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Held at the Palais des Nations, Geneva, on Friday, 12 May 2023, at 10 a.m.

Contents

Present:

Chair:	Mr. Vázquez-Bermúdez (First Vice-Chair)
Members:	Mr. Akande
	Mr. Argüello Gómez
	Mr. Asada
	Mr. Fathalla
	Mr. Fife
	Mr. Forteau
	Mr. Galindo
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Mr. Mavroyiannis
	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

Secretariat:

Mr. Llewellyn	Secretary to the Commission

In the absence of Ms. Oral, Mr. Vázquez-Bermúdez, First Vice-Chair, took the Chair.

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. Paparinskis, thanking the Special Rapporteur for his comprehensive first report on prevention and repression of piracy and armed robbery at sea (A/CN.4/758), said that, while helpful, the information on pre-twentieth-century piracy included in the introduction did not have much, if any, relevance for the modern international legal order. The Special Rapporteur had rightly focused on the codification efforts of the twentieth century, which were more pertinent to the topic at hand and had culminated in the adoption of the 1982 United Nations Convention on the Law of the Sea. However, one historical concept seemed to be treated as having some relevance, namely the characterization of pirates as *hostis humani generis* or "enemies of humankind". He wished to caution against engaging with that concept; the term was best understood as one of rhetorical condemnation rather than legal art and had generally been treated as such by previous codifiers. The topic called instead for the drawing of precise distinctions regarding the character and scope of rules of jurisdiction; that end would be better served if the "enemies of humankind" nomenclature was avoided.

The Special Rapporteur's analysis of the multilayered legal framework applicable to piracy and armed robbery at sea underscored the importance of technical accuracy in discussing what was arguably a unique legal topic. Despite constituting an international crime, as recalled in the 2020 arbitral award in *The "Enrica Lexie" Incident (Italy v. India)*, piracy was unlike other international crimes in that it was not expressly prohibited by customary international law but was only defined by it as being subject to universal prescriptive jurisdiction. In addition, even though piracy was defined by custom, the definition itself referred in part to domestic law, particularly in relation to what constituted "any illegal acts". Thus, the prohibition of piracy was arguably more akin to a rule expanding national jurisdiction over certain criminal conduct than a rule of international criminal law in the modern sense.

Since the international legal framework applicable to piracy and armed robbery at sea was so strongly shaped by the 1982 Convention, recent inter-State arbitral practice that had interpreted and applied some of its relevant provisions could be a helpful source, particularly the 2015 arbitral award on the merits in *The Arctic Sunrise (Kingdom of the Netherlands v. Russian Federation)*, in addition to the *Enrica Lexie* award.

The Special Rapporteur's list of shortcomings of the international legal framework provided a helpful benchmark for evaluating State practice and for reflecting, in the light of the *modus operandi* of crimes of piracy and armed robbery at sea, on which of the difficult legal questions associated with the topic also raised genuine practical problems. The Commission needed to know what the most pressing challenges were if it was to produce an output that reflected the "concrete, practical and feasible nature" of the topic. In its annual report, the Commission could perhaps encourage States in the Sixth Committee to address the shortcomings that they themselves had identified in the framework.

Regarding the first shortcoming, namely the partitioning of the marine environment into several maritime spaces, which complicated efforts to define and repress piracy, while he agreed with the general thrust of the Special Rapporteur's observations in paragraphs 44 to 46 of the report, he supported the view expressed by other members that the foundational tenets of the modern law of the sea had to be taken as a given for the topic at hand, as noted by Mr. Oyarzábal. Indeed, in *Enrica Lexie*, the arbitral tribunal had confirmed that article 58 (2) of the 1982 Convention extended specific rights and duties of States with regard to the repression of piracy to the exclusive economic zone. When discussing solutions, the Commission should take care to clearly distinguish between the categories of jurisdiction applicable in different spaces, particularly jurisdiction to prescribe, jurisdiction to enforce and, in some cases, jurisdiction to adjudicate.

The second shortcoming, namely the ambiguity of the reference to "private ends" in the definition of piracy, could be read in terms of the dichotomy between private and public or between the personal and the political. In his view, the classic international law distinction

between private and public was the better reading of relevant practice. Consequently, "piracy" could cover acts of terrorism but probably also acts of violence against ships in the course of environmental protests, even though the boundary between such "piracy" and legitimate acts of protest might be difficult to draw, particularly if the human rights to freedom of speech and assembly were involved. The real question, however, was whether States considered that to be a genuine practical problem. One view was that the issue would simply not arise because commercially savvy modern pirates would deny political motivation on the logic that, if they were considered terrorists, ransoms for captives might not be payable under laws against the financing of terrorism.

There was some uncertainty over whether the third and fourth shortcomings – the "two ships" rule imposed by article 101 of the 1982 Convention and the notion of a "private ship", particularly in relation to mutinies under article 102 of the Convention – created genuine practical problems. When illegal or violent conduct on the high seas involved only one ship, the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation was likely to be applicable in the case of States parties thereto. A recent example of the application of the "two ships" rule could be found in paragraphs 238 and 240 of the arbitral award on the merits in *Arctic Sunrise*. Scholars had suggested that mutinies were relevant in a contemporary context because, in some parts of the world, government-owned ships were supposedly taken out unofficially to engage in acts of piracy, which could be assimilated to mutiny. However, few States were likely, in practice, to attempt to arrest a government ship for piracy.

