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For participants only

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International Law Commission
Seventy-fourth session (first part)

Provisional summary record of the 3621st meeting
Held at the Palais des Nations, Geneva, on Wednesday, 10 May 2023, at 10 a.m.

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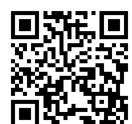

Present:

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.

Programme, procedures and working methods of the Commission and its documentation (agenda item 8) (*continued*)

The Chair said that the Commission had completed its first reading of the draft articles on the topic "Immunity of State officials from foreign criminal jurisdiction" at its seventy-third session and would proceed to the second reading at its seventy-fifth session. However, as the former Special Rapporteur on the topic was no longer a member of the Commission, a new Special Rapporteur would need to be appointed.

Noting that consultations had been held within the Bureau and widely among members of the Commission, she said she took it that the Commission wished to appoint Mr. Grossman Guiloff as Special Rapporteur for the topic.

It was so decided.

The Chair said that the Commission had not completed its work on the topic "Succession of States in respect of State responsibility" at its seventy-third session and therefore needed to consider how it wished to proceed. To that end, a working group would be set up, for which the Commission needed to appoint a Chair.

Noting that consultations had been held within the Bureau and widely among members of the Commission, she said she took it that the Commission wished to appoint Mr. Reinisch to chair the Working Group on the topic "Succession of States in respect of State responsibility".

It was so decided.

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

Mr. Asada, thanking the Special Rapporteur for his extremely informative first report on prevention and repression of piracy and armed robbery at sea (A/CN.4/758), said that the number of incidents of piracy and armed robbery at sea had fallen over the last decade; in Asia, for example, it had fallen by half. However, the proportion of incidents that were categorized as armed robbery at sea had risen significantly.

In 2009, Japan had enacted legislation covering both piracy and armed robbery at sea in its territorial waters and on the high seas, granting the country's courts the authority to exercise universal jurisdiction over those crimes. Two cases had been heard under the legislation, both involving Somali nationals alleged to have engaged in acts of piracy in the Arabian Sea against a ship registered under the flag of the Bahamas. They had been prosecuted on the basis of universal jurisdiction under the 1982 United Nations Convention on the Law of the Sea, in particular its article 100, rather than article 105, as the pirates had been captured by the crew of a United States Navy vessel rather than that of a Japanese government ship.

The concept of universal jurisdiction over piracy had long been recognized as an established customary rule and was explicitly laid out in both the 1958 Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea, which had clarified its definition, requirements and effects. Its first characteristic was that it enabled any State, irrespective of its connection to the crime, to exercise jurisdiction over acts of piracy; it was thus genuinely universal jurisdiction, distinct from the limited universal jurisdiction established under international conventions related to terrorism, including maritime terrorism, which imposed the obligation to extradite or prosecute on certain countries. He would use the term "universal jurisdiction" in the context of piracy to mean genuinely universal jurisdiction.

A second characteristic of universal jurisdiction over piracy was that it had been established as a "right" possessed by States, rather than an obligation, in contrast to the provisions of the Geneva Conventions of 12 August 1949 and Protocol I Additional thereto, under which, in the case of grave breaches, States were obligated to exercise universal jurisdiction.

It was likely that the concept of universal jurisdiction had been established in the case of piracy because of the threat it posed to the safety of maritime traffic, which meant that the entire international community had a general interest in its prevention and repression. Thus, under article 100 of the 1982 Convention, "all States" had a duty to cooperate in the repression of piracy. As no country could have a legitimate interest in protecting individuals who had committed acts of piracy, not even a flag State would protest if another country exercised jurisdiction over piracy and prosecuted the individuals concerned. Furthermore, the exercise of jurisdiction on the high seas did not constitute an infringement of any country's territorial sovereignty and had thus been deemed acceptable. Piracy was therefore defined strictly as an exception to flag State jurisdiction on the high seas and consisted of an illegal act of violence committed for private ends by the crew or passengers of a private ship against another ship on the high seas, as provided in article 101 of the Convention.

In paragraph 45 of the report, the Special Rapporteur suggested that it was restrictive to limit piracy to acts committed only on the high seas and that the definition of piracy should be expanded to cover armed robbery in the territorial waters of States. While there was no substantive difference between piracy and armed robbery at sea as far as the conduct itself was concerned, it would be neither easy nor appropriate to apply universal jurisdiction to the latter.

Although, in many cases, States made no strict distinction in their domestic legislation between piracy and armed robbery at sea, that did not mean that they disregarded the distinction between them or perceived them as equal under international law; rather, it was probably simply a way of facilitating public understanding of the relevant domestic legislation. Definitions or designations of crimes in domestic legislation did not have to be identical to those under international law, as long as the legislation adhered to the rules of international law. Therefore, while certain States categorized armed robbery at sea as "piracy" in their domestic legislation, they did not necessarily consider that the two categories were treated in the same manner under international law.

By its resolution 1816 (2008), the Security Council had authorized States to "enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea", on the basis of Chapter VII of the Charter of the United Nations, in order to address a particular "threat to international peace and security in the region". At the time of its adoption, the resolution had been considered an exceptional measure that could not be generalized. It had also been based on the consent of the Transitional Federal Government of Somalia; as a result, when that consent had been lost in March 2022, the system established pursuant to the resolution had ceased to exist. The international community was not therefore in a position to apply the international rules for piracy on the high seas to armed robbery at sea in the territorial waters of States and it was not appropriate to equate armed robbery at sea with piracy under international law for the purpose of obtaining universal jurisdiction.

A second suggestion made in the report was that the rules on piracy should no longer require the existence of illegal acts of violence by the crew or passengers of one ship against another ship, but should apply also to similar acts within a single vessel. However, the current requirement was based on the recognition that it could be extremely difficult, from the outside, to determine the events happening inside a ship. Thus, allowing third-party law enforcement to intervene could potentially lead to abuses of power. That concern would take on even greater significance if the concept of piracy was expanded to include armed robbery in a State's territorial waters. It should also be recalled that the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation had been negotiated after the *SNC Achille Lauro* incident in order to address the issue of maritime terrorism within a single ship, which fell outside the traditional definition of piracy. That Convention did not provide for universal jurisdiction, further underscoring the distinction between piracy and other maritime crimes that occurred within a single ship.

