Statement by Mario Oyarzábal*

on the First Report on the Prevention and Repression of Piracy and Armed Robbery at Sea by Yacouba Cissé, Special Rapporteur (A/CN.4/758, 22 March 2023)

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Thank you, Mme. Chair,

My intervention today will be structured as follows. To start with, I will make some general observations on the report and the topic itself. After that, I will draw some conclusions and make some suggestions for the way forward.

First, I thank Special Rapporteur (SR) Cissé for his Report containing a very detailed account of the domestic legislative and judicial practice of all five continents, including my own continent and country. I found the loopholes identified by the SR in the current international legal framework to be particularly useful.[1] Also the reactions of the States in the Sixth Committee of the UN General Assembly.[2] As pointed out by the SR in his Syllabus, possible elements to be included are the punishment of piracy, the cooperation in the suppression of piracy, including issues on criminalisation, pursuit, arrest, detention, extradition, transfer agreement of suspected pirates, mutual legal assistance, prosecution, investigation, evidence, sentences, rights of alleged pirates, rights of victims of piracy and armed robbery at sea.[3] I believe that the triad of lacunas, governments' preferences and possible elements, provides us with much food for thought in determining the scope of our work.

Second, like previous speakers, I would like to emphasise the importance of the threat and the actual socio-economic losses caused by piracy globally, particularly in Africa and where States lack the capacity to prevent it, suppress it and punish it off their coasts. In some contexts, such as Somalia and the Gulf of Guinea, the United Nations Security Council has affirmed the security threat posed by piracy to the sovereignty and territorial integrity of the States involved.[4] UN member States have welcomed the decision to include this topic in our programme of work, and the Commission has a historic opportunity to contribute to combat this scourge.

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* I thank Liline Steyn and Foysal Omar Quazi for their research assistance.
[1] Chap. VI.
[2] Chap. VII.
[3] A/74/10, annex C., para. 27.
[4] On Somalia, UNSC Res. 2608 (2021) and UNSC Res. 2634 (2022), recalling prior resolutions; and on the Gulf of Guinea, UNSC Res. 2634 (2022), recalling UNSC Res. 2018 (2011) and UNSC Res. 2039 (2012).

Third, I commend the SR for providing us with the national definitions of piracy and armed robbery at sea in a large number of countries, alongside yet separately from the definition of piracy contained in the United Nations Convention on the Law of the Sea (UNCLOS). This distinction is sound and a good starting point. In UNCLOS, Piracy is defined for the purposes of the application of the Convention, while domestic definitions are directed at the application of the national criminal laws of the respective States. This explains why domestic definitions of piracy do not, nor should they necessarily, coincide with that of UNCLOS.[5] It explains why some domestic legislations define as "piracy" similar acts being committed in waters subject to their national jurisdiction, beyond the high seas, even if the national definition borrows from UNCLOS — as it is the case with Article 198 of Argentina's Penal Code —, and even if said acts would constitute "armed robbery at sea" pursuant to a notion commonly used to designate activities that take place in a State's territorial sea and, therefore, do not fall within the ambit of the piracy definition of Article 101 of UNCLOS.[6] For example, Article 198 of the aforementioned Argentine Penal Code, is generally interpreted in light of Article 1 of the same Code that defines the scope of Argentine criminal law, as a result of which Argentine courts would not have jurisdiction to judge acts of piracy committed on the high seas.[7] It follows from the above that domestic definitions of piracy must not also be construed automatically as interpreting or applying UNCLOS.

If the enforcement of domestic legislation violates UNCLOS or a customary rule, the State will be responsible for its internationally wrongful act, for example if the "right of visit" has been exercised abusively, in cases other than those contemplated in Article 110 of UNCLOS, or the "hot pursuit" has not ceased once the vessel being pursued enters the territorial sea of a third State. However, these cases are rare, as few countries have the capacity to undertake anti-piracy operations in the high seas and, as the SR observes correctly, Article 105 of UNCLOS does not mandate States to exercise jurisdiction over piracy acts and pirates, only allowing them to do so.