Regarding the fifth and sixth shortcomings, which concerned the limitations of the legal framework for the punishment of piracy, both in the Convention and in domestic practice, he agreed with the general thrust of the concerns expressed by the Special Rapporteur in paragraphs 53 to 55 of the report. However, the duty to cooperate under article 100 of the Convention was, as explained in paragraph 723 of the *Enrica Lexie* award, an obligation of conduct rather than result that did not necessarily imply a duty to capture and prosecute pirates and could be implemented also through the inclusion in national legislation of provisions on mutual assistance, extradition and transfer of suspected, detained and convicted pirates or the conclusion of bilateral and multilateral cooperation agreements. Addressing regional and subregional practices and initiatives would be instrumental for evaluating best practices in countries' compliance with the relevant obligations.

The Special Rapporteur might, in addition, wish to consider clarifying a number of possible ambiguities: first, the fact that when a State seized a pirate ship, article 105 of the Convention did not suggest that the courts of the seizing State alone had jurisdiction to adjudicate, as had been accepted by the Security Council in paragraph 4 of resolution 2634 (2022); second, the question of whether conduct ancillary to piracy was already subject to universal prescriptive jurisdiction, even if committed on land, as might be suggested by paragraphs 13 to 15 of Security Council resolution 1976 (2011); and third, the question of the legal implications of the presence of privately contracted security personnel and vessel protection detachments on board merchant ships, in the light of the arbitral award in the *Enrica Lexie* case.

On legislative and judicial practice, which the Special Rapporteur explored very thoroughly in the report, he noted that various legal systems addressed the same legal issues through different rules and institutions. That was not necessarily a problem if the rules on piracy were viewed as extending prescriptive jurisdiction, including broad discretion to define the offence in national law within the limits of international law, and a unique, internationally regulated enforcement jurisdiction on the high seas and in the exclusive economic zone. However, that might make domestic legal positions difficult to characterize in precise terms. The case of Latvia referred to in paragraph 246 of the report underlined the need to avoid overgeneralization on issues where much depended on the small print deeply embedded within the legal systems of individual States.

The Special Rapporteur might wish to clarify whether the State practice summarized in chapter VII of the report was meant to serve as an argument of treaty interpretation by subsequent practice or agreement and, if so, whether the quality and quantity of that practice satisfied the benchmarks set in the Commission's 2018 conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, or whether

that practice was contributing directly to customary international law and, if so, whether it satisfied the benchmarks set in the Commission's 2018 conclusions on identification of customary international law. Or was the intention simply to set out examples of good practice that did not necessarily have legal implications?

He encouraged the Special Rapporteur to explore other ways of organizing the primary materials related to the topic and to clearly explain what weight should be given to them in the process of drafting the relevant provisions. For example, the materials could be organized in relation to the shortcomings of the international legal framework identified by the Special Rapporteur; arranged chronologically, progressing from pre-codification materials to modern challenges; distinguished by reference to particular regional instruments or Security Council resolutions; or categorized according to whether national laws directly incorporated the Convention terminology or provided only for "ordinary" crimes that were interpreted as covering piracy, to the extent permitted by prescriptive jurisdiction over piracy. He also noted the interesting suggestions that Mr. Mingashang had made in that regard.

Like other members, he considered that it would be helpful if the Special Rapporteur could explain the rationale behind his proposals, particularly regarding the legal character of the issues addressed in draft article 3. In the 2019 syllabus for the topic, the Special Rapporteur had identified draft articles as the preferred form of output without ruling out the possibility of producing conclusions or guidelines, if appropriate. However, as stated in the topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-fourth session (A/CN.4/734), the Commission had been called upon to ensure that the study on the topic did not conflict with existing treaties and frameworks on the law of the sea, notably with the 1982 Convention; that seemed to call for a form of output other than draft articles. To his mind, guidelines would be substantively more fitting in the light of the variety of instruments and techniques that the Commission might have to take into account. A discussion on the output to be produced should take place in the early stages of the Commission's work on the topic.

Concerning the proposed draft articles, he wished to propose that draft article 1 should be shortened to read: "The present draft articles apply to the prevention and repression of piracy and armed robbery at sea." If the form of output was changed from draft articles to conclusions or guidelines, the operative verb would change from "apply to" to "concern". In draft article 2, he would prefer to delete subparagraph (d) so as not to depart from the definition of piracy set out in article 101 of the Convention; otherwise, the Commission might create uncertainty and possible geographical and substantive overlap between piracy and armed robbery at sea. In draft article 3, for the same reason, he would prefer not to modify the definition of armed robbery at sea, which was borrowed from the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships, contained in the annex to International Maritime Organization (IMO) resolution A.1025(26). He therefore wished to propose the deletion of subparagraph (c). Like other members, he would like to hear more about the future programme of work for the topic. He supported the referral of the draft articles to the Drafting Committee in the light of the debate.