He shared the Special Rapporteur's concern regarding the absence of a definition of the term "ship" in the 1982 Convention and suggested that the Commission could address it by providing an interpretation of the term "ship" as it was used in the Convention.

Third, as to the Special Rapporteur's implication in paragraph 53 of the report that the exercise of universal jurisdiction over piracy should be defined as an obligation rather than a

right, he considered that such a change would lead to significant difficulties. While it would make little difference to flag States of pirate ships, since they had, in any case, to tolerate an exercise of jurisdiction by a third State, the difference for third States would be significant, as enforcement and punitive measures entailed costs that could reasonably disincentivize some States from taking enforcement actions and exercising jurisdiction. While all States had a general interest in eliminating threats to maritime navigation, not all of them had a specific interest in each individual instance of piracy. Consequently, there could be opposition from States to a change in the nature of universal jurisdiction from a right to an obligation.

Fourth, in respect of the proposed draft articles, given his doubts about the approach taken by the Special Rapporteur in the first report, he would refrain from making any definitive comments on the proposed definitions of piracy and armed robbery at sea until the proposals in respect of substantive provisions covering those acts became available.

In general, the proposed draft articles seemed to have been derived from the domestic laws and jurisprudence of States, which the Special Rapporteur sought to incorporate into his proposed new definition of piracy. He was unsure how to interpret the reference to domestic law in proposed draft article 2 (d), on the definition of acts of piracy, as it could be understood to imply that, if a domestic law defined certain illegal acts as acts of piracy, those acts would be included in the definition. If that was the case, domestic laws would effectively be allowed to govern international law, potentially leading to a situation where a State could create a new category of acts of piracy simply by enacting new domestic legislation, and those acts would then give rise to mandatory universal jurisdiction. That would be unacceptable to other States.

He was thus of the view that, while the first report identified important issues with regard to piracy, the Special Rapporteur's suggestions for addressing them presented problems. It seemed that universal jurisdiction over piracy had been accepted as a result of its strict definition and of its being considered a right rather than an obligation. The suggested expansion of the definition and the change from a right to an obligation would thus be problematic and would require an amendment to the 1982 Convention, which, given the stringent procedural requirements and States' generally negative attitudes towards amendments, would not be practical. The Commission should instead address the issues of piracy and armed robbery at sea by enhancing and elaborating on the obligation to "cooperate to the fullest possible extent in the repression of piracy" stipulated in article 100 of the Convention.

In its work on piracy, the Institute of International Law appeared to be arguing, on the basis of article 100 of the Convention, that when a State detained a person suspected of piracy, it should investigate and submit the case to its competent authorities for prosecution or, alternatively, transfer the person to another State for investigation and prosecution, a rule that aligned with the principle of *aut dedere aut judicare*. However, the Institute did not seem to extract from article 100 the principle of universal jurisdiction as an obligation. It was nevertheless undeniable that the obligation to cooperate established in article 100 encompassed the conclusion of appropriate bilateral and regional cooperation agreements or arrangements providing for measures of international cooperation in the prevention and repression of piracy. In that regard, he looked forward to the Special Rapporteur's second report, which was expected to discuss activities under the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia and other regional initiatives.

Mr. Oyarzábal, thanking the Special Rapporteur for the very detailed account of the domestic legislative and judicial practice of all five continents presented in his first report, said he agreed that the punishment of piracy and cooperation in its suppression, including issues such as its criminalization, the pursuit, arrest, detention and extradition of suspected pirates, transfer agreements, mutual legal assistance, prosecution, investigation, evidence, sentences, the rights of alleged pirates and the rights of victims of piracy and armed robbery at sea, were all possible elements to be considered. Together with the lacunae that the Special Rapporteur had identified in the current international legal framework and the views expressed by Member States at the seventy-fourth session of the General Assembly, they provided much food for thought.

Second, reference had already been made in the Commission's current debate to the importance of the socioeconomic losses, both threatened and actual, caused by piracy, particularly in Africa and other areas where States lacked the capacity to prevent, repress and punish it off their coasts. As the Security Council had affirmed, piracy represented a security threat to the sovereignty and territorial integrity of States such as Somalia and those in the Gulf of Guinea region. The Member States had welcomed the topic's inclusion in the Commission's programme of work as a historic opportunity to contribute to combating that scourge.

Third, he noted that the definitions of piracy provided in the first report, which were taken from States' domestic legislation, differed from the one given in the 1982 United Nations Convention on the Law of the Sea, since they had been adopted for the purpose of applying national criminal laws. Some of them – even where the definition was based on the Convention wording – included acts similar to piracy committed in waters subject to national jurisdiction, rather than on the high seas, although such acts would otherwise be considered to constitute "armed robbery at sea" and would not fall within the ambit of piracy as defined in article 101 of the Convention. For example, article 198 of the Argentine Criminal Code, cited in the report, was generally interpreted in the light of article 1 of the Code, which defined the scope; that meant that the country's courts would not have jurisdiction to hear cases concerning acts of piracy committed on the high seas. Definitions of piracy in domestic legislation should thus not automatically be construed as interpreting or applying the provisions of the 1982 Convention.

If the enforcement of domestic legislation violated the Convention or a customary rule, such as where the "right of visit" was exercised abusively in cases other than those contemplated in article 110 of the Convention, or a "hot pursuit" did not cease once the vessel being pursued entered the territorial sea of a third State, the State concerned would be responsible for its internationally wrongful act. However, such cases were rare, as few countries had the capacity to undertake anti-piracy operations on the high seas and, as the Special Rapporteur observed, article 105 of the Convention did not require, but only allowed, States to exercise jurisdiction over acts of piracy.

