

Chapter VI

Prevention and repression of piracy and armed robbery at sea

A. Introduction

50. At its seventy-third session (2022), the Commission decided to include the topic “Prevention and repression of piracy and armed robbery at sea” in its programme of work and appointed Mr. Yacouba Cissé as Special Rapporteur for the topic.¹⁸⁰ The Commission requested the Secretariat to prepare a memorandum concerning the topic, addressing in particular: elements in the previous work of the Commission that could be particularly relevant for its future work on the topic and the views expressed by States; writings relevant to the definitions of piracy and of armed robbery at sea; and resolutions adopted by the Security Council and by the General Assembly relevant to the topic. The Commission also approved the Special Rapporteur’s recommendation that the Secretariat contact States and relevant international organizations in order to obtain information and views concerning the topic.¹⁸¹

51. Subsequently, the General Assembly, in paragraph 7 of its resolution 77/103 of 7 December 2022, took note of the decision of the Commission to include the topic in its programme of work.

B. Consideration of the topic at the present session

52. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/758) and the memorandum prepared by the Secretariat concerning the topic (A/CN.4/757). In his first report, the Special Rapporteur addressed the historical, socioeconomic and legal aspects of the topic, including an analysis of the international law applicable to piracy and armed robbery at sea, and the shortcomings thereof. He reviewed the national legislation and judicial practice of States concerning the definition of piracy and the implementation of conventional and customary international law. The Special Rapporteur proposed three draft articles: on the scope of the draft articles, on the definition of piracy, and on the definition of armed robbery at sea. He also discussed the future programme of work on the topic.

53. The Commission considered the first report and the memorandum at its 3619th to 3621st and 3623rd to 3625th meetings, from 5 to 16 May 2023.

54. At its 3625th meeting, on 16 May 2023, the Commission decided to refer draft articles 1, 2 and 3, as contained in the first report, to the Drafting Committee, taking into account the views expressed in the plenary debate.

55. At its 3634th meeting, on 2 June 2023, the Commission considered the report of the Drafting Committee on the topic (A/CN.4/L.984) and provisionally adopted draft articles 1, 2 and 3 (see sect. C.1 below).

56. At its 3649th and 3651st meetings, on 27 and 31 July 2023, the Commission adopted the commentaries to the draft articles provisionally adopted at the current session (see sect. C.2 below).

¹⁸⁰ At its 3582nd meeting, on 17 May 2022 (*Official Records of the General Assembly, Seventy-seventh Session, Supplement No. 10 (A/77/10)*, para. 239). The topic had been included in the long-term programme of work of the Commission during its seventy-first session (2019), on the basis of the proposal contained in annex C to the report of the Commission (*Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, para. 290 (b)).

¹⁸¹ At its 3612th meeting, on 5 August 2022 (*A/77/10*, paras. 243 and 244).

C. Text of the draft articles on the prevention and repression of piracy and armed robbery at sea provisionally adopted by the Commission at its seventy-fourth session

1. Text of the draft articles

57. The text of the draft articles provisionally adopted by the Commission at its seventy-fourth session is reproduced below.

Article 1

Scope

The present draft articles apply to the prevention and repression of piracy and armed robbery at sea.

Article 2

Definition of piracy

1. 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).

2. Paragraph 1 shall be read in conjunction with the provisions of article 58, paragraph 2, of the United Nations Convention on the Law of the Sea.

Article 3

Definition of armed robbery at sea

Armed robbery at sea consists of any of the following acts:

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

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

2. Text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-fourth session

58. The text of the draft articles and commentaries thereto provisionally adopted by the Commission at its seventy-fourth session is reproduced below.

Article 1

Scope

The present draft articles apply to the prevention and repression of piracy and armed robbery at sea.

Commentary

(1) Draft article 1 defines the scope of the present draft articles, indicating that they apply to piracy and armed robbery at sea. The provision should be read together with draft articles 2 and 3, which define these two crimes and serve to delimit the scope of the topic.

