 1 for entry into force thereof have been met, the ratification, acceptance, approval or accession shall take effect ninety days after the date of such deposit.

ARTICLE 19

Denunciation

1. This Protocol may be denounced by any State Party at any time after the date on which this Protocol enters into force for that State.
2. Denunciation shall be effected by the deposit of an instrument of denunciation with the Secretary-General.
3. A denunciation shall take effect one year, or such longer period as may be specified in the instrument of denunciation, after the deposit of the instrument with the Secretary-General.

ARTICLE 20

Revision and amendment

1. A conference for the purpose of revising or amending this Protocol may be convened by the Organization.
2. The Secretary-General shall convene a conference of States Parties to this Protocol for revising or amending the Protocol, at the request of one third of the States Parties, or ten States Parties, whichever is the higher figure.
3. Any instrument of ratification, acceptance, approval or accession deposited after the date of entry into force of an amendment to this Protocol shall be deemed to apply to the Protocol as amended.

ARTICLE 21

Declarations

1. Upon depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the Annex may declare that, in the application of this Protocol to the State Party, the treaty shall be deemed not to be included in article 3ter. The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the Secretary-General of this fact.
2. When a State Party ceases to be a party to a treaty listed in the Annex, it may make a declaration as provided for in this article, with respect to that treaty.
3. Upon depositing its instrument of ratification, acceptance, approval or accession, a State Party may declare that it will apply the provisions of article 3ter in accordance with the principles of its criminal law concerning family exemptions of liability.

ARTICLE 22

Amendments to the Annex

1. The Annex may be amended by the addition of relevant treaties that:
   (a) are open to the participation of all States;
   (b) have entered into force; and
   (c) have been ratified, accepted, approved or acceded to by at least twelve States Parties to this Protocol.
2. After the entry into force of this Protocol, any State Party thereto may propose such an amendment to the Annex. Any proposal for an amendment shall be communicated to the Secretary-General in written form. The Secretary-General shall circulate any proposed amendment that meets the requirements of paragraph 1 to all members of the Organization and seek from States Parties to this Protocol their consent to the adoption of the proposed amendment.
3. The proposed amendment to the Annex shall be deemed adopted after more than twelve of the States Parties to this Protocol consent to it by written notification to the Secretary-General.

4. The adopted amendment to the Annex shall enter into force thirty days after the deposit with the Secretary-General of the twelfth instrument of ratification, acceptance or approval of such amendment for those States Parties to this Protocol that have deposited such an instrument. For each State Party to this Protocol ratifying, accepting or approving the amendment after the deposit of the twelfth instrument with the Secretary-General, the amendment shall enter into force on the thirtieth day after deposit by such State Party of its instrument of ratification, acceptance or approval.

ARTICLE 23

Depositary

1. This Protocol and any amendments adopted under articles 20 and 22 shall be deposited with the Secretary-General.
2. The Secretary-General shall:
   (a) inform all States which have signed this Protocol or acceded to this Protocol of:
      (i) each new signature or deposit of an instrument of ratification, acceptance, approval or accession together with the date thereof;
      (ii) the date of the entry into force of this Protocol;
      (iii) the deposit of any instrument of denunciation of this Protocol together with the date on which it is received and the date on which the denunciation takes effect;
      (iv) any communication called for by any article of this Protocol;
      (v) any proposal to amend the Annex which has been made in accordance with article 22, paragraph 2;
      (vi) any amendment deemed to have been adopted in accordance with article 22, paragraph 3;
      (vii) any amendment ratified, accepted or approved in accordance with article 22, paragraph 4, together with the date on which that amendment shall enter into force; and
   (b) transmit certified true copies of this Protocol to all States which have signed or acceded to this Protocol.
3. As soon as this Protocol enters into force, a certified true copy of the text shall be transmitted by the Secretary-General to the Secretary-General of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.

ARTICLE 24

Languages

This Protocol is established in a single original in the Arabic, Chinese, English, French, Russian and Spanish languages, each text being equally authentic.

DONE AT LONDON this fourteenth day of October two thousand and five.
IN WITNESS WHEREOF the undersigned, being duly authorized by their respective Governments for that purpose, have signed this Protocol.

APPENDIX XII

Merchant Shipping and Maritime Security Act 1997 – Section 26

Piracy.

(1) For the avoidance of doubt it is hereby declared that for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, the provisions of the United Nations Convention on the Law of the Sea 1982 that are set out in Schedule 5 shall be treated as constituting part of the law of nations.

(2) For the purposes of those provisions the high seas shall (in accordance with paragraph 2 of Article 58 of that Convention) be taken to include all waters beyond the territorial sea of the United Kingdom or of any other state.

(3) The M1Tokyo Convention Act 1967 (so far as unrepealed) shall cease to have effect.

(4) Her Majesty may by Order in Council direct that subsections (1) to (3) and Schedule 5 shall extend to the Isle of Man, any of the Channel Islands or any colony with such modifications, if any, as appear to Her to be appropriate.

(5) In section 39 of the M2Aviation Security Act 1982 (extension of 1982 Act outside United Kingdom), for subsection (2) (application of power in 1967 Act to section 5 of 1982 Act) there is substituted—
"(2)Subsection (4) of section 26 of the Merchant Shipping and Maritime Security Act 1997 (power to extend provisions about piracy to Isle of Man, Channel Islands and colonies) shall apply to section 5 of this Act as it applies to the provisions mentioned in that subsection."

(6)Nothing in this section affects the operation of any Order in Council made under section 8 of the M3Tokyo Convention Act 1967; but any such Order may be revoked as if made under subsection (4).

APPENDIX XIII

Act no. 2011-13 of 5 January 2011 concerning measures against piracy and the Exercise of national police powers at sea

The National Assembly and Senate have adopted,

The President of the Republic has promulgated, the following Act:

CHAPTER I

Provisions amending Act No. 94-589 of 15 July 1994 concerning modalities for the exercise of national police powers at sea

Article 1
Title I of Act No. 94-589 of 15 July 1994 concerning modalities for the exercise of national police powers at sea is hereby amended as follows:

Title I:
CONCERNING MEASURES AGAINST MARITIME PIRACY

Article 1. – I. – This title applies to acts of piracy as defined in the United Nations Convention on the Law of the Sea, concluded at Montego Bay on 10 December 1982, where they are committed

1. At sea;
2. In maritime areas that do not fall under the jurisdiction of any State;
3. Where provided for under international law, in the territorial waters of a State.

II. – Where they constitute acts of piracy under article 1.I above, the offences that may be investigated, established and prosecuted under this title are as follows:

1. The offences defined in articles 224-6, 224-7 and 224-8-1 of the Criminal Code, where they relate to at least one vessel or aircraft and involve another vessel or aircraft;
2. The offences defined in articles 224-1 through 224-5-2 and article 224-8 of the Criminal Code where they precede, accompany or follow the offences mentioned in article 1.II.1 above;
3. The offences defined in articles 450-1 and 450-5 of the Criminal Code where they are committed with a view to preparing the offences mentioned in articles 1.II.1 and 2 above.

Article 2. – Where there are reasonable grounds to suspect that one or more of the offences mentioned in article 1.II have been or are being perpetrated, or are being prepared, on or against the vessels mentioned in article L.1521-1 of the Defence Code, commanders of Government vessels or aircraft responsible for maritime surveillance shall be entitled to conduct or have conducted inspection and coercion measures as provided for under international law, under the first part, book V, title II of the Defence Code, and under this Act. They shall act either under the authority of the Maritime Prefect — or, when overseas, the Government official responsible for State action at sea — or, in an international context, under the authority of a designated civilian or military command.

The persons on board may be subjected to the coercive measures set forth in the first part, book V, title II, sole chapter, of the Defence Code, concerning conditions of detention on board.

Article 3. – On boarding the vessel, the personnel mentioned in article 2 can take or have taken any provisional measure in respect of objects or documents apparently connected to the commission of the offences mentioned in article 1.II in order to ensure that the said offences are not perpetrated or repeated.

They may also order that the vessel be diverted to an appropriate position or port in order to conduct such detailed examination as may be appropriate, or in order to hand over the detained individuals or the objects and documents subject to provisional measures.

Article 4. – Officers of the judicial police, and - when granted special authorization under conditions determined by decree of the Council of State -commanders of Government vessels or aircraft and naval officers on such vessels responsible for maritime surveillance, shall establish the offences mentioned in article 1.II and pursue and apprehend the perpetrators or accomplices.

They may seize objects or documents connected with the commission of the acts, proceeding, except in situations of extreme emergency, with the authorization of the public prosecutor.

After the seizure provided for under the above paragraph, and when authorized by the public prosecutor, they may also destroy non-flagged vessels only used to commit the offences mentioned in article 1.II, acting in compliance with the international treaties and agreements in force, where no technical means are available to definitively prevent their use for a repeat offence.

Measures taken in respect of persons on board are regulated by the first part, book V, title II, sole chapter, section 3 of the Defence Code.

Article 5. – In the absence of any agreement with the authorities of another State for the latter to exercise its jurisdictional competence, the perpetrators and accomplices of the offences mentioned in article 1.II committed outside the territory of the Republic may be prosecuted and put on trial by French courts when they have been apprehended by the personnel mentioned in article 4.

Article 6. – The following courts shall be responsible for the prosecution, investigation and judgment of offences under this title:

1. On the territory of the mainland, the regional court in whose jurisdiction the maritime prefecture or the port to which the ship has been diverted is located;
2. In overseas departments, Mayotte, Saint-Pierre-et-Miquelon, the Wallis and Futuna Islands, Saint-Barthélémy, Saint-Martin, French Polynesia, New Caledonia and the French Southern and Antarctic Lands, either the competent court of first instance in whose jurisdiction the headquarters of the Government official responsible for State action at sea are located or the court of first instance in whose jurisdiction the port to which the ship has been diverted is located;
3. All competent courts in implementation of the Code of Criminal Procedure or a special law, in particular those mentioned in article 706-75 of the Code of Criminal Procedure.

These courts are also competent in respect of offences related to those mentioned in this title.

Article 2
In the title of Act No. 94-589 of 15 July 1994 referred to above, insert the words “measures against piracy and” after the word “concerning”.

Article 3
Articles 12 and 19 of Act No. 94-589 of 15 July 1994 referred to above are amended as follows:
1. In the first paragraph, delete the words “in addition to”.
2. Delete the two last subparagraphs.

CHAPTER II

Provisions amending the Criminal Code and Code of Criminal Procedure

Article 4
After article 224-6 of the Criminal Code, a new article 224-6-1 is inserted, as follows:

Article 224-6-1. – Where the offence set forth in article 224-6 is committed by an organized gang, the penalty shall be increased to 30 years' imprisonment.

The provisions of the first two paragraphs of article 132-23 shall apply to this offence.

Article 5
Article 706-73 of the Code of Criminal Procedure is amended as follows:
1. In paragraphs 15 and 16 insert the reference "and 17".

2. After paragraph 16, insert a new paragraph 17, as follows:
"17o The crime of hijacking an aircraft, vessel or any other means of transport when committed by an organized gang, as provided for under article 224-6-1 of the Criminal Code".

CHAPTER III

Provisions amending the Defence Code

Article 6
The Defence Code is amended as follows:
1. Article L.1521-1 is amended as follows:
(*a*) In the first line of paragraph 2, after the words "foreign vessels", insert the words "vessels without a flag or nationality".
(*b*) A new paragraph 4 is added, as follows:
4. Vessels flying the flag of a State that has requested France's intervention or accepted its request to intervene.";
2. In the first part, book V, title II, sole chapter, a new section 3 is added as follows:

Section 3
Measures taken in respect of persons on board vessels
Article L.1521-11. – From the time when the boarding party provided for under article L.1521-4 boards the ship that is being inspected, the personnel mentioned in article L.1521-2 can take such coercive measures as are necessary and appropriate in order to ensure the availability for questioning of the persons on board, the securing of the vessel and cargo, and the security of the persons on board.

Article L.1521-12. – When measures are taken for the restriction or deprivation of liberty, the personnel mentioned in article 1521-2 shall inform the Maritime Prefect or, when overseas, the Government official responsible for State action at sea, who shall as soon as possible inform the competent public prosecutor.

Article L.1521-13. – All persons subject to restriction or deprivation of liberty shall receive a health examination carried out by a qualified person within twenty-four hours of the time when the measure is imposed. A medical examination shall take place no later than ten days after the first health examination.

A report on those examinations, including an opinion regarding the appropriateness of restriction or deprivation of liberty, shall be transmitted as soon as possible to the public prosecutor.

Article L.1521-14. – Within 48 hours of the time when the restriction or deprivation of liberty referred to in article 1521-12, is imposed and at the request of the personnel mentioned in article 1521-2, the custodial judge to whom the case has been referred by the public prosecutor shall determine whether the measure may be extended for a maximum length of 120 hours from the expiration of the previous deadline.

These measures can be renewed under the same formal and substantive conditions for the time that is needed in order to bring the person before the competent authority.

Article L.1521-15. – In order to implement article 1521-14, the custodial judge may request from the public prosecutor any information that could shed light on the practical situation and health of the person subjected to restriction or deprivation of liberty.

The custodial judge may order a new health examination.

Unless technical reasons prevent it, the custodial judge shall, if he or she deems it useful, communicate with the person subjected to restriction or deprivation of liberty.

Article L1521-16. – The custodial judge shall take decisions by reasoned orders that may not be appealed. A copy of the order shall be transmitted as soon as possible by the public prosecutor to the Maritime Prefect or, when overseas, the Government official responsible for State action at sea, who shall inform the person in question in a language that he or she understands.

