

Statement by Mario Oyarzábal*

**on the Second Report on the Prevention and Repression of Piracy and Armed
Robbery at Sea by Yacouba Cissé, Special Rapporteur
(A/CN.4/770, 4 March 2024)**

**International Law Commission – 75th Session
21 May 2024**

Original: Spanish

Thank you, Mr. Chair.

My intervention today will be structured as follows. To begin with, I will make some general remarks on the Report submitted by the Special Rapporteur (SR) and the work done by the Secretariat. I will then make some non-exhaustive suggestions on the proposed Draft Articles.

Mr. Chair,

First, I thank the SR for his Report, which constitutes a detailed and comprehensive study of the developments carried out by various international organisations and of the international, regional, and bilateral agreements on cooperation aimed at preventing and suppressing piracy and armed robbery at sea. It seemed to me that the Report highlights the existing challenges in the thematic area and that the practices described will be of great importance for the Commission's work on this topic. It also emphasizes the importance of international cooperation, which is key to confronting this scourge, taking into account in particular the lack of capacity of some particularly affected States.

I believe, however, that the SR could have explained in more detail in his Report how the developments included therein have inspired the Draft Articles proposed for this year. I thank the SR for elaborating on the matter in his presentation of the topic today.

Secondly, I would also like to thank the Secretariat for the excellent Memorandum. The work provides an insight into the legislative history that culminated in the establishment of the acts of piracy and armed robbery at sea in both the First and Third United Nations Conferences on the Law of the Sea. In addition, it exhaustively develops the elements that make up these crimes, uses academic literature in different languages, and cites authors from different sources. All this leads me to consider that this contribution would have been extremely useful for the 74th Session in 2023. I trust that, in the interest of optimising available resources and in view of our further work, the Commission will be cautious as to when and what kind of report it requests from the Secretariat.

* I thank Ignacio Odriozola and Ignacio Mazal for their research assistance.

Thirdly, as I did in my speech at the 74th Session, I consider it important that, in carrying out this task, account be taken, above all and as a point of departure, of the provisions of the United Nations Convention on the Law of the Sea (UNCLOS) together with other agreements adopted within the International Maritime Organisation and other international and regional organisations that may be relevant, including existing agreements providing for cooperation and mutual legal assistance in combating transnational organised crime.

Such agreements include the 1979 International Convention Against the Taking of Hostages, the 1988 Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (SUA Convention), and the 2000 United Nations Convention against Transnational Organised Crime (known as the “Palermo Convention”). Similarly, one could consider the Naples Declaration of 2009 and the Angers Resolution of 2023, both elaborated by the Institute of International Law and whose approach is similar to the one I propose here. In any case, I reiterate that, in my view, the provisions of UNCLOS should be the point of departure for our work, starting with Article 100 on the obligation to cooperate, 105 to 107 on the seizure of pirate vessels and 110 on the right of visit, developing and complementing them to help States and relevant international and regional organisations to meet the new challenges presented by the scourge of piracy and armed robbery at sea.

Fourthly, although there is a consensus that acts of piracy represent international crimes, this does not imply that other instruments to prevent and combat international crimes are automatically applicable to piracy and armed robbery at sea, which are distinguished by their transnational connotation.

In my view, taking the basis of this Commission’s Draft Articles on the Prevention and Punishment of Crimes Against Humanity to address the issue of piracy and armed robbery at sea is problematic.

A crime against humanity involves the commission of certain types of inhumane acts, such as murder, torture, or rape, in a particular context: a widespread or systematic attack against a civilian population and with knowledge of such an attack, which may be perpetrated as part of a State policy.¹ In general, the crimes of piracy and armed robbery at sea can hardly be considered part of an attack directed against a civilian population. This typical element of crimes against humanity marks the distinction between these crimes and other isolated acts against individuals.² Moreover, piracy and armed robbery at sea, by definition, cannot be committed by individuals acting on behalf of the State.

In the same vein, the transnational nature of piracy and armed robbery at sea implies the involvement of different States insofar as the activity often involves conduct and/or effects in different jurisdictions. This quality also distinguishes these crimes from other international

¹ Rome Statute of the International Criminal Court, Article 7.

