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Provisional summary record of the 3620th meeting
Held at the Palais des Nations, Geneva, on Tuesday, 9 May 2023, at 10 a.m.

Contents

Present:

Chair:	Ms. Oral
Members:	Mr. Argüello Gómez
	Mr. Asada
	Mr. Cissé
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Ms. Galvão Teles
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Mingashang
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Tsend
	Mr. Vázquez-Bermúdez

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 10.05 a.m.

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

Mr. Savadogo said that he wished to thank the Special Rapporteur for his well-researched first report on the topic "Prevention and repression of piracy and armed robbery at sea". According to his own research, there were provisions criminalizing piracy in the criminal codes of 22 States, including Türkiye, which was not a party to the United Nations Convention on the Law of the Sea. Some States parties to the Convention had adopted specific laws on the repression of piracy, namely France, India, Ireland, Italy and Mauritius. The United States had also adopted such a law but was not a party to the Convention. Seven landlocked States had provisions criminalizing maritime piracy in their criminal codes, namely Austria, Azerbaijan, Czechia, Kazakhstan, Liechtenstein, the Republic of Moldova and Serbia. Several agreements on the extradition of pirates had been concluded. Regarding judicial cases, while the case concerning the *"Enrica Lexie" Incident (Italy v. India)* before the Permanent Court of Arbitration had raised issues of both an internal and an international nature, pirates had also been prosecuted before the national courts of various States, namely France, Germany, Japan, Kenya, the Kingdom of the Netherlands, the Republic of Korea, Seychelles, Spain and the United States of America.

Piracy was subject to a classic customary regime. As indicated by the Special Rapporteur in his first report, piracy was defined in article 101 of the 1982 United Nations Convention on the Law of the Sea, which should be read in conjunction with article 102. Article 101 built on the definition set forth in the 1958 Convention on the High Seas. Under the 1982 Convention, piracy entailed the commission of "acts of violence" or "depredation". The term "violence" could include not only physical violence, but also psychological violence exerted through intimidation in the form of serious threats against life or physical safety. Only individuals could be guilty of piracy. Under article 102 of the 1982 Convention, piracy could also result from mutiny, which was defined as a collective act of rebellion against the official authority on board a warship or government ship, in which case the acts in question were assimilated to acts committed by a private ship. The seizure of warships suspected of piracy raised practical issues, in view of the immunity enjoyed by warships pursuant to article 32 of the Convention, as noted by the International Tribunal for the Law of the Sea in its orders of 15 December 2012 in the *"ARA Libertad" (Argentina v. Ghana)* case and of 25 May 2019 in the *Case Concerning the Detention of three Ukrainian naval vessels (Ukraine v. Russian Federation)*. Acts of piracy were committed on the high seas and were motivated by *animus furandi*, or the intention to rob. Both article 15 of the Convention on the High Seas and article 101 of the 1982 Convention referred to acts committed "for private ends". That was an important precision, since it excluded from the definition of piracy any act committed for political ends. The question of the use of violence against ships for political ends had been raised in relation to several cases, such as the *Santa Maria* case of 1961, the *Anzoátegui* case of 1963, the *Achille Lauro* case of 1985 and the *City of Poros* case of 1988.

Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation covered certain acts that could be perceived as piracy; however, it could not be said to expand the concept of piracy. The Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, of the International Maritime Organization (IMO), used the definition of piracy established in the 1982 United Nations Convention on the Law of the Sea, as did the Charter on Maritime Security and Safety and Development in Africa (the Lomé Charter). Article 8 of the Lomé Charter promoted the harmonization of national legislation with the 1982 Convention; article 32 promoted cooperation in combating crime at sea; and article 40 promoted judicial and legal cooperation. Article 28F of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights defined piracy as an illegal act on the high seas in the terms used in the 1982 Convention but also employed the term "boat"; under French maritime law, the French equivalent, "*bateau*", referred to vessels which navigated in inland waters. The international jurisdiction of the African Court of Justice and Human Rights enabled it to prosecute pirates. Security Council resolution 1816 (2008) treated "acts of piracy" and "armed robbery at sea" in the same way. IMO defined the concept of "armed robbery" in the

terms used to define piracy in the 1982 Convention but specified that “armed robbery” was directed against a ship within a State’s jurisdiction.

The repression of piracy and armed robbery at sea raised questions around two major issues: the right of hot pursuit and the entitlement of ships and aircraft to seize a ship on account of piracy. The right of hot pursuit could be exercised by the coastal State within the internal waters, archipelagic waters, territorial sea or contiguous zone of that State. According to article 111 of the United Nations Convention on the Law of the Sea, hot pursuit must not be interrupted, and ceased as soon as the ship pursued entered the territorial sea of its own State or a third State. Security Council resolution 1816 (2008), however, did not place any such restriction on hot pursuit; in paragraph 7, it provided that States cooperating with the Transitional Federal Government of Somalia were entitled to “enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea”. The right of hot pursuit provided for in resolution 1816 (2008) could be exercised on the high seas but also within territorial waters, because its purpose was to repress both acts of piracy, which were committed on the high seas, and “armed robbery at sea”, which was committed in waters within a State’s jurisdiction. Those spatial and material extensions of the notion of piracy did not constitute real derogations from the existing rules on the repression of acts of piracy, however. They had been adopted with the consent of the Transitional Federal Government of Somalia, and paragraph 9 of resolution 1816 (2008) provided that: “The authorization provided … applies only with respect to the situation in Somalia and shall not affect the rights or obligations or responsibilities of member states under international law, including any rights or obligations under the Convention, with respect to any other situation.”