Article L.1521-17. – Measures in respect of persons on board a vessel may be undertaken, for the time strictly necessary, on land or on board an aircraft, under the authority of the Government agents entrusted with the transfer, under the oversight of the judicial authority as defined in this section.

Article L.1521-18. – On arrival on French soil, the person subjected to coercive measures shall be handed over to the judicial authority.

CHAPTER IV

Provisions regarding the children of the victims of acts of piracy at sea

Article 7
Children whose father, mother or breadwinner of French nationality has been the victim of acts of maritime piracy can be recognized as wards of the nation under the conditions set forth in title IV of book III of the Code of Military Pensions for Invalidity and War Victims.

These provisions shall apply to the victims of acts of maritime piracy committed from 10 November 2008.

CHAPTER V

Final provisions

Article 8
This Act shall apply throughout the territory of the Republic.
This Act shall be implemented as a law of the State.

APPENDIX XIV

Done at Paris, on 5 January 2011.

GRAND CHAMBER

CASE OF MEDVEDYEV AND OTHERS v. FRANCE

(Application no. 3394/03)

JUDGMENT

STRASBOURG

29 March 2010

This judgment is final but may be subject to editorial revision.

In the case of Medvedyev and Others v. France,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *president*,
Jean-Paul Costa,
Christos Rozakis,
Françoise Tulkens,
Josep Casadevall,
Giovanni Bonello,
Corneliu Bîrsan,
Boštjan M. Zupančič,
Lech Garlicki,
Elisabet Fura,
Khanlar Hajiyev,
Dean Spielmann,
Ján Šikuta,
George Nicolaou,
Nona Tsotsoria,
Ann Power,
Mihai Poalelungi, *judges*,
and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 6 May 2009 and 3 February 2010,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 3394/03) against the French Republic lodged with the Court on 19 December 2002 under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Mr Oleksandr Medvedyev and Mr Borys Bilenikin, Ukrainian nationals, Mr Nicolae Balaban, Mr Puiu Dodica, Mr Nicu Stelian Manolache and Mr Viorel Petcu, Romanian nationals, Mr Georgios Boreas, a Greek national, and Mr Sergio Cabrera Leon and Mr Guillermo Luis Eduar Sage Martinez, Chilean nationals ("the applicants").

2. The applicants were represented by Mr P. Spinosi, of the *Conseil d'Etat* and Court of Cassation Bar. The French Government ("the Government") were represented by Mrs E. Belliard, Director of Legal Affairs at the Ministry of Foreign Affairs.

3. The applicants alleged that they had been arbitrarily deprived of their liberty following the boarding of their ship by the French authorities and complained that they had not been brought "promptly" before a judge or other officer authorised by law to exercise judicial power.

4. The application was allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court). On 10 July 2008, after a hearing on admissibility and the merits (Rule 54 § 3), a Chamber of that Section, composed of the following judges: Peer Lorenzen, President, Jean-Paul Costa, Karel Jungwiert, Renate Jaeger, Mark Villiger, Isabelle Berro-Lefèvre, Mirjana Lazarova Trajkovska, judges, and Claudia Westerdiek, Section Registrar, declared the application admissible and delivered a judgment in which the Court held by a majority that there had been a violation of Article 5 § 1 of the Convention and no violation of Article 5 § 3. The partly dissenting opinion of Judge Berro-Lefèvre, joined by Judges Lorenzen and Lazarova Trajkovska, was annexed to the judgment.

5. On 9 and 10 October respectively the applicants and the Government requested that the case be referred to the Grand Chamber, in accordance with Article 43 of the Convention. A panel of five judges of the Grand Chamber accepted that request on 1 December 2008.

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

7. The applicants and the Government each filed written observations on the merits.

8. A hearing took place in public in the Human Rights Building in Strasbourg, on 6 May 2009 (Rule 59 § 3).

There appeared before the Court:

(a) for the Government

Ms E. BELLIARD, Director of Legal Affairs, Ministry of Foreign Affairs, agent of the Government, *Agent*,
Mr J.-C. MARIN, public prosecutor in Paris,
Mr L. DI GUARDIA, Principal Advocate-General, Court of Cassation,
Mrs A.-F. TISSIER, Deputy Director for Human Rights, Legal Affairs Department, Ministry of Foreign Affairs,
Mrs M. MONGIN-HEUZÉ, *magistrat*, on secondment to the Ministry of Foreign Affairs
Mr T. POCQUET DU HAUT JUSSE, Deputy to the Director of Civil Affairs and Pardons (DACG), Ministry of Justice,
Mr J.-C. GRACIA, Head of Litigation Department, Ministry of Justice,
Ms D. MERRI, *chargée d'études*, Legal Affairs Department, Ministry of Defence, *Advisers*.

(b) for the applicants

Mr P. SPINOSI, of the *Conseil d'Etat* and Court of Cassation Bar, *Counsel.*

The Court heard addresses by Mr Spinosi and Mrs Belliard.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicants were crew members on a merchant ship named the *Winner*, registered in Cambodia. The ship had attracted the attention of the American, Spanish and Greek anti-drug services when the Central Office for the Repression of Drug Trafficking ("OCRTIS"), a ministerial body attached to the Central Police Directorate of the French Ministry of the Interior, requested authorisation to intercept it. The OCRTIS suspected the ship of carrying large quantities of drugs, with the intention of transferring them to speedboats off the Canary Islands for subsequent delivery to the coasts of Europe.

10. In a diplomatic note dated 7 June 2002, in response to a request from the French embassy in Phnom Penh, the Cambodian Minister of Foreign Affairs gave his Government's agreement for the French authorities to take action, in the following terms:

"The Ministry of Foreign Affairs and International Cooperation presents its compliments to the French Embassy in Phnom Penh and, referring to its note no. 507/2002 dated 7 June 2002, has the honour formally to confirm that the Royal Government of Cambodia authorises the French authorities to intercept, inspect and take legal action against the ship Winner, flying the Cambodian flag XUDJ3, belonging to "Sherlock Marine" in the Marshall islands.

The Ministry of Foreign Affairs and International Cooperation takes this opportunity to renew its assurance of its high esteem."

11. In a diplomatic telegram dated the same day, the French Embassy in Phnom Penh passed on the information to the Ministry of Defence in Paris.

12. The commander of the French frigate *Lieutenant de vaisseau Le Hénaff,* which lay at anchor in Brest harbour and had been assigned a mission off the coast of Africa, was instructed by the French naval authorities to locate and intercept the *Winner*. The frigate left Brest harbour the same day to search for and intercept the *Winner*, with the French Navy commando unit *Jaubert*, a special forces team specialised in boarding vessels at sea, on board

for the duration of the mission. On 10 June 2002, during a technical stopover in Spain, three experts from the OCRTIS also boarded the frigate.

13. On 13 June 2002, at 6 a.m., the French frigate spotted a merchant ship travelling at slow speed through the waters off Cape Verde, several thousand kilometres from France. It was not flying a flag, but was identified as the *Winner*. The merchant ship suddenly changed course and began to steer a course that was dangerous both for the frigate and for members of the armed forces who had taken place on board a speedboat. While the *Winner* refused to answer the attempts of the commander of the frigate to establish radio contact, its crew jettisoned a number of packages into the sea; one of the packages, containing about a hundred kilos of cocaine, was recovered by the French seamen. After several warnings and warning shots fired under orders from France's Maritime Prefect for the Atlantic went unheeded, the French frigate fired a shot directly at the *Winner*. The merchant ship then answered by radio and agreed to stop. When they boarded the *Winner,* the French commando team used their weapons to open certain locked doors. When a crew member of the *Winner* refused to obey their commands, a "warning shot" was fired at the ground, but the bullet ricocheted and the crew member was wounded. He was immediately evacuated onto the French frigate, then transferred to Dakar hospital, where he died a week later.

14. Under orders from the Maritime Prefect and at the request of the public prosecutor in Brest, a tug with a military doctor on board was sent out from Brest to tow the *Winner* back to Brest harbour, escorted by the frigate *Commandant Bouan.* Because of its poor state of repair and the weather conditions, the ship was incapable of speeds faster than 5 knots.

15. The crew of the *Winner* were confined to their quarters under military guard. The Government submit that when they calmed down they were allowed to move about the ship under the supervision of the French forces. According to the applicants, the coercive measures were maintained throughout the voyage, until they arrived in Brest.

16. On 13 June 2002, at 11 a.m., the Brest public prosecutor referred the case to OCRTIS for examination under the *flagrante delicto* procedure. It emerged that the Greek coastguard had had the *Winner* under observation in connection with international drug trafficking in which Greek nationals were involved.

17. On 24 June 2002, the Brest prosecutor's office opened an investigation into charges, against persons unknown, of leading a group with the aim of producing, making, importing, exporting, transporting, holding, supplying, selling, acquiring or illegally using drugs and conspiring to import and export drugs illegally. Two investigating judges were appointed.

18. On 26 June 2002, at 8.45 a.m., the *Winner* entered Brest harbour under escort. The crew were handed over to the police, acting under instructions dated 25 June 2002 from one of the investigating judges, who immediately notified the persons concerned that they were being placed in police custody and informed them of their rights.

19. The same day the applicants were presented to an investigating judge at the police station in Brest, to determine whether or not their police custody should be extended. The reports submitted to the Grand Chamber by the Government show that certain applicants met one of the investigating judges (R. André) at 5.05 p.m. (Sergio Cabrera Leon), 5.10 p.m. (Guillermo Luis Eduar Sage Martínez), 5.16 p.m. (Nicolae Balaban), 5.25 p.m. (Nicu Stelian Manolache), 5.34 p.m. (Viorel Petcu) and 5.40 p.m. (Puiu Dodica), and the other applicants (Oleksandr Medvedyev, Borys Bilenikin and Georgios Boreas) were heard by the second investigating judge (B. Simier) at an unspecified time. The applicants were presented to the same investigating judges again the following day, 27 June 2002 (Guillermo Luis Eduar Sage Martinez at 5.05 p.m., Sergio Cabrera Leon at 5.10 p.m., Nicu Stelian Manolache at 5.20 p.m., Nicolae Balaban at 5.28 p.m., Puiu Dodica at 5.35 p.m. and Viorel Petcu at 5.40 p.m.; the times for the other three applicants are not known).

20. On 28 and 29 June 2002 the applicants were charged and remanded in custody pending trial (Mr Viorel Petcu, Mr Puiu Dodica, Mr Nicolae Balaban and Mr Nicu Stelian Manolache on 28 June, and Mr Oleksandr Medvedyev, Mr Bory Bilenikin, Mr Georgios Boreas, Mr Sergio Cabrera Leon, Mr Guillermo Luis Eduar Sage Martínez and two other crew members – Mr Oleksandor Litetski and Mr Symeon Theophanous – on 29 June).

21. The applicants applied to the Investigation Division of the Rennes Court of Appeal to have the evidence disallowed, submitting that the French authorities had acted *ultra vires* in boarding the *Winner*, as the ship had been under Cambodian jurisdiction and Cambodia was not party to the Vienna Convention of 19 December 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and also that they had not been brought "promptly" before a judge, as required under Article 5 § 3 of the Convention, when the *Winner* was intercepted.

22. In a judgment of 3 October 2002 the court dismissed their appeal and held that there were no grounds for disallowing the evidence. After retracing the details of the operations, including the fact that "on 13 June at 6 a.m. the French frigate spotted a merchant ship – first on its radar, then visually – travelling at slow speed and flying no flag, and identified it as the *Winner*", it pronounced judgment in the following terms:

"Considering that the international effort to combat drug trafficking is governed by three conventions: the United Nations Single Convention on Narcotic Drugs of 30 March 1961, the United Nations Convention on the Law of the Sea, signed at Montego Bay on [10] December 1982, and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna on 20 December 1988; while France has signed and ratified all three conventions, Cambodia has not signed the Vienna Convention, Article 17.3 of which provides for derogations from the traditional principle of the "law of the flag State".

Considering that the applicants wrongly suggest in this case that in keeping with the traditional rule codified in Article 92 of the Montego Bay Convention, the authority of a State on ships on the high seas flying its flag is both full and exclusive and that coercion may be used to ensure that the rules of international law and the State's own law are respected as Article 108 of that convention, on "Illicit traffic in narcotic drugs or psychotropic substances", stipulates:

1. All States shall cooperate 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 cooperation of other States to suppress such traffic.

Considering that, based on that text and "with reference" to the earlier United Nations Convention of 30 March 1961 against international drug trafficking, the French authorities were within their rights to request Cambodia's cooperation with a view to obtaining that country's authorisation to intercept the "Winner" in order to put a stop to the drug trafficking in which all or part of its crew was suspected of being involved; that as the provisions of the Vienna Convention do not apply to Cambodia, it was for that State to ask the French authorities for all the relevant information concerning the alleged drug trafficking to enable it to assess the merits of the request using its unfettered discretion; that the diplomatic telegram sent by the French Embassy on 7 June 2002, which actually mentions the reasoned request submitted by the OCRTIS, suffices to establish the existence of an agreement given without restrictions or reservations by the Government of Cambodia for the planned interception and all its consequences, and is authoritative until proven otherwise; that on this point the applicants cannot contend that the document does not meet the formal requirements of Article 17.3 of the Vienna Convention concerning bilateral agreements between parties, when they are also arguing that the Vienna Convention is not applicable to Cambodia because it has not signed it; and that the value of the diplomatic document is not affected by the fact that the accused did not know the exact status of the person who signed the message or the person who transmitted the Cambodian Government's agreement to the French Embassy.

