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Prevention and repression of piracy and armed robbery at sea

Statement of the Chair of the Drafting Committee, Mr. Mārtiņš Pāparinskis

2 June 2023

Madam Chair,

This morning, it is my pleasure to introduce the third report of the Drafting Committee for the seventy-fourth session of the International Law Commission, which concerns the topic “Prevention and repression of piracy and armed robbery at sea”. The report, which is to be found in document A/CN.4/L.984 and was issued on 30 May 2023, contains the texts and titles of the draft articles provisionally adopted by the Drafting Committee at the present session. Since the issuance of the document, we have been made aware of a technical error in the French text of article (2) paragraph 1(a)(ii), where the comma after the word “biens” was omitted. I trust that the Secretariat will make the appropriate correction in the Report of the Commission.

Before commencing, allow me to pay tribute to the Special Rapporteur, Mr. Yacouba Cissé, whose mastery of the subject, guidance and cooperation greatly facilitated the work of the Drafting Committee. I also would like to thank the other members of the Committee for their active participation and significant contributions to the successful outcome. Furthermore, I wish to thank the Secretariat for its invaluable assistance. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

Madam Chair,

The Drafting Committee devoted six meetings to this topic, from 16 to 23 May, for the consideration of the draft articles as originally proposed by the Special Rapporteur in his first report¹ and which were referred to the Drafting Committee by the Commission at the conclusion of the Plenary debate at its 3625th meeting. At the present session, the Drafting Committee provisionally adopted a total of three draft articles on this topic.

Outcome of the Commission's work

Madam Chair,

Before I introduce the three draft articles provisionally adopted by the Drafting Committee, allow me to point out that in the course of the debate there were exchanges on the format of the outcome of the Commission's work on this topic.

Different views were expressed as to whether the work on the topic should continue in the form of draft articles, as proposed by the Special Rapporteur. Some members considered that draft articles would be the most appropriate outcome, as it was more suitable for a topic in the realm of criminal law. It was also noted that draft articles would allow the Commission to provide States with a concrete objective and practical legal solutions to the problems posed by piracy and armed robbery at sea. Others favoured a format other than draft articles, in particular draft guidelines, as it would allow the Commission to consider a wider range of legal issues, especially where State practice was not sufficiently developed, and to avoid the risk of affecting the integrity of the United Nations Convention on the Law of the Sea (UNCLOS).

The Drafting Committee ultimately decided that it was premature to make a recommendation on the format of the Commission's work on the topic at this stage, as it would largely depend on the content of substantive provisions that would be introduced by Special Rapporteur in his future reports. In that regard, a "flexible approach" was supported, allowing the Commission – in accordance with its past practice – to revisit the issue at a later stage. Nonetheless, I wish to emphasize that some members considered the issue of the eventual form of the outcome

¹ A/CN.4/758.

to be urgent and decisive for the direction of the Commission's work on the topic.

Draft article 1 - Scope

Madam Chair,

Let me now turn to draft article 1.

Draft article 1 is concerned with the scope of the draft articles, and is based on the version proposed by the Special Rapporteur in his first report. The draft article reflects the Commission's intention to address in this topic both piracy and armed robbery at sea. The Committee decided not to further qualify the criminal acts or their geographical scope, as subsequent draft articles would define piracy and armed robbery at sea.

The Drafting Committee considered it unnecessary to retain the phrase "in view of international law, the legislative, judicial and executive practices of States, and regional and subregional practices", which was contained in the original proposal by the Special Rapporteur. It was emphasized that this phrase related to methodology and source materials, rather than scope of the topic. Furthermore, a shorter wording of the draft article was considered to be more consistent with analogous provisions contained in previous texts produced by the Commission. I wish to note that a proposal was made to retain just the words "in view of international law", but the Committee ultimately decided against it. It was understood that the commentary will explain these points in more detail.

The Committee also held a debate on whether it was necessary to retain the phrase "at sea". It was observed that this phrase could be interpreted as qualifying not only "armed robbery", but also "piracy", thus extending the geographic scope of piracy. It was also highlighted that the phrase "armed robbery at sea" was the term of art, and therefore the words "at sea" was not meant as qualifying any of the criminal acts. The Drafting Committee decided to retain the text as it was, on the understanding that this issue will be addressed in the commentary.

