

Provisional

For participants only

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Provisional summary record of the 3634th meeting

Held at the Palais des Nations, Geneva, on Friday, 2 June 2023, at 10 a.m.

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Present:

Chair: Ms. Oral

Members: Mr. Akande
Mr. Argüello Gómez
Mr. Asada
Mr. Fathalla
Mr. Fife
Mr. Forteau
Ms. Galvão Teles
Mr. Huang
Mr. Jalloh
Mr. Laraba
Mr. Lee
Ms. Mangklatanakul
Mr. Mavroyiannis
Mr. Mingashang
Mr. Nesi
Mr. Nguyen
Mr. Ouazzani Chahdi
Mr. Oyarzábal
Mr. Paparinskis
Mr. Patel
Ms. Ridings
Mr. Ruda Santolaria
Mr. Sall
Mr. Savadogo
Mr. Vázquez-Bermúdez
Mr. Zagaynov

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10.10 a.m.

Prevention and repression of piracy and armed robbery at sea (agenda item 6)
(*continued*) (A/CN.4/758)

Report of the Drafting Committee (A/CN.4/L.984)

Mr. Paparinskis (Chair of the Drafting Committee), introducing the third report of the Drafting Committee on the topic “Prevention and repression of piracy and armed robbery at sea”, said that he wished to pay tribute to the Special Rapporteur, whose mastery of the subject, guidance and cooperation had greatly facilitated the Committee’s work. The Committee had devoted six meetings, held between 16 and 23 May 2023, to the topic and had provisionally adopted three draft articles.

The Committee had addressed the form of the outcome of the Commission’s work during its debates. Some members had favoured the use of draft articles, as proposed by the Special Rapporteur, noting, for example, the suitability of that format for a topic in the realm of criminal law. Others had favoured other formats, in particular draft guidelines, that would allow the Commission to consider a wider range of legal issues, especially where State practice was insufficiently developed, and that would pose no risk to the integrity of the United Nations Convention on the Law of the Sea. The Committee had ultimately decided that it was premature to make a recommendation on the form of the outcome, which would largely depend on the substantive provisions to be introduced by the Special Rapporteur in future reports, and had supported a flexible approach allowing the Commission, in accordance with its past practice, to revisit the issue at a later stage. Nevertheless, some members had considered that the issue should have been addressed immediately as it would determine the direction of the Commission’s work on the topic.

The text of draft article 1, entitled “Scope”, that the Committee had provisionally adopted was based on the version proposed by the Special Rapporteur in his first report, but the Committee had considered it unnecessary to retain the portion of his proposal reading “in view of international law, the legislative, judicial and executive practices of States, and regional and subregional practices”, because it related to methodology and source materials rather than the scope of the topic, and a shorter formulation would be more consistent with analogous provisions in the Commission’s previous work. The Committee had also decided against a proposal to retain only the phrase “in view of international law”. Furthermore, the Committee had decided not to further qualify the criminal acts or define their geographical scope in draft article 1 because both piracy and armed robbery at sea would be defined in subsequent draft articles. Those decisions would be explained in the commentary.

The Committee had also debated the inclusion of the phrase “at sea”, which, it had been noted, could be understood to qualify “piracy” as well as “armed robbery” and thus extend the geographical scope of piracy. However, it had also been pointed out that, since the phrase “armed robbery at sea” was a term of art, the phrase “at sea” was not meant to qualify both of the criminal acts. The Committee had decided to retain the phrase on the understanding that the issues surrounding it would be addressed in the commentary.

A discussion had been held regarding the use of the phrase “prevention and repression” in the draft article, given the Commission’s recent use of the phrase “prevention and punishment” in the draft articles on prevention and punishment of crimes against humanity. It had been noted that various formulations had been used in other international instruments, including 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, and that the term chosen for the draft article would have substantive implications. Members had agreed that the concept of punishment was part and parcel of the wider concept of repression, making the latter more suitable for the Commission’s work on the topic. It had been noted that the broader term better reflected members’ intentions as to the different matters to be tackled under the topic, that the United Nations Convention on the Law of the Sea and the 1958 Convention on the High Seas used the term “repression” when describing the objective of State cooperation in relation to piracy, and that any change to the phrase “prevention and repression” in draft article 1 would require a corresponding change in the title of the topic.