Mr. Galindo, thanking the Special Rapporteur for his interesting first report on the legal aspects and the social and political causes of piracy and armed robbery at sea, said that he welcomed the broad geographical scope of the report but that national legislation and case law alone were insufficient to provide an accurate picture of State practice. He hoped that future reports on the topic would examine the behaviour of States in the relevant international forums.

The statement in paragraph 27 of the report that the sea was shared or common property (*res communis*) needed to be qualified in the light of the recently adopted draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, which referred to the common heritage of humankind as a guiding principle and which, once in effect, would lead to a shift in the legal perspective on the *res communis* nature of the high seas.

Contrary to what was stated in paragraph 37 of the report, it was doubtful that the definition of piracy set forth in the Convention represented the codification of a pre-existing

rule of customary international law. The Special Rapporteur's analysis of national legislation seemed to support the idea that it was the Convention that had influenced the legislation, not vice versa.

Moreover, it seemed premature, at the current juncture, to state that private ships were entitled to exercise the right of self-defence, as seemingly posited in paragraph 52 of the report. Allowing for such a possibility would inevitably, and needlessly, lead to discussions on complex issues, such as the domestic law applicable in cases of self-defence and questions concerning the international responsibility of States in cases where private ships exercised the right of self-defence.

He was not at all convinced that a set of draft articles was the best form of output for the topic at hand. A set of guidelines or even a set of principles that could assist States in their efforts to prevent and repress acts of piracy or armed robbery at sea would be more useful. That was nevertheless a question for the Commission to decide in due course.

In proposed draft article 1, it would be preferable to delete the words "in view of international law, the legislative, judicial and executive practices of States, and regional and subregional practices" because they were not so much a statement of the scope of the draft articles as a description of the approach taken by the Commission. However, if that phrase was retained, the words "legislative, judicial and executive" should be removed so as to make the draft article more concise and more consistent with the Commission's previous work, in particular the definition of "State practice" in conclusion 5 of the 2018 conclusions on identification of customary international law.

Regarding draft article 2, a major decision that would affect the scope of the draft article was whether to retain the word "ship", the meaning of which was not currently defined in the provision, or to replace that word with a broader term such as "vessel". Neither the 1982 Convention nor customary international law provided a clear definition of the term "ship". It was therefore unclear whether acts of piracy could be committed by or against an object such as an autonomous, self-propelled drone operating either on or below the surface. Even in the Convention, "submarines and other underwater vehicles" were not clearly defined. As far as the right of innocent passage was concerned, such vehicles were subject to the specific requirements set out in article 20, whereas "foreign ships" were subject to the general provisions of article 19. Moreover, article III (2) of the IMO Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter defined "vessels and aircraft" as "waterborne or airborne craft of any type whatsoever", including "air cushioned craft and floating craft, whether self-propelled or not".

Another important question was whether acts of piracy or armed robbery at sea could be committed against static objects, such as offshore oil rigs. While, in principle, it seemed reasonable to include such acts in the concept of piracy or armed robbery at sea, it would be useful to gather the opinions of States on that issue.

Also to be discussed was the scope of the phrase "committed for private ends" in draft article 2 (a). It would be useful if, after having collected the views of States, the Commission could clarify whether "private ends" should be the sole or predominant motivation for acts of piracy and armed robbery at sea and/or how that regime would interact with other possible concurrent reasons – especially when political ends were also involved – in the context of what was termed "maritime terrorism", insurgency or non-international armed conflicts.

Regarding draft article 2 (c), relating to acts of inciting piracy, there was a subtle but important difference between the terms used in the various authentic texts of article 101 (c) of the 1982 Convention. Whereas the English, Spanish and Chinese texts did not require an examination of the intention behind the incitement of acts of piracy and defined the incitement itself as an act of piracy, the French version appeared to define not the incitement itself, but rather any act aimed at incitement, as an act of piracy. The French text therefore seemed to require an examination of the intention behind the act in question. In other words, an act that unintentionally incited the commission of an act of piracy – such as a post on social media, in certain circumstances – would apparently constitute an act of piracy according to the English, Spanish and Chinese texts, but not according to the French text. It would therefore be useful for the Commission to consider whether the unintentional incitement of an act of piracy, as referred to in article 101 (a) and (b) of the 1982 Convention,

was in fact an act of piracy, taking into account article 33 of the 1969 Vienna Convention on the Law of Treaties and relevant State practice. The Arabic and Russian versions of the 1982 Convention should also be analysed. That discussion would evidently apply also to draft article 3 (b).

He had reservations about draft article 2 (d) for two reasons. First, the conjunction *et* [and] in the French text could be understood as indicating that a given act must be defined as an act of piracy in both domestic law and international law in order to be considered illegal. Such an interpretation could weaken the international legal regime on piracy, since domestic law could set out additional criteria for an act to be considered illegal. Second, and more importantly, the reference to "any other illegal act committed at sea" that was "defined as an act of piracy in domestic law" meant that, under draft article 2, almost any act that States wished to define as piracy would become so, especially since the illegality of the act was also likely to be established under domestic law. As the Special Rapporteur noted elsewhere in his report, some countries had broad, open-ended definitions of piracy. Draft article 2 (d) was not limited in its scope of application to the high seas and could therefore encompass illegal acts committed in territorial seas, internal waters or archipelagic waters. Thus, the Commission would be taking the position that the definition of piracy was open-ended and would be endorsing an interpretation according to which the draft articles could be applied to almost any act that States wished to define as piracy, regardless of the maritime area in which the act took place. The most serious consequence of such a decision would be the potential exercise by a State of universal jurisdiction – to be provided for in a draft article based on article 105 of the 1982 Convention – in respect of non-violent acts occurring in the internal waters of another State, so long as domestic law defined that act as one of piracy.