Considering, on the other hand, that in proceeding to intercept the "Winner" it was the duty of the French authorities to comply with the procedures provided for both in the Vienna Convention signed by France – in particular to "take due account of the need not to endanger the safety of life at sea, the security of the vessel and its cargo" – and in the law of 15 July 1994, as amended by the law of 29 April 1996 adapting French law to Article 17 of the Vienna Convention, Articles 12 *et seq.* of which define the sphere of competence of commanders of naval vessels and the procedures for the search, reporting, prosecution and judgment in the French courts of drug trafficking offences committed at sea.

Considering that the reports drawn up by the commander of the "Lieutenant de vaisseau Le Hénaff", duly authorised by the Maritime Prefect for the Atlantic, which are authoritative until proven otherwise, state that when the frigate drew within sight of the "Winner", off the Cape Verde islands, the merchant ship was flying no flag and its captain not only failed to answer the requests to identify his ship, in breach of the rules of international law, and

to stop his ship, but responded aggressively with a series of dangerous manoeuvres that jeopardised the safety of the French frigate and the lives of the sailors on board the speedboat; that it was also reported that the crew of the "Winner" were seen to be throwing suspicious parcels overboard, one of which was recovered and found to contain a large quantity of cocaine; that all these elements together amounted to reasonable grounds for the commander of the frigate to suspect that he was in the presence of drug traffickers who had jettisoned their cargo before attempting to escape; and that by using force to board the "Winner" and taking appropriate coercive measures to control the crew and confine them to their cabins and to take over and sail the ship, the commander of the frigate acted in strict compliance with:

- the provisions of Article 17.4 of the Vienna Convention under which, if evidence of involvement in illicit traffic is found after a ship has been boarded and searched, appropriate action may be taken with respect to the vessel and the persons and cargo on board,

- the provisions of the Law of 15 July 1994 as supplemented by the Law of 29 April 1996, which, in its general provisions (Articles 1 to 10) regulates recourse to coercive measures comprising, if necessary, the use of force in the event of refusal by a ship to submit to control and also, in the particular case of the fight against drug trafficking (Articles 12 to 14), makes provision for the implementation of the control and coercion measures provided for under international law.

Considering that, regard being had to the distinctly aggressive conduct of the captain of the "Winner" in attempting to evade inspection by the French naval authorities, and to the attitude of the crew members, who took advantage of the time thus gained to eliminate any traces of the drug trafficking by deliberately throwing the evidence overboard, the members of the commando unit who boarded the ship found themselves in the presence of large-scale international trafficking and were likely at any moment to come up against a hostile and potentially dangerous crew who could threaten the security of their mission; that they were obliged to use their weapons in response to the resistance put up by one of the ship's crew; that it cannot be claimed that Article 13 of the Law of 15 July 1994 as amended provides only for administrative assistance measures and excludes any form of coercion in respect of people when it stipulates in general terms that the competent maritime authorities are authorised to carry out or have carried out "the inspection and coercion measures provided for in international law", and Article 17.4 (c) of the Vienna Convention against illicit traffic in narcotic drugs expressly mentions taking "appropriate action with respect to the persons on board"; that although the nature of these measures is not specified, the text at least provides for the possibility for the competent naval authorities to limit, if necessary, the freedom of the boarded ship's crew to come and go, otherwise the provision would be meaningless and the safety of the men taking over control of the ship would be seriously jeopardised; that it cannot be ruled out in the course of such operations against international drug traffickers on the high seas that the crew may have weapons hidden away and may seek to regain control of the ship by force; that consequently, confining the members of the crew of the "Winner" – all but the wounded man, who was transferred to the frigate – to their cabins under the guard of the commando unit, so that the ship could be safely taken over and rerouted, fell within the appropriate measures provided for in Article 17.4 (c) of the Vienna Convention.

Considering that the Law of 15 July 1994 necessarily requires some departure from ordinary criminal procedure to allow for the specific needs of the effort to combat drug trafficking by ships on the high seas, in keeping with the rules of international law, and for the fact that it is impossible in practice, bearing in mind the time needed to sail to the new port of destination, to apply the ordinary rules governing detention and the right to be brought promptly before a judge; and, that being so, that the restrictions placed on the movements of the boarded ship's crew, as authorised in such cases by the United Nations Convention signed in Vienna on 20 December 1988, were not at variance with Article 5 § 3 of the European Convention on Human Rights and did not amount to unlawful detention; and that it should be noted that as soon as the "Winner" docked in Brest, its crew were handed over to the police, immediately informed of their rights and placed in custody, then brought before the investigating judge.

Considering also that the French courts have jurisdiction under the Law of 15 July 1994 as amended.

(...) the grounds of nullity must accordingly be rejected [and] there is no reason to disallow any other documents from the proceedings, which are lawful."

23. In a judgment of 15 January 2003, the Court of Cassation dismissed an appeal lodged by the applicants in the following terms:

“(...) in so far as Cambodia, the flag State, expressly and without restriction authorised the French authorities to stop the Winner and, in keeping with Article 17 of the Vienna Convention, only appropriate action was taken against the persons on board, who were lawfully taken into police custody as soon as they landed on French soil, the Investigation Division has justified its decision”.

24. On 28 May 2005, the Ille-et-Vilaine Special Assize Court found three applicants – Mr Georgios Boreas, Mr Guillermo Sage Martínez and Mr Sergio Cabrera Leon – and one other crew member, S.T., guilty of conspiracy to illegally attempt to import narcotics and sentenced them respectively to twenty years', ten years', three years' and eighteen years' imprisonment. However, Georgios Boreas and S.T. were acquitted of the charge of leading or organising a gang for the purposes of drug trafficking. The Assize Court acquitted the other six applicants and O.L., another crew member, of the charges against them.

25. In a judgment of 6 July 2007 the Loire Atlantique Assize Court, examining an appeal lodged by Georgios Boreas, Guillermo Sage Martínez and S.T., upheld the conviction and sentenced them respectively to twenty, twelve and seventeen years' imprisonment. On 9 April 2008 the Court of Cassation dismissed an appeal on points of law lodged by S.T. and Georgios Boreas.

26. In a note of 9 September 2008, in reply to a request submitted by the French Embassy in Phnom Penh on 3 September 2008, the Ministry of Foreign Affairs and International Cooperation of Cambodia confirmed that its diplomatic note of 7 June 2002 had “indeed authorised the French authorities to intercept and carry out all necessary operations for the inspection, seizure and legal proceedings against the ship *Winner*, flying the Cambodian flag, but also against all the members of its crew”.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. The United Nations Single Convention on Narcotic Drugs of 30 March 1961

27. The relevant provisions of the Single Convention on Narcotic Drugs of 30 March 1961, to which France is party, read as follows:

Article 35

“Having due regard to their constitutional, legal and administrative systems, the Parties shall:

a) Make arrangements at the national level for co-ordination of preventive and repressive action against the illicit traffic; to this end they may usefully designate an appropriate agency responsible for such co-ordination;

b) Assist each other in the campaign against the illicit traffic in narcotic drugs;

c) Co-operate closely with each other and with the competent international organizations of which they are members with a view to maintaining a co-ordinated campaign against the illicit traffic;

d) Ensure that international co-operation between the appropriate agencies be conducted in an expeditious manner; and

e) Ensure that where legal papers are transmitted internationally for the purposes of a prosecution, the transmittal be effected in an expeditious manner to the bodies designated by the Parties; this requirement shall be without prejudice to the right of a Party to require that legal papers be sent to it through the diplomatic channel;

f) Furnish, if they deem it appropriate, to the Board and the Commission through the Secretary-General, in addition to information required by article 18, information relating to illicit drug activity within their borders, including information on illicit cultivation, production, manufacture and use of, and on illicit trafficking in, drugs; and

g) Furnish the information referred to in the preceding paragraph as far as possible in such manner, and by such dates as the Board may request; if requested by a Party, the Board may offer its advice to it in furnishing the information and in endeavouring to reduce the illicit drug activity within the borders of that Party."

B. The United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982

28. The relevant provisions of the Montego Bay Convention on the Law of the Sea (to which Cambodia is not a party) read as follows:

Article 108: Illicit traffic in narcotic drugs or psychotropic substances

"1. All States shall cooperate 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 cooperation of other States to suppress such traffic."

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, 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."

C. The United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna on 20 December 1988

29. The relevant provisions of the Vienna Convention (to which France is a party but not Cambodia) read as follows:

Article 17

“Illicit traffic by sea

1. The Parties shall co-operate to the fullest extent possible to suppress illicit traffic by sea, in conformity with the international law of the sea.

2. A Party which has reasonable grounds to suspect that a vessel flying its flag or not displaying a flag or marks of registry is engaged in illicit traffic may request the assistance of other Parties in suppressing its use for that purpose. The Parties so requested shall render such assistance within the means available to them.

3. A Party which has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law, and flying the flag or displaying marks of registry of another Party is engaged in illicit traffic may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures in regard to that vessel.

4. In accordance with paragraph 3 or in accordance with treaties in force between them or in accordance with any agreement or arrangement otherwise reached between those Parties, the flag State may authorize the requesting State to, inter alia:

a) Board the vessel;

b) Search the vessel;

c) If evidence of involvement in illicit traffic is found, take appropriate action with respect to the vessel, persons and cargo on board.

5. Where action is taken pursuant to this article, the Parties concerned shall take due account of the need not to endanger the safety of life at sea, the security of the vessel and the cargo or to prejudice the commercial and legal interests of the flag State or any other interested State.

6. The flag State may, consistent with its obligations in paragraph 1 of this article, subject its authorization to conditions to be mutually agreed between it and the requesting Party, including conditions relating to responsibility.

7. For the purposes of paragraphs 3 and 4 of this article, a Party shall respond expeditiously to a request from another Party to determine whether a vessel that is flying its flag is entitled to do so, and to requests for authorization made pursuant to paragraph 3. At the time of becoming a Party to this Convention, each Party shall designate an authority or, when necessary, authorities to receive and respond to such requests. Such designation shall be notified through the Secretary-General to all other Parties within one month of the designation.

8. A Party which has taken any action in accordance with this article shall promptly inform the flag State concerned of the results of that action.

9. The Parties shall consider entering into bilateral or regional agreements or arrangements to carry out, or to enhance the effectiveness of, the provisions of this article.

10. Action pursuant to paragraph 4 of this article shall 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.

11. Any action taken in accordance with this article shall take due account of the need not to interfere with or affect the rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea.”

D. Council of Europe Agreement “on Illicit Traffic by Sea, implementing article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances” (the Vienna Convention of 20 December 1988), done at Strasbourg on 31 January 1995 and which entered into force on 1 May 2000

30. The relevant provisions of this agreement, signed by twenty-two member States of the Council of Europe (but not by France) and ratified by thirteen, read as follows:

"The member States of the Council of Europe, having expressed their consent to be bound by the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, done at Vienna on 20 December 1988, hereinafter referred to as "the Vienna Convention",

Considering that the aim of the Council of Europe is to bring about a closer union between its members;

Convinced of the need to pursue a common criminal policy aimed at the protection of society;

Considering that the fight against serious crime, which has become an increasingly international problem, calls for close co-operation on an international scale;

Desiring to increase their co-operation to the fullest possible extent in the suppression of illicit traffic in narcotic drugs and psychotropic substances by sea, in conformity with the international law of the sea and in full respect of the principle of right of freedom of navigation;

Considering, therefore, that Article 17 of the Vienna Convention should be supplemented by a regional agreement to carry out, and to enhance the effectiveness of the provisions of that article,

Have agreed as follows:

(...)

Section 3 – Rules governing action

Article 9 – Authorised actions

1. Having received the authorisation of the flag State, and subject to the conditions or limitations, if any, made under Article 8, paragraph 1, the intervening State may take the following actions:

i. a. stop and board the vessel;

b. establish effective control of the vessel and over any person thereon;

c. take any action provided for in sub-paragraph ii of this article which is considered necessary to establish whether a relevant offence has been committed and to secure any evidence thereof;

d. require the vessel and any persons thereon to be taken into the territory of the intervening State and detain the vessel there for the purpose of carrying out further investigations;

ii. and, having established effective control of the vessel:

a. search the vessel, anyone on it and anything in it, including its cargo;

b. open or require the opening of any containers, and test or take samples of anything on the vessel;

c. require any person on the vessel to give information concerning himself or anything on the vessel;

d. require the production of documents, books or records relating to the vessel or any persons or objects on it, and make photographs or copies of anything the production of which the competent authorities have the power to require;

e. seize, secure and protect any evidence or material discovered on the vessel.

2. Any action taken under paragraph 1 of this article shall be without prejudice to any right existing under the law of the intervening State of suspected persons not to incriminate themselves.

Article 10 – Enforcement measures

1. Where, as a result of action taken under Article 9, the intervening State has evidence that a relevant offence has been committed which would be sufficient under its laws to justify its either arresting the persons concerned or detaining the vessel, or both, it may so proceed.

...

Article 11 – Execution of action

1. Actions taken under Articles 9 and 10 shall be governed by the law of the intervening State ..."

E. Agreement Concerning Co-operation in Suppressing Illicit Maritime and Air Trafficking in Narcotic Drugs and Psychotropic Substances in the Caribbean Area, signed at San Jose on 10 April 2003

31. This agreement between continental and island States of the Caribbean area (France, Costa Rica, United States, Haiti, Honduras, Nicaragua, the Netherlands and the Dominican Republic) in respect of the Vienna Convention, lays down the conditions of the battle against trafficking in narcotic drugs in the area by introducing broad cooperation and providing for States to be able to consent in advance to intervention by the other Parties on ships flying their flags.

32. It allows a State Party to take coercive action, even in the territorial waters of another State Party, by delegation of the latter State. There are three possibilities:

– systematic authorisation;

– autorisation if no answer is received from the flag State within four hours of another Party submitting a request for intervention;

– express authorisation for the intervention, which corresponds to the current legal situation under the Vienna Convention.