The expansion of the right of hot pursuit to territorial waters was also provided for in the Maritime and Airspace Security Cooperation Agreement of the Caribbean Community, article 8 of which provided that: “This Agreement constitutes permission by each State Party for any other State Party to conduct law enforcement operations in the waters of the first-mentioned State Party to address any activity likely to compromise the security of the Region or of any State Party where: (a) on notification of the proposed operation, permission is granted.” Article 1 of the Memorandum of Understanding on the Establishment of a Sub-regional Integrated Coast Guard Network in West and Central Africa defined “piracy” in the same terms as the United Nations Convention on the Law of the Sea. Article 24 of the Memorandum of Understanding provided that an “act of police in a foreign sector” could be carried out with the authorization of a competent agent, and thus permitted foreign States to intervene in waters under the jurisdiction of another State in order to repress piracy. Further research on that point could be useful to determine whether the prosecution of suspected pirate ships in internal waters was provided for in other legal instruments. In any case, it seemed to be the established practice of Central African States.

Because of the perpetuation of the phenomenon of piracy, for protection purposes, some States embarked armed security personnel on board commercial vessels flying their flag. Modern forms of the defensive armament of commercial ships included the use of privately contracted armed security personnel, in addition to protection detachments composed of police and military units. The use of armed security personnel, particularly in high-risk areas, raised complex questions about the different legal forms that security detachments could take, the right of innocent passage of commercial ships manned by armed guards and the powers and legal status of those armed guards. Vessel protection detachments, as distinguished from privately contracted armed security personnel, were mentioned in article 7 of the Code of Conduct concerning the repression of piracy and armed robbery against ships in the Western Indian Ocean and the Gulf of Aden and article 9 of the Code of Conduct concerning the repression of piracy, armed robbery against ships and illicit maritime activity in West and Central Africa. A similar term was used in the national laws of Belgium, Cyprus, Denmark, Finland, Italy, the Kingdom of the Netherlands, Malaysia and Malta. The United States operations “Guardian Mariner” and “Vigilant Mariner” had consisted in the deployment of military personnel to ensure the security of ships, and it had been reported that French marines were deployed on tuna-fishing vessels operating in the Indian Ocean and on commercial vessels considered strategic and particularly vulnerable operating in high-risk areas. Operation Atalanta, of the European Union Naval Force (EUNAVFOR) Somalia, had a mandate, *inter alia*, to protect ships chartered for the World Food Programme, including by deploying armed guards on the ships concerned.

The embarkation of armed personnel presupposed the agreement of the flag State, as exemplified by the epistolary agreement in that regard between France and Jordan of 1 December 2009. Operation Atalanta used ships allocated to it by participating States. Such vessels often operated under the double flag of the organization and the State concerned. That was the case for the ships used by the Regional Security System for the Eastern Caribbean. Article 93 of the United Nations Convention on the Law of the Sea referred to "ships flying the flag of the United Nations, its specialized agencies and the International Atomic Energy Agency". The "dual flag" solution made it possible to maintain a connection to a flag State and consequently to the civil and criminal laws of that State and to the treaties to which the State was a party. In some cases, so-called "private" companies providing coastal surveillance were jointly composed of military officers and local security personnel. For example, the security situation in the Gulf of Guinea obliged shipowners to enter into agreements with national navies, which hired out their protection services, often in territorial waters.

The multiplication of private maritime security companies and the uncertainty around their status and powers had prompted IMO to provide them with a legal framework in the form of the revised interim guidance to shipowners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area in the Indian Ocean. In the revised interim guidance, "private maritime security companies" were defined as "private contractors employed to provide security personnel, both armed and unarmed, on board for protection against piracy", and "privately contracted armed security personnel" were defined as "armed employees of private maritime security companies". A specific instrument had been issued on protection from piracy off the coast of Somalia, which had in turn led to the development of a maritime protection industry dominated by American and British companies organized under the International Association of Maritime Security Professionals.

In any event, the use of armed guards required authorization, the legal bases for which were diverse. Authorization could be granted pursuant to a law aimed at repressing piracy and other illicit acts at sea, as was the case in Belgium, Cyprus, France, Germany, Greece, Japan, Malta, Spain, Switzerland and the United States. In other places, it could be granted pursuant to an administrative act, as was the case in Denmark, Spain, Djibouti, Finland, Kenya and Norway. In Antigua and Barbuda, Bermuda, the Cook Islands, Malta, the Marshall Islands and Switzerland, authorization could be granted through a circular or decision. Some States, such as Luxembourg, relied on information published on the website of the maritime authority. Some States, such as Indonesia, and one entity, the European Union, remained opposed to the embarkation of armed guards on board commercial vessels.