A discussion also took place as to whether the phrase "prevention and repression" was the most appropriate in view of the recent practice of the Commission, notably the draft articles on prevention and punishment of crimes against humanity, where the phrase "prevention and punishment" was used. It was noted that other instruments of international law addressing international crimes used various formulations. In particular, the examples of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and the 1988 Convention for the

Suppression of Unlawful Acts against the Safety of Maritime Navigation, were highlighted.

In discussing the merits of the various formulations, the Drafting Committee considered the scope of the concept of “repression” vis-à-vis that of “punishment”. It was noted that this was not simply an issue of formulation, and that there would be substantive consequences depending on the term used. Members agreed that the concept of punishment was part and parcel of the wider concept of repression, making the latter more suitable to describe the work of the Commission on this topic. The view was expressed that the broader term reflected better the intention of members as to the different matters that would be tackled on this topic. It was also pointed out that UNCLOS and the 1958 Convention on the High Seas use the term repression when describing the objective of cooperation amongst States in regard to piracy. It was also noted that any change to the provision on scope would require a commensurate change to the title of the topic, which contained the phrase “prevention and repression”.

Finally, let me also bring to your attention that the Committee introduced two editorial changes to the text of the French language version of the draft article. First, the phrase “*la prévention et à la répression*” was placed before “*la piraterie et au vol à main armée en mer*”, thus fully aligning the text with the English and Spanish language versions. Secondly, the phrase “*Le présent projet d’articles*” was changed to “*Les présents projets d’article*”, plural then singular, to comply with the Commission’s customary approach.

The title of draft article 1 is “Scope”.

Draft article 2 – Definition of Piracy

Madam Chair,

Let me now turn to draft article 2 which deals with the definition of piracy. The Committee commenced its work on the basis of the text proposed by the Special Rapporteur in his first report. The proposal contained a chapeau and 3 subparagraphs (a) to (c) which were identical to Article 101 of UNCLOS, as well as an additional subparagraph (d) proposed by the Special Rapporteur which sought to accommodate existing definitions of the crime of piracy in national and international law.

Draft article 2 was adopted by the Drafting Committee with some changes to the original proposal by the Special Rapporteur in his first report. It was renumbered and now consists of two

paragraphs which I will address in turn.

I would like to first address paragraph 1 of the draft article 2 as adopted. The Committee agreed that the point of departure for this paragraph should be UNCLOS. The definition of piracy contained in Article 101 of that Convention corresponds almost word for word to that in Article 15 of the 1958 Convention on the High Seas, which, in turn, was based on Article 39 of the draft articles concerning the law of the sea, finalized by this Commission in 1956.

Members agreed that the overall goal of the Commission with regard to this draft article should be to preserve the integrity of the internationally agreed definition of piracy contained in Article 101 of UNCLOS. The Committee therefore decided to reproduce and adopt this definition of piracy, as now contained in paragraph 1 of the draft article, without any changes.

At the same time, several members noted that many of the terms used therein merited a thorough explanation, in the commentary, in order to clarify the Commission's understanding of the scope and content of the definition. It was also recalled that many debates had arisen throughout the decades as to the applicability of the definition to new developments. The Committee agreed that there was value in identifying issues where further clarification was needed, and in continuing to discuss those issues in the context of the topic. The Committee was also favourable to considering those issues in the commentaries to the draft articles, or where necessary in draft provisions further addressing those matters. Such specific aspects possibly meriting further consideration included: the meaning of the phrase "private ends" and of the terms "violence" and "vessel"; whether the term "facilitation" encompasses the financing of pirates and the disposal of illicit goods resulting from the criminal enterprise; as well as the use of uncrewed vessels and aeroplanes by pirates.