He would therefore be in favour of either the deletion of subparagraph (d) or its revision to limit its scope. In any case, it should be clarified for States that such an innovation would represent progressive development rather than codification of customary international law or interpretation of the scope of article 101 of the 1982 Convention. A further issue relating to draft article 2 (d) was whether the concept of piracy committed "from land" should be covered in the Commission's proposed definition of piracy. There was limited State practice and case law to support such an argument. It was unlikely that the case law referred to in the report could be described as "sufficiently widespread and representative", as required by the standards of customary international law. Furthermore, the wording of article 101 (c) of the 1982 Convention, as reproduced in the Special Rapporteur's draft article 2 (c), did not refer to any geographical limitation. He would therefore be in favour of the deletion of the words "or from land" and a clarification in the commentary that "piracy from land" was already covered in article 101 (c) of the 1982 Convention.

The definition of "armed robbery at sea" in draft article 3 did not include an explanation of the adjective "armed". The Commission might wish to specify the meaning of the word in order to future-proof the text, as new technologies could make robbery at sea possible through conduct that was violent or led to violence without the use of weapons such as firearms. Such methods could include hacking into a ship's electronic systems or taking control of its electronic equipment using drones. The word "armed" did not apply to such situations.

Noting that draft article 3 (a) included a reference to the "threat" of an act of depredation, which did not appear in the definition of piracy in draft article 2 (a) or in article 101 (a) of the Convention, he said that if the main purpose behind the definition of armed robbery at sea was to confirm the geographical approach to the distinction between armed robbery at sea and piracy by specifying that the former occurred in internal waters, archipelagic waters and territorial seas while the latter occurred only on the high seas, in the exclusive economic zone and in the contiguous zone, the wording of draft articles 2 (a) and 3 (a) should be more closely aligned so that the only difference between them was the maritime area to which each applied. Thus, the words "or threat thereof" should either be added to draft article 2 (a) or deleted from draft article 3 (a). The same should be done, *mutatis mutandis*, in respect of the phrase "by the crew or the passengers of a private ship" in draft article 2 (a), which did not appear in draft article 3 (a).

The comments and suggestions he had made regarding draft article 2 (d) also applied, *mutatis mutandis*, to draft article 3 (c), which raised similar issues. Lastly, he looked forward

to addressing the numerous legal issues raised by the topic, as outlined in the 2019 syllabus and in the first report.

Mr. Nesi said that he welcomed the Special Rapporteur's comprehensive report and the regional approach taken to the topic, which was the most appropriate for achieving an effective solution to and understanding of the crimes under consideration. He also appreciated the analysis of modern forms of piracy, which involved the use of new technological, economic and political tools that were likely to increase the dangers for ships and could also have a serious impact on the economies of States whose commercial activities were made almost impossible by the frequent attacks on ships. While the measures taken by States to date had greatly contributed to reducing the number of incidents of piracy and armed robbery at sea, the Commission's consideration of the topic was essential to prevent such crimes from spreading further in areas tragically experiencing social and economic instability.

With regard to the definition of piracy, some States had transposed article 101 of the 1982 United Nations Convention on the Law of the Sea into their national codes, while others had decided to modify it in order to obtain greater flexibility. That tendency was no doubt closely linked to the evolution of piracy since the adoption of the Convention. As pointed out by Mr. Nguyen, the use of new high-technology unmanned weapons in the commission of piracy was a trend that the Commission must consider in its work on the topic. Modern-day attacks were carried out not only by one ship against another, as described in the Convention, but also from land or artificial islands built in exclusive economic zones, using drones or other modern weapons. It was important when attempting to define piracy to focus on the nature of the criminal activities and the means through which they were pursued. Proposed draft article 2 (d), in referring to "any other illegal act committed at sea or from land", appeared sufficient to cover piracy activities directed or conducted from land as well as from artificial islands and to ensure the accountability of pirates involved in the remote control of unmanned weapons. Nonetheless, given that the definition of piracy in the national laws of some States covered acts committed in territorial waters rather than only those committed on the high seas or other places outside the jurisdiction of any State, as was stipulated in the Convention, draft article 2 (d) might require further discussion. It was not clear how the reference to national and international law in that draft article could be reconciled, given the significant difference between national and international definitions of the crime of piracy in terms of the *locus delicti commissi*.

Noting that the Special Rapporteur's report focused mainly on sea piracy, even though the definition of piracy proposed in draft article 2 referred also to air piracy, he suggested that an in-depth analysis of the relevant legal instruments of aviation law, such as the Convention on International Civil Aviation or the Convention for the Suppression of Unlawful Seizure of Aircraft, would help to clarify whether the definition contained in article 101 of the 1982 Convention should be retained. Such an analysis might also provide guidance on other questions, including jurisdictional issues.