33. The draft law thus allows the States to consent in advance to the intervention of other Parties on a ship flying their flag or located within their territorial waters.

Domestic legislation

1. Law no. 94-589 of 15 July 1994 "on conditions governing the exercise by the State of its powers to carry out checks at sea"

34. The relevant provisions of Law no. 94-589 of 15 July 1994 "on conditions governing the exercise by the State of its powers to carry out checks at sea", as amended by Law no. 96-359 of 29 April 1996 "on drug trafficking at sea and adapting French legislation to Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances signed in Vienna on 20 December 1988", read as follows (version applicable at the material time):

"Part II: Special provisions adapting French legislation to Article 17 of the Convention of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, signed in Vienna on 20 December 1988

Section 12

The investigation and establishment of drug trafficking offences committed at sea, and prosecution and trial therefor shall be governed by the provisions of Part I of the present law and by the following provisions. These provisions shall apply not only to ships flying the French flag, but also:

– to ships flying the flag of a State Party to the Vienna Convention of 20 December 1988 other than France, or lawfully registered in such a State, at the request or with the agreement of the flag State;

– to ships displaying no flag or having no nationality.

Section 13

Where there exist reasonable grounds to suspect that one of the vessels referred to in section 12 and sailing outside territorial waters is engaged in illicit drug trafficking, commanders of State vessels and of aircraft responsible for surveillance at sea shall have the power – under the authority of the Maritime Prefect, who shall inform the Public Prosecutors' Office – to carry out, or have carried out the inspection and coercion measures provided for under international law and under this law."

35. In the version amended by Law no. 2005-371 of 22 April 2005, which was not applicable at the material time, Section 12 also refers to ships flying the flag of a State which is not party to the Vienna Convention:

Section 12

"The investigation and establishment of drug trafficking offences committed at sea, and prosecution and trial therefor shall be governed by the provisions of Part II of Book V of the first part of the Defence Code and by the provisions of the present Part of this law. These provisions shall apply not only to the ships mentioned in Article L. 1521-1 of the Defence Code, but also:

– to ships flying the flag of a State which has requested intervention by France or agreed to its request for intervention;

– to ships displaying no flag or having no nationality."

36. In order to allow for the period of transit subsequent to a decision to reroute a vessel, Law no. 2005-371 of 22 April 2005 amended Article L. 1521-5 of the Defence Code, in the chapter on "exercise of the State's law enforcement powers at sea", by adding the following final sentence:

Article L. 1521-5

"During transit subsequent to rerouting, the officers mentioned in Article L. 1521-2 may take the necessary and appropriate coercion measures to ensure the safety of the ship and its cargo and of the persons on board."

37. In its report on the draft of this law the Foreign Affairs Committee stated (extract from report no. 280, dated 6 April 2005):

"B. THE DRAFT LAW

1. Secure the procedures

a) Delete the reference to the Vienna Convention on drug trafficking

In the case involving the *Winner*, a ship flying the Cambodian flag that was stopped by the French navy off the coast of West Africa, the Court of Cassation did not deem it necessary to rely on the Vienna Convention**,** to which Cambodia was not party, to find that the stopping of the ship with the consent of the flag State in the particular case of drug trafficking had been lawful. It found it sufficient to rely on Article 108 of the Montego Bay Convention, which provides: "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 cooperation of other States to suppress

such traffic". On the other hand, when carrying out the interception, a State Party to the Vienna Convention which stops such a ship – in this case, France – must comply with the rules laid down therein and may thus rely on the provisions of Article 17 of the Vienna Convention, concerning coercion measures. In this case the Court found that the jurisdiction of the flag State was not exclusive when it assented to a request to intervene.

It appears preferable, however, to delete the reference to the Vienna Convention**,** in so far as inspection and coercion measures may be carried out on the strength of other international instruments, including the regional cooperation agreements concluded on the basis of the Vienna Convention, such as the San José agreement when it enters into force.

b) State exactly what the coercion measures involve

The draft law also says that during transit subsequent to rerouting, the duly authorised officers of the State may take the necessary and appropriate coercion measures to ensure the safety of the ship and its cargo and of the persons on board."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

38. The applicants claimed that they had been arbitrarily deprived of their liberty after the ship was boarded by the French authorities. They relied on Article 5 § 1 of the Convention, the relevant parts of which provide:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(...)

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(...)"

A. The Chamber judgment

39. The Chamber disagreed with the French courts' approach in so far as they referred to international conventions to which Cambodia was not party and relied on legal provisions which, at the material time, provided for extraterritorial intervention by the French authorities only on French ships, "ships flying the flag of a State Party to the Vienna Convention of 20 December 1988 [which Cambodia has not ratified, as mentioned previously] (...) or lawfully registered in such a State, at the request or with the agreement of the flag State", and on ships flying no flag or having no nationality. In addition to the fact that the *Winner* did not fit into any of those categories, it noted that the Law of 15 July 1994 had been amended *inter alia* so that it no longer referred only to States Parties to the Vienna Convention. It also considered that the Government's argument concerning the applicability of and compliance with the legal provisions concerned was based on a contradiction, as they had submitted that at the time of the interception the *Winner* had been flying no flag, while at the same time asserting that the French authorities had previously sought confirmation from the Cambodian authorities that the ship was registered in their country and that the ship had been identified as the *Winner* before the operations commenced.

40. The Chamber nevertheless agreed that, regard being had to Article 108 of the Montego Bay Convention, the Cambodian authorities' diplomatic note of 7 June 2002 could be considered to have provided a legal basis for the interception and boarding of the *Winner* by the French authorities, although this did not apply to the thirteen days' deprivation of liberty imposed on the crew on board the ship. It further found that neither French law nor Article 17 of the Vienna Convention made any more specific provision for deprivation of liberty of the type and duration of that to which the applicants were subjected.

41. In the Chamber's opinion, the legal provisions relied on by the Government did not afford sufficient protection against arbitrary violations of the right to liberty: firstly, none of those provisions referred specifically to depriving the crew of the intercepted ship of their liberty or regulated the conditions of deprivation of liberty on board ship; secondly, they neglected to place the detention under the supervision of a judicial authority. On this last point the Chamber noted that although measures taken under the Law of 15 July 1994 were taken under the supervision of the public prosecutor, the public prosecutor was not a "competent legal authority" within the meaning the Court's case-law gave to that notion (see *Schiesser v. Switzerland*, judgment of 4 December 1979, Series A no. 34, §§ 29-30).

42. It accordingly found that the applicants had not been deprived of their liberty "in accordance with a procedure prescribed by law", within the meaning of Article 5 § 1.

B. The parties' submissions before the Grand Chamber

1. The applicants

43. The applicants, who shared the analysis followed by the Chamber in its judgment, considered that the action taken by the French authorities on the high seas and their detention on board the *Winner* had no legal basis. They submitted that there was no legal basis for the boarding of the *Winner* either in international conventions to which Cambodia was not a party, be it the Montego Bay Convention of 10 December 1982 or the Vienna Convention of 20 December 1988, or in the diplomatic note of the Ministry of Foreign Affairs of 7 June 2002.

44. They argued that Article 108 of the Montego Bay Convention was not applicable in this case because, in their submission, it was not Cambodia, the flag State, that had requested the cooperation of France, but France that had taken the initiative of requesting authorisation to stop a ship flying the Cambodian flag. The fact that Cambodia granted that request could not be likened to a request for cooperation within the meaning of Article 108 of the Montego Bay Convention. As to Article 110 of that convention, they submitted that the Government were proposing an interpretation which distorted its meaning, as the *Winner* had not been without nationality and had not had the same nationality as the French warship.

45. The applicants also considered that Law no. 94-589 of 14 July 1994 was not applicable, particularly because it referred to international conventions to which Cambodia was not a party.

46. They considered it established that domestic and international law failed to afford effective protection against arbitrary interference when it did not provide for the possibility of contacting a lawyer or family member but did, according to the Government, authorise thirteen days' detention.

47. Concerning the diplomatic note of 7 June 2002, the applicants also challenged the Government's legal interpretation. They maintained that it could not be considered as a delegation of jurisdiction to France. Even assuming, for argument's sake, that such an *ad hoc* agreement did justify French intervention in keeping with the principle of public international law that a State could relinquish part of its sovereignty other than by a convention, they alleged that the limits of such an exceptional transfer of power had been considerably exceeded in the present case. According to the Government's own submissions, the agreement had merely concerned a "request to intercept", while the Cambodian Government had only authorised the "stopping" of the ship (*"arraisonnement"* in French). Strictly speaking this consisted solely in stopping the ship at sea or on arrival in port to make certain verifications (concerning its identity and its nationality, for example): it did not extend to searches or arrests on board the ship. Yet that was what had happened in this case: the applicants had been arrested and confined to their cabins for thirteen days. Their detention on board the *Winner* and their judgment in another country had not been authorised by Cambodia. The applicants thus challenged the existence of any *ad hoc* agreement justifying the stopping of the *Winner* and considered that even if there had been such an agreement, it did not justify the detention of the crew following the French military operation.

48. The applicants further submitted that the production before the Grand Chamber of a diplomatic note dated 9 September 2008, sent by the Cambodian authorities at the request of the French Government seven years after the events and two months after the Fifth Section of the Court had pronounced judgment in their favour, was "very late and quite astounding". They requested that the note, which had never been produced in the proceedings

before the domestic courts and the Fifth Section of the Court, as it had not existed at the time and amounted to a reinterpretation of the facts after the event, be disallowed as evidence.

2. The Government

49. In their preliminary observations the Government stressed that the events in this case had taken place on the high seas, so that it was necessary to take into account the specificities of the maritime environment and of navigation at sea. In the Government's submissions this had two specific consequences. First of all, the Convention was completely silent about maritime matters and the Government argued that it was possible to draw a parallel with the solution adopted by the Court in cases concerning the handing over of persons by one State to another in the context of extradition (*Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV; *Freda v. Italy*, (dec.), no. 8916/80, Commission decision of 7 October 1980, Decisions and Reports (DR) 21, p. 250; *Altmann (Barbie) v. France*, (dec.), no. 10689/83, Commission decision of 4 July 1984, DR 37, p. 225; and *Sánchez Ramirez v. France*, (dec.), no. 28780/95, Commission decision of 24 June 1996, DR 86-A, p. 155). The Government considered that "the same reasoning, *mutatis mutandis*, could be applied in this case" for want of any provision in the Convention concerning arrangements for rerouting ships, or specific provisions concerning maritime matters, which made the Convention inapplicable *ratione materiae*.

50. Secondly, they submitted that freedom to come and go on board a ship had more restrictive limits, which were the confines of the ship itself: the lawful rerouting of a ship therefore necessarily authorised restrictions on the movements of the people on board; the specificities and the risks of navigation at sea justified the extensive powers enjoyed by ships' captains. The Government inferred that the applicants had not been deprived of their liberty within the meaning of Article 5 but had been subjected to restrictions of liberty that were justified, restrictions they were challenging on a purely formalistic and litigious basis. The Government submitted that Article 5 of the Convention was not applicable in the present case.

51. In the alternative, on the merits, the Government submitted that the deprivation of liberty imposed on the applicants for the thirteen days during which the *Winner* had been rerouted had been lawful, and disputed the findings of the Chamber.

52. The lawfulness of the measure had to be examined from two points of view, that of public international law and that of domestic law.

53. With regard to public international law, the Government pointed out that the *Winner* had been flying no flag and had refused to identify itself. The ship's crew had therefore deliberately placed itself in the situation provided for in Article 110 of the Montego Bay Convention, which provided expressly for a warship to be able to stop a ship that is "refusing to show its flag", a principle unanimously accepted under the law of the sea.

54. The Government considered in any event that the agreement given by Cambodia to the French authorities by diplomatic note had made the intervention of the French navy perfectly lawful from the international law perspective. The Montego Bay Convention well illustrated the signatory States' aim of 'cohabitation' in what belonged to all and yet to none, by strictly defining the conditions in which a State could interfere with another State's sovereignty by having a naval vessel inspect a ship flying a foreign flag. And although Cambodia was not a party to the Vienna Convention of 1988, the agreement that sovereign State had given by diplomatic note had been self-sufficient with regard to the principles of public international law and the law of the sea. The diplomatic note of 7 June 2002 had authorised the stopping of the ship and all "its consequences", as confirmed by the Cambodian authorities in their note of 9 September 2008. In such circumstances the agreement concerned had provided a legal basis for the rerouting of the *Winner* and its crew.

55. The Government submitted in addition that the agreement concerned had been fully in compliance with the requirements of public international law. The damage caused by drug trafficking in democratic societies explained why Article 108 of the Montego Bay Convention, the Vienna Convention of 1988 and the Council of Europe agreement of 31 January 1995 all provided for the requisite cooperation between States to put a stop to the traffic. As the sea could be a "safe haven" (*Öcalan* cited above, § 88) for traffickers, international law had provided for the flag State to be able to delegate its power to combat this type of crime. The Government further noted that in the *Rigopoulos* case the Court had found that the verbal agreement given to Spain by Panama had been sufficient to make the operations lawful under public international law.

56. With regard to domestic law, the Government contested the Chamber's analysis, pointing out that according to the Court's case-law it was first and foremost for the domestic authorities to interpret and apply their country's law, especially when, as in this case, what was in question was not the substance of the law but its scope. They submitted that in any event the Investigation Division had not based its findings solely on Article 17 of the Vienna Convention, but also on the general provisions of the Law of 1994, which empowered commanders of naval vessels responsible for surveillance at sea to carry out, or have carried out "inspection and coercion measures". They accordingly considered that that part of the law had provided a legal basis for the measures complained of, because the ship was suspected of drug trafficking and because it had been flying no flag, had refused to identify itself and had responded aggressively by making dangerous manoeuvres.