Fourth, understanding the *raison d'être* of this "special common basis for jurisdiction" may be helpful, yet not decisive, in defining "piracy".[8] Once again, the SR takes the wise approach of differentiating the international law "as it is" (*lex lata*) from the law being sought to establish (*lex ferenda*). The common interest in preserving the freedom of navigation on the high seas, protected by UNCLOS, neglects the fact that piracy-like acts are often committed in the territorial sea. In turn, putting piracy in the same category of other heinous acts, such as crimes against humanity, war crimes, or genocide, as the SR appears to suggest, does not *per se* entail that States may — much less are obliged to — exercise jurisdiction over acts committed in places within the jurisdiction of other States.

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[5] *ILC Yearbook,* 1955, vol. I, p. 39, para. 30; "Codification of International Law: Part IV: Piracy" (1932) 26 *Supplement to the American Journal of International Law* 739, at 764.
[6] Petrig and Geiß, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford, 2011), p. 55.
[7] Cf. Donna, *Derecho Penal: Parte Especial* (1st ed., Rubinzal-Culzoni, 2002), vol. II-C, p. 199; Cappagli, "La Piratería y el Derecho", *La Ley,* 2009-A, p. 642; Riquert, *Código Penal de la Nación, Comentado y Anotado* (Erreius, 2018), vol. III, p. 1805 and note 338; Tazza, *Código Penal de la Nación Comentado: Parte Especial* (2ª ed. Rubinzal-Culzoni, 2020), vol. II, p. 442.
[8] "Codification of International Law: Part IV: Piracy" (1932), cit., at 575.

Moreover, "universal jurisdiction" is not a commonly accepted basis for jurisdiction in most States.

The broad basis for enforcement and adjudicatory jurisdiction established in Article 105 of UNCLOS cannot be understood separately from the specific (maritime) space — the high seas — to which it is confined. Protecting freedom of navigation is of course its underlying rationale. But the fact that universal jurisdiction is accepted in piracy cases is largely due to the fact that it is limited to places outside any State's territorial jurisdiction.[9]

Extending this jurisdictional basis to territorial waters would entail fundamentally reinterpreting the jurisdictional regime applicable to piracy and, in the views of many States, opening the door for other States' interference with their own sovereignty over the territorial sea, let alone the internal waters. This may help explain why regional arrangements concerned with anti-piracy operations and cooperation have taken a geographically limited approach to jurisdiction. For example, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP)[10] provides that "[n]othing in this Agreement entitles a Contracting Party to undertake in the territory of another Contracting Party the exercise of jurisdiction and performance of functions which are exclusively reserved for the authorities of that other Contracting Party by its national law" (Art. 5); while the Djibouti Code of Conduct[11] in turn states that "[a]ny pursuit of a ship, where there are reasonable grounds to suspect that the ship is engaged in piracy, extending in and over the territorial sea of a Participant is subject to the authority of that Participant. No Participant should pursue such a ship in or over the territory or territorial sea of any coastal State without the permission of that State" (Art. 2.5).

Moreover, the "optional clause" in Article 105 is connected to the nature and feasibility of the jurisdictional activity envisaged. A quick survey of piracy-related conventions show that an obligation to exercise criminal jurisdiction only applies when there is a territorial or personal jurisdictional link with the State, such as the case of Article 6.1[12] of the Rome Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the "SUA" Convention) concluded under the auspices of the International Maritime Organisation (IMO) in 1988, Article 5 of the 1979 International Convention against the Taking of Hostages, and Article 15.1 of the 2000 UN Convention against Transnational Organised Crime (known as "Palermo Convention"). All three conventions also establish an obligation to exercise jurisdiction in cases where the alleged offender is present in any territory under its jurisdiction and the State does not extradite,

[9] In his Separate Opinion in the Arrest Warrant of 11 April 2000, Judge Guillaume stated that "international law knows only one true case of universal jurisdiction: piracy", ICJ, *Case Concerning the Arrest Warrant (DRC v. Belgium)* 14 February 2002, I.C.J. Reports 2002, p. 42.

[10] https://www.recaap.org/

[11] https://dcoc.org

[12] Art. 6.1 provides that "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 onboard 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 the State".

namely the "obligation to extradite or prosecute" (*aut dedere aut judicare*)[13] — another important international rule related, but conceptually distinct, from "universal jurisdiction" which entails the ability of the court of any State to try persons for crimes committed outside its territory which are not linked to the State by the nationality of the suspect or the victims or by harm to the State's own national interests.