(2) The present draft articles are broader in scope than the 1982 United Nations Convention on the Law of the Sea.¹⁸² While the Convention only refers specifically to piracy, the present draft articles also include “armed robbery at sea”, a crime that is not as such referred to in the Convention. For the purposes of the draft articles and commentary, reference to piracy means maritime piracy.

(3) The aim of the work on the present topic is to examine two crimes at sea: piracy and armed robbery at sea. The topic of piracy will be addressed principally within the framework of the United Nations Convention on the Law of the Sea, taking into account existing applicable international law, regional approaches, extensive State practice, and legislative and judicial practice under national legal systems, especially for armed robbery at sea, which is not addressed under the Convention. The framework of regional and subregional organizations involved in combating maritime piracy and armed robbery at sea will provide useful illustrations of the implementation of international law in this area.¹⁸³ The work on the present topic is not to duplicate existing frameworks and academic studies, but instead aims to clarify and build upon them, as well as to identify new issues of common concern.

(4) The present draft articles apply to the “prevention” and “repression” of piracy and armed robbery at sea. “Prevention” is the act of stopping something from happening or arising, while “repression” is the act of subduing or suppressing something that has arisen. The Security Council has highlighted the need to establish legal frameworks for the prevention and repression of piracy and armed robbery at sea in the Gulf of Guinea,¹⁸⁴ and for the repression of piracy in Somalia.¹⁸⁵

(5) The term “repression” is used in article 100 of the United Nations Convention on the Law of the Sea, which requires all States to “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”. This provision is identical to article 14 of the 1958 Convention on the High Seas,¹⁸⁶ which in turn was based on article 38 of the 1956 draft articles concerning the law of the sea with commentaries, adopted by the Commission at its eighth session.¹⁸⁷ “Repression” is broader than the term “punishment”, for example as used in the draft articles on prevention and punishment of crimes against humanity, adopted by the Commission at its seventy-first

¹⁸² United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982), United Nations, *Treaty Series*, vol. 1834, No. 31363, p. 3. For a commentary, see: S.N. Nandan and S. Rosenne, eds., *United Nations Convention on the Law of the Sea, 1982 A Commentary*, vol. III: *Articles 86 to 132* (Leiden, Martinus Nijhoff, 1995); A. Proelss *et al.*, eds., *United Nations Convention on the Law of the Sea: a commentary* (Munich, Oxford and Baden-Baden, C.H.N Beck/Hart/Nomos, 2017), pp. 737–744. Although old, the study published by V. Pella deserves attention: “La répression de la piraterie”, *Recueil des cours de l’Académie de droit international (RCADI)*, vol. 15 (1926), pp. 145–275.

¹⁸³ Code of Conduct concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct) (Djibouti, 29 January 2009), Council of the International Maritime Organization, document C 102/14, annex, attachment 1, resolution 1, annex; Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships and Illicit Maritime Activity in West and Central Africa (Yaoundé Code of Conduct) (Yaoundé, 25 June 2013), available at https://au.int/sites/default/files/newsevents/workingdocuments/27463-wd-code_de_conduite.pdf; Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (Tokyo, 11 November 2004), available at https://www.mofa.go.jp/mofaj/gaiko/kaiyo/pdfs/kyotei_s.pdf.

¹⁸⁴ Security Council resolution 2039 (2012), para. 5.

¹⁸⁵ Security Council resolution 1838 (2008), para. 3.

¹⁸⁶ Convention on the High Seas (Geneva, 29 April 1958), United Nations, *Treaty Series*, vol. 450, No. 6465, p. 11.

¹⁸⁷ *Yearbook of the International Law Commission, 1956*, vol. II, document A/3159, pp. 256 ff, at p. 282.

session.¹⁸⁸ The obligation to take measures to prevent and punish is a more specific aspect of the wider concept of “repression”.¹⁸⁹

Article 2

Definition of piracy

1. Piracy consists of any of the following acts:

(a) any illegal act 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).