57. The Government set great store by two factors. First, a State not party to a convention could, by special agreement, in given circumstances, consent to the application of provisions of the convention concerned, and the French courts had thus been able to find that French law should apply. Secondly, French law applied because the *Winner* had been flying no flag and had refused to identify itself.

58. As to the quality of the legal basis, which the Chamber had questioned, the Government maintained that the specificity of the law of the sea had to be taken into consideration to appreciate the precise meaning of the legal standards; the French law of 1994, in conjunction with Cambodia's agreement in conformity with the provisions of Article 17.4 of the Vienna Convention and the Montego Bay Convention, had authorised the rerouting of the ship. So, as the law provided for the ship to be rerouted, it also provided for restriction of the freedom of movement of those on board, as the two were inseparable. According to the Government, the rerouting was nevertheless to be considered as a preliminary to the suspects being brought before the judicial authorities.

59. In any event, the unpredictability of navigation and the vastness of the oceans made it impossible to provide in detail for every eventuality when ships were rerouted. The Government considered that the allegation that it had not been possible for the applicants to contact a relative or a lawyer was unfounded, as the technical conditions for such contact were not always available; besides, as the applicants had not established that they had been in contact with their families or their lawyers prior to the interception by the French navy, their practical situation had not been altered by the rerouting of their ship. The Government also pointed out that the length of the voyage had merely been a material contingency and that the applicants had not been questioned during the thirteen days spent on board, naval personnel having no power to take such action. Accordingly, the Government considered that the right to contact a lawyer or a family member would have been theoretical and illusory.

60. The Government then broached the matter of supervision by the public prosecutor. They argued that the Chamber judgment confused the notions referred to in paragraphs 1 (c) and 3 of Article 5 of the Convention, while noting that the applicants were to be presented, when they arrived in Brest, not to the public prosecutor but to an investigating judge.

61. They saw the fact that the rerouting of the ship had been carried out under the supervision of the public prosecutor as a guarantee against arbitrary treatment, arguing that in view of the guarantees of independence public prosecutors offered, they should be considered judicial authorities. On this last point the Government developed arguments demonstrating the guarantees of the independence of public prosecutors in terms of their status, the way they were recruited, their powers and their institutional role. They pointed out, in particular, that Article 64 of the French Constitution enshrined the independence of the "judicial authority" and that the Constitutional Council had found that the said judicial authority included both judges and public prosecutors.

C. The Court's assessment

1. Article 1 of the Convention

62. The Court considers that the first question to be decided in this case is whether the events in dispute, from the stopping of the *Winner* on the high seas and throughout the thirteen days of alleged deprivation of liberty until the ship reached Brest, brought the applicants within the jurisdiction of France for the purposes of Article 1 of the Convention, which reads as follows:

"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention."

63. Article 1 sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to 'securing' ('*reconnaître*' in the French text) the listed rights and freedoms to persons within its own 'jurisdiction'. Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States (see *Soering v. the United Kingdom*, 7 July 1989, § 86, Series A no. 161, and *Banković and Others v. Belgium and 16 other Contracting States* (dec.) [GC], no. 52207/99, § 66, ECHR 2001-XII).

64. In keeping with the essentially territorial notion of jurisdiction, the Court has accepted only in exceptional cases that acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction by them for the purposes of Article 1 of the Convention (see *Banković,* cited above, § 67, and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 314, ECHR 2004-VII). In its first Loizidou judgment (*preliminary objections*), for example, the Court found that bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party might also arise when as a consequence of military action – whether lawful or unlawful – it exercised effective control of an area outside its national territory (see *Loizidou v. Turkey* (*preliminary objections*) [GC], 23 March 1995, § 62, Series A no. 310). This excluded situations, however, where – as in the Banković case – what was at issue was an instantaneous extraterritorial act, as the provisions of Article 1 did not admit of a "cause-and-effect" notion of "jurisdiction" (*Banković*, § 75).

65. Additionally, the Court notes that other recognised instances of the extraterritorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad and on board aircraft and ships registered in, or flying the flag of, that State. In these specific situations, customary international law and treaty provisions have clearly recognised and defined the extraterritorial exercise of jurisdiction by the relevant State (see *Banković*, cited above, § 73).

66. In the instant case, the Court notes that a French warship, the frigate *Lieutenant de vaisseau Le Hénaff*, was specially instructed by the French naval authorities to intercept the *Winner*, and that the frigate sailed out of Brest harbour on that mission carrying on board the French Navy commando unit *Jaubert*, a special forces team specialised in boarding vessels at sea. When the *Winner* was spotted off Cape Verde on 13 June 2002, the frigate issued several warnings and fired warning shots, before firing directly at the merchant ship, under orders from France's Maritime Prefect for the Atlantic. When they boarded the *Winner*, the French commando team were obliged to use their weapons to defend themselves, and subsequently kept the crew members under their exclusive guard and confined them to their cabins during the journey to France, where they arrived on 26 June 2002. The rerouting of the *Winner* to France, by decision of the French authorities, was made possible by sending a tug out of Brest harbour to tow the ship back to the French port, escorted by another warship, the frigate *Commandant Bouan*, all under orders from the Maritime Prefect and at the request of the Brest Public Prosecutor.

67. That being so, the Court considers that, as this was a case of France having exercised full and exclusive control over the *Winner* and its crew, at least *de facto*, from the time of its interception, in a continuous and uninterrupted manner until they were tried in France, the applicants were effectively within France's jurisdiction for the purposes of Article 1 of the Convention (contrast *Banković*, cited above).

2. The Government's "preliminary observations"

68. The Court notes at the outset that the Government contended for the first time before the Grand Chamber, in "preliminary observations", that the applicants' complaints were incompatible *ratione materiae* with the provisions of Article 5 of the Convention, their observations on the merits being submitted only "in the alternative".

69. The Grand Chamber reiterates that it is not precluded from deciding in appropriate cases questions concerning the admissibility of an application under Article 35 § 4 of the Convention, as that provision enables the Court to dismiss applications it considers inadmissible "at any stage of the proceedings" (see *Odièvre v. France* [GC], no. 42326/98, § 22, ECHR 2003-III; *Azinas v. Cyprus* [GC], no. 56679/00, § 32, ECHR 2004-III; *Yumak and Sadak v. Turkey* [GC], no. 10226/03, § 72, 8 July 2008; and *Mooren v. Germany* [GC], no. 11364/03, § 57, ECHR 2009-...). Under Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its observations on the admissibility of the application submitted as provided in Rule 54 (compare *N.C. v. Italy* [GC], no. 24952/94, § 44, ECHR 2002-X; *Azinas*, cited above, §§ 32 and 37; *Sejdovic v. Italy* [GC], no. 56581/00, § 41, ECHR 2006-II; and *Mooren* cited above). Only exceptional circumstances, such as the fact that the grounds for the objection of inadmissibility came to light late in the day, can dispense a government from the obligation to raise their objection

in their observations on the admissibility of the application before the adoption of the Chamber's admissibility decision (see *N.C.*, cited above, § 44; *Sejdovic*, cited above, § 41; and *Mooren* cited above).

70. In the instant case the Court notes that, in the written observations on admissibility which they submitted to the Chamber, the Government did not argue that the complaints were incompatible *ratione materiae* with the provisions of Article 5 of the Convention, and the Court can discern no exceptional circumstance capable of dispensing the Government from raising that objection in their observations to the Chamber on admissibility.

71. The Government are accordingly estopped from raising a preliminary objection of incompatibility *ratione materiae* at this stage in the proceedings. In spite of this estoppel, however, the Court must examine this question, which goes to its jurisdiction, the extent of which is determined by the Convention itself, in particular by Article 32, and not by the parties' submissions in a particular case (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, ECHR 2008-...).

72. First of all, referring also to its finding that the applicants were within the jurisdiction of France for the purposes of Article 1 of the Convention, the Court considers that the preliminary observations on the applicability of Article 5 actually concern the merits of the application.

73. As to the observations concerning the existence or otherwise of the deprivation of liberty, the Court reiterates that Article 5 – paragraph 1 of which proclaims the “right to liberty” – is concerned with a person's physical liberty. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5 the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see *Amuur v. France*, 25 June 1996, § 42, *Reports of Judgments and Decisions* 1996-III). The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance (see *Guzzardi v. Italy*, 6 November 1980, Series A no. 39, and *Amuur*, cited above).

74. In the Court's opinion, while it is true that the applicants' movements prior to the boarding of the *Winner* were already confined to the physical boundaries of the ship, so that there was a *de facto* restriction on their freedom to come and go, it cannot be said, as the Government submitted, that the measures taken after the ship was boarded merely placed a restriction on their freedom of movement. The crew members were placed under the control of the French special forces and confined to their cabins during the voyage. True, the Government maintained that during the voyage the restrictions were relaxed. In the Court's view that does not alter the fact that the applicants were deprived of their liberty throughout the voyage as the ship's course was imposed by the French forces.

75. Accordingly, the Court concludes that the applicants' situation on board the *Winner* after it was boarded, because of the restrictions endured, amounted in practice to a deprivation of liberty, and that Article 5 § 1 applies to their case.

3. Article 5 § 1 of the Convention

(a) The general principles

76. The Court reiterates that Article 5 of the Convention protects the right to liberty and security. This right is of the highest importance “in a democratic society” within the meaning of the Convention (see, amongst many other authorities, *De Wilde, Ooms and Versyp v. Belgium*, 18 June 1971, § 65, Series A no. 12, and *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33).

77. All persons are entitled to the protection of this right, that is to say, not to be deprived, or continue to be deprived, of their liberty (see *Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A no. 114, p. 22, § 40), save in accordance with the conditions specified in paragraph 1 of Article 5.

78. The list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one (see *Quinn v. France*, judgment of 22 March 1995, § 42, Series A no. 311, and *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-

IV), and only a narrow interpretation of those exceptions is consistent with the aim of that provision (see *Engel and Others v. the Netherlands,* 8 June 1976, § 58, Series A no. 22, and *Amuur,* cited above, § 42).

79. The Court further reiterates that where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law. In all cases it establishes the obligation to conform to the substantive and procedural rules of the laws concerned, but it also requires that any deprivation of liberty be compatible with the purpose of Article 5, namely, to protect the individual from arbitrariness (see, amongst many other authorities, *Bozano v. France*, 18 December 1986, § 54, Series A no. 111; *Amuur,* cited above, § 50; *Ilaşcu and Others v. Moldova and Russia* [GC], no. 8787/99, § 461, ECHR 2004-VII; *Assanidze v. Georgia* [GC], no. 71503/01, § 171, ECHR 2004-II; *McKay v. the United Kingdom* [GC], no. 543/03, § 30, ECHR 2006-X; and *Mooren*, cited above, § 76).

80. The Court stresses that where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic and/or international law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention, a standard which requires that all law be sufficiently precise to avoid all risk of arbitrariness and to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances of the case, the consequences which a given action may entail (see, among other authorities, *Amuur,* cited above; *Steel and Others v. the United Kingdom*, 23 September 1998, § 54, *Reports* 1998-VII; *Baranowski v. Poland*, no. 28358/95, §§ 50-52, ECHR 2000-III; and *Ječius v. Lithuania*, no. 34578/97, § 56, ECHR 2000-IX**).**

81. Lastly, the Grand Chamber shares the view of the Government and the Chamber that it must be borne in mind that the measures taken by the French authorities against the *Winner* and its crew were taken in the context of France's participation in the effort to combat international trafficking in drugs. As it has pointed out on numerous occasions, in view of the ravages drugs cause it can see in particular why the authorities of the Contracting States are so firm towards those who contribute to the spread of this scourge, and it is fully aware of the need to combat drug trafficking and, accordingly, to secure fruitful cooperation between States in this area. Nevertheless, the special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a "safe haven".

(b) Application of the above principles

82. The Court notes first of all that it is not disputed that the purpose of the deprivation of liberty to which the applicants were subjected on board the *Winner* while it was being escorted to France was to bring them "before the competent legal authority" within the meaning of Article 5 § 1 (c) of the Convention. In this case the Court notes that the parties disagree as to whether the facts of the case had a "legal basis" under public international law and domestic law.

83. The Court notes at the outset that in cases concerning drug trafficking on the high seas public international law upholds the principle that the flag State – in this case Cambodia – has jurisdiction. It also notes that Cambodia is party neither to the Montego Bay Convention of 1982 nor to the Vienna Convention of 1988.

84. The Government subscribe to the Court of Cassation's view that the intervention of the French authorities found justification in Article 108 § 1 of the Montego Bay Convention. However, Article 108 § 1 specifically authorises "a State which has reasonable grounds for believing that a ship flying its flag is engaged in illicit traffic in drugs" to request the cooperation of other States. It does not provide in general for States to request cooperation whenever they suspect a ship not flying their flag of such trafficking. The Court considers that Article 108 does not provide any legal basis for the action taken by the French authorities in this case. As Cambodia is not party to the Montego Bay Convention, it cannot have been acting under that convention when it sent its diplomatic note of 7 June 2002. Nor did France's request for cooperation from the Cambodian authorities fall within the scope of Article 108, as it was not based on France's suspicion that a ship flying the French flag was engaged in drug trafficking.

85. This lacuna in Article 108 of the Montego Bay Convention vis-à-vis the fight against illicit trafficking in drugs is also reflected in the rest of the text: not only are the provisions concerning the fight against drug trafficking minimal – in comparison with those concerning piracy, for example, on which there are eight Articles, which lay down, *inter alia*, the principle of universal jurisdiction as an exception to the rule of the exclusive jurisdiction of the flag State – but fighting drug trafficking is not among the offences, listed in Article 110, suspicion of which gives rise to the right to board and inspect foreign vessels. Lastly, while the provisions of the Montego Bay Convention concerning illegal drug trafficking on the high seas appear to suggest that the issue was not a part of customary law when that convention was signed, the Government have not shown that there has since been any constant practice on the part of the States capable of establishing the existence of a principle of customary international law generally authorising the intervention of any State which has reasonable grounds for believing that a ship flying the flag of another State is engaged in illicit traffic in drugs.