The definition of armed robbery at sea, as contained in draft article 3, required further consideration, as did the need to differentiate between the crimes of piracy and armed robbery. The definition in draft article 3, which was based on the one in the IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships, was similar to the one in article 101 of the 1982 Convention except that it referred to acts committed in the internal waters, archipelagic waters or territorial sea of a State. The number of States that had adopted a definition of armed robbery at sea in their national legislation was very limited compared to the number that had adopted a definition of piracy. There was a tendency to include armed robbery at sea in the definition of piracy, without restricting the latter to acts committed on the high seas. While a distinction was made between piracy and armed robbery at sea in a number of Security Council resolutions, he wondered whether it was necessary to include the issue in the scope of the Commission's work on the topic. As pointed out by Mr. Forteau, the Special Rapporteur's indication in his report that there was no legal practice with regard to armed robbery at sea in a number of States was somewhat misleading. For instance, the Special Rapporteur's statement that Italy had no specific legislation relating to armed robbery at sea was not entirely correct, since the vast majority of States, including Italy, had adopted legislation on armed robbery, which applied to acts

that took place anywhere in the national territory, including maritime zones under national jurisdiction. He wondered, therefore, whether it was necessary to establish any international regulation of such activities, given that States were entitled to apply and enforce those provisions as part of their criminal laws. The distinction between acts of piracy committed on the high seas and the same acts committed in sovereign maritime areas could be relevant only in the context of establishing forms of cooperation between States in order to adequately enforce the international rules on piracy.

States tended to accept the idea that piracy, the oldest international crime, was a *crimen juris gentium* subject to the exercise of universal jurisdiction, as reflected in articles 100 and 105 of the Convention. However, the main reason for that acceptance was that piracy was a crime that States could easily prosecute without impinging on the sovereignty of other States. However, as highlighted by other members, the Commission would need to examine whether the Convention also legitimized the exercise of universal enforcement jurisdiction over similar acts that began on the high seas but continued in maritime zones under State jurisdiction.

In considering enforcement jurisdiction, the Commission should attempt to move away from an obligation to cooperate and a right of seizure limited to the high seas. The issue was in fact closely linked to the right of hot pursuit enshrined in article 111 of the Convention, a right that ceased as soon as the ship pursued entered the territorial sea of its own State or of a third State. That limitation, together with the permissive language of article 105, constituted an obstacle to the effective suppression of piracy, as noted in paragraph 35 of the Special Rapporteur's report. The Commission should take advantage of the fact that piracy was generally considered a crime against *juris gentium* in order to strengthen the obligation of States to allow temporary extraterritorial enforcement measures in areas under the jurisdiction of another State, thereby giving a less permissive meaning to article 105 of the Convention. That appeared to be the best solution for responding promptly to criminal activities that might take place in different areas and for preventing impunity.

Concerning universal adjudicative jurisdiction, a number of States could potentially exercise their judicial authority over robbery offences committed in maritime areas subject to national jurisdiction. As conflicts of jurisdiction might arise between such States, including the State of registration or flag State, the State where the act was committed and the State of the victims, it was important to find a common solution to avoid disputes and impunity, including by examining existing instruments. In the field of airspace law, for example, article 4 of the Convention for the Suppression of Unlawful Seizure of Aircraft dealt with the exercise of jurisdiction, attributing it to the State of registration or, alternatively, to the State of landing. That Convention could also be useful in determining the exercise of jurisdiction in relation to piracy committed in maritime areas under State sovereignty, where jurisdiction could be attributed either to the flag State or to the port State. He suggested, therefore, that the Commission should not only discuss enforcement measures, but also analyse means of determining which State had the power to adjudicate a given dispute.

While he agreed with the current scope of the Commission's work on the issue of piracy, which was limited to illegal acts committed for private ends by the crew or the passengers of a private ship or a private aircraft, he wondered whether, in light of the evolution of piracy, the Commission should also address the issue of so-called strategic piracy. Modern-day pirates were adaptable not only in technological terms but also in political terms, with the development of strategic piracy, understood as any unlawful activity of financing, supporting or committing acts of piracy and armed robbery at sea by a State in order to gain political, economic or strategic advantage or to create or foment economic, commercial or political instability in another State. The Commission might wish to consider defining the crime of piracy as a complex offence supported by States through forms of illicit financing in order to control sea routes and manage the political instability of vast regions through mercenary activities. Preventive and repressive measures must therefore take into account the potential collusion of coastal authorities, who provided strategic protection to pirates. Lastly, it would be useful to discuss the strategic function of modern piracy, supported by the expansionist ambitions of some States, as a technique that was implemented both through disruptive actions against enemy navies and through camouflaged sabotage operations.

The Special Rapporteur's report did not address the issue of the form that the outcome of the Commission's work should take. He would like to know, specifically, what kind of legal text would be drawn up and whether it would be a non-binding instrument or a draft convention to be submitted for the approval of States. Such questions should be answered as soon as possible, as they would influence the Commission's future work on the topic.