2. Paragraph 1 shall be read in conjunction with the provisions of article 58, paragraph 2, of the United Nations Convention on the Law of the Sea.

Commentary

Paragraph 1

(1) Draft article 2, paragraph 1, sets out a definition of acts of piracy for the purpose of the present draft articles. The definition in paragraph 1 is based on article 101 of the United Nations Convention on the Law of the Sea, article 15 of the 1958 Convention on the High Seas and article 39 of the draft articles concerning the law of the sea, adopted by the Commission in 1956.¹⁹⁰ It is regarded as reflecting customary international law and has been reproduced in several regional legal instruments.¹⁹¹

(2) The essential elements of piracy under the United Nations Convention on the Law of the Sea are that it comprises any illegal act 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,

¹⁸⁸ See *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, paras. 44 and 45.

¹⁸⁹ See article 99 of the United Nations Convention on the Law of the Sea, which provides in part: “Every State shall take 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.”

¹⁹⁰ *Yearbook of the International Law Commission, 1956*, vol. II, document A/3159, pp. 256 ff, at pp. 260 and 261.

¹⁹¹ See Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, art. 1, para. 1; the CARICOM Maritime and Airspace Security Cooperation Agreement (3 July 2008), available from *Law of the Sea Bulletin*, No. 68 (2008), arts. 1, para. 2 (b), and 2, para. 2 (g); the Djibouti Code of Conduct, art. 1, para. 1; Revised Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships, and Illicit Maritime Activities in the Western Indian Ocean and Gulf of Aden Area (Jeddah, 12 January 2017), available from <https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/A2%20Revised%20Code%20Of%20Conduct%20Concerning%20The%20Repression%20Of%20Piracy%20Armed%20Robbery%20Against%20Ships%20Secretariat.pdf>, art. 1, para. 1; the Memorandum of Understanding on the Establishment of a Sub-Regional Integrated Coast Guard Function Network in West and Central African, July 2008, available from <https://www.imo.org/en/OurWork/Security/Pages/Code-of-Conduct-against-illicit-maritime-activity.aspx>, art. 1; the Yaoundé Code of Conduct, art. 1(310); the African Charter on Maritime Security, Safety and Development in Africa (Lomé Charter) (Lomé, 15 October 2017), available at https://au.int/sites/default/files/treaties/37286-treaty-african_charter_on_maritime_security.pdf, art. 1.

and directed on the high seas or a place outside the jurisdiction of any State, against another ship or aircraft, or against persons or property on board such ship or aircraft.

(3) The Commission felt that the integrity of the definition of piracy contained in article 101 of the United Nations Convention on the Law of the Sea should be preserved. This is in line with the objective of the topic, which is not to seek to alter any of the rules set forth in existing treaties, including the Convention.¹⁹²

(4) The Commission acknowledged that there were certain elements of the definition of piracy contained in article 101 of the United Nations Convention on the Law of the Sea that posed questions of interpretation and application, especially in view of the evolving nature of modern piracy. The Commission found it advisable to explain in the commentaries certain terms in article 101, which are set out below.

“[A]ny illegal act of violence or detention, or any act of depredation”

(5) Drawing on its earlier work in 1956, the Commission has adopted a definition of illegal acts of violence where the intention to rob (*animus furandi*) is not required.¹⁹³ The Commission also considered that the term “violence” included intimidation, as well as violence of different kinds, including physical and psychological violence. Material acts that constitute piracy result from any “illegal act of violence” exercised against persons on board a ship or aircraft, the deprivation of liberty of persons on board, or acts of depredation against property. “Depredation” implies the looting of property on board a ship or aircraft, accompanied by destruction.