² Bemba Gombo, ICC PTC II, 15 June 2009 (ICC-01/05-01/08-424) para. 81; Katanga and Ngudjolo, ICC PTC I, 30 September 2008 (ICC-01/04-01/07-717) para. 396; Situation in Côte d’Ivoire, ICC PTC III, 3 October 2011 (ICC-02/11-14).

crimes which, although they represent an offence against the order and security of the international community, may take place and have effects in a single jurisdiction.³

Therefore, I emphasise that it is not so simple to transpose the reasoning and provisions developed to prevent and punish crimes against humanity to combat piracy and armed robbery at sea.

Mr. Chair,

After these general and introductory remarks, I would again like to thank the SR for his work and for making a few suggestions to the Draft Articles that the time allotted allows, in the hope that they can contribute to the work ahead.

Mr. Chair,

With regard to **draft article 4**, first of all, I welcome the inclusion of an article exclusively devoted to setting out the general obligations of States in this area. However, I suggest that the obligations to prevent and repress, together with the obligation to cooperate, should be combined in a single paragraph. If this proposal is not considered relevant, it would seem reasonable to propose reversing the order of paragraphs 1 and 2.

In paragraph 2, the inclusion of the phrase “whether or not committed in time of armed conflict” raises certain questions, for which I am inclined to suggest that it be deleted. This phrase would seem to come from Article 3, paragraph 2, of the Draft Articles on the Prevention and Punishment of Crimes Against Humanity. However, in that draft, it was included for a specific reason. The law of crimes against humanity has evolved over time. At first, it required a connection with an armed conflict until that requirement was dropped, as a result of international custom and the Rome Statute.⁴ There seems to be no reason to presume that this logic is applicable to the crimes of piracy and armed robbery at sea.

Moreover, the inclusion of this phrase seems to have little relevance in the context of piracy and armed robbery at sea. In an international armed conflict, attacks carried out by government vessels cannot be considered acts of piracy or armed robbery at sea.⁵ Similarly, in a non-international armed conflict, whether an attack on a ship constitutes piracy or armed robbery at sea will depend on the target and intent of the attack. If the attack is carried out for a public cause, it cannot be considered as either of the two acts under study.⁶

Mr. Chair,

With regard to **draft article 5**, I note a certain contradiction in the first paragraph, since the obligation to repress has been included within the scope of an article dealing with the

³ Srisombat Chokprajakchat, Review Mechanism UNTOC: Definition of transnational crime.

⁴ ICTY, Tadić, TC II, 7 May 1997, para. 627; RS, art. 7; Darryl Robinson, “Defining Crimes Against Humanity at the Rome Conference” (1999) 93 AJIL 43.

⁵ See: A/CN.4/767, Memorandum by the Secretariat, Chapter III, B.2.

⁶ *Ibid.*

obligation to prevent. Along these lines, I suggest that the mention of repression be eliminated to avoid confusion.

Moreover, the possibility of adopting “effective legislative, administrative, judicial or other appropriate preventive measures... on the high seas” established in paragraph (a) is far-reaching and could have important implications in view of the broad freedoms that States enjoy in the high seas and the obligations that are established in relation to piracy and other crimes, where the balance established by UNCLOS could be affected by the measures that a State may adopt under this article.

For its part, paragraph (b) provides that States must cooperate in the task of prevention with “non-State actors”.⁷ Given the leading role that these actors have acquired in recent decades, there is no doubt of their potential to help ensure the safety of navigation. At the same time, the extensive debates on the conceptualisation of non-state actors reveal a lack of academic consensus on the subject. It has been pointed out that there is no uniform definition of what constitutes a non-state actor, nor is there a consensus methodology on how to identify or classify them.⁸ In addition, due to the diversity of non-state actors, their meaning tends to vary according to the environment in which they operate.⁹ It is for this reason that it would be advisable to carefully consider who and in what circumstances we are referring to them.

Mr. Chair,

Draft article 6 enshrines the obligation of States to criminalise acts of piracy and armed robbery at sea in all modes of participation.

For the sake of brevity and without prejudice to other matters, paragraphs 4 and 5, which address criminal responsibility for acts ordered by a government or by persons acting in an official capacity, both seem to presume that States have the capacity to commit acts of piracy and armed robbery at sea. However, the crimes under study are acts exclusively capable of being committed by private entities, regardless of their political purpose. Hence, the proposal does not seem to coincide with the general and majority opinion on the matter. In this sense, the documents prepared by the Secretariat for this session¹⁰ and the previous one,¹¹ clearly reflect this position. Under this premise, I propose the elimination of both paragraphs.