Fifth, the report accurately highlighted the connection between piracy and terrorism and between piracy and transnational crime, including corruption, money laundering, Illegal, unreported and unregulated (IUU) fishing, human trafficking and the smuggling of drugs (para. 18). There is now a large number of international instruments that provide for measures of assistance in connection with criminal proceedings, usually in the most general terms, as well as covering specific topics.[14] International action in criminal matters is nowadays ensured by a myriad of international organisations and political and specialist bodies[15], and regional arrangements[16]. Coordination mechanisms among countries include the coordination of national policies and action plans, and coordinated investigative and prosecutorial actions. For example, the SUA Convention contains provisions on mutual assistance in connection with criminal proceedings (Art. 12), prevention and cooperation (Art. 13), and information sharing (Art. 14); the ReCAAP contains provisions on information sharing (Art. 9), request for cooperation in detection, arrest and seizure, and rescue (Arts. 10 and 11), obligation to extradite upon request (Art. 12), mutual legal assistance (Art. 13), and capacity building (Art. 14); and the Djibouti Code of Conduct also contains provisions on coordination and information sharing (Art. 8), incident reporting (Art. 9), assistance requests in detection, response and capacity building (Art. 10). Similar provisions are found in other modern international instruments aimed at fighting transnational crime.

Sixth, Mr. Cissé has adequately recounted the preferences manifested by States regarding the scope of our work which, in the views of most, must strengthen and build upon, rather than modify, UNCLOS.[17] It is commonly accepted that UNCLOS has struck a balance between the rights of coastal States and the rights of the international community, conferring upon the former sovereignty over its territorial sea, specific law enforcement powers in its contiguous zone, and sovereign rights to the resources of the exclusive economic zone and the continental shelf, while protecting the international community's interest in the freedom of navigation and the Area and its resources as the common heritage of mankind. There is also general agreement that said balance ought to be

[13] Art. 10.1 of the SUA Convention; Art. 9.1 of the Hostages Convention; and Art. 15.2-4 of the Palermo Convention.
[14] E.g., 1988 Vienna Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 1999 International Convention for the Suppression of the Financing of Terrorism; 2000 Palermo Convention against Transnational Organized Crime (supplemented by the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, and the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Parts and Components and Ammunition); the 2001 Budapest Convention on Cybercrime; 2003 Convention against Corruption.
[15] E.g., Interpol, the World Customs Organisation, the United Nations Office on Drugs and Crime (UNODC), the Financial Action Task Force (FATF-GAFI).
[16] Such as Eurojust and Crimjust in Europe, or IberRed among Latin American countries, Andorra, Portugal and Spain.
[17] Chap. VII.

maintained, which does not preclude UNCLOS from being developed in light of new challenges and opportunities, as proven by the recent agreement on an international legally binding instrument under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (referred to as "BBNJ").

Seventh and last, while a regional approach may be warranted, the universal underpinning of UNCLOS must be preserved. I look forward to the SR's second report with a focus on regional and subregional practices and initiatives of international organisations. The UN Security Council has also taken a regional approach in addressing piracy off the coast of Somalia and in the Gulf of Guinea, while "*[a]ffirming* 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, as well as other ocean activities".[18] All Security Council resolutions on Somalia expressly state that they apply only to Somalia, do not affect the rights or obligations of UN members under international law, do not create customary international law, are given with the consent of the Federal Government of Somalia, and their exercise must not deny or impair the right of innocent passage in Somalia's territorial sea.[19] The same can be said of the Security Council resolutions on the Gulf of Guinea, in the last one issued the Council "*[reaffirmed]* that international law, as reflected in the United Nations Convention on the Law of the Sea (UNCLOS) of 10 December 1982, sets out the legal framework within which all activities in the oceans and seas must be carried out, including countering piracy and armed robbery at sea, and the provisions of this resolution apply only with respect to the situation in the Gulf of Guinea".[20]

Pursuant to these seven very broad observations, allow me Madame Chair, to draw some conclusions relevant for the way forward:

Firstly, I would like to reiterate my support for the work undertaken by the SR with regard to piracy and armed robbery at sea. I am confident that, under the leadership of Mr. Cissé, ILC's work will contribute to addressing the challenges that piracy and armed robbery at sea pose to the safety and security of international navigation.