86. According to the Government, Article 110 of the Montego Bay Convention, which provides for a warship to be able to board a ship which refuses to fly its flag, is applicable in the instant case.

87. The Court notes that if at all, Article 110 would only be relevant to the present case in so far as paragraph 1 (d) refers to a ship "without nationality". The case of a ship "refusing to fly its flag" provided for in paragraph 1 (e) refers only to a ship that "is, in reality, of the same nationality as the warship", which is not the case here.

88. Furthermore, as regards the nationality of the ship, the Court shares the view of the Chamber and the applicants that the Government's arguments are based on a contradiction. It is an undisputed fact that the meeting of the frigate *Lieutenant de vaisseau Le Hénaff* and the *Winner* owed nothing to chance. The *Winner* was under the observation of the American, Spanish and Greek drug control agencies when the Central Office for the Repression of Drug Trafficking, which suspected it of transporting a large quantity of drugs for the European market, requested authorisation to intercept it. The ship's nationality being known in fact as early as 7 June 2002, the French Embassy requested Cambodia's consent to the French authorities' intervention; that agreement was given in a diplomatic note of 7 June 2002 and the Ministry of Defence in Paris was immediately informed. Thus, by 7 June 2002 at the latest the *Winner* had been precisely identified as a ship flying the Cambodian flag, as expressly stated in the diplomatic note sent by the Cambodian authorities. As to the frigate *Lieutenant de vaisseau Le Hénaff*, it had been at anchor in Brest harbour, and had already been assigned another mission off the African coast when, instead, it was specially instructed to set sail immediately to intercept the *Winner*. In order to carry out this clearly defined mission it took on board a French Navy special forces team specialised in boarding vessels at sea, as well as three experts from the OCRTIS.

89. In view of these elements, the Government cannot reasonably argue that the situation provided for in Article 110 of the Montego Bay Convention, concerning the possibility for a warship to board a ship if it has reasonable ground to suspect that that ship is without nationality (see paragraph 28 above), applies to the present case. The circumstances of the case do not support such an assertion. Moreover, the judgment of the Investigation Division of the Rennes Court of Appeal states quite plainly that the merchant ship spotted on 13 June at 6 a.m. was identified as the *Winner* (see paragraph 22 above).

90. Concerning the relevant French law, apart from the fact that its main purpose was to transpose the international treaties, and in particular the Vienna Convention, into domestic law, it cannot override the treaties concerned, or the principle of the exclusive jurisdiction of the flag State. Thus, as Cambodia was not a party to the conventions transposed into domestic law, and as the *Winner* was not flying the French flag and none of its crew members were French nationals – even assuming that the nationality of the crew members could be pleaded as an alternative to the principle of the flag State –, there were no grounds for French law to be applied.

91. The Court further notes that French law has since been amended: the reference limiting its scope to States Parties to the Vienna Convention has been deleted – in spite of the position of the Court of Cassation in the Medvedyev case – and the content of the coercion measures has been specified (see paragraphs 34 - 37 above).

92. Nor could it be argued that French law satisfied the general principle of legal certainty, as it failed to meet the requisite conditions of foreseeability and accessibility: it is unreasonable to contend that the crew of a ship on the high seas flying the Cambodian flag could have foreseen – even with appropriate advice – that they might fall under French jurisdiction in the circumstances of the case. Furthermore, although the purpose of the Montego Bay Convention was, *inter alia*, to codify or consolidate the customary law of the sea, its provisions concerning illicit traffic in narcotic drugs on the high seas – like those of the complementary Vienna Convention, organising

international cooperation without making it mandatory – reflect a lack of consensus and of clear, agreed rules and practices in the matter at the international level.

93. The Court notes, however, that independently of the Montego Bay and Vienna Conventions, and of French law, Cambodia consented in a diplomatic note to the intervention of the French authorities, a fact which, according to the Government, attested to the existence of an *ad hoc* agreement between the two countries on the interception of the *Winner* and the subsequent events.

94. The question is therefore whether the diplomatic note of the Ministry of Foreign Affairs of Cambodia dated 7 June 2002 provided a legal basis for the impugned measures.

95. In the Court's opinion, although the provisions of Article 108 § 2 of the Montego Bay Convention do not apply to the present case, as Cambodia has not ratified that instrument, they do not prevent States from envisaging other forms of collaboration to combat drug trafficking at sea. The Single Convention on Narcotic Drugs of 1961 (see paragraph 27 above, Article 35 (c)) and the Montego Bay and Vienna Conventions (see paragraphs 28 and 29 above, Article 108 paragraph 1, and Article 17 paragraph 1, respectively) all provide expressly for cooperation between States on this matter. Such cooperation may take various forms, particularly in view of the vague wording of the provisions of Article 17, subparagraph 4 (c), which merely refers to "appropriate measures", and give rise, for example, to regional agreements, like the Council of Europe agreement of 1995 implementing Article 17 of the Vienna Convention (see paragraph 30 above) and the San José agreement of 10 April 2003 on regional cooperation in the Caribbean (see paragraphs 31-33 above), or to the bilateral treaties referred to in Article 17, paragraph 9, of the Vienna Convention.

96. Moreover, diplomatic notes are a source of international law comparable to a treaty or an agreement when they formalise an agreement between the authorities concerned, a common stance on a given matter or even, for example, the expression of a unilateral wish or commitment.

97. The Court accordingly considers, like the Government, that the diplomatic note issued by the Cambodian authorities on 7 June 2002 officialised Cambodia's agreement to the interception of the *Winner*, Cambodia having the right to engage in cooperation with other countries outside the framework of the Montego Bay and Vienna Conventions.

98. However, the existence of an *ad hoc* agreement does not solve the problem of its scope, which it is for the Court to appreciate in order to determine whether or not the diplomatic note authorised the arrest and detention of the crew members on board ship and their transfer to France.

99. On this point the Court observes first of all that the text of the diplomatic note mentions "the ship *Winner*, flying the Cambodian flag", the sole object of the agreement, confirming the authorisation to intercept, inspect and take legal action against it (see paragraph 10 above). Evidently, therefore, the fate of the crew was not covered sufficiently clearly by the note and so it is not established that their deprivation of liberty was the subject of an agreement between the two States that could be considered to represent a "clearly defined law" within the meaning of the Court's case-law. As to the explanatory diplomatic note produced by the Cambodian authorities on 9 September 2008 in response to a request from the French authorities of 3 September 2008 and submitted by the respondent Government for the first time to the Grand Chamber, after the Chamber pronounced its finding of a violation of Article 5 § 1 of the Convention and more than six years after the events, the applicants having had no opportunity at the material time to familiarise themselves with the explanations given, the Court does not consider it decisive.

100. Secondly, the Court considers that the diplomatic note did not meet the "foreseeability" requirement either. Nor have the Government demonstrated the existence of any current and long-standing practice between Cambodia and France in the battle against drug trafficking at sea in respect of ships flying the Cambodian flag; on the contrary, the use of an *ad hoc* agreement by diplomatic note, in the absence of any permanent bilateral or multilateral treaty or agreement between the two States, attests to the exceptional, one-off nature of the cooperation measure adopted in this case. Added to the fact that Cambodia had not ratified the relevant conventions, this shows that the intervention of the French authorities on the basis of an *ad hoc* agreement cannot reasonably be said to have been "foreseeable" within the meaning of the Court's case-law, even with the help of appropriate advice. In any event the Court considers that the foreseeability, for an offender, of prosecution for drug trafficking should not be confused with the foreseeability of the law pleaded as the basis for the

intervention. Otherwise any activity considered criminal under domestic law would release the States from their obligation to pass laws having the requisite qualities, particularly with regard to Article 5 § 1 of the Convention and, in so doing, deprive that provision of its substance.

101. It is regrettable, in the Court's view, that the international effort to combat drug trafficking on the high seas is not better coordinated bearing in mind the increasingly global dimension of the problem. The fact remains that when a flag State, like Cambodia in this case, is not a party to the Montego Bay or Vienna Conventions**,** the insufficiency of such legal instruments, for want of regional or bilateral initiatives, is of no real consequence. In fact such initiatives are not always supported by the States in spite of the fact that they afford the possibility of acting within a clearly defined legal framework. In any event, for States that are not parties to the Montego Bay and Vienna Conventions one solution might be to conclude bilateral or multilateral agreements, like the San José agreement of 2003, with other States. Having regard to the gravity and enormity of the problem posed by illegal drug trafficking, developments in public international law which embraced the principle that all States have jurisdiction as an exception to the law of the flag State would be a significant step in the fight against illegal trade in narcotics. This would bring international law on drug trafficking into line with what has already existed for many years now in respect of piracy.

102. In view of the above and of the fact that only a narrow interpretation is consistent with the aim of Article 5 § 1 of the Convention (see paragraph 78 above), the Court accordingly finds that the deprivation of liberty to which the applicants were subjected between the boarding of their ship and its arrival in Brest was not “lawful” within the meaning of Article 5 § 1, for lack of a legal basis of the requisite quality to satisfy the general principle of legal certainty.

103. There has, therefore, been a violation of Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

104. The applicants also complained that they had not been brought “promptly” before a judge or other officer authorised by law to exercise judicial power after their ship was intercepted. They relied on Article 5 § 3 of the Convention, which provides:

“3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

A. The Chamber judgment

105. The Chamber found no violation of Article 5 § 3 of the Convention, considering that the instant case had a lot in common with the *Rigopoulos* case (*Rigopoulos v. Spain* (dec.), no. 37388/97, ECHR 1999-II) and that, here too, it had not been materially possible to bring the applicants “physically” before a “legal authority” any sooner. Having regard to the evidence in its possession, the Government having produced no information concerning the exact details of the police custody in Brest and the relevant reports (see § 64 of the judgment), it also found that two or three days in police custody after thirteen days at sea were justified under the circumstances. The Chamber considered that the duration of the deprivation of liberty suffered by the applicants was justified by “wholly exceptional circumstances”, in particular the time it inevitably took to get the *Winner* to France.

B. The parties' submissions before the Grand Chamber

1. The applicants

106. The applicants argued that the case-law of the Court has always emphasised the importance of the provisions of Article 5 § 3 of the Convention and the need for the Contracting States to have a legal framework that offers sufficient guarantees against arbitrary deprivation of liberty. They submitted that the “exceptional circumstances” found in the *Rigopoulos* case (cited above) had not been established in their case: inevitable duration of the sea voyage, deprivation of liberty under the supervision of a “judge or other officer authorised by

law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention and immediate presentation before a judge upon landing.

107. They contended that exceptional circumstances could justify failure to bring a person promptly before a judge only if the detention was supervised and controlled by a legal authority, which was not the case here. The applicants considered that the reasons given by the Chamber in its judgment (§ 68) were insufficient and left some important questions unanswered. They objected to the argument concerning "the time it inevitably took the *Winner* to reach France" in so far as they could have been repatriated on the French frigate instead of the *Winner,* which was in a deplorable state of repair.

108. The applicants further complained that after thirteen days of detention at sea they had been held in police custody for two or three days before being presented before a judge or other officer authorised by law to exercise judicial power, and finally all placed under investigation and remanded in custody, regardless of their degree of involvement in the traffic.

109. As well as disputing the fact that police custody helped to protect individual freedoms and the rights of the defence, because they had had no access to the case file and had been unable to consult a lawyer before the seventy-second hour, they complained that they had not been brought before the liberties and detention judge as soon as they arrived in Brest. On this point they noted that the interception had been planned for several weeks and the investigation opened no later than 24 June 2002: the two or three extra days in police custody had therefore been unnecessary. In view of the thirteen days' deprivation of liberty on board the *Winner*, those two or three extra days were not in compliance with the requirement of promptness enshrined in Article 5 § 3.

110. In any event the circumstances of the present case differed from the "exceptional circumstances" that justified the *Rigopoulos* judgment. While noting that the Spanish authorities had acted legally in boarding a ship flying a Panamanian flag, Spain and Panama being Parties to the Vienna Convention of 1988, the applicants objected to the fact that their detention on the ship had not been under the supervision of a "judge or other officer authorised by law to exercise judicial power" but under that of the public prosecutor, who was not such an officer according to the Court's case-law (*Schiesser v. Switzerland*, 4 December 1979, Series A no. 34; *Huber v. Switzerland*, 23 October 1990, Series A no. 188; and *Brincat v. Italy*, 26 November 1992, Series A no. 249-A), in particular because of his lack of independence vis-à-vis the executive. They maintained that the purely formal criterion relied on by the Government was ineffective in the light of the functional criterion developed by the Court in its case-law, as confirmed in the Chamber judgment. Thus, unlike the Spanish authorities in the *Rigopoulos* case, where the deprivation of liberty had been decided by the Central Investigating Court, an officer authorised by law to exercise judicial power within the meaning of Article 5 § 3 of the Convention, by means of a promptly issued, duly reasoned detention order, the French authorities had made no attempt to regularise the applicants' situation. Yet their ship was not an "area outside the law", especially considering that an investigating judge could have been contacted by radio, and the crew could have been informed of their rights and allowed to contact a lawyer and alert a family member. In addition to the resulting alleged violation of Article 5 § 3, the applicants, referring to the partially dissenting opinion expressed by three of the Chamber's judges, pointed out that they had had to wait another two or three days to be brought before the liberties and detention judge .