“[C]ommitted for private ends”

(6) It was recognized that the expression “committed for private ends” in paragraph 1 (a) primarily refers to the pursuit of profit or private gain, most often including ransom demands and theft of property on board private ships or ships belonging to a State. This could also include acts against a State ship for private ends. It was further recognized that the pursuit of private ends can coexist with political or ideological objectives, sometimes making it difficult to distinguish between piracy committed for purely private ends and maritime crimes other than piracy, which can be committed for political or other ends. There is an ongoing debate as to whether “private ends” can be assimilated to ideological or political ends. Some scholars have contended that any maritime violence lacking public authority can be regarded as violence “for private ends”.¹⁹⁴

“[O]n the high seas”

(7) The definition of piracy specifies that it is committed “on the high seas” or “in a place outside the jurisdiction of any State”. The regime applicable to piracy under international law is an exception to the exclusive jurisdiction of the flag State which applies on the high seas.¹⁹⁵ This regime does not apply to acts committed within the territorial jurisdiction of a State. The Commission decided to retain this geographical limitation of piracy as set out in the United

¹⁹² *Official Records of the General Assembly, Seventy-fourth Session, Supplement No. 10 (A/74/10)*, annex C, Prevention and repression of piracy and armed robbery at sea, para. 11.

¹⁹³ *Yearbook of the International Law Commission, 1956*, vol. II, document A/3159, p. 282. The Commission in 1956 also considered that: “Acts of piracy may be prompted by feelings of hatred or revenge, and not merely by the desire for gain.”

¹⁹⁴ R. Churchill, V. Lowe and A. Sander, *The Law of the Sea*, 4th ed. (Manchester, Manchester University Press, 2022), pp. 385–386. See also Belgian Court of Cassation, *Castle John and Nederlandse Stichting Sirius v. NV Nabeco and NV Parfin*, 19 December 1986, *International Law Reports*, vol. 77, p. 537, at p. 540 (1986); Supreme Court of Seychelles, *The Republic v. Mohamed Ahmed Dahir & 10 others*, Case No. 51 of 2009, Judgment, 25 July 2010, para. 37; Supreme Court of Seychelles, *The Republic v. Abdugar Ahmed & 5 others*, Case No. 21 of 2011, 14 July 2011, para. 21; United States Court of Appeals for the Ninth Circuit, *The Institute of Cetacean Research v. Sea Shepherd Conservation Society*, 25 February 2013, *International Law Reports*, vol. 156 (2014), pp. 718–763, 756 (US CA 2nd Cir, 2013); D. Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge, Cambridge University Press, 2009), pp. 32–42; R. O’Keefe, *International Criminal Law* (Cambridge, Cambridge University Press, 2015), p. 20; United Nations Office on Drugs and Crime, *Maritime Crime: A Manual for Criminal Justice Practitioners*, 3rd ed. (Colombo, 2020), para. 9.3.

¹⁹⁵ This extends to the exclusive economic zone; see para. 2 of draft article 2.

Nations Convention on the Law of the Sea and to provide a definition of “armed robbery at sea” to cover other geographical areas at sea where acts, which can be assimilated to piracy, may occur.

“[A]gainst another ship or aircraft”

(8) The definition of piracy in the United Nations Convention on the Law of the Sea is based on acts committed by the crew or the passengers of a private ship or aircraft against another ship or aircraft. The requirement for piracy to involve acts of violence by one ship directed towards another ship is based on the historical antecedents of the provision. When illegal or violent conduct on the high seas involves only one ship, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation¹⁹⁶ is likely to be implicated for its parties. Regarding “aircraft”, it is important to note that the Convention on International Civil Aviation¹⁹⁷ declares that “aircraft used in military, customs and police services shall be deemed to be State aircraft”. As a result, according to article 2, paragraph 1 (a), of the present draft articles – which repeats article 101 (a) of the United Nations Convention on the Law of the Sea – piracy entails acts against “private aircraft” not “State aircraft”.