Mr. Mavroyiannis said that the Commission might wish to devote further consideration to the need for cooperation between States for the prevention and repression of piracy and armed robbery at sea. In particular, it might wish to discuss how to create an obligation of cooperation between States for that purpose. Forms of cooperation could include the sharing of information and cooperation in investigations, prosecutions and the administration of justice. It was perhaps time to go beyond the permissive rules relating to cooperation in the repression of piracy in existing international law and consider some more prescriptive rules, as suggested by Ms. Mangklatanakul.

Mr. Grossman Guiloff said that the Special Rapporteur's first report provided a robust and comprehensive foundation for the Commission's examination of the topic, as it set out a rich array of case law and legislation from all regions of the world, highlighted the urgent need to strengthen the international legal framework on piracy and armed robbery at sea and addressed the contemporary challenges arising from the intersection of piracy and other illicit conduct. Piracy had substantial global ramifications, affecting maritime trade, merchant shipping and human rights, and a regulatory framework to curb it was crucial, not only for the nations most impacted, but for the international community as a whole. The topic fitted squarely into the Commission's mandate of progressive development and codification of international law.

Chapters II and III of the report showed how piracy had historically constituted a serious threat to international peace and security and the protection of human rights and, particularly, how countries in the global South were disproportionately affected because of their lack of equipment and personnel to monitor piracy and enforce the law against perpetrators.

One of the most important considerations for the Commission was the impact of piracy and armed robbery at sea on human security and human rights, due to the violence frequently associated with those crimes. As potential victims, persons such as merchants, fishers and other seafarers faced infringements of their rights to life, freedom from torture, freedom from slavery, liberty and security of person and freedom of movement. States had the obligation to guarantee a legal order that ensured that the population could freely enjoy human rights, a duty that had been accepted in almost every human rights treaty. It was, for example, set out in article 1 (1) of the American Convention on Human Rights, as interpreted in the 29 July 1988 judgment of the Inter-American Court of Human Rights in *Velásquez-Rodríguez v. Honduras*. The duty of prevention fell not only on the State directly impacted by the crime, but on all those that had a role to play. As flag States exercised exclusive jurisdiction over their vessels on the high seas, they had a responsibility to prevent those vessels from engaging in illicit conduct.

Individuals and communities dependent on coastal maritime activities experienced adverse impacts on their rights to an adequate standard of living, to freedom from hunger and to work, education and health, among others. Migrants and refugees were especially vulnerable to the hazards of piracy and armed robbery at sea, which could expose them to exploitation in different forms, forced labour or assaults on their physical, psychological and sexual integrity. Addressing the risks and burdens faced by those vulnerable groups and communities should be an essential component of the project.

Second, the challenge of tracking piracy and armed robbery at sea was linked to efforts to ensure compliance with tax, environmental and labour regulations and to combat corruption; however, possible solutions should not unduly undermine freedom of navigation on the high seas. Efforts to control piracy should be harmonized with a State's capacity to govern its maritime territories, and the impact of piracy and armed robbery at sea on its economic development, political stability and the exacerbation of existing inequalities must be addressed.

A third consideration concerned the threats posed to the broader international community. Failure to address piracy and to provide adequate support to those affected effectively jeopardized the capacity of the rules-based international order to deal with specific challenges and could allow the further proliferation of such illegal behaviour. The Special Rapporteur correctly emphasized the need for the international community to establish an appropriate framework for responding to such issues.

The Commission should be wary of the idea that the primary responsibility for combating piracy lay only with the coastal States close to the affected area. Piracy was a crime with international implications, and the responsibility to prevent it also fell on the international community, including Governments and international organizations. It disproportionately affected the global South, where limited resources, political instability and economic challenges limited the ability of States and regional bodies to combat piracy effectively. The international community must assume its responsibilities and provide adequate support to the regions most directly affected.

The first challenge in addressing piracy and armed robbery at sea, as noted by Mr. Fathalla and Mr. Oyarzábal, was to ensure that the Commission's work was grounded in the principles and legal provisions established in the 1982 United Nations Convention on the Law of the Sea. The definition of piracy set out in article 101 of the Convention had been given varying interpretations by domestic courts and legislatures. In light of the ever-changing nature of piracy and the threat it currently represented to international security, highlighted by Mr. Nguyen, the Commission needed to develop a more consistent and coherent analysis, drawing upon State practice to ensure a unified approach and to give its efforts the legitimacy of the law.

The Special Rapporteur had outlined six shortcomings in the current framework for addressing piracy. The first was the geographical element of the definition of piracy, which limited it to illicit conduct committed on the high seas. As mentioned in paragraph 32 of the report, under article 58 (2) of the 1982 Convention, piracy also included illicit activities in a State's exclusive economic zone. In any event, as the Special Rapporteur, Mr. Patel and other members had noted, given the dynamic and cross-border nature of maritime piracy, it was essential to determine whether there was a need to complement the existing regime. As the geographical element was tied to questions of jurisdiction, any determination that piracy under international law could be committed in areas other than the high seas and the exclusive economic zone would have serious implications, including possible conflict among States. Piracy, as it was currently defined, was a crime subject to universal jurisdiction; any broadening of its geographical scope would require the Commission to address the crucial issues of determining which States should investigate and prosecute the individuals involved and what solutions could be found if more than one State claimed jurisdiction over the same act.