2. The Government

111. The Government denied that the applicants had had to wait two or three days after arriving in Brest before they were brought before a judge or other officer authorised by law to exercise judicial power within the meaning of Article 5 § 3. They contended – producing the official reports for the first time before the Grand Chamber – that the applicants had in fact all been presented that very day, only hours after their arrival in Brest, to an investigating judge who had the power to order their release. They further argued that in any event the initial application to the Court concerned only the period of thirteen days it took to reroute the ship to France.

112. The Government reiterated that the notion of promptness had been clarified in the *Brogan* case (*Brogan and Others v. the United Kingdom*, 29 November 1988, Series A no. 145-B), and confirmed recently in *McKay* (*McKay v. the United Kingdom* [GC], no. 543/03, § 30, ECHR 2006-X). They contended, *inter alia,* that in the *Rigopoulos* case the Court had found that it was necessary to examine each case with reference to its particular characteristics in order to determine whether the authorities had complied with the requirement of promptness, while pointing out that it had been materially impossible to bring the applicant before the investigating judge any

sooner and that the applicant had been presented to the investigating judge the day after his arrival on Spanish soil.

113. The Government also considered that in its *McKay* judgment the Court had accepted derogations from the principle of the automatic nature of the review.

114. Concerning the characteristics and powers of the officer concerned, the Government maintained that although the Court had found that a public prosecutor or other judicial officer appearing for the prosecution could not be considered a "judge" for the purposes of Article 5 § 3 (see *Huber*, cited above), the same could not be said of an investigating judge. Investigating judges were fully independent judges whose job was to seek evidence both for and against the accused party, without participating in the prosecution or the judgment of the cases they investigated. In France the investigating judge supervised all custodial measures taken in the cases under his responsibility – be it police custody or detention pending trial – and could terminate them at any time. Although he had to apply to the liberties and detention judge when contemplating remanding a suspect in custody, he had full power to release people or place them under court supervision. The Government pointed out that the Court had already ruled that the investigating judge fulfilled the conditions laid down in Article 5 § 3 (*A.C. v. France* (dec.), no. 37547/97, 14 December 1999).

115. The Government affirmed that the applicants had been brought before the investigating judges, without having had to ask, the same day they arrived in Brest, as soon as had been possible.

116. Lastly, the Government considered that the public prosecutor was a legal authority independent of the executive, and that his supervision while the *Winner* was rerouted to Brest had provided the protection against arbitrariness which Article 5 of the Convention was meant to guarantee.

C. The Court's assessment

1. General principles

117. The Court reiterates that Article 5 of the Convention is in the first rank of the fundamental rights that protect the physical security of an individual, and that three strands in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8-11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls under Article 5 §§ 3 and 4 (see *McKay*, cited above, § 30).

118. The Court also notes the importance of the guarantees afforded by Article 5 § 3 to an arrested person. The purpose of this provision is to ensure that arrested persons are physically brought before a judicial officer promptly. Such automatic expedited judicial scrutiny provides an important measure of protection against arbitrary behaviour, incommunicado detention and ill-treatment (see, among other authorities, *Brogan and Others*, cited above, § 58; *Brannigan and McBride v. the United Kingdom,* judgment of 26 May 1993, Series A no. 258-B, p. 55, §§ 62-63; *Aquilina v. Malta* [GC], no. 25642/94, § 49, ECHR 1999-III; *Dikme v. Turkey*, no. 20869/92, § 66, ECHR 2000-VIII; and *Öcalan v. Turkey*, no. 46221/99 , § 103, ECHR 2005-IV).

119. Article 5 § 3, as part of this framework of guarantees, is structurally concerned with two separate matters: the early stages following an arrest, when an individual is taken into the power of the authorities, and the period pending any trial before a criminal court, during which the suspect may be detained or released with or without conditions. These two limbs confer distinct rights and are not on their face logically or temporally linked (see *T.W. v. Malta* [GC], no. 25644/94, § 49, 29 April 1999).

120. Taking the initial stage under the first limb, which is the only one at issue here, the Court's case-law establishes that there must be protection, through judicial control, of an individual arrested or detained on suspicion of having committed a criminal offence. Such control serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes and

exercisable strictly in accordance with prescribed procedures. The judicial control must satisfy the following requirements (see *McKay*, cited above, § 32):

i. Promptness

121. The judicial control on the first appearance of an arrested individual must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. The strict time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision (*Brogan and Others*, cited above, § 62, where periods of four days and six hours in detention without appearance before a judge were held to be in violation of Article 5 § 3, even in the special context of terrorist investigations).

ii. Automatic nature of the review

122. The review must be automatic and not depend on the application of the detained person; in this respect it must be distinguished from Article 5 § 4, which gives a detained person the right to apply for release. The automatic nature of the review is necessary to fulfil the purpose of the paragraph, as a person subjected to ill-treatment might be incapable of lodging an application asking for a judge to review their detention; the same might also be true of other vulnerable categories of arrested person, such as the mentally frail or those ignorant of the language of the judicial officer (see *Aquilina*, cited above).

iii. The characteristics and powers of the judicial officer

123. Since Article 5 § 1 (c) forms a whole with Article 5 § 3, "competent legal authority" in paragraph 1 (c) is a synonym, of abbreviated form, for "judge or other officer authorised by law to exercise judicial power" in paragraph 3 (see, amongst other authorities, *Lawless v. Ireland,* 1 July 1978, Series A, no. 3, and *Schiesser v. Switzerland*, cited above, § 29).

124. The judicial officer must offer the requisite guarantees of independence from the executive and the parties, which precludes his subsequent intervention in criminal proceedings on behalf of the prosecuting authority, and he or she must have the power to order release, after hearing the individual and reviewing the lawfulness of, and justification for, the arrest and detention (see, amongst many other authorities *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, §§ 146 and 149, *Reports* 1998-VIII). As regards the scope of that review, the formulation which has been at the basis of the Court's long-established case-law dates back to the early case of *Schiesser*, cited above (§ 31):

"In addition, under Article 5 § 3 there is both a procedural and a substantive requirement. The procedural requirement places the "officer" under the obligation of hearing himself the individual brought before him (see, *mutatis mutandis*, the above-mentioned *Winterwerp* judgment, § 60); the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons (see *Ireland v. the United Kingdom* judgment, 18 January 1978, Series A no. 25, p. 25, § 199)" or, in other words, "Article 5 § 3 requires the judicial officer to consider the merits of the detention" (see *T.W.* and *Aquilina*, cited above, § 41 and § 47 respectively).

125. The initial automatic review of arrest and detention accordingly must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person has committed an offence, in other words, whether detention falls within the permitted exceptions set out in Article 5 § 1(c). When the detention does not, or is unlawful, the judicial officer must then have the power to release (see *McKay*, cited above, § 40).

126. The Court has noted on several occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems (see *Brogan and Others*, cited above, § 61; *Murray v. the United Kingdom*, 28 October 1994, Series A no. 300-A, p. 27, § 58; and *Aksoy v. Turkey*, 18 December 1996, *Reports* 1996-VI, § 78). This does not mean, however, that the investigating authorities have *carte blanche* under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts and, ultimately, by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved (see *Öcalan*, cited above, §

104). The same approach applies to the fight against drug trafficking on the high seas, the importance of which the Court has acknowledged in paragraph 81 above and which also undoubtedly presents special problems.

2. Application of the above principles

127. The Court notes that the arrest and detention of the applicants began with the interception of the ship on the high seas on 13 June 2002. The applicants were not placed in police custody until 26 June 2002, after arriving in Brest. Before the Grand Chamber, and for the first time since the proceedings began – which the Court can only find regrettable – the Government submitted substantiated information concerning the presentation of the applicants, at the end of the day, to the investigating judges in charge of the case (see paragraph 19 above).

128. The fact remains that the applicants were not brought before the investigating judges – who may certainly be described as "judge[s] or other officer[s] authorised by law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention – until thirteen days after their arrest.

129. The Court points out that in the *Brogan* case it held that a period of detention in police custody amounting to four days and six hours without judicial review fell outside the strict constraints permitted by Article 5 § 3, even though it was designed to protect the community as a whole from terrorism (see *Brogan and Others*, cited above, § 62). It also found a period of seven days without being brought before a judge incompatible with Article 5 § 3 (see *Öcalan*, cited above, §§ 104-105).

130. The Court observes, however, that it did accept, in the *Rigopoulos* decision (cited above), which concerned the interception on the high seas by the Spanish customs authorities, in the context of an international drug trafficking investigation, of a ship flying the Panamanian flag and the detention of its crew for as long as it took to escort their ship to a Spanish port, that a period of sixteen days was not incompatible with the notion of "promptness" required under Article 5 § 3 of the Convention, in view of the existence of "wholly exceptional circumstances" that justified such a delay. In its decision the Court noted that the distance to be covered was "considerable" (the ship was 5,500 km from Spanish territory when it was intercepted), and that a forty-three-hour delay caused by resistance put up by the ship's crew "could not be attributed to the Spanish authorities". It concluded that it had been "materially impossible to bring the applicant physically before the investigating judge any sooner", while taking into account the fact that once he had arrived on Spanish soil the applicant had been immediately transferred to Madrid by air and brought before the judicial authority on the following day. Lastly, the Court considered "unrealistic" the applicant's suggestion that, under an agreement between Spain and the United Kingdom to prevent illicit traffic in narcotic drugs, instead of being diverted to Spain the ship could have been taken to Ascension Island, which was approximately 1,600 km from where it was intercepted.

131. In the present case the Court notes that at the time of its interception the *Winner* was also on the high seas, off the coast of the Cape Verde islands, and therefore a long way from the French coast, comparable to the distance in the *Rigopoulos* case. There was nothing to indicate that it took any longer than necessary to escort it to France, particularly in view of the weather conditions and the poor state of repair of the *Winner*, which made it impossible for it to travel any faster. In addition, the applicants did not claim that they could have been handed over to the authorities of a country nearer than France, where they could have been brought promptly before a judicial authority. As to the idea of transferring them to a French naval vessel to make the journey faster, it is not for the Court to assess the feasibility of such an operation in the circumstances of the case, particularly as it has not been established that the frigate was capable of accommodating all the crew members in sufficiently safe conditions.

132. The Court notes lastly that the applicants were placed in police custody at 8.45 a.m. on 26 June 2002 and effectively brought before an investigating judge at the police station in Brest, according to the reports produced by the Government, between 5.05 and 5.45 p.m. in the case of the first judge and at undocumented times in the case of the second judge (see paragraph 19 above), it being understood that the applicants do not dispute the fact that the meetings with the second judge took place at about the same time. This means that after arriving in France the applicants spent only about eight or nine hours in police custody before they were brought before a judge.

133. That period of eight or nine hours was perfectly compatible with the concept of "brought promptly" enshrined in Article 5 § 3 of the Convention and in the Court's case-law.

134. Accordingly, there has been no violation of Article 5 § 3.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

135. Article 41 of the Convention provides:

'If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.'

A. Damage

136. The applicants claimed 10,000 euros (EUR) each in respect of non-pecuniary damage.

137. The Government did not express an opinion on this matter.

138. Ruling on an equitable basis as required by Article 41 of the Convention, the Court awards each of the applicants EUR 5,000 under this head.

B. Costs and expenses

139. The applicants claimed EUR 10,000 for the costs and expenses incurred before the Court. They submitted two requests for payment on account, dated 24 April and 6 December 2008, each for EUR 5,000, concerning the successive proceedings before the Chamber and the Grand Chamber of the Court.

140. The Government did not comment.

141. The Court notes that the applicants have produced vouchers in support of their claim. It considers reasonable the sum of EUR 10,000 claimed by the applicants and awards it to them jointly.

C. Default interest

142. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds*, unanimously, that the applicants were within the jurisdiction of France for the purposes of Article 1 of the Convention;

2. *Holds*, unanimously, that the Government are estopped from raising a preliminary objection of incompatibility of the application and that Article 5 § 1 applies to the present case;

3. *Holds*, by ten votes to seven, that there has been a violation of Article 5 § 1 of the Convention;

4. *Holds*, by nine votes to eight, that there has been no violation of Article 5 § 3 of the Convention.

5. *Holds*, by thirteen votes to four,

(a) that the respondent State is to pay the applicants, within three months, the following amounts:

(i) EUR 5,000 (five thousand euros) each in respect of non-pecuniary damage plus any tax that may be chargeable on this amount;

(i) EUR 10,000 (ten thousand euros) jointly for costs and expenses plus any tax that may be chargeable to the applicants on this amount;

(b) that simple interest at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable on these amounts from the expiry of the above-mentioned three months until settlement;

6. *Dismisses*, unanimously, the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 March 2010.

Michael	O'Boyle Nicolas	Bratza
Deputy Registrar		President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following partly dissenting opinions are annexed to this judgment:

– Partly dissenting opinion of Judges Costa, Casadevall, Bîrsan, Garlicki, Hajiyev, Šikuta and Nicolaou;

– Partly dissenting opinion of Judges Tulkens, Bonello, Zupančič, Fura, Spielmann, Tsotsoria, Power and Poalelungi.

JOINT PARTLY DISSENTING OPINION OF JUDGES COSTA, CASADEVALL, BIRSAN, GARLICKI, HAJIYEV, SIKUTA AND NICOLAOU

(Translation)

1. We did not vote for a violation of Article 5 § 1 of the Convention and we should like to explain why.

2. The analysis of the majority of our colleagues is developed in paragraphs 82 to 103 of the judgment. The majority begin by admitting that the purpose of the deprivation of liberty to which the applicants were subjected on board the *Winner* after it was boarded and while it was being escorted to France was to bring them “before the competent legal authority” within the meaning of Article 5 § 1 (c) of the Convention, and that the parties did not dispute this (§ 82). The majority also acknowledge, implicitly but necessarily as Article 5 § 1 c) is applicable, that there was “reasonable suspicion” that the applicants had committed one or more offences. This too was not disputed and, indeed, some of the accused were given prison sentences for conspiracy to illegally attempt to import narcotics (see paragraphs 24 and 25).