Fourth, in defining the term "piracy", it could be helpful to understand the *raison d'être* of the "special, common basis of jurisdiction" referred to in the commentary to the 1932 draft convention on piracy prepared under the auspices of Harvard University. The Special Rapporteur had adopted a wise approach in differentiating *lex lata* from *lex ferenda*. The common interest in preserving the freedom of navigation on the high seas, protected under the 1982 Convention, neglected the fact that piracy-like acts were often committed in territorial seas. The Special Rapporteur seemed to suggest that piracy should be put in the same category as heinous acts such as crimes against humanity, war crimes or genocide; however, that would not *per se* mean that States could – much less that they must – exercise jurisdiction over acts committed in places within the jurisdiction of other States. Moreover, in most States, universal jurisdiction was not commonly accepted as a basis for jurisdiction.

The broad basis for the enforcement and adjudicative jurisdiction established in article 105 of the 1982 Convention could not be understood separately from the specific space – the high seas – to which it was confined. Although its underlying rationale was to protect freedom of navigation, universal jurisdiction was accepted in piracy cases largely because it was limited to places outside the territorial jurisdiction of any State. The extension of that jurisdictional basis to territorial waters would require a fundamental reinterpretation of the jurisdictional regime applicable to piracy and, in the view of many States, would open the door to interference by other States in their sovereignty over their territorial sea, not to mention their internal waters. That could be why regional arrangements concerned with anti-piracy operations and cooperation had taken a geographically limited approach to jurisdiction. For example, article 2 of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia provided that nothing in the Agreement entitled a contracting party to undertake in the territory of another contracting party "the exercise of jurisdiction and performance of functions which [were] exclusively reserved for the authorities of" that other contracting party by its national law; while the Djibouti Code of Conduct, in its article 4, provided that any pursuit of a ship on suspicion of piracy in and over the territorial sea of a participating State was subject to the authority of that State.

The optional clause in article 105 of the 1982 Convention was connected to the nature and feasibility of the jurisdictional activity envisaged. In the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the 1979 International Convention against the Taking of Hostages and the 2000 United Nations Convention against Transnational Organized Crime, the obligation to exercise criminal jurisdiction applied only when there was a territorial or personal jurisdictional link with the State. All three conventions also established the obligation of *aut dedere aut judicare*, another important international rule that was related to, but conceptually distinct from, the concept of "universal jurisdiction". The latter entailed the ability of a court of any State to try persons for crimes committed outside its territory that were not linked to the State by the nationality of the suspect or of the victims or by harm to the State's national interests.

Fifth, in paragraph 18, the report accurately highlighted the connections between piracy and terrorism and between piracy and transnational organized crime, including corruption, money-laundering, illegal, unreported and unregulated fishing, human trafficking and drug trafficking. Many international instruments provided for measures of assistance in connection with criminal proceedings in general and on specific topics. There were many international organizations, political and specialized bodies and regional arrangements that could take international action in criminal matters. Inter-State coordination mechanisms existed to ensure the coordination of national policies and action plans, as well as of investigative and prosecutorial actions. For example, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation contained provisions on mutual assistance in connection with criminal proceedings, prevention and cooperation, and information-sharing; the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia contained provisions on information-sharing, requests for cooperation in detection, arrest and seizure, and rescue, the obligation to extradite upon request, mutual legal assistance, and capacity-building; and the Djibouti Code of Conduct contained provisions on coordination and information-sharing, incident reporting and assistance requests in detection, response and capacity-building. Similar provisions could be found in other modern international instruments aimed at fighting transnational organized crime.

Sixth, the report adequately conveyed States' preferences regarding the scope of the Commission's work on the topic, which, in the view of the majority, should strengthen and build upon, rather than modify, the 1982 Convention. That instrument was widely held to have struck a balance between the rights of coastal States, by granting them sovereignty over their territorial sea, specific law enforcement powers in the contiguous zone and sovereign rights to the resources of the exclusive economic zone and the continental shelf, and the rights of the international community, by simultaneously protecting its interest in freedom of navigation and in the Area – defined as the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction – and its resources as the common heritage of humankind. There was also general agreement that such a balance must be maintained; however, that did not preclude the further development of the 1982 Convention to respond to new challenges and opportunities, as demonstrated by the agreement recently reached on an international legally binding instrument, under the Convention, on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction.

Lastly, while a regional approach might be warranted, the universal foundation laid by the 1982 Convention must be preserved. The Security Council, despite having taken a regional approach in addressing piracy off the coast of Somalia and in the Gulf of Guinea, had reaffirmed that international law, as reflected in the Convention, set out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities. All Security Council resolutions on the situation in Somalia expressly stated that they applied only to that country, did not affect the rights or obligations of Member States under international law, did not create customary international law and were issued with the consent of the Government of Somalia and that their implementation must not deny or impair the right of innocent passage in the country's territorial sea. Similarly, the Security Council had made it clear that its resolutions on the Gulf of Guinea applied only to that situation.

He welcomed the Commission's initiative to develop a set of draft articles on piracy and armed robbery at sea, which would contribute to legal certainty and international

cooperation in safeguarding navigation at sea, holding perpetrators accountable and protecting victims' rights, all within the strict framework of the 1982 Convention. He also welcomed the regional approach aimed at improving cooperation for the prevention and repression of piracy and armed robbery at sea and looked forward to learning more about how that approach would operate within the framework of the Convention.