A second issue identified by the Special Rapporteur concerned acts that could, simultaneously, have both "private" and "political" motives. Such situations were seen in other transnational crimes, such as narco-terrorism. As Mr. Mingashang had noted, piracy involved well-organized cartels with vast resources, including human capital, investors, technology, weapons and a strong ability to corrupt. Further study of the issue was thus warranted. All the relevant terms taken from national legislation and mentioned in the report, such as "private ends", "selfish ends" or "material ends", ultimately conveyed a similar meaning, namely the pursuit of a private benefit, irrespective of whether its nature was monetary. The current wording should therefore be retained, in the absence of a better solution.

The third issue concerned article 101 (a) of the 1982 Convention, which implied that both the perpetrator and the victim of a crime of piracy must be located on "ships". However, as other members of the Commission had pointed out, acts of piracy could take various forms and involve different actors not situated on ships. For instance, as the Special Rapporteur, Mr. Fathalla and others had highlighted, there were vehicles other than ships that were capable of perpetrating acts of piracy. The matter should therefore be explored in depth. The question of whether attacks on oil platforms at sea qualified as acts of piracy should also be discussed. Another intriguing issue, raised by Mr. Forteau, was the fact that piracy as currently defined covered only acts committed on the surface and not on the continental shelf.

With the increasing number of new technologies that could potentially be used to perpetrate acts of piracy, further clarification on that point was necessary.

A further concern raised by the Special Rapporteur pertained to article 105 of the 1982 Convention, which allowed States to seize a pirate ship or aircraft; the optional nature of the provision raised questions about its legal implications and about whether it should be regarded as soft law. However, the article should be interpreted in the context of the overall purpose of the Convention, which included the principles of freedom of navigation on the high seas and shared responsibility among States; that, as Mr. Oyarzábal had suggested, required effective repression of piracy, a legal obligation under article 100 of the Convention. Nevertheless, once a State had arrested a vessel engaging in piracy, it could decide to seize it and exercise jurisdiction over the offenders under the rule of universal jurisdiction or to hand them over to another State willing to do so, or adopt other measures that did not involve criminal prosecution, provided that they met the requirements of international law.

In its 2020 final award in the *Enrica Lexie* case, the Permanent Court of Arbitration had noted that the duty to cooperate under article 100 of the Convention did not necessarily imply a duty to capture and prosecute pirates. Rather, States could implement their obligations under article 100 through measures such as including "in their national legislation provisions on mutual assistance in criminal matters, extradition and transfer of suspected, detained and convicted pirates" or through the conclusion of "bilateral and multilateral agreements or arrangements in order to facilitate such cooperation". As the Commission stated in the commentary to article 38 of its 1956 draft articles concerning the law of the sea, the crucial point was that any State "having an opportunity of taking measures against piracy, and neglecting to do so, would be failing in a duty laid upon it by international law". Therefore, despite the possible ambiguity in the scope of article 105, his view was that it should be interpreted in a manner aligned with the purposes of the Convention. While it offered States the option to exercise criminal jurisdiction over piracy, it did not allow them to neglect the duty established in article 100.

Arguments that article 105 of the Convention lacked legal character and that the universal jurisdiction rule concerning the seizure of pirate ships had a soft law nature were unconvincing. He supported Mr. Fife's comments on the nature of universal jurisdiction, considering the power of domestic courts or competent authorities to seize pirate ships. Mr. Jalloh's comments should also be considered in depth.

It was important to note and thoroughly address the exception contained in the Convention to the normal rule that flag States exercised exclusive jurisdiction over their vessels on the high seas: under article 105, other States were permitted to assert their jurisdiction over a pirate vessel and its crew. Without that provision, it could be argued that only the flag State would be allowed to exercise its jurisdiction over the infringing vessel.

There were two regional practices in respect of universal jurisdiction that might form a good starting point for the Commission's work. The African Union Model National Law on Universal Jurisdiction over International Crimes provided that, in exercising jurisdiction under the law, a court must accord priority to the court of the State in whose territory the crime was alleged to have been committed, provided that that State was willing and able to prosecute. The European Union focused on subsidiarity, asserting that the primary responsibility for investigating and prosecuting crimes lay with States directly linked to the crime. It stressed cooperation between States while respecting the jurisdiction of the State most closely connected to the offence. In the region of the Americas, there were important treaties on matters such as international crime, corruption and terrorism that established principles involving cooperation, assistance and, in some cases, liability that would merit consideration.

The sixth legal problem noted in the report concerned the failure of some States to prosecute piracy due to the lack of domestic legislation criminalizing it. He did not share the Special Rapporteur's view that lack of legislation was not a convincing reason for not repressing piracy. Without relevant domestic legislation defining the offence and specifying the penalty, any prosecution for piracy would conflict with the principle of legality. Moreover, as previously noted, the obligation established under article 100 of the Convention

did not necessarily require States to engage in criminal prosecutions on the basis of universal jurisdiction.