3. What was at issue, therefore, was whether the deprivation of liberty suffered by the applicants had a “legal basis” under public international law and domestic law, as stated in paragraph 82 of the judgment. The majority of our colleagues found that “a legal basis of the requisite quality to satisfy the general principle of legal certainty” was lacking (§ 102, *in fine*). This is where the disagreement lies.

4. The boarding of the *Winner* and the subsequent loss of liberty of its crew during the voyage to Brest (where the applicants were presented before two investigating judges, placed under investigation and remanded in custody, before being tried by a Special Assize Court) had their origin in an international agreement: the diplomatic note of 7 June 2002 or, more precisely, the exchange of two notes on that date, one from the French Republic and the other from the Kingdom of Cambodia. We believe that our Court, which operates in the field of general public international law, should take the existence of that agreement into account, and presume it to be valid unless there is evidence to the contrary (none was adduced in this case).

5. It is explained in the “Facts” part of the judgment that the *Winner*, a ship registered in Cambodia, had attracted the attention of the anti-drug services of three States (the United States, Spain and Greece) when the French anti-drug agency OCRTIS, suspecting it of carrying drugs, requested authorisation to intercept it (§ 9).

6. The request to intercept the *Winner*, made by the French Embassy in Phnom Penh by diplomatic note of 7 June 2002, was thus set in the dual framework of international cooperation and the fight against international drug trafficking. It was in that same framework that the Ministry for Foreign Affairs of Cambodia, the flag State, replied by diplomatic note on the same day. It is important to remember the wording used in that note (quoted in paragraph 10):

"The Ministry of Foreign Affairs and International Cooperation ... has the honour formally to confirm that the Royal Government of Cambodia authorises the French authorities to intercept, inspect and take legal action against the ship *Winner*, flying the Cambodian flag..."

The message is very clear, for both States.

7. It can, of course, be argued that Cambodia's diplomatic note did not explicitly mention the fate of the ship's crew; this is pointed out in paragraph 99 of the judgment. It would not be logical, however, to interpret this note so narrowly as to exclude the possibility for the French authorities to take control of the ship and its crew were the inspection to reveal (as it did) the presence of a consignment of drugs. A less literal interpretation was not only confirmed by Cambodia in an explanatory note in 2008 – which there is no reason to believe was mendacious or spurious – but it also seems to be the most reasonable in our opinion, in the context of cooperation between States in the fight against drug trafficking. Besides, it is scarcely possible to dissociate the crew from the ship itself when a ship is boarded and inspected on the high seas. The actions expressly authorised by Cambodia (interception, inspection, legal action) necessarily concerned the crew members.

8. The notion of international cooperation is very important in the Court's case-law (see, *mutatis mutandis*, *Öcalan v. Turkey,* ECHR 2005-IV, §§ 97 to 99). It may be too soon to affirm that new principles of customary international law exist in the field of international drug trafficking (see paragraph 85 of the judgment). But all civilised nations clearly agree that drug trafficking is a scourge, that States must work together to combat it, and that offenders must be arrested and punished, at least where the applicable domestic law so provides, which is evidently the case here. Cambodia's diplomatic note reflects this will to cooperate and to take legal action against a ship flying its flag but sailing a long way from its coastline (off Cape Verde).

9. It may still be said, it is true, that the diplomatic note did not meet all the conditions laid down in the case-law regarding the quality of the "law" (in particular that of accessibility). But an exchange of diplomatic notes is usually confidential, and must be so if it is to be effective in circumstances such as those in the present case. Nor can foreseeability be appraised in the ordinary manner. The attitude of the *Winner*, described in paragraph 13, shows that the crew, or at least their leaders, knew the risks they were running in view of the cargo they were carrying: the ship was flying no flag; it suddenly changed course and began steering a course that was dangerous for the French vessel and armed forces; attempts to contact it by radio received no reply; a number of packages were thrown overboard, one of which was recovered and found to contain about 100 kilos of cocaine; and finally, the resistance put up by the crew obliged the French forces to use their weapons. In such conditions, how is it possible to say that the interception, boarding and inspection of the *Winner*, and the confinement of the crew to their quarters, were unforeseeable?

10. Basically, it is necessary to be realistic in such exceptional circumstances. Cambodia was not party to the Montego Bay and Vienna Conventions; but that did not prevent it from concluding, as it did, a bilateral agreement with France, as acknowledged in paragraphs 97 and 98 of the judgment. That being so, and bearing in mind that under domestic law the offences of which the applicants were suspected were punishable offences, and that it was not in dispute that the applicants were punished in the proper legal manner, is it necessary to apply the same criteria of "lawfulness" to the legal basis provided by the diplomatic note as are applied in much less exceptional situations? We think not. We believe that the deprivation of liberty imposed on the applicants was not arbitrary, which is, of course, what Article 5 requires above all (see, for example, *Winterwerp v. the Netherlands*, Series A-33, § 39, amongst many other authorities). We believe that the requirement of legal certainty, which was decisive in the finding reached in the judgment (see by analogy *Baranowski v. Poland,* ECHR 2000-III, § 56) was, in the circumstances, construed too narrowly. Lastly, is it necessary to point out that although the *Winner* – with the agreement of the flag State – was undeniably within the jurisdiction of France for the purposes of Article 1 of the Convention, that is no reason to draw conclusions that stretch logic? When there is sufficient concurring evidence to suspect that a ship on the high seas, thousands of miles from the State thus authorised to board it, is engaged in international trafficking to which all countries want to put a stop, it is without a doubt legitimate not to place as narrow an interpretation on the legal basis as one would inside the territory of the State concerned.

JOINT PARTLY DISSENTING OPINION OF JUDGES TULKENS, BONELLO, ZUPANČIČ, FURA, SPIELMANN, TSOTSORIA, POWER AND POALELUNGI

1. We disagree with the majority's view that there has been no violation of Article 5 § 3 of the Convention. The applicants complained that they had not been brought "promptly" before a judge or other officer authorised by law to exercise judicial power after their vessel had been intercepted by the French authorities. Since the Court has already held that the applicants' arrest and detention until their arrival in Brest had no legal basis and was, therefore, in violation of Article 5 § 1 of the Convention, it could have decided that there was no need to examine, separately, the applicants' complaint under Article 5 § 3 in respect of the period concerned.[1] This, however, it chose not to do.

2. At the outset, we emphasise that we are as opposed to the scourge inflicted upon society by those involved in illegal drug trafficking as is the majority. Where we differ is in our unwillingness to endorse *unnecessary* abridgements of fundamental human rights in the fight against that scourge. Such abridgements add nothing to the efficacy of the battle against narcotics but subtract, substantially, from the battle against the diminution of human rights protection.

3. It is undisputed that the applicants were not brought before the investigating judges until thirteen days after their arrest. The Government's argument that the rerouting of the ship under the supervision of the Brest Public Prosecutor should be regarded as being a sufficient guarantee against arbitrariness within the meaning of Article 5 § 1 is not convincing, as such supervision cannot be considered to meet the requirements of either Article 5 § 1 or Article 5 § 3 of the Convention in the light of the principles set out in the Judgment itself (paragraphs 123 et seq.) and the jurisprudence of the Court.[2]

4. In *Brogan and Others v. the United Kingdom*[3] the Court held that a period of detention in police custody amounting to four days and six hours without judicial review fell outside the strict constraints permitted by Article 5 § 3, notwithstanding the fact that it was aimed at protecting the community as a whole from terrorism (§ 62). It has also found in *Öcalan v. Turkey* that a period of seven days' detention without being brought before a judge was incompatible with Article 5 § 3.[4]

5. We acknowledge that the Court in *Rigopoulos v. Spain*[5] found that a period of sixteen days was not incompatible with the notion of "promptness" as required under Article 5 § 3 of the Convention in view of the "wholly exceptional circumstances" that were involved therein. In that case, the Spanish customs authorities, in the context of an international drug trafficking investigation, intercepted on the high seas a vessel flying the Panamanian flag and its crew was detained for as long as it took to escort the vessel to a Spanish port. In our view, however, the facts in *Rigopoulos* are entirely distinguishable from those of the instant case. Most significantly, in *Rigopoulos,* there was an independent Central Investigating Court and not a public prosecutor supervising the proceedings on board the ship on the day of interception. The very next day its crew members were informed of their situation and advised of their rights. Within two days the court had ordered the crew to be remanded in custody. On the following day they were apprised of that decision and invited to name the persons they wanted to have informed of their detention. This information was communicated to the respective embassies of the States of which the crew members were nationals. Three days after the boarding, the independent investigating court issued an order regularising the crew's situation in accordance with the Spanish Code of Criminal Procedure. One week after the interception, the applicant had access to the services of a lawyer. Finally, it must be noted that the *lawfulness* of the detention with regard to Article 5 § 1 was never in issue in the *Rigopoulos* case.

6. We do not exclude the possibility that there may, at times, exist "wholly exceptional circumstances" which might justify a period that is, in principle, at variance with the provisions of Article 5 § 3. However, in our view, such circumstances would need to be established, clearly, and to be more than simply "special" or "exceptional". The notion of "wholly exceptional circumstances" connotes, if not "insurmountable" or "insuperable", then, at least, circumstances in which the authorities could not reasonably envisage or execute any other measures in order to comply with their obligations under the Convention.

7. The Government argued that the weather conditions at the relevant time and the poor state of repair of the *Winner* accounted for the very slow speed of the vessel and, thus, for the protracted period of time that passed

before its crew was brought before a judge. Such factors may explain the delay involved, but they do not justify it. There was no evidence adduced before the Court that the French authorities had even considered, let alone examined, any other options which would have enabled the applicants to have been brought promptly before a judge.

8. In our view, it seems that various possibilities were open to the French authorities which they might have considered as a means of ensuring respect for and vindication of the applicants' rights under Article 5 § 3. For example, from the moment the frigate *Lieutenant de vaisseau Le Hénaff* set out from Brest to intercept the *Winner* (which had been under observation by the American, Spanish and Greek authorities on suspicion of transporting illegal drugs thus leading to a request by OCRTIS for authorisation to intercept), it was reasonably foreseeable that the services of a judicial officer would be required during the course or in the immediate follow-up to the planned interception. In such circumstances, some consideration might have been given to having a judge join the frigate in Brest, or even later in Spain, when the OCRTIS experts went on board.

9. Alternatively, some consideration might have been given to transporting the crew back to Brest on board a naval vessel. (We note that, having left Brest, it took the *Lieutenant de vaisseau Le Hénaff* only six days to reach the location of the *Winner*). Having regard to the state of repair of the intercepted vessel, it is surprising that the authorities decided to keep its crew on board when they must have known that, as a result, it would take a long time to bring them before a judge. Nor, indeed, would it appear that any thought was given to airlifting those deprived of their liberty to France. This option has been used by the French authorities in cases of piracy on the high seas and it might also have been considered in this one.

10. The above examples, which are not exhaustive, demonstrate that there were, at least, other possibilities open to the French authorities which, if pursued or even explored, might have enabled them to comply with their Convention obligations. Such alternative measures as outlined herein may be considered as extraordinary or far-reaching but when fundamental human rights are at stake exceptional circumstances may, indeed, call for exceptional measures. In this case, far from doing *everything possible* to bring the applicants promptly before a judge, there is no evidence at all that the above or any alternative measures were even contemplated. Rather, notwithstanding the vessel's poor state of repair and its incapacity to travel at speed, the crew was simply detained on board the *Winner* while it made its way, slowly, back to Brest. Thus, it seems to us that the least favourable measure (in terms of travel time) was chosen by the authorities and that any other option would have been preferable in order to ensure compliance with the requirement of promptness contained in Article 5 § 3 of the Convention.

11. We could have accepted a dilution of the protection of personal liberty had it been the result of some material impossibility on the part of the authorities to respect the requirements of Article 5 § 3. We cannot accept it when the authorities had within their power alternative ways to ensure respect for fundamental rights but chose, rather, to do next to nothing about it. Had the French authorities invested a fraction of the resources used to ensure the success of the operation in order to ensure its *legality*, then this complaint would not have arisen.

12. We cannot follow the majority's apparent reliance on the subsequent conviction of some of the applicants (not all of them) as a justification for the delay in bringing those detained before a judge. We do not subscribe to the view that respect by the state for the fundamental rights of the individual is dependent upon reciprocity of respect on the part of the individual for the state's criminal law. What is required at the prologue to a criminal trial hardly depends upon its epilogue.

13. In conclusion, we cannot agree that, in the circumstances of this case, it was necessary to keep the applicants in detention for thirteen days, without any proper legal framework, before bringing them before a judge or other officer authorised by law to exercise judicial power. The French authorities, very laudably, made every effort to place on board the *Henaff* impressive technical and military manpower to ensure the capture and detention of the suspects. It is regrettable that they made no effort at all to place the proceedings under some form of judicial control which would have ensured that the capture and detention of the suspects was as legitimate as it was successful.

[1] See *Paladi v. Moldova*, judgment of 10 March, 2009, § 76.

[2] See *Baranowski v. Poland*, judgment of 28 March 2000, § 57; *Goral v. Poland*, judgment of 30 October 2003, § 57; and *Ciszewski v. Poland*, judgment of 13 July 2004, § 30.

[3] 29 November 1988.

[4] Judgment of 12 May 2005, §§ 104-105.

[5] Decision of 12 January 1999.