The French version of draft article 1 had been aligned with the amended English text, and the phrase “*Le présent projet d’articles*” in that version had been changed to “*Les présents projets d’article*”, in line with the Commission’s customary approach.

Draft article 2 was entitled “Definition of piracy”. In the version proposed by the Special Rapporteur in his first report, the draft article had a chapeau and three subparagraphs, lettered (a) to (c), that were identical to article 101 of the United Nations Convention on the Law of the Sea, and an additional subparagraph (d) that sought to accommodate existing definitions of the crime of piracy in domestic and international law.

Draft article 2 as provisionally adopted by the Drafting Committee contained two paragraphs. The Committee had agreed that the language of the United Nations Convention on the Law of the Sea should be the point of departure for the first paragraph. The definition of piracy that appeared in article 101 of that convention was almost identical to the definition contained in article 15 of the Convention on the High Seas, which, in turn, was based on article 39 of the Commission’s 1956 draft articles concerning the law of the sea. Committee members had agreed that the Commission’s overall goal in draft article 2 should be to preserve the integrity of the internationally agreed definition of piracy contained in article 101 of the United Nations Convention on the Law of the Sea and had therefore decided to reproduce that definition in paragraph 1 of the draft article, without any changes.

Several members had noted that the terms used in the definition should be thoroughly explained in the commentary so as to clarify the Commission’s understanding of the scope and content of the definition. It had been recalled that many debates had arisen over the decades regarding the applicability of the definition to new developments. The Committee had taken the view that issues needing further clarification should continue to be identified and discussed and should be considered in the commentaries or, where necessary, separate draft articles. Specific points possibly meriting further consideration included the meaning of the phrase “private ends” and the terms “violence” and “vessel”; the scope of the term “facilitation” and whether it encompassed the financing of pirates and the disposal of illicit goods resulting from the criminal enterprise; and the use of uncrewed vessels and aeroplanes by pirates.

The introduction of paragraph 2 into draft article 2, which had not been part of the Special Rapporteur’s original proposal, had been prompted by the Committee’s discussion of article 58 (2) of the United Nations Convention on the Law of the Sea, which stated that articles 88 to 115 of the Convention and other pertinent rules of international law applied to the exclusive economic zone insofar as they were not incompatible with the regime established for that maritime zone in part V of the Convention. It had been agreed that the definition of piracy under article 101 of the Convention would encompass acts committed in the exclusive economic zone by virtue of article 58 (2).

Committee members had recalled that, in accordance with the Convention, coastal States enjoyed jurisdiction in the exclusive economic zone over very specific matters, which did not include criminal law enforcement. It had also been acknowledged that many States, including some that were not parties to the Convention, considered parts of the Convention to reflect customary international law. In that regard, the concern had been expressed that a failure by the Commission to reflect the delicate balance of rights and obligations reached at the Third United Nations Conference on the Law of the Sea might give the appearance of a gap in the draft articles as to jurisdiction over the crime of piracy in the exclusive economic zone. The Committee had therefore decided to include a new paragraph in draft article 2 to capture the notion that the crime of piracy could also be committed in the exclusive economic zone.

A rich debate had ensued regarding the best way to reflect the notion that piratical acts committed in the exclusive economic zone constituted piracy. In settling on the wording of paragraph 2, the Committee had taken care not to suggest that maritime zones were equivalent or that one zone absorbed another. Members had been 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 that had been chosen in relation to piracy could not be seen to blur that distinction in relation to any other issue. The Committee had also sought to preserve the rights of States that were not parties to the United Nations

Convention on the Law of the Sea and had selected the wording “shall be read in conjunction with” because it reinforced the jurisdictional system created by the Convention for the repression of piracy but did not impose obligations on non-parties.

There had been no agreement in the Committee on the inclusion of the Special Rapporteur’s proposed subparagraph (d). The Committee had been 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, the inclusion in the definition of piracy of any other definition found in either national or international law would result in an absence of legal certainty and the possible incorporation of acts beyond those set out in paragraph 1 of draft article 2, thus running counter to the objective of maintaining the integrity of the internationally agreed definition.