In addressing piracy and armed robbery at sea, the Commission could draw on existing international instruments and regional arrangements for cooperation and mutual legal assistance in the fight against transnational organized crime. For example, articles 5, 6 and 8 of the United Nations Convention against Transnational Organized Crime all provided that each State party was to adopt such legislative and other measures as might be necessary to establish as criminal offences those that were the object of the Convention. A similar provision might help to address the fact that, as noted in the report, the 1982 Convention did not impose on States any 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. The United Nations Convention against Transnational Organized Crime also provided that the offences to which it referred should be deemed to be extraditable offences in any existing and future extradition treaties between States parties; that, if a State party made extradition conditional on the existence of a treaty, it could consider the Convention the legal basis for extradition in respect of any offence referred to therein; and that States parties should afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention. That Convention and other treaties provided a solid basis for tackling crime while respecting the sovereignty of the States concerned.

Concerning the draft articles proposed by the Special Rapporteur, he wished to suggest that draft article 1 should be amended to read: "The present draft articles apply to the prevention and repression of piracy and armed robbery at sea." That wording was sufficiently broad and flexible, particularly at the current early stage of the Commission's work.

Draft article 2 should perhaps be reworked to spell out the cases in which States were to take such measures as might be necessary to establish their jurisdiction over piracy, while preserving the definition of piracy set out in the 1982 Convention. That jurisdiction could be extended to cover acts of piracy committed "from land", as proposed in subparagraph (d); however, "an act of piracy in domestic law" should not be given the status of an international rule.

As for draft article 3, the term "armed robbery at sea", which was not a standing legal term in international law, could prove difficult to define, as its elements were far from settled and domestic definitions tended to vary quite considerably. However, he could support provisions that might help coastal States to address the challenges posed by armed robbery at sea, in full accordance with the legal status of the territorial sea established in article 2 of the 1982 Convention and other applicable Convention rules. Any criminal acts committed in the territorial sea that did not hamper the innocent passage of foreign ships, and any criminal acts committed in the internal waters of a State, were best addressed exclusively by the domestic laws and authorities of the coastal State. However, that did not preclude the provision of capacity-building or other forms of assistance at the request of the coastal State.

Ms. Mangklatanakul, thanking the Special Rapporteur for the breadth and depth of his first report on prevention and repression of piracy and armed robbery at sea, said that, since the English version of the report had only recently become available, her comments would focus mainly on the content of the 2019 syllabus for the topic, annexed to the report on the work of the Commission's seventy-first session, the Special Rapporteur's oral introduction and her preliminary reading of the report. She would make further comments in due course. Piracy was indeed an issue of great concern to the international community. In the list of reference materials for the topic, it might be useful to include other studies on the impacts of piracy conducted by international institutions such as the United Nations Conference on Trade and Development and the World Bank.

She agreed with the Special Rapporteur's observation that, despite the existence of extensive international, regional and national law on piracy and armed robbery at sea, there remained important issues of international law that were uncertain or underdeveloped and

that could benefit from study, codification and progressive development by the Commission. The call for more effective prevention and repression of piracy was not new: the matter had been raised at the International Conference on Piracy at Sea held in Sweden in 2011. The fact that many States in the Sixth Committee had welcomed the topic's inclusion in the Commission's programme of work only served to underscore its importance.

She had studied with great interest the six shortcomings of the current global anti-piracy regime discussed in the first report. The Commission's work on the topic should build upon existing academic studies and identify new issues of common concern to States; seek to provide practical solutions that would assist States in combating piracy, taking full account of existing State practice and the views expressed in the Sixth Committee; and provide for the harmonization of existing domestic laws and address new legal elements not yet covered by the 1982 United Nations Convention on the Law of the Sea and other international agreements by, *inter alia*, clarifying the definition of, and the distinction between, piracy and armed robbery at sea.

She generally supported the Special Rapporteur's proposal that, in addition to the definition of piracy, the work under the topic should address the issues of punishment, cooperation, jurisdiction, criminalization, pursuit, arrest, detention, extradition, transfer of suspected pirates, mutual legal assistance, prosecution, investigation, evidence, sentences, rights of alleged pirates and rights of victims of piracy and armed robbery at sea. As other members had pointed out, many of those elements were dealt with in existing international instruments, such as the United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. Similar elements could also be found in the Commission's 2019 draft articles on prevention and punishment of crimes against humanity. Those texts could help to frame discussions on the scope and structure of the Commission's work on the topic going forward.

Although she supported the workplan set out in paragraph 61 of the report – the consideration of regional and subregional practices and initiatives for combating piracy and armed robbery at sea followed by the assessment of trends in academic writings and the views of learned societies – in principle, it would be useful to know what aspects of those practices and initiatives would be analysed in the second report. Information on the general structure and content of the draft articles to be proposed in future reports would also be useful.

In her view, several issues might benefit from further study. The first was the humanitarian aspect of an anti-piracy regime, including the rescue and repatriation of victims of piracy, especially victims held captive for ransom, and the assistance to be provided to them. Related issues that could be explored included the application of international human rights law, international cooperation for rescue and repatriation, the provision of physical and psychological assistance, compensation and rehabilitation.

Second was the question of whether the current international legal framework was able to adequately address modern forms of piracy, such as the use of unmanned drones operated from land to attack ships. Although examples of practices and other information on modern-day piracy and the shortcomings of the current anti-piracy regime were provided in the syllabus and the first report, a more detailed analysis of the challenges posed by modern forms of piracy might be needed, especially since draft articles 2 (d) and 3 (c) referred to the land-based dimension of piracy and armed robbery at sea, respectively.

The third issue was how the proposed draft articles would fit into the existing international legal landscape when numerous international, regional and subregional instruments to address piracy and related crimes already existed. The Commission must clarify what value its work would add. Without prejudging the final form of the Commission's output, she would like to know whether the Special Rapporteur intended the proposed set of draft articles to serve as the basis for a completely new treaty or for an agreement under the 1982 Convention similar to the draft agreement on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction. In any case, a clause on the relationship between the draft articles and other international instruments or rules of international law might need to be included.