Under article 17 of the United Nations Convention on the Law of the Sea, vessels of all States, whether coastal or landlocked, enjoyed the right of innocent passage through territorial seas. According to article 19 (1) of the Convention, passage was innocent so long as it was not prejudicial to the peace, good order or security of the coastal State, and such passage must take place in conformity with the Convention and with other rules of international law. Article 19 (2) of the Convention provided a list of activities that were "prejudicial to the peace, good order or security of the coastal State" if carried out in the State's territorial sea. While the list did not include piracy, the reference to "any other activity not having a direct bearing on passage" in article 19 (2) (l) could be interpreted as including private vessel protection activities. Several States were opposed to the passage of commercial vessels carrying armed guards on board through their territorial seas. Such States could avail themselves of article 21 of the Convention, on the laws and regulations of the coastal State relating to innocent passage, or article 25, on the rights of protection of the coastal State, to adopt measures restricting passage. The transport of weapons by vessels anchored in the State's port or passing through its territorial sea would thus be considered a violation of that State's law. In such cases, privately contracted armed security personnel stored their weapons in floating armouries in the high seas before entering the State's territorial sea.

State practice in that regard was very diverse. States such as Saudi Arabia and India allowed the guards employed by private ship protection companies to carry weapons in their territorial seas. Other States required notification or even prior authorization when the vessels in question crossed their territorial seas or contiguous zones before arriving at port or at

anchorage, harbour or terminal facilities. State practice was not limited to the sole circumstance of the presence of armed guards on board commercial vessels; there was also the particular case of the use of patrol vessels belonging to private companies for the purpose of carrying out escort missions, as exemplified in the case of the merchant vessel *Seaman Guard Ohio*, which had flown the flag of Sierra Leone and whose owner, AdvanFort, was a United States military maritime security company. The vessel had been boarded on 12 October 2013 by the Indian Navy 15 miles off the Indian coast and had been escorted to the port of Thoothukudi in the State of Tamil Nadu. It had later been released.

International law did not specifically regulate the legal powers of private security companies. Reference could be made, however, to a body of norms contained in several legal instruments, namely: the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict; the International Code of Conduct for Private Security Service Providers; and the IMO interim guidance to private maritime security companies providing privately contracted armed security personnel on board ships in the High Risk Area. The powers of armed guards included the use of force. There was no general prohibition on the use of force in police activities at sea. On that point, the International Tribunal for the Law of the Sea had noted, in its judgment in the case concerning *M/V "SAIGA" (No. 2) (Saint Vincent and the Grenadines v. Guinea)*, that:

> Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

The Court had reiterated its position in that regard in its judgment in the case concerning *M/V "Virginia G" (Panama/Guinea-Bissau)*. In the context of the repression of piracy, the use of force must be reasonable. That criterion was enshrined in article 14 (1) (b) of the Caribbean Community Maritime and Airspace Security Cooperation Agreement and was also included in the IMO revised interim guidance to shipowners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area.

In accordance with article 21 of the Convention on the High Seas and article 107 of the 1982 United Nations Convention on the Law of the Sea, only warships or military aircraft, or other ships or aircraft on government service authorized to that effect, could carry out a seizure on account of piracy. It was unclear whether ships with privately contracted armed security personnel on board could carry out such a seizure. Article 107 of the 1982 Convention specified that the other ships or aircraft in question should be "clearly marked and identifiable as being" on government service and authorized to that effect. In the commentary to draft article 45 of the Commission's draft articles concerning the law of the sea, it was explained that the draft article in question clearly did not apply in the case of a merchant ship that had repulsed an attack by a pirate ship. Indeed, the seizure covered by article 19 of the Convention on the High Seas and article 105 of the 1982 Convention should be understood in the context of maritime warfare. It was an act whereby the commander of a warship substituted his or her authority for that of the captain of the seized vessel. It could be agreed that the "seizure" of a pirate ship by armed personnel operating on board a merchant ship was a different case. In any event, article 106 of the 1982 Convention stated that: "Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure." That provision raised a liability issue.

Concerning the liability of armed security teams, it was important to draw a distinction between two different scenarios. The first concerned on-board security teams consisting of soldiers or police officers of a particular State. In the *Enrica Lexie* incident, the question had arisen as to whether military personnel on board merchant ships could be considered organs of the State within the meaning of articles 4, 5 and 7 of the Commission's articles on

responsibility of States for internationally wrongful acts. Italy had claimed sovereign immunities in respect of Italian marines who had fired fatal shots at Indian nationals mistaken for pirates. Alongside the arbitral proceedings, Italy had submitted a request for provisional measures to the International Tribunal for the Law of the Sea in accordance with article 290 (5) of the United Nations Convention on the Law of the Sea. In its order of 24 August 2015, the International Tribunal had prescribed that the parties should suspend all court proceedings and refrain from initiating new ones which might aggravate or extend the dispute submitted to the tribunal constituted under annex VII of the Convention or which might jeopardize or prejudice the carrying out of any decision which the arbitral tribunal might render. In its award of 21 May 2020, the tribunal constituted under annex VII had declared that the marines were State officials of Italy because they had been and remained members of the Italian Navy and officers and agents of the judicial police entrusted with guaranteeing the maritime defence of the State. The tribunal had observed that, during the incident, the marines had been under an apprehension of a piracy threat and had engaged in conduct that was in the exercise of their official functions as members of the Italian Navy and of a vessel protection detachment. The tribunal had found that the marines were entitled to immunity in relation to the acts that they had committed during the incident.