More generally, in relation to draft article 6, I consider that States should not only adopt legislation but also “procedures” to prevent and punish piracy, and that such measures should

⁷ Fernández Lieza, C. (2018), “Sujetos de Derecho y actores no estatales: cuestiones de derecho internacional”, *Anuario Español de Derecho Internacional*, 38, p. 87-113.

⁸ Heffes, E., Kotlik, M. D., & Ventura, M. J. (2019). *International humanitarian law and non-state actors: Debates, law and practice*. Springer

⁹ Charountaki, M., & Irrera, D. (Eds.) (2022). *Mapping non-state actors in international relations*. Springer International Publishing AG, p. 2.

¹⁰ See: Memorandum by the Secretariat, Chapter III, B.2, A/CN.4/767, 31 January 2024, paras. 88-89.

¹¹ See: Memorandum by the Secretariat, Chapter I, A.2, A/CN.4/757, 7 February 2023, paras. 40-60.

not only be “necessary” but also “effective”, as suggested by the Institute of International Law in the 2009 Naples Declaration.¹²

Mr. Chair,

Finally, **draft article 7** establishes the basis for the exercise of jurisdiction over acts of piracy and armed robbery at sea. As I understand, draft article 7 is a corollary to and complements draft article 6 by setting out the criteria according to which a State shall exercise its jurisdiction over criminal prosecution, and does not authorise the exercise of enforcement measures by a State in the internal waters, archipelagic waters or territorial sea of another State not permitted by UNCLOS. However, this issue should be clarified as appropriate.

The proposed draft article appears to be comprehensive. Paragraph 1(a) implies territorial jurisdiction, paragraph 1(b) active personality (the accused is a national of the State), paragraph 1(c) passive personality, and paragraph 2 is a limited form of universal jurisdiction. In addition, paragraph 1(b) gives States the option of establishing jurisdiction if the offender is “a stateless person who has his habitual residence in the territory of that State”.

In relation to the exercise of jurisdiction on stateless persons, I would like to observe, in the first place, that the concept of “habitual residence” assumes various meanings depending on the legal perspective, could lead to difficulties and loopholes that may undermine the objective pursued by the proposed article.¹³

In the second place, the term “stateless person” refers to a *de jure* figure based on the 1954 Convention relating to the Status of Stateless Persons, whose personal status according to Article 12, paragraph 1, is governed by “the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence”,¹⁴ and not by the law of the country of the “habitual residence” as proposed by the SR in paragraph 1(b) of draft article 7.

Although I am aware that the subject matter of the 1954 Convention and these Draft Articles is different, as are the matters subject to personal status, depending on the legal perspective adopted, following the approach of the 1954 Convention would contribute to consistency between the international instruments in force. Failing that, on the understanding that the concept of domicile has become rare, I would choose to limit the proposal to “the law of the country of his residence”.

¹² Institut de Droit International, Naples Declaration, 10 September 2009, (a): to adopt or develop effective domestic laws and procedures to prevent and suppress piracy and other acts of violence at sea. Online: https://www.idi-iil.org/app/uploads/2017/06/2009_Naples_EN.pdf

¹³ For example, under EU law, habitual residence is determined by a “close and stable connection” with a place, but it is possible for a person to maintain habitual residence in his or her home country despite moving abroad for social and family ties. See: [https://www.europarl.europa.eu/RegData/etudes/ATAG/2013/130427/LDM_BRI\(2013\)130427_REV1_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2013/130427/LDM_BRI(2013)130427_REV1_EN.pdf). Another perspective is that the duration of residence could be a factor in deciding the habituality of residence in a place, suggesting that residence acquires such a character after a period of time. See: *Re J. (A Minor) (Abduction)* [1990] 2 AC 562.

¹⁴ Convention relating to the Status of Stateless Persons, adopted on 28 September 1954 by a Conference of Plenipotentiaries convened by the Economic and Social Council in its resolution 526 A (XVII) of 26 April 1954 and approved on 26 September 1954, Art. 12 (1).

Mr. Chair,

In conclusion, I thank Mr. Cissé for his work on such an important topic. My thanks also to you, Mr. Chair, and to the other members of the Commission for a rich and fruitful debate.