The Special Rapporteur had identified the absence of domestic laws criminalizing piracy as an obstacle to the effective repression of the phenomenon. For example, according to the syllabus, most African States currently did not have legislation on piracy or had laws that were outdated. Moreover, the report listed as one of the shortcomings of the current anti-piracy regime States' tendency to regard the absence of national legislation as a reason not to prosecute pirates. Under the 1982 Convention, States had no specific obligation to criminalize piracy in domestic law *per se*, only an obligation to cooperate in the repression of piracy under article 100. Furthermore, under article 105 of the Convention, States had a right, not an obligation, to seize vessels taken by piracy and arrest the persons on board. In other words, the current rules in international law on piracy appeared to be more permissive than prescriptive.

She agreed in principle with the Special Rapporteur's statement, in paragraph 15 of the syllabus, that measures taken to promote the adoption of national anti-piracy laws might allow for "a more effective global regime of enforcement and for greater inter-State cooperation" in that area. She was open to discussing whether there was or should be an international legal obligation for States to criminalize piracy and to establish jurisdiction over piracy in their national laws. In that regard, the Commission should consider the important issues raised by Mr. Asada concerning the appropriate scope of application of universal jurisdiction.

States were already required, under a number of international instruments, including the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, the International Convention against the Taking of Hostages and the United Nations Convention against Transnational Organized Crime, to make certain acts that could fall under the definition of piracy punishable under national law. Any discussion of the potential creation of new rules on piracy should be based on an assessment of whether the apparent gaps in international law would be best filled through the adoption of new rules or through the promotion of more effective implementation of existing rules.

The discrepancies between different States' national laws on piracy, as highlighted in the syllabus and in the Special Rapporteur's report, presented an obstacle to the effective prevention and suppression of piracy, especially in the context of mutual legal assistance and extradition, where dual criminality was often required. It would be useful if the Commission's work on the topic contributed to the harmonization of anti-piracy laws, for example by ascertaining the lowest common denominator of State practice in criminalizing piracy, including on issues such as the definition of piracy and armed robbery, the establishment of jurisdiction, penalties, cooperation in the suppression of piracy and the promotion of mutual legal assistance.

She supported the Special Rapporteur's suggestion, in paragraph 12 of the syllabus, that the Commission should analyse methods of prevention that had operated successfully in other areas of international law so as to provide guidance to States on how to implement those obligations of prevention. In doing so, the Commission might wish to review the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, which imposed a general obligation on the parties to "make every effort to take effective measures" to "prevent and suppress piracy and armed robbery against ships".

Regarding the controversial question of the legality under international law of the presence of private security personnel on board merchant ships, she agreed with the suggestion made in paragraph 21 of the syllabus that the Commission should examine the law and practice in that area to determine whether private vessels were prohibited from engaging in enforcement action by international law and, if so, to identify the line between such actions and defensive acts in the event of attack by maritime pirates. Existing non-legally binding documents, such as the International Code of Conduct for Private Security Service Providers, might be of relevance to the Commission's discussion on that topic, as had been mentioned by Mr. Savadogo.

In a 2014 paper on maritime piracy, the United Nations Conference on Trade and Development stated that the effective prevention and suppression of piracy required strong cooperation at the political, economic, legal, diplomatic and military levels, as well as collaboration between diverse public and private sector stakeholders across regions.

International organizations, such as the International Maritime Organization, also played important roles in facilitating international cooperation and providing technical assistance. Further study of such roles and of how those actors could cooperate in practice could be useful. In that regard, she supported the Special Rapporteur's plans to further examine regional and subregional cooperation agreements in his second report. In addition, an examination of the scope and implementation of article 100 of the United Nations Convention on the Law of the Sea, which concerned States' duty to cooperate in the repression of piracy in places outside the jurisdiction of any State, would also be useful, as had already been suggested by Mr. Asada.

She supported the Special Rapporteur's choice of draft articles as the form that the outcome of the Commission's work on the topic should take. However, she remained open to discussing other forms of outcome if it later became clear, either from States' comments in the Sixth Committee or from the Commission's further study, that a less prescriptive form would be more appropriate.

Mr. Mingashang, thanking the Special Rapporteur for his wide-ranging and exhaustive first report, said that recent manifestations of piracy had highlighted the inadequacy of the existing legal framework for bringing it under control, which was based on the requirements stemming from the principle that coastal States had exclusive sovereignty over their territorial sea. International cooperation in the prevention and repression of piracy no longer produced the desired effect, given the profound changes observed with regard to modern-day pirates' geographical scope of operation and *modus operandi*, which involved considerable human, material and financial resources; the increased sophistication of the technology and weapons they used; and the industrialization of their operations, which were part of a chain of activities that included investors and intermediaries and had led to the emergence of well-organized cartels on which local populations were increasingly dependent. Other major developments related to the growing importance of networks among pirates, which enabled them to perpetrate logistically complex crimes, sometimes involving the corruption of public officials and the complicity of business and religious leaders; the development of a pirate economy based on profitability rather than ideology, which was intertwined with and financed by both lawful and unlawful activities and had resulted in the breakdown of certain societies; and the politicization of piracy, whereby certain pirates claimed to be acting in the name of social groups in order to force potential adversaries to do their bidding or to accomplish specific political objectives.

The Special Rapporteur's report highlighted the need to modernize the legal framework and identified a number of specific issues, such as the fact that there was no consensus among States on the interpretation and application of articles 101 and 102 of the 1982 United Nations Convention on the Law of the Sea. While some States continued to apply the Convention's definition of piracy, others had moved away from it by adopting a broad interpretation of the geographical aspect that was no longer limited to the high seas or to places outside the jurisdiction of any State. In such States, it became superfluous to establish an additional definition of armed robbery at sea. Thus, definitions of piracy fell into two categories: those that referred to the Convention framework, which was based on the partitioning of the marine environment into several maritime spaces, and those that blurred the boundaries between different spatial and territorial points of reference. That expansion of the traditional definition of piracy had complicated efforts to combat the phenomenon, as it had called articles 101 and 102 of the Convention into question and created legal uncertainty, thus heightening the risk of impunity.