The second scenario concerned private maritime security companies. Such companies had no official status under the United Nations Convention on the Law of the Sea, which raised questions regarding their liability, including for any property damage or personal injury that they might cause. In that regard, reference could be made to article 5 of the Commission's articles on State responsibility, which concerned the "conduct of persons or entities exercising elements of governmental authority". The IMO revised interim guidance to shipowners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area set out the requirements for providing such services. They concerned, *inter alia*, the disclosure of information on company ownership, the extent of insurance cover and personnel selection and vetting. The same requirements were laid down in the national legislation of Antigua and Barbuda, the Bahamas, Malta and the United Kingdom. In France, the law on private maritime security activities stated explicitly that authorization to provide maritime security services did not confer any State authority on the company or person so authorized, which encouraged private maritime security companies to take out insurance to cover their personal liability. Under the national law of Belgium, Germany and the United Kingdom, private maritime security companies were required to have insurance cover. In the legislation of certain States, for example the Bahamas, the Marshall Islands and Saint Vincent and the Grenadines, it was made explicit that the Government would not accept liability for the illegal acts of private maritime security companies. According to the draft of a possible convention on private military and security companies submitted to the Human Rights Council, States would be responsible for the activities of such companies.

Other issues, such as the relationship between the captain of the ship and the commander of the armed forces on board, could be addressed at a later stage of the Commission's work on the topic.

Mr. Patel said that, in paragraph 38 of the report, the Special Rapporteur argued that it was essential to clarify the definition of maritime piracy and distinguish it from armed robbery at sea. However, the justification given for that argument, namely, that pirates were moving from the high seas to the coasts and were operating in the internal waters and territorial seas of coastal states, seemed inadequate.

The statistics cited in the report needed to be updated. The data gathered from governmental and private organizations, including merchant shipping and insurance companies, suggested that incidents of piracy were becoming less frequent in some of the most affected areas, such as the coast of Somalia, the Gulf of Guinea, the Strait of Singapore and South America. The International Maritime Bureau of the International Chamber of Commerce had recently recorded the lowest level of global piracy and armed robbery incidents since 1993. In addition, both piracy and armed robbery at sea were defined in the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships.

With regard to the definitions of piracy and armed robbery at sea, the Special Rapporteur might wish to provide further guidance on how his proposed clarification exercise was related to the Commission's previous work. According to the commentary to draft article 39 of the draft articles concerning the law of the sea, for example, piracy could not be committed within the territory of a State or in its territorial sea. In the same commentary, it was stated that: "The Commission considers … that where the attack takes place within the territory of a State, including its territorial sea, the general rule should be applied that it is a matter for the State affected to take necessary measures for the repression of the acts committed within its territory."

In its previous work, the Commission had refrained from defining armed robbery at sea. He therefore saw no reason why the Commission should now seek to distinguish acts of piracy from acts of armed robbery at sea. The drafters of the United Nations Convention on the Law of the Sea had purposefully chosen to define the term "piracy" and had concluded, *inter alia*, that the intention to rob (*animus furandi*) was not required as a defining element of piracy; that acts of piracy must be committed for private ends; and that piracy could be committed only by private ships.

In paragraph 38 of the report, the Special Rapporteur stated that piracy could "no longer be confined to defined geographical limits of the sea", since pirates were moving from the high seas to the coasts. In his view, the Commission should not deviate from the definitions set out in the United Nations Convention on the Law of the Sea. The crimes of piracy and armed robbery at sea should under no circumstances be merged, and piracy should remain a crime that was committed on the high seas. Such caution was warranted in view of State practice, doctrine and the case law of the previous decade.

He agreed that the Commission should examine such issues as the use of private security personnel on board merchant ships. International law was silent on such issues. IMO had issued interim guidance to private maritime security companies providing privately contracted armed security personnel on board ships in the High Risk Area in view of the increased number of operators choosing to employ privately contracted armed security personnel on board their ships in that area of the Indian Ocean. The interim guidance provided a set of verifiable standards that were not legally binding. The increased number of private maritime security companies, particularly in the Asia-Pacific region, could be seen as a positive development, since they provided a deterrent against pirates and armed robbers.

In August 2011, the Government of India had published guidelines on the deployment of armed guards on Indian merchant ships. The deployment of armed security guards on a merchant ship had implications for its freedom to transit the territorial waters of any State under the concept of "innocent passage". In addition, if a merchant ship with weapons on board docked at a commercial port of a coastal State, it would cause alarm among customs, police and other security agencies tasked with law enforcement and coastal security. It was for that reason that IMO left the implementation of its interim guidance to the flag States concerned. In his second report, the Special Rapporteur might wish to address the legal and governance framework governing mutual legal assistance treaties and the extradition of pirates between States. In that connection, given the human rights issues raised in the report, it would be beneficial to carry out a specific analysis of the question and the best practices that could be learned from both the *ad hoc* and the more institutionalized mechanisms that had been operating over the previous decade.

With regard to the partitioning of the marine environment into several maritime spaces, which the Special Rapporteur had identified as a shortcoming, he wished to reiterate one of the conclusions set out in the Commission's commentary to draft article 39 of the draft articles concerning the law of the sea: "Piracy can be committed only on the high seas or in a place situated outside the territorial jurisdiction of any State, and cannot be committed within the territory of a State or in its territorial sea." As piracy was defined in the United Nations Convention on the Law of the Sea as a crime committed "on the high seas", the relevant provision was also applicable to the exclusive economic zone. The Special Rapporteur argued that pirates were able to escape and avoid hot pursuit, citing the situation in Somalia as an example. However, more representative examples from State practice needed to be provided before changes could be proposed to the definition of piracy set out in article 101 of the Convention.