During the Committee’s discussions, the Special Rapporteur had put forward several amendments to his initial proposal for subparagraph (d), including one that would have made it a separate paragraph and recast it as a “without prejudice” clause. Different views had been expressed on the need for such a clause in draft article 2. On the one hand, it had been noted that the Commission’s work had to be considered within the wider context of the efforts of the international community to address the crime of piracy, which could affect the scope and content of the definition of piracy in future legal instruments, and that a “without prejudice” clause could be a means to accommodate new developments while preserving the integrity of the definition of piracy. On the other hand, it had been suggested that a “without prejudice” clause was unnecessary because, even in its absence, States could modify the definition of piracy in international or regional instruments, and it had been recalled that “without prejudice” clauses had been included in the draft articles on prevention and punishment of crimes against humanity and the Rome Statute of the International Criminal Court owing to specific legal and political contexts. Although the Committee had decided not to include a “without prejudice” clause in draft article 2, it had been understood that the Commission could later revisit the possibility of adding such a clause in relation to the draft articles generally.

Draft article 3 was entitled “Definition of armed robbery at sea” and, as provisionally adopted, consisted of a chapeau and two subparagraphs. The Committee had based its work on the text proposed by the Special Rapporteur in his first report, which had almost fully replicated the definition of “armed robbery against ships” from the annex to resolution A.1025 (26) of 2 December 2009 of the International Maritime Organization. The Committee had decided to use that definition as a guide but not to replicate it entirely.

The Committee had extensively debated whether to retain the words “committed against ships”, which followed the phrase “armed robbery at sea” in the chapeau of the Special Rapporteur’s initial proposal. While some members had been amenable to retaining them, since various international instruments, including resolution A.1025 (26), referred to “armed robbery against ships”, others had thought that the words must be omitted because a reference to armed robbery “committed against ships” was stylistically inconsistent with the titles of the topic and of the draft article, the addition of the words “against ships” unnecessarily and prematurely restricted the scope of the definition, and regional practice on the use of terms was not entirely consistent. For example, while the Code of Conduct concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden used the phrase “armed robbery against ships”, the Code of Conduct concerning the repression of piracy, armed robbery against ships and illicit maritime activity in West and Central Africa used the phrase “armed robbery at sea”. It had also been noted that Security Council resolutions addressing the situations off the coast of Somalia and in the Gulf of Guinea commonly used the phrase “armed robbery at sea” but did not include the words “committed against ships”. The Committee had ultimately decided not to retain the words “committed against ships” on the understanding that the discussion and members’ differing views would be reflected in the commentary.

The Committee had provisionally adopted subparagraphs (a) and (b), as originally proposed by the Special Rapporteur in the first report, without any substantive changes; in subparagraph (b), a reference to “acts described above” had been replaced with a more specific reference to “acts described in subparagraph (a)”. The Committee had discussed the

possibility of adding a subparagraph on acts of armed robbery against ships committed in straits and had decided against it because, *inter alia*, straits were not a distinct maritime zone under the relevant provisions of the United Nations Convention on the Law of the Sea. It had been agreed that issues pertinent to armed robbery against ships committed in straits would be best addressed in the commentary to draft article 3. The Drafting Committee had decided not to retain the Special Rapporteur's proposed subparagraph (c), which would have included in the definition of armed robbery at sea "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"; the Committee considered that the formulation was too broad and would, in effect, have resulted in domestic law definitions determining the content of international law.

He recommended that the Commission should provisionally adopt draft articles 1, 2 and 3 as contained in the report of the Drafting Committee. Commentaries to the draft articles would be submitted by the Special Rapporteur for consideration by the Commission during the second part of its current session.

The Chair invited the Commission to proceed with the adoption of the titles and texts of the draft articles on "Prevention and repression of piracy and armed robbery at sea", as provisionally adopted by the Drafting Committee.

Draft article 1

Mr. Forteau said it was regrettable that the Drafting Committee had provisionally adopted the draft articles only in English, given that the Special Rapporteur was a French speaker.

Draft article 1 was adopted.

Draft article 2

Draft article 2 was adopted, subject to editorial changes to the French and English texts.

Draft article 3

Mr. Ouazzani Chahdi said that the commentaries should make clear that attacks by aircraft on other aircraft were beyond the scope of the draft articles.

Draft article 3 was adopted, subject to editorial changes to the French and English texts.

Election of officers (*continued*)

The Chair said she took it that the Commission wished to elect Ms. Galvão Teles to chair the Commission during the second part of the session, in accordance with the arrangement proposed at the Commission's 3613rd meeting.

Ms. Galvão Teles was elected Chair by acclamation.

The meeting rose at 10.50 a.m.