According to the International Maritime Organization, during the period 2001–2014, the majority of attacks by pirates in the Gulf of Guinea and the Horn of Africa had been perpetrated in territorial waters rather than on the high seas, and therefore fell under the jurisdiction of the coastal States under international maritime law. That situation made it difficult to implement the response mechanisms recommended in the 1982 Convention.

The inconsistency among definitions of piracy was reflected by ambiguities in the legal framework. For example, the definition of offences in article 2 of the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf made no mention of the *ratione loci* limitation ("on the high seas") or the *mens rea* condition ("for private ends") that had traditionally characterized piracy as it was

defined in the 1982 Convention and other instruments. On the contrary, to a certain extent it expanded the definition of piracy to the point of encompassing a range of unlawful acts that could be committed at sea.

While the application of the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation could cause confusion between the concepts of "pirate" and "terrorist", it also provided for a number of actions that could result in the arrest of pirates and the commencement of the various stages of prosecution. The fact that modern-day pirates continued to attack ships both in areas under national jurisdiction and in places outside the jurisdiction of any State meant that the same individuals were committing acts of piracy and acts of maritime terrorism. Maritime piracy and maritime terrorism therefore could be said to constitute a single crime in reality, even if they were characterized differently in law. From that point of view, the 1988 Convention and the 2005 Protocol thereto were useful in that they provided for the organization of judicial cooperation in that regard.

The legal ambiguity around piracy was increased by the legislative practice of States that sought to encompass, in their legal arsenal, forms of violence that were similar to piracy but only took place in internal waters, meaning rivers and lakes. The criminalization of armed robbery at sea unarguably fell under such laws. Legal definitions that were based solely on the geographical location of an offence's commission, when changes in its *modus operandi* were making that criterion increasingly obsolete, were likely to cause serious problems of coherence that needed to be addressed.

Under existing treaty law, acts committed in maritime areas under a State's jurisdiction did not constitute acts of piracy under the law of the sea, but could be characterized as armed robbery or terrorist acts at sea, which in turn explained the conflation often observed in the literature between piracy and maritime terrorism as a result of the mobility of modern-day pirates.

It would be useful if the Special Rapporteur could draw up a table summarizing the practice of States, as an annex to his report. The columns in such a table could comprise a summary of the facts; issues relating to the prevention and repression of piracy and/or armed robbery at sea; the reasoning of legislators and judges; and the implications thereof with regard to the clarification of international law on the subject. It would also be particularly interesting to consider the overall reasoning of various jurisdictions, from lower to higher courts, to identify the arguments made with a view to crystallizing a legal opinion on the subject.

Mr. Fife said that the Special Rapporteur's report effectively demonstrated the importance of a legal framework for international cooperation in combating piracy and usefully highlighted the frequent links between piracy and armed robbery at sea and also other illegal acts, such as maritime terrorism, illegal fishing and arms trafficking. As Mr. Mingashang had stated, it was also important to understand the developments linked to organized crime networks, the suppression of which might require police and judicial cooperation beyond the scope of the topic.

While the Special Rapporteur had focused on a regional approach to the issue, Security Council resolution 2634 (2022), which related to piracy and armed robbery at sea in the Gulf of Guinea, could also be useful in guiding the Commission's discussions at the current session. In that resolution, which had been adopted without a vote, the Security Council reaffirmed that international law, as reflected in the 1982 United Nations Convention on the Law of the Sea, set 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; it was unlikely, therefore, that the resolution represented a call for changes to the Convention. In the text, the Council reiterated that States in the region of the Gulf of Guinea had a leadership role to play, in close cooperation with a number of regional and subregional organizations, and urged States in the region to develop and implement national maritime security strategies, including for the establishment of a harmonized legal framework for the prevention and repression of piracy and armed robbery at sea, in accordance with applicable international law, including international human rights law. He understood those provisions as a call for a more uniform approach among domestic legal systems, in line with international law, for more effective cooperation in the prevention and repression of piracy and armed robbery at

sea. While the Council emphasized the leadership role of States in the region, other States, as well as the Secretary-General, were requested to support the States concerned in their efforts.

Regarding the Special Rapporteur's suggestion that there were shortcomings in the legal framework for the repression of piracy and armed robbery at sea, he was open to all means of clarification, including interpretation, so long as the 1982 Convention remained untouched. It was necessary to identify the exact nature of the issues to be resolved: did they concern gaps in national or international law, including a lack of clarity in the relevant provisions of the 1982 Convention, or a lack of police and coastguard resources?

There appeared to be general agreement in principle on a common point of departure in respect of piracy. All States were authorized to seize a pirate ship on the high seas or an aircraft taken by piracy and to prosecute persons accused of piracy. Under article 100 of the 1982 Convention, all States had a duty to cooperate to the fullest possible extent in the repression of piracy on the high seas.

Following the completion of the 1932 Harvard codification initiative, two possible approaches had become apparent. One was to authorize States to exercise universal jurisdiction, meaning to apply their criminal law and criminal procedure in certain well-defined cases, by providing for an exception to the almost sacrosanct principle that the flag State had exclusive jurisdiction, albeit without undermining the regime or the freedom of the high seas. Pirates would then be prosecutable under a State's domestic criminal law, provided, however, that piracy was criminalized therein, within the limitations of international law. One such limitation was the obligation to respect the principle of legality by establishing a predictable legal basis for coercive measures, as stated in the European Court of Human Rights judgment in *Medvedyev and Others v. France*. He agreed with Mr. Forteau that coercive measures could not be carried out in such cases without a sufficient legal basis in domestic law.

A second approach would have been to consider piracy as such to constitute an international crime entailing an obligation to incorporate a specific definition of the offence into domestic law and an obligation of cooperation amounting to an obligation of result, in particular *aut dedere aut judicare*. However, that solution had not been chosen; the first option had predominated ever since the adoption of article 14 (2) of the Harvard draft convention. It continued to predominate in the interpretation of the 1982 Convention, which reflected customary international law. While the system could hardly be described as perfect, it rested on a solid foundation. He supported Mr. Asada's comments on the nature of the Convention system.