He appreciated the Special Rapporteur's efforts to highlight the inconsistencies in case law and State practice with regard to piracy and armed robbery at sea. In future reports, it would be useful if the Special Rapporteur could explain how the United Nations Convention on the Law of the Sea could be used as a point of reference to achieve greater consistency.

In his report, the Special Rapporteur argued that it was difficult to distinguish between the "private ends" that characterized acts of piracy and political ends. For a clearer understanding of that distinction, reference could be made to the definition contained in article 15 of the Convention on the High Seas and that proposed at the 1971 session of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction. It was explained in a footnote accompanying the definition proposed at the 1971 session that the words "for private ends" had been omitted from one of the subparagraphs of the relevant article of the Convention on the High Seas "in order to include within the definition … acts of violence or depredation committed for professed political ends". Furthermore, it was stated explicitly in the commentaries to the United Nations Convention on the Law of the Sea that acts having political motives had been excluded in order to limit the definition. It could therefore be concluded that the expression "for private ends" in the definition of piracy should not be a source of ambiguity.

He hoped that his clarifications and those of other members would enable the Special Rapporteur and the Commission to provide clear guidance to States, international organizations and the international community as a whole. It was important to ensure that the Commission's work on the topic remained focused on the key issues. If necessary, the scope of the project should be refined to ensure that tangible results were achieved.

Mr. Fathalla said that the Special Rapporteur was to be commended for a clear and well-structured first report. The six shortcomings of the applicable international legal framework identified in paragraphs 44 to 55 of the report demonstrated the complexity of the topic. The report also revealed that there was great variation in the legislative and judicial practice of States with regard to piracy and armed robbery at sea.

In his view, there were several points that the Commission needed to bear in mind in order to produce an acceptable legal text within the framework of the progressive development of international law while taking into account the concerns expressed by States. The United Nations Convention on the Law of the Sea should serve as the point of departure for the preparation of more specific and detailed legal texts. Future legal rules should complement the Convention, perhaps by providing a more precise interpretation of its provisions or reflecting customary rules that already existed. Equally, when drafting a future text, the Commission should take into consideration the common features of State practice from around the world.

The Commission should not lose sight of the objective of its work on piracy. Piracy was defined under international law as a crime committed on the high seas. That definition provided the basis for the exercise by States of their jurisdiction over offences committed by foreign nationals against ships located outside their territory. The definition needed to be broad enough to encompass the very diverse practice described in the report. However, the Commission should not limit itself to defining piracy; it should also seek to develop the law on the prevention and repression of piracy. In other words, it should be concerned not only with the power of States to exercise universal jurisdiction but also with their obligations with regard to combating piracy.

The Commission should bear in mind the gravity of the crime. As noted in paragraph 55 of the report, States had a double legal obligation: to adopt legislation and to cooperate in the prevention and repression of piracy and armed robbery at sea.

The Commission should consider the views expressed by States at the seventy-fourth and seventy-seventh sessions of the General Assembly. It should also consider relevant Security Council resolutions. It was important to properly define the concept of universal jurisdiction and the right of hot pursuit, which were directly linked to the need to identify the crime scene clearly and precisely. The fact that the maritime environment was divided into five zones, and therefore five such scenes, explained the rather different and sometimes divergent views of States in that regard. The same could not be said of the land-based

dimension of piracy. As noted in paragraph 45 of the report, modern piracy no longer took place exclusively on the high seas but was increasingly seen along coastlines.

A clear distinction should be drawn between piracy and armed robbery at sea, as the rights and obligations of States were completely different in each case. It was particularly significant that piracy was defined as occurring on the high seas, as States therefore had universal jurisdiction over the crime. Armed robbery at sea, by contrast, was defined as occurring in territorial waters and therefore fell within the jurisdiction of the coastal State. Given those differences, the definition of armed robbery at sea gave the coastal State greater room for manoeuvre. It was important to consider the legal issues raised in paragraph 318 of the report in depth. In that connection, he agreed with the Special Rapporteur's conclusions.

There was also a need to carry out an in-depth examination of all the shortcomings of the applicable international legal framework identified in the report so that they could be clearly addressed in future legal texts. Examples included how to qualify attacks committed against fixed platforms; whether the requirement of two ships was appropriate; whether acts committed for political ends should be excluded from the scope of piracy; and what approach should be taken in respect of acts of piracy committed by a government ship whose crew had mutinied and taken control.

He had no comments on the Special Rapporteur's proposed draft article 1. With regard to draft article 2, he wondered why subparagraph (a) was limited to acts committed "for private ends" by the crew or the passengers of a private ship and why, in subparagraph (a) (i), it was specified that the act was directed "against another ship". It was unclear how the expression "on the high seas" in subparagraph (a) (i) and the expression "outside the jurisdiction of any State" in subparagraph (a) (ii) were related. In addition, he would be grateful if the Special Rapporteur could provide detailed explanations regarding subparagraph (d). With regard to draft article 3 (a), the use of the word "ship" raised the same problems as in draft article 2. In addition, the inclusion of the words "other than an act of piracy" gave the impression that an act of piracy could be committed in a State's internal waters, archipelagic waters and territorial sea. Further clarification was needed in that regard.