(9) The Commission noted that, according to the legislative practice of some States, “piracy” is also considered to include piratical acts against offshore oil platforms.¹⁹⁸ Such State practice is, however, at best *de lege ferenda* as a matter of international law as oil platforms do not qualify as either a “ship or aircraft” or as “property in a place outside the jurisdiction of any State”. Furthermore, the arbitral tribunal in *The Arctic Sunrise* award on the merits concluded that the conduct in question was not piracy because “[t]he *Prirazlomnaya* is not a ship. It is an offshore ice-resistant fixed platform”.¹⁹⁹

(10) The legal instruments referred to in paragraph (1) of the present commentary have recognized, on the basis of the debates that took place in the Commission in 1954, that piracy can be committed by an aircraft against a ship. In reality, modern piracy is no longer committed using only ships and aircraft as they were understood when the definition of piracy was developed. The use of drones, UAV (unmanned aerial vehicles) or MAV (maritime autonomous vehicles) in the commission of acts of piracy or armed robbery at sea is a new phenomenon. So too is the use of other devices for carrying out cyberattacks at sea. It is recognized that such actions are within the scope of the definition of piracy in draft article 2, paragraph 1.

(11) Acts of piracy under the definition in paragraph 1 of draft article 2 involve acts from a private ship or aircraft. However, article 102 of the United Nations Convention on the Law of the Sea specifically provides that “acts of piracy ... committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft”.²⁰⁰

(12) The definition of piracy in paragraph 1 of draft article 2 is limited to acts involving two ships, two aircraft or a ship and an aircraft. It does not extend to situations of unlawful violence or detention or acts of depredation by the crew or the passengers of a ship or aircraft against that same ship or aircraft. A view was expressed that piracy should not always be

¹⁹⁶ Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, (Rome, 10 March 1988), United Nations, *Treaty Series*, vol. 1678, No. 29004, p. 201.

¹⁹⁷ Convention on International Civil Aviation (Chicago, 7 December 1944), United Nations, *Treaty Series*, vol. 15, No. 102, p. 295.

¹⁹⁸ Some national laws distinguish between piracy targeting ships and “maritime offences” targeting fixed or floating platforms: see *Suppression of Piracy and other Maritime Offences Act, 2019*, of Nigeria, available at: <https://placbillstrack.org/8th/upload/Suppression%20of%20Piracy%20and%20Other%20Maritime%20Offences%20Act%202019.pdf>.

¹⁹⁹ Permanent Court of Arbitration, *The Arctic Sunrise Arbitration (Netherlands v Russia)*, Case No. 2014-02, Award on the Merits, 14 August 2015, *Reports of International Arbitral Awards*, vol. XXXII (2019), p. 205, at para. 238, also para. 240.

²⁰⁰ United Nations Convention on the Law of the Sea, art. 102.

considered as involving two ships, but may involve action by a crew on a ship against that ship.

(13) Piracy may also be conducted from land against ships, but the Commission decided to avoid specifically referring to “land” as the place where preparations are made to commit acts of piracy. Some members considered that acts of piracy could also be conducted from offshore platforms.

(14) The Commission gave consideration to whether to include a definition of “ship” to assist in clarifying the definition in draft article 2, paragraph 1. Although the International Maritime Organization has defined “vessels and aircraft” in some of the conventions concluded under its auspices,²⁰¹ the United Nations Convention on the Law of the Sea does not define “ship” or “vessel”. The Commission did not consider it productive to include a definition of ship in the present draft articles.