International law also provided a very solid foundation for the criminalization of armed robbery at sea in maritime areas where the State concerned had territorial jurisdiction, including the territorial sea and internal waters. International law thus did not *a priori* represent any obstacle to the repression of armed robbery at sea in territorial waters or the repression of piracy on certain bases, but in both cases a domestic law was necessary.

Accordingly, for both piracy and armed robbery at sea, an initial requirement for effective repression was the existence of domestic legal provisions adopted and implemented within the limits of international law. There were wide variations in the internal practice of States, though the diversity of legal traditions and the relationship between international and national legal provisions should be borne in mind. He had some doubts about the usefulness of performing a comparative analysis of all national legal systems. While the report's analysis of various national laws was very interesting, providing a precise description of all scenarios would be a considerable challenge. He would attempt to illustrate that point using the practice of his own country, Norway, as an example.

In the report it was suggested that Norway asserted its right to exercise universal jurisdiction irrespective of the place at sea where the crimes had been committed and of the nationality of the perpetrators. That was not entirely correct. The Norwegian Penal Code contained provisions describing armed robbery, including aggravated armed robbery, and other very serious crimes. Those general provisions also applied to acts committed at sea, as was clear from the initial provisions of the Code concerning its geographical scope, from the *travaux préparatoires* of legislation – which, in the Nordic countries, were of particular

importance in the interpretation of laws – and from successive practice. Crucially, those provisions were to be read in the light of an overarching reference, in the Penal Code and the Code of Criminal Procedure, to limitations under public international law. That meant that those criminal law provisions applied automatically in territorial waters but could not be applied beyond the limits of the territorial sea without a legal basis under international law.

Piracy on the high seas was thus punishable under those provisions of the Penal Code, interpreted in the light of the reference to the 1982 Convention. Another example was the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol relating to fixed platforms located on the continental shelf. A third example was the 1979 International Convention against the Taking of Hostages. Those two conventions required States to criminalize such acts not only in their own territory, including their territorial waters, but also aboard their ships and by their nationals on the high seas.

Those legal provisions were among the laws enacted in Norway following the adoption of specific Security Council resolutions. There were also regulations defining the limits within which personnel of private security companies must operate on private ships. Their use of force was strictly circumscribed and could not amount to police power on the high seas or to the exercise of jurisdiction, which were reserved for warships. Norway thus could not exercise any universal jurisdiction that went beyond the limitations imposed under international law.

It was possible that other countries with a dualist approach in which public international law was clearly distinguished from domestic law might have established different types of bridges between the two systems. It could thus be risky to cite isolated provisions outside not only their immediate context, but also the relevant judicial and jurisprudential tradition.

The Special Rapporteur's report would enable the Commission to take a much more methodical approach in considering the possibilities for the development of national law and international cooperation. As suggested by the Special Rapporteur, it was important to consider the *de facto* connection that could exist in some regions between piracy and armed robbery at sea in order to ensure more effective prevention and repression. Those two types of offences could form part of a single *modus operandi* and a succession of illegal acts or concurrent offences. In his view, it was useful to preserve clear distinctions regarding the bases of applicable jurisdiction deriving from the place of commission of such offences. States had broad latitude in the choice of how to characterize crimes in their domestic law, provided that the limitations and conditions set out in international law were respected.

There had long been intensive international cooperation in combating the crimes in question. That collective effort had produced undeniable results, particularly in terms of prevention through policing on the high seas; however, the prosecution of pirates and thus the repression of piracy had been less frequent. He agreed with the Special Rapporteur that the Commission should promote a more harmonized approach by the States concerned to ensure the successful implementation of the relevant rules. Of particular interest were the new challenges posed by technological developments such as drones, as well as the limits within which private security companies must operate in providing protection from piracy on the high seas. The Institute of International Law had carried out valuable work on efforts to combat piracy, which could serve as inspiration for the Special Rapporteur.

Taking account of the interaction among the different legal bases of international law made it possible to suggest a more consistent legal framework, as the Special Rapporteur had done. Prevention and repression efforts had become more effective thanks to consistent and joint efforts made in Asia, with the adoption of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, and in Africa, with the 2009 Djibouti Code of Conduct and the 2013 Yaoundé Code of Conduct. The latter Code took a particularly holistic approach to the effort to combat several types of unlawful activity in the region.

Concerning the specific proposals put forward by the Special Rapporteur, he could not support the proposal to expand the definition of piracy in international law by adding a reference to domestic law. It would, however, be useful to examine the elements of

definitions of the crime of piracy more closely with a view to ensuring that the definition's interpretation and application were as consistent as possible at the national level. Account must also be taken of the need to uphold human rights standards and the principle of legality for coercive measures. Lastly, some issues were purely matters of domestic law. Having served, for a number of years, as Chair of the Working Group on Penalties during the negotiations on the establishment of the International Criminal Court, he took the view that the Commission should avoid any comparative law debates in respect of the application of domestic criminal law on the matter.

Mr. Sall said that the Special Rapporteur's first report provided a valuable overview of the issues at stake in the debate surrounding piracy and armed robbery at sea. One issue that the Commission would need to address was the definition of piracy in the context of the 1982 United Nations Convention on the Law of the Sea and in the light of current and emerging aspects of the phenomenon. In relation to those emerging aspects, the Commission could usefully examine two areas: first, the framework within which States operated in preventing and repressing those scourges, and second, the originality and importance of certain regional approaches in that regard.