Mr. Forteau said that he wished to congratulate the Special Rapporteur on the considerable work he had done on a topic that was of great importance to many States and individuals. The Special Rapporteur's first report was rich in content and detail and, together with the extremely useful memorandum prepared by the secretariat (A/CN.4/757), would greatly assist the Commission's understanding of contemporary practice in respect of piracy and armed robbery at sea.

In terms of the organization of the content of both documents, he felt that a more thematic, synthesized approach would have highlighted the disparities and similarities identified in the study of practice more effectively. In terms of the content, it was regrettable that the *travaux préparatoires* of the 1982 United Nations Convention on the Law of the Sea had not yet been studied in detail, given the centrality of the Convention to the topic.

With regard to the analysis of State practice contained in the report, and specifically the region-by-region overview provided, he wished to highlight the importance of ensuring that the legislative and judicial practice of States was described in a manner consistent with their national legislation, which was not an easy task since the Special Rapporteur and the members of the Commission could not be expected to be experts in every domestic law. He believed that he had identified a number of assertions in the region-by-region overview that did not accurately reflect the provisions of the national laws cited, and wished to draw the Special Rapporteur's attention to those assertions that should be reviewed so that the corresponding conclusions could be adjusted accordingly.

In paragraphs 71 and 80, for example, there were references to national legislation which indicated that piracy was outlawed "on the continental shelf" as well as on the high seas. That was a somewhat surprising affirmation given that piracy was normally committed on the surface of the sea, not the seabed. Furthermore, it was stated in numerous paragraphs of the first report either that there was no law expressly defining and criminalizing armed robbery at sea or that "armed robbery at sea is not criminalized" or that "armed robbery at sea is neither defined nor criminalized" in the national legislation of the country or countries concerned. He doubted that those statements were always correct. While it was true that some

national legislations did not specifically criminalize armed robbery at sea according to the formula used by the Special Rapporteur, it was reasonable to assume that most, if not all, of them criminalized armed robbery throughout their national territory – and thus, by implication, even if not explicitly, in their territorial seas and internal waters. Armed robbery at sea was thus indeed a crime in those countries, as the Special Rapporteur himself suggested in paragraph 66, in deducing that armed robbery would be "an ordinary crime under the Penal Code … whether committed at sea or in the land territory". If that was indeed the case, there was a risk of national practice being misunderstood whenever the Special Rapporteur asserted that armed robbery was not criminalized at all in certain national legislations.

In the particular case of France, it was, for instance, incorrect to state, in paragraph 243 of the first report, that armed robbery at sea was neither defined nor criminalized in national law. A 1994 law concerning police powers at sea was cited in support of the assertion but that law had been amended in 2011, by Act No. 2011-13, and in 2019, by Order No. 2019-414. Furthermore, the French Criminal Code criminalized armed robbery both generally, in article 311-8, and specifically at sea, in article 224-6, which stated that "the seizure or taking over by violence or threat of violence of a plane, ship or any other means of transport on board which persons have taken their places, or of any permanent platform situated on the continental shelf, is punished by twenty years of criminal imprisonment". The same problem was apparent in the description of the national legislation of Monaco. Paragraph 247 of the report asserted that armed robbery was neither defined nor criminalized in Monegasque legislation, and yet, according to his own research, article L.633-25 of the country's Maritime Code criminalized "acts of violence against a person on board a vessel" and articles 311 and 312 of its Criminal Code criminalized armed robbery in general.

The Special Rapporteur's assertion, in paragraph 230, that some States had defined the crime of piracy but did not impose penalties was also questionable. It was hard to see how an offence could be defined and criminalized and yet not carry penalties, unless the intended meaning of the assertion was that no penalties were defined specifically for the offence. The statement was of particular concern because the Special Rapporteur included France in the category of States that did not impose penalties, whereas the French Criminal Code did in fact establish such penalties.

A further concern, related to the overview of case law provided in the report, was that the various references provided suggested that the Special Rapporteur had conducted an exhaustive study. However, that was apparently not the case and, consequently, the practice identified could not be considered complete. With regard to the case law of France for instance, it would appear from paragraphs 263 to 265 that the decisions cited by the Special Rapporteur were the only relevant judgments to have been issued by French courts, and yet there were at least eight other decisions that were relevant to the topic. It should be made clear that the Special Rapporteur's overview was illustrative, not exhaustive, because that fact changed the implications of the statistical conclusions contained in paragraph 275, *inter alia*, quite drastically. In addition, the statistical information provided in paragraphs 211 and 255 could have been presented in a clearer fashion.

A final point related to practice was that the conclusions drawn by the Special Rapporteur in paragraph 314, in which he summarized his analysis of national legislation, were somewhat overstated. For instance, while the conclusion that "to a large extent, the crime of armed robbery at sea remains undefined, considering the practice of States" was clearly based on observations made earlier in the report, it could not be said with certainty that all those observations actually reflected current State practice. The Special Rapporteur's conclusions should therefore be approached with caution, at least at the current stage of consideration of the topic. To obtain a more accurate picture of current State practice, it might be useful to include in the Commission's annual report a paragraph specifically drawing States' attention to the domestic practice that had been identified to date in order to give them the opportunity, in the Sixth Committee later in 2023, to specify what their current practice actually entailed and to provide any necessary clarification.