“[A]ny act of inciting or of intentionally facilitating” such an act

(15) The definition of piracy includes conduct that is ancillary to piracy, such as incitement, financing or intentional facilitation of piracy. The Security Council has seen the need to address this element of acts of piracy in its resolutions concerning the situation in Somalia and the Gulf of Guinea. In its resolution 1976 (2011) on Somalia, the Council emphasized the importance of all States criminalizing under their domestic law “incitement, facilitation, conspiracy and attempts to commit acts of piracy”.²⁰² In its subsequent resolution 2020 (2011), the Security Council inserted text to cover not only pirates apprehended off the coast of Somalia, but also “their facilitators and financiers ashore”.²⁰³ A similar approach was adopted most recently by the Security Council with regard to the Gulf of Guinea²⁰⁴. Consistent with the approach of the Security Council, the Commission considered that the expression “any act of inciting or of intentionally facilitating” a piratical act is sufficiently broad to include, in particular, the financing of acts of piracy.²⁰⁵ Arming a vessel intended for piracy, or leasing a vessel in the knowledge that it will be used for the same purpose, constitutes an act of complicity. It should also be noted that preparatory acts, assistance given to pirates or an unsuccessful attempt to commit an act of piracy are punishable under national laws.²⁰⁶

Paragraph 2

(16) Paragraph 1 of draft article 2 refers to acts of piracy committed “on the high seas”. Nevertheless, article 58, paragraph 2, of the United Nations Convention on the Law of the Sea, regarding the rights and obligations of States in the exclusive economic zone, provides: “Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part”. It follows that article 101

²⁰¹ See, for example: Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London, Mexico City, Moscow and Washington, 29 December 1972), United Nations, *Treaty Series*, vol. 1046, No. 15749, p. 120, at art. III, para. 2: “‘Vessels and aircraft’ means waterborne or airborne craft of any type whatsoever. This expression includes air-cushioned craft and floating craft, whether self-propelled or not.”

²⁰² Security Council resolution 1976 (2011), para. 13.

²⁰³ Security Council resolution 2020 (2011), para. 15.

²⁰⁴ Security Council resolution 2634 (2022), para. 3, which “Calls upon Member States in the region to criminalize piracy and armed robbery at sea under their domestic laws, and to investigate, and to prosecute or extradite, in accordance with applicable international law, including international human rights law, perpetrators of piracy and armed robbery at sea, as well as those who incite, finance or intentionally facilitate such crimes, including key figures of criminal networks involved in piracy and armed robbery at sea who plan, organize, facilitate, finance or profit from such attacks”.

²⁰⁵ United States Court of Appeals, District of Columbia Circuit, *United States v. Ali*, 21 August 2013, 718 F.3d 929.

²⁰⁶ British Empire, Judicial Committee of the Privy Council, *In re Piracy Jure Gentium*, 26 July 1934 (available at <https://vlex.co.uk/vid/re-piracy-jure-gentium-805016117>), cited in *Dahir* (see footnote 194 above), para. 57: “As was held in *Re Piracy Jure Gentium* (1934) A.G. 586, ‘an actual robbery is not an essential element of the crime. A frustrated attempt to commit a piratical robbery will constitute piracy *jure gentium*’”. Cyprus, Criminal Code, art. 69; Republic of Korea, Act concerning Punishment of Unlawful Acts against Ships and Maritime Navigational Facilities, art. 5; India, Maritime Anti-Piracy Act, 2022, No. 3 of 2023, sect. 3.

of the United Nations Convention on the Law of the Sea and related provisions thereof regarding piracy apply to the exclusive economic zone. This is confirmed by the arbitral tribunal in *The “Enrica Lexie” Incident*, which observed that article 58, paragraph 2, of the United Nations Convention on the Law of the Sea “extends specific rights and duties of States as regards the repression of piracy to the exclusive economic zone”.²⁰⁷

(17) The Commission considered whether an explicit reference should be made to the exclusive economic zone, but decided to include a reference to the provisions of article 58, paragraph 2, of the United Nations Convention on the Law of the Sea to indicate that piracy can also be committed in the exclusive economic zone.²⁰⁸ The paragraph was drafted in a neutral manner so as not to prejudice the position of non-parties to the United Nations Convention on the Law of the Sea.