International rules on the prevention and repression of piracy and armed robbery at sea were far from comprehensive, as could be seen from the relevant international case law. International courts, in particular the International Tribunal for the Law of the Sea, had often lamented the scarcity of relevant rules; the Commission should seek to fill those gaps. Two aspects of State action for the repression of piracy were subject to regulation: the use of force against pirate ships and respect for the rights of the persons apprehended. In its 1999 judgment in the *M/V "SAIGA" (No. 2)* case, the International Tribunal for the Law of the Sea noted that the 1982 Convention did "not contain express provisions on the use of force in the arrest of ships". Indeed, the two Convention provisions that supposedly governed the use of force in combating piracy, articles 293 and 300, were somewhat general and thus not very satisfactory. Article 293 provided that courts merely had an obligation not to apply other rules of international law that were "incompatible with" the Convention. The link between that article and the regulation of the use of force was thus rather tenuous. Article 300 was also quite general and loosely related to the issue in question, as it simply required States to act in good faith and to avoid the abuse of rights.

In view of that deficiency in the rules of international law, international courts had taken up the baton, essentially in two ways: by recalling "elementary considerations of humanity" and by stressing the imperative of "reasonable use" of force. The notion of "elementary considerations of humanity" was enshrined in international jurisprudence, both arbitral, as in the Naulilaa decision of 31 July 1928, and judicial. The International Court of Justice, in particular, referred to that concept in its judgments in *Corfu Channel (Judgment of 9 April 1949)*, *United States Diplomatic and Consular Staff in Tehran* and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. The *Corfu Channel* judgment specified that elementary considerations of humanity were "even more exacting in peace than in war". The effect of that principle was to limit the power of States engaged in the repression of unlawful acts committed at sea. The International Tribunal for the Law of the Sea, in its 18 December 2004 judgment in the *"Juno Trader"* case, recalled that the "obligation of prompt release of vessels and crews" included "elementary considerations of humanity and due process of law".

Alongside elementary considerations of humanity, international courts had developed the notion of the reasonable use of force. In the context of piracy, it had been referred to by universal courts – the International Court of Justice and the International Tribunal for the Law of the Sea – and at least one regional court, the Inter-American Court of Human Rights. In its judgment in *Fisheries Jurisdiction (Spain v. Canada)*, the International Court of Justice held that the boarding, inspection and seizure of a fishing vessel and minimum use of force for those purposes were "contained within the concept of enforcement of conservation and management measures according to a 'natural and reasonable' interpretation" of that concept. In the *"SAIGA" (No. 2)* judgment to which he had already referred, the International Tribunal for the Law of the Sea had held that where force was "unavoidable, it must not go beyond what [was] reasonable and necessary in the circumstances". More recently, in its 2014 judgment in the *M/V "Virginia G"* case, the Tribunal had reiterated that "the use of force

must be avoided as far as possible". Lastly, the Inter-American Court of Human Rights had noted in *Bámaca-Velásquez v. Guatemala* that State powers were "not unlimited" and in *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela* that the use of firearms and lethal force "must be generally forbidden" and was "only justified in even more extraordinary cases".

Courts had further recalled the need to respect the rights of persons accused of piracy or similar acts, while noting the scarcity of applicable legal provisions. In the *M/V "Louisa"* case, the International Tribunal for the Law of the Sea had found that, while it did not have jurisdiction, it could not but "take note of the issues of human rights" raised in the case and that States were "required to fulfil their obligations under international law, in particular human rights law, and that considerations of due process of law must be applied in all circumstances". Both the European Court of Human Rights and the Inter-American Court of Human Rights had recalled States' duty to uphold their treaty obligations. In *Medvedyev and Others v. France*, the European Court had dealt with the alleged violation of due process rights under article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms and had spelled out the requirements of promptness, automatic review of lawfulness and independence. The Inter-American Court had found, *in Bámaca-Velásquez v. Guatemala*, that the State had the "obligation, at all times, to apply procedures that [were] in accordance with the law and to respect the fundamental rights of each individual in its jurisdiction".

Concerning regional practices in relation to the topic, the practice of States in West and Central Africa did not always fully reflect the rules established at the universal level. Combating piracy was particularly urgent for Africa in general and the Gulf of Guinea region in particular, as the vast majority of cases of kidnapping and hostage-taking at sea took place off the coasts of Nigeria, Guinea, Togo, Benin and Cameroon. The Security Council had adopted resolutions and declarations specifically referring to piracy in that area and had stressed the need for regional cooperation. Piracy was an international crime under the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol). The definition of piracy in the Protocol was the same as the one in the 1982 Convention and in the 2016 African Charter on Maritime Security and Safety and Development in Africa.

The specific approach taken in Africa was exemplified by the memorandum of understanding concluded by the Maritime Organization of West and Central Africa to establish a subregional integrated coastguard network. That initiative reflected those countries' desire to join forces in implementing a regional maritime security policy to protect maritime shipping from unlawful acts of all kinds. The aim was to establish an *ordre public* at sea, based on cooperation actions and joint maritime surveillance. The legal regime for the network was operational both in normal times and in crisis situations involving acts of piracy, marine pollution or illicit trafficking. When such situations arose, a plan of action was implemented. The treaty also provided for a right of pursuit in conditions that differed in some respects from those provided for in international rules. That experience showed that efforts against piracy on a universal scale could also be conceived as a pooling of resources rather than simply harmonization among unilateral practices. The outcome could be the establishment of regional and subregional systems, as appropriate.

In the light of those considerations, he wished to make two recommendations. The first was that the Commission should include the issues of the use of force and measures to safeguard the rights of persons accused of piracy in its work under the topic, at least in principle and without necessarily entering into detailed rules, which were almost non-existent in current instruments but were being developed by international jurisprudence. The second was that it should take note of regional practices and consider their role in the global effort to combat piracy. Those practices might not fully reflect universal rules but did not contradict them. It should be acknowledged that States had the latitude to conclude specific arrangements that were limited only by the requirement not to disregard obligations deriving from universal rules. The Commission had taken account of such regional approaches in some of its previous work, such as its 1978 draft articles on most-favoured-nation clauses

and its 1989 draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.

The meeting rose at 1 p.m.