Turning to the current state of the international legal framework, he said that he did not share the view, set forth in paragraphs 139 and 149, that, within the current framework, acts containing all the elements of maritime piracy committed in the territorial sea or internal waters could "only be characterized as armed robbery". By virtue of their territorial

sovereignty, States were free to choose which criminal offence to apply and to characterize acts committed in their territorial sea or internal waters as acts of piracy. International law did not prohibit them from criminalizing as acts of piracy acts committed in their territorial sea or internal waters. Moreover, the fact that several States had opted to characterize acts committed in their territorial sea as piracy constituted a relevant practice that should be taken into account in the assessment of the international legal framework.

The Special Rapporteur appeared to affirm, in paragraph 200, that that practice ran counter to article 101 of the United Nations Convention on the Law of the Sea. That affirmation was inaccurate, however, as the Convention did not prohibit States from characterizing acts committed in waters within their jurisdiction as piracy. The practice also raised the question of whether there was actually a clear-cut distinction between piracy and armed robbery at sea. The Special Rapporteur perceived "a fundamental need" for that distinction, and from the point of view of the text of the Convention, which characterized as piracy only acts committed in certain spaces, the distinction was certainly beyond question. On the other hand, when considered from the perspective of the elements that States might or might not include in the characterization of the offences in their national criminal legislation, the distinction was less clear-cut.

An additional definitional concern was that, in paragraph 47, the Special Rapporteur appeared to question whether motive should be one of the defining elements of the crime. However, the memorandum prepared by the secretariat explained the reasons – which were quite legitimate – for the inclusion of that criterion in the Commission's 1956 draft articles concerning the law of the sea and the United Nations Convention on the Law of the Sea. More generally, the shortcomings in existing conventions that the Special Rapporteur identified in paragraphs 44 to 55 of the report would have to be analysed closely in order to ascertain beyond doubt that the shortcomings genuinely existed and that all members of the Commission agreed with the Special Rapporteur's proposed interpretation of the relevant international legal framework.

He disagreed with the Special Rapporteur on a number of points raised in paragraphs 44 to 55. For example, he was puzzled by the assertion, in paragraph 50, that a pirate ship would lose its flag or nationality simply by virtue of its crew becoming pirates, given that the provisions of article 104 of the United Nations Convention on Law of the Sea provided otherwise. He had serious reservations about what he saw as the dangerous proposition in paragraph 52 that merchant ships "should be able to respond immediately in self-defence". He also questioned whether it was appropriate to affirm that "the absence of legislation should not serve as grounds not to pursue and arrest a pirate", as stated in paragraph 54. The assertion seemed contrary to the principle of *nullum crimen sine lege* and the requirement that there should be a legal basis under national law for any constraint of liberty, including arrest and detention at sea. The European Court of Human Rights, for example, had emphasized in 2010, in *Medvedyev and Others v. France*, that deprivation of liberty at sea must have a legal basis that was foreseeable and had "the requisite quality to satisfy the general principle of legal certainty".

With regard to the future direction of the Commission's work on the topic, it would have been helpful if the Special Rapporteur had identified the issues to be covered and suggested ways forward in his first report, especially since the 2019 syllabus was open-ended and, despite opening many doors onto the topic, proposed no clear direction. In paragraph 31, the Special Rapporteur put forward three alternatives – codification, progressive development or a combination of the two in a single document – but did not state a preference or, more importantly, indicate in respect of which practices and norms a decision to adopt one or other of those alternatives was required. That imprecision raised various questions. Was it simply a question of defining piracy? Would the Commission be limiting itself to existing obligations under international law or would it propose model legislation? Was it a question of establishing new international obligations, such as an obligation to exercise universal jurisdiction? Was the intention to regulate national criminal procedure? In short, what were the Commission's objectives and what was it aiming to achieve through its consideration of the topic?

More specifically, the Special Rapporteur gave no indication of what should be done to address the various "shortcomings" in the United Nations Convention on the Law of the

Sea that he identified. At times he appeared to suggest that the Convention should be amended and at others simply that its provisions should be fleshed out and clarified. In any case, whatever his intention, the Commission could hardly develop law in the area *contra legem* and could not interfere with the *acquis* of the Convention.

With regard to the scope of the study, he considered the first report to be, if not ambiguous, at least oblique. It addressed a large number of issues of differing natures without indicating whether each one actually fell or did not fall within the scope of the topic. Some of the issues addressed appeared to fall outside the Commission's area of expertise. For other issues, their possible inclusion required discussion. The issue of aggravating and mitigating circumstances, mentioned in paragraph 43, was, in his view, a matter of national criminal law into which the Commission should not stray. Similarly, several passages in the report, including, for example, paragraphs 86 and 212, dealt with the penalties or "types of penalties" applicable to piracy, which were for national criminal law and national courts, not international law, to determine. The only penalty that might perhaps warrant consideration from the perspective of international law was the confiscation of a ship, which was mentioned in various paragraphs. Confiscation had implications for freedom of navigation and compliance with article 292 of the United Nations Convention on the Law of the Sea, concerning the prompt release of vessels and crews, as well as in respect of the system of immunities, as had been demonstrated, albeit in a very different context, by the *Ara Libertad* case between Argentina and Ghana.

A number of passages in the report mentioned the "burden of proof" or "adduction of evidence" before national courts. Such matters should also be excluded from the topic. The question of whether national courts had jurisdiction to rule on acts of piracy in the absence of a definition of such a crime in national law, which was addressed in paragraph 103, should likewise be excluded in that it was a matter of national law, not international law, that concerned the internal organization of each State and the manner in which international law was incorporated into national law. The immunity enjoyed by government ships, which was mentioned in paragraph 35, also fell beyond the scope of the topic.