(18) The separation between the two paragraphs recognizes that the exclusive economic zone and the high seas are two distinct maritime spaces in which different rights and obligations apply.

National legislative practices

(19) The Commission noted that the evolution of States’ legislative practice has given rise to a variety of definitions of piracy.²⁰⁹ It examined whether a definition of piracy based on definitions in national law might supplement the definition under international law. It considered, however, that any such definition risked encompassing all kinds of illegal acts at sea not defined in article 101 (a) and (b) of the United Nations Convention on the Law of the Sea. Such an expansion would undermine the integrity of the definition of piracy under the United Nations Convention on the Law of the Sea. Nevertheless, the Commission noted that national anti-piracy laws may help shed light on State practice, and common elements should be examined to promote harmonization of national laws.

Subsequent developments

(20) The Commission recognized that the current definition of piracy may not encapsulate technological developments in maritime security, which may lead to subsequent efforts by the international community to update it. It nonetheless considered it unnecessary to introduce a “without prejudice” clause to accommodate possible further developments.

Article 3

Definition of armed robbery at sea

Armed robbery at sea consists of any of the following acts:

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

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

Commentary

(1) Draft article 3 concerns the definition of armed robbery at sea. The definition is drawn from the one adopted by the Assembly of the International Maritime Organization (IMO) in its Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships.²¹⁰ Subparagraphs (a) and (b) of draft article 3 correspond to subparagraphs 1 and 2 respectively of paragraph 2.2 of the Code.

²⁰⁷ Permanent Court of Arbitration, *The “Enrica Lexie” Incident (Italy v India)*, Case 2015-28, Award, 21 May 2020, para. 979.

²⁰⁸ International Court of Justice, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, 21 April 2022, para. 62.

²⁰⁹ See first report by the Special Rapporteur, [A/CN.4/758](#).

²¹⁰ IMO resolution A.1025(26) of 2 December 2009, annex.

(2) There is not necessarily any substantive difference between piracy and armed robbery at sea as far as the conduct itself is concerned. The main difference between piracy and armed robbery at sea is the location of the act: the high seas and exclusive economic zone on one hand, and waters subject to the jurisdiction of the coastal State on the other. This has consequences for the applicable jurisdiction in respect of the two crimes. In the case of piracy, it is acknowledged that universal jurisdiction applies such that any State has the right to prosecute the crime of piracy committed on the high seas. With respect to armed robbery at sea, the coastal State has the exclusive competence to exercise prescriptive and enforcement jurisdiction over such acts.

(3) The difference between the definition in draft article 3 and the IMO Assembly's definition is that, in the chapeau of the draft article, the Commission used the term "armed robbery at sea", instead of "armed robbery against ships" as in the IMO Assembly's definition. A recent Security Council resolution on maritime piracy in the Gulf of Guinea in particular has used the phrase "armed robbery at sea", instead of "armed robbery against ships".²¹¹ In view of the practice of the Security Council, and to avoid unduly restricting the definition, the Commission considered that it was unnecessary to replicate the IMO definition verbatim.

(4) Unlike piracy, to which universal jurisdiction applies, IMO Resolution A.1025(26) states that armed robbery is punishable under coastal State's jurisdiction, as examined in some national legislation and regional conventions as described above. In addition, it has to be noted that armed robbery at sea does not necessarily involve two ships.

(5) "Armed robbery at sea" applies within a State's internal waters, archipelagic waters and territorial sea. Although a number of acts of armed robbery at sea occur in straits used in international navigation, such straits may include areas that are within the maritime zones of a coastal State as well as high seas. For example, the Strait of Korea/Tsushima includes areas of high seas. It was therefore considered not necessary, and indeed confusing, to include a specific reference to straits used for international navigation within the definition.

²¹¹ Security Council resolution 2634 (2022). See also statement by the President of the Security Council [S/PRST/2021/15](#) of 9 August 2021.