Let me now address paragraph 2. I note that this provision was not originally proposed by the Special Rapporteur in his first report. The introduction of this paragraph was prompted by the discussion in the Drafting Committee on Article 58, paragraph 2 of UNCLOS, which states that "[a]rticles 88 to 115 [of UNCLOS] and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible" with the regime established for that maritime zone in Part Five of UNCLOS. It was thus agreed that the definition of piracy as contained in Article 101 of UNCLOS would also encompass acts committed in the Exclusive Economic Zone by virtue of the aforementioned Article 58, paragraph 2.

During the debate in the Drafting Committee, members recalled that, in accordance with UNCLOS, coastal States enjoyed jurisdiction in the exclusive economic zone over very specific matters, which do not include criminal law enforcement. It was also acknowledged that many States, including non-parties, consider that parts of UNCLOS reflected customary international

law. In that regard, the concern was expressed that if the Commission did not reflect the delicate balance of rights and obligations reached by the Third Conference on the Law of the Sea – in so far as piracy is concerned – it might give the impression that there existed a gap within draft articles as to the existence of jurisdiction for the repression of the crime of piracy in the exclusive economic zone. Hence, the Committee decided to include a new paragraph in draft article 2 which would capture the notion, reflected in Article 58, paragraph 2 of UNCLOS, that the crime of piracy could also be committed in the exclusive economic zone.

A rich debate ensued as to how best to reflect that piratical acts committed in the exclusive economic zone constitute piracy. In reaching the wording ultimately chosen by the Drafting Committee, particular attention was paid by Members not to suggest an equivalence between maritime zones, or the absorption of one zone by another. The Committee was conscious of the fact that the high seas and the exclusive economic zone were distinct areas where States enjoyed and assumed different rights and obligations, and the wording chosen in relation to piracy could not be seen as blurring such distinction in relation to any other issue or adding confusion.

The Drafting Committee further sought to preserve the rights of States non-parties to UNCLOS. Accordingly, the phrase “shall be read in conjunction with” was seen as the most appropriate, as it reinforced the jurisdictional system created by UNCLOS for the repression of piracy, while not imposing obligations on non-parties.

Madam Chair,

I turn now to the drafting of draft article 2. As I mentioned earlier, subparagraphs (a) to (c) are drawn verbatim from Article 101 of UNCLOS. I wish to recall further that the Special Rapporteur initially proposed a further subparagraph (d), which sought to accommodate existing definitions of the crime of piracy by including, for the purpose of the draft articles, “any other illegal act committed at sea or from land that is defined as an act of piracy in domestic law or in international law”. However, such proposal did not find agreement in the Drafting Committee.

The Committee was of the view that a provision seeking to develop the content of a criminal offence under international law would run counter to the principle of legality if it did not clearly define the acts that were to be considered criminal. Furthermore, extending the definition so as to include any other definition found in either national or international law lacked legal certainty and opened the door for the draft articles to incorporate acts beyond the definition already adopted in paragraph 1 subparagraphs (a) to (c), thus running counter to the objective of

maintaining the integrity of the internationally agreed definition.

In response to exchanges in the Drafting Committee on the proposal for a new subparagraph (d), the Special Rapporteur introduced several amendments to the text of the subparagraph in question, including recasting it as a “without prejudice” clause, which he proposed be adopted as a separate paragraph. Different views were expressed as to whether there was a need for a “without prejudice” clause in draft article 2.

On the one hand, the view was expressed that the work of the Commission had to be considered within the wider context of the efforts of the international community to address the crime of piracy, which could lead to further developments of the scope and content of the definition of piracy in future legal instruments. It was also recalled that nearly seventy years had passed since the definition of piracy in the Convention was first formulated by this Commission in the 1950s. Accordingly, a “without prejudice” clause was seen as a way of accommodating new developments, while preserving the integrity of the definition of piracy.

Conversely, it was suggested that a “without prejudice” clause was unnecessary as, even in its absence, there was always a possibility for States to modify the definition of piracy in the context of international or regional instruments. Members recalled that the introduction of comparable “without prejudice” clauses in the draft articles on crimes against humanity and in the Rome Statute of the International Criminal Court were introduced due to specific legal and political contexts, addressing existing and evolving definitions.