Secondly, I welcome the development by the ILC of a set of draft articles with regard to piracy and armed robbery at sea that would contribute to legal certainty and international cooperation in safeguarding navigation at sea, accountability of perpetrators and very importantly victims' rights, within the strict framework of the United Nations Convention on the Law of the Sea.

Thirdly, I also welcome a regional approach that could improve arrangements and cooperation for prevention and repression of piracy and armed robbery at sea. I look forward to further clarification from the SR as to what said regional approach will

[18] See for example the preamble of UNSC Res. 1816 (2008).
[19] See for example UNSC Res. 1816 (2008) para. 9, UNSC Res. 1846 (2008) para. 11, UNSC Res. 1897 (2009) para. 8, UNSC Res. 1950 (2010) para. 8; UNSC Res. 2020 (2011) para. 10, UNSC Res. 2077 (2012) para. 13, and UNSC Res. 2608 (2021) para. 15.
[20] See, for example, the preamble of UNSC Res. 1816 (2008).

encompass and how it will be articulated in the legal framework of UNCLOS.

Fourthly, I believe that in addressing the new challenges posed by piracy and armed robbery at sea, much can be drawn from the abovementioned and other relevant existing international instruments and regional arrangements providing for cooperation and mutual legal assistance to fight transnational crime. For example, the United Nations Convention against Transnational Organised Crime provides that each State party shall adopt such legislative and other measures as may be necessary to establish as criminal offences those which are the object of the Convention (Arts. 5, 6 and 8). A similar provision might help address the problem identified in the report that UNCLOS does not impose on States an obligation to prosecute or exercise jurisdiction over acts of piracy committed on the high seas or in a place outside the jurisdiction of any State (para. 33). The UN Convention also provides that the offences referred to shall be deemed to be included as extraditable offences in any extradition treaty existing between States parties, that States parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them (Art. 16.3), and that if a State party makes extradition conditional on the existence of a treaty, it may consider this Convention the legal basis for extradition (Art. 16.4). Lastly, States parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention (Art. 18). This and other above-mentioned conventions provide for some solid ground to effectively tackle crime, while respecting the sovereignty of the States concerned.

Fifthly, regarding the text of Draft Articles proposed by the SR, I would suggest that **draft article 1** reads *"[t]he present draft articles apply to the prevention and repression of piracy and armed robbery at sea".* I believe that said formulation is sufficiently broad and flexible in particular at this early stage of our work.

Regarding **draft article 2**, I would suggest a rather different approach that, while preserving UNCLOS definition of piracy, establishes in which cases States shall take such measures as may be necessary to establish their jurisdiction over piracy. Said jurisdiction could be extended to piracy acts committed "from land" as proposed in paragraph (d), but I do not support the elevation of "any act of piracy in domestic law" to the level of an international rule.

Finally, regarding **draft article 3**, I am wary of the difficulties that we may encounter in defining "armed robbery at sea", which is not an established legal term under international law, its exact definitional elements are far from settled,[21] and domestic definitions tend to substantially differ. However, I could support provisions that may assist coastal States address the challenges posed by armed robbery at sea, fully in line with the legal status of the territorial sea as provided for in Article 2 of UNCLOS and other UNCLOS rules applicable to it. I believe that any criminal acts committed in the territorial sea that do not hamper the innocent passage of foreign ships, and any criminal acts committed in the internal waters of a State, are best addressed exclusively by the domestic laws and authorities of the coastal State; which does not preclude capacity building and other

[21] Petrig and Geiß, *supra* note 7, p. 73.

assistance being provided at the request of the coastal State that could assist the latter in strengthening its legal framework and operational capacities to prevent and eradicate crime.

To conclude, I thank Mr. Cissé for his work on such an important topic. My appreciation also goes to you, Mme. Chair, and to the rest of ILC members for a rich and fruitful debate.