The right of pirates to a fair trial, which was considered in paragraph 114, did, on the other hand, fall within the scope of the Commission's work. The distinction and similarities between piracy and other associated forms of crime at sea, to which the Special Rapporteur had referred during his oral presentation of the report, should also be addressed, as should the presence of private security personnel on board ships for protection purposes, as noted by Mr. Savadogo and Mr. Patel. Whether the Commission should discuss, as appeared to be suggested in paragraph 224, the principle of *male captus, bene detentus* was a matter open to discussion. The Commission would also need to discuss whether "thefts in anchorage areas or from ships at berth", which were mentioned in paragraph 12, should be included, notably in the light of Mr. Ouazzani Chahdi's comments regarding the geographical scope of the present topic. Given that the Special Rapporteur indicated, in paragraph 291, that there was a difference in legislative practice in respect of piracy in peacetime and in wartime, a decision on whether the topic covered peacetime only or also encompassed the law of armed conflict would likewise be needed.

As a final observation on the scope of the topic, he noted that paragraphs 206 *et seq.* of the memorandum prepared by the secretariat, which were devoted to the practice of the Security Council and the General Assembly, showed that there was a vast range of complex issues that might potentially be covered, including cooperation and coordination, precautionary measures, the obligation of States concerning criminalization, efforts to prevent the illicit financing of acts of piracy and the laundering of its proceeds, and detention at sea. The Commission needed to decide whether or not it intended to address all of those issues.

Before any draft articles were sent to the Drafting Committee, and in order to agree on the scope of the topic and the future direction of the study, an in-depth discussion, ideally on the basis of a document prepared by the Special Rapporteur, would be helpful. Otherwise, the Drafting Committee was likely to have great difficulty determining what was expected of it. One possibility was to prepare a road map, as the Commission had done in the early stages of its consideration of the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)". A general framework for the Commission's consideration of that topic had

been prepared, which had consisted of a list of questions and issues to be addressed and had proved very useful.

Turning lastly to the draft articles themselves, he said that explanations of the rationale underpinning each of them would have been helpful. Draft article 1 should be left in abeyance until the Commission had decided, under the guidance of the Special Rapporteur, on the direction that the topic should take. In draft article 2, while subparagraphs (a), (b) and (c) posed no problems as they reproduced the text of the United Nations Convention on the Law of the Sea, subparagraph (d) should be reworded as a without-prejudice clause. The formula used in article 2 (3) of the Commission's draft articles on prevention and punishment of crimes against humanity, which was itself based on the provisions of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, might be used as a model. Subparagraph (d), as reworked, could read: "This definition is without prejudice to any broader definition provided for in any international instrument, in customary international law or in national law." On the other hand, he did not think it possible, as the Special Rapporteur proposed, to state that, for the purposes of the draft articles, piracy consisted of any act defined as such "in domestic law". Such a provision would imply that the simple fact that national law characterized an act as piracy would make the regime attached to the crime of piracy under international law applicable even in cases where the characterization of the offence under national law was overly broad.

In respect of draft article 3, he had a number of doubts. First, he wondered whether the definition should be broadened to include, in subparagraph (a), acts committed within straits, which were subject to a special regime. Second, until the legal regime attached to the crime of armed robbery at sea was clarified, it was difficult to define it. He wondered, in that connection, whether the purpose of the definition was to place States under an obligation under international law to prosecute crimes of that nature; whether that obligation should be considered a customary norm; and, if such a customary norm did exist, to what specific forms of crime it applied. The Commission lacked information on those questions, the answers to which would be dependent mainly on the practice that the Special Rapporteur planned to examine in his second report. Third, subparagraph (c) was of particular concern since it encompassed acts of armed robbery committed on the high seas. That part of the definition appeared to overlap with draft article 2 and raised a question mark over the distinction between acts of armed robbery and acts of piracy. Clarifications that served to enhance understanding of the proposed text of the draft articles would therefore be welcome.

Organization of the work of the session (agenda item 1) (*continued*)

The Chair drew attention to the draft programme of work for the second part of the session, which had been circulated informally. If she heard no objection, she would take it that the Commission wished to adopt the proposed draft programme of work.

It was so decided.

Mr. Paparinskis (Chair of the Drafting Committee) said that, for the topic "General principles of law", the Drafting Committee was composed of Mr. Akande, Mr. Argüello Gómez, Mr. Asada, Mr. Fife, Mr. Forteau, Mr. Galindo, Ms. Galvão Teles, Mr. Grossman Guiloff, Mr. Huang, Mr. Jalloh, Mr. Lee, Ms. Mangklatanakul, Mr. Mavroyiannis, Mr. Mingashang, Mr. Nesi, Ms. Okowa, Ms. Oral, Mr. Ouazzani Chahdi, Mr. Oyarzábal, Mr. Patel, Mr. Reinisch, Ms. Ridings, Mr. Ruda Santolaria, Mr. Sall, Mr. Savadogo and Mr. Tsend, together with Mr. Vázquez-Bermúdez (Special Rapporteur) and Mr. Nguyen (Rapporteur), *ex officio*.

The meeting rose at 11.50 a.m.