Ultimately, the Drafting Committee decided not to retain draft paragraph 3. However, there was an understanding among members that the Commission may revisit at a later stage the possibility of adding a “without prejudice” clause applying to the draft articles more generally.

The title of draft article 2 is “Definition of Piracy”.

Draft article 3 – Definition of armed robbery at sea

Madam Chair,

Let me now turn to draft article 3, dealing with the definition of armed robbery at sea. The proposal, as provisionally adopted by the Drafting Committee, consists of a chapeau and subparagraphs (a) and (b).

The Committee commenced its work on the basis of the text proposed by the Special Rapporteur in his first report, which almost entirely replicated the definition of “armed robbery against ships”, as contained in the annex to resolution A.1025 (26), adopted by the Assembly of the International Maritime Organization on 2 December 2009.

The Drafting Committee decided to use the International Maritime Organization definition as a guiding text, but did not consider it necessary to replicate this definition word for word in draft article 3. Following discussion, the Committee amended the chapeau of the draft article and adopted it together with subparagraphs (a) and (b). The subparagraphs were adopted without any substantive change to the original Special Rapporteur’s proposal.

Let me now address the amendments to the chapeau of the draft article.

I wish to recall that the chapeau, as originally proposed by the Special Rapporteur in his first report, contained the phrase “armed robbery at sea committed against ships”. The Committee held an extensive debate on whether to retain the words “committed against ships”. Some members considered the possibility of keeping these words. They recalled that various international instruments, including resolution A.1025 (26) of the Assembly of the International Maritime Organization, referred to “armed robbery against ships”. Other members considered it necessary to omit an explicit reference to an armed robbery being “committed against ships”. Firstly, it was perceived as stylistically inconsistent with the title of the topic and that of the draft article. Secondly, the addition of the words “against ships” unnecessarily restricted the scope of the definition, which at the present stage of the work was seen as being premature. Thirdly, it was recalled that regional practice on the use of terms was not entirely consistent, e.g., while the Djibouti Code of Conduct² uses the phrase "armed robbery against ships", the Yaoundé Code of Conduct³ uses the phrase “armed robbery at sea”. Finally, it was noted that the relevant United Nations Security Council resolutions addressing the situation in Somalia and the Gulf of Guinea commonly used the phrase “armed robbery at sea” without the words “committed against ships”.

The Drafting Committee ultimately decided not to retain the words “committed against ships” on the understanding that the discussion within the Committee and the differing views among members would be reflected in the commentary.

An editorial change was made to subparagraph (b), replacing the original reference to “acts

² Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden.

³ Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illegal Maritime Activity in West and Central Africa.

described above” to the more specific reference to “acts described in subparagraph (a)”.

I also wish to bring to your attention the fact that there was a discussion in the Drafting Committee as to whether it was necessary to introduce an additional subparagraph that would address acts of armed robbery against ships committed in straits. The Drafting Committee decided that it was not necessary, among other things, because straits were not themselves a distinct maritime zone under the relevant provisions of UNCLOS. There was agreement that issues pertinent to armed robbery against ships committed in straits was best addressed in the commentary to this draft article.

Finally, I note that the Drafting Committee decided not to retain subparagraph (c), which was contained in the original proposal by the Special Rapporteur, which sought to accommodate other existing definitions of armed robbery at sea by including, for the purpose of the draft articles, “any other illegal act committed at sea or from land that is defined as armed robbery at sea in domestic law or in international law”. It was considered that such formulation was too broad and would, in effect, result in domestic law definitions determining the content of international law.

The title of draft article 3 is “Definition of armed robbery at sea”.

Madam Chair,

This concludes my introduction of the third report of the Drafting Committee at the seventy-fourth session, devoted to the topic “Prevention and repression of piracy and armed robbery at sea”.

I recommend that the Commission provisionally adopt draft articles 1, 2 and 3 as contained in the report of the Drafting Committee. The Special Rapporteur will submit the commentaries to these draft articles, which will be considered by the Commission at the current session. I would like to thank Mr. Cissé for this and to thank him for his outstanding work on this topic.

I thank you for your kind attention.