However, while the norms of international law and, in particular, international criminal law should be respected, that did not mean that failure to take action did not engage the international responsibility of the State. In addressing the question, the Commission should take into consideration more types of legislation that could provide guidance for further development. Future reports could thus discuss the possibilities available for repressing piracy, determining responsibility and providing accountability and relief.

On the definition of piracy, three further points could be added to those mentioned in the first report. As Mr. Fathalla and Ms. Mangklatanakul had pointed out, the Commission should focus on both universal jurisdiction and the wider obligation of States to cooperate in combating piracy, as stipulated in article 100 of the Convention. Capacity-building, mentioned by Mr. Oyarzábal, was also of utmost importance, especially for countries in the global South. The Convention was complex and technical and covered a wide range of issues related to the oceans and their resources. Many of those countries lacked the expertise and resources to be able to fully implement it and so were at a disadvantage in negotiations and decision-making processes related to ocean governance. They would therefore benefit from clear provisions on areas in which cooperation was required, such as technology transfer, scientific research and the protection and preservation of the marine environment. From his experience serving on the International Criminal Police Organization (INTERPOL) Commission for the Control of INTERPOL's Files, he was of the view that INTERPOL could provide the Commission with more assistance on the topic. He encouraged the Special Rapporteur to consult it to explore ways of strengthening cooperation with that body.

Second, as many colleagues had mentioned, while the Convention was an invaluable instrument, it presented procedural challenges in areas such as fact-finding, evidence-gathering and ensuring due process for both alleged perpetrators and victims, which needed to be further addressed if it was to be fully implemented. The procedural shortcomings should thus be taken into consideration in the Commission's study.

The third point concerned the humanitarian aspect, mentioned by Ms. Mangklatanakul, which was relevant in the context of combating transnational crimes in the maritime domain. It was not enough to prosecute and punish the criminals involved; priority should also be attached to providing assistance, rescuing those affected and providing them with medical and psychological care, among other requirements of full reparation for the damage inflicted. It was also important to facilitate the repatriation of victims – who might include children, women, refugees, stateless individuals, victims of sexual exploitation and persons placed in a situation of vulnerability – to their countries of origin, in compliance with international law.

The Special Rapporteur might also find it useful to consider some additional aspects of the regulation of piracy in Chile. Article 434 of the Criminal Code of Chile, mentioned in paragraph 196 of the report, criminalized "acts of piracy" but did not include a definition of those acts. However, as it fell under title IX (2) of the Code, entitled "Robbery with violence and intimidation", piracy was only punishable in Chile to the extent that it amounted to robbery. In a notorious case of piracy prosecuted in Chile (No. 130-2006, Criminal Court of Concepción), the applicants had challenged the constitutionality of article 434 of the Criminal Code, alleging that it violated the principle of legality by failing to describe the acts amounting to piracy. However, in its judgment No. 549-2006, the Constitutional Court of Chile had found that the application of the provision in question was not unconstitutional because the article was found in the section of the Criminal Code criminalizing robbery and had been applied in a case of robbery of fish in territorial waters. Article 434 was applicable to acts of piracy committed both within and beyond the territorial sea, as article 6 (7) of the Courts Organization Code specifically included piracy among those crimes committed outside national territory that fell under the jurisdiction of Chilean courts. A comparative study would probably identify similar provisions in other States' domestic legislation.

With regard to the proposed draft articles, he believed that the element of geographical scope in the definition of piracy set out in draft article 2 should be worded more precisely. Specifically, it would be helpful to expressly state that the definition of piracy encompassed

acts committed on the high seas and in the exclusive economic zone. The question of whether piracy included acts committed in the territorial sea or the contiguous zone was more complex. Arguably, their inclusion would trigger the exercise of universal jurisdiction over acts committed in those areas, a situation that did not currently arise. He encouraged the Special Rapporteur to formulate a more detailed proposal addressing the issue of piracy in different zones. It would also be helpful to use more precise language to explain the thinking behind the Special Rapporteur's conclusion that the definition of piracy should encompass only acts committed on ships. In order to effectively combat the crime of piracy, it was essential to consider all possible forms and all possible actors, and whether the current framework allowed for a broader interpretation.

With regard to draft article 3 (a), he agreed with Mr. Forteau that international straits should be included in the list of zones. Lastly, he noted that, as currently worded, draft article 2 (d) and draft article 3 (c) appeared to create space for potential breaches of the *ne bis in idem* principle, in that an act could amount to both piracy and armed robbery if national legislation defined either of the two terms in a manner that overlapped with the international definition of the other term and the latter definition had been incorporated into the domestic legal order.

Mr. Huang said that the Special Rapporteur's first report on the topic "Prevention and repression of piracy and armed robbery at sea" was impressive in that he had managed to collect a vast amount of primary research material in a relatively short period of time and had used it to provide a detailed account, on a region-by-region basis, of historical and recent developments in the area of piracy and armed robbery at sea and in the legislation and case law of relevant States. The material was highly valuable as a source of reference and provided a good foundation for the consideration of the topic. The memorandum by the Secretariat (A/CN.4/757) was a valuable supplement to the report and gave the Commission a clear idea of the key questions that arose in relation to the topic: what consensus the Commission had achieved, what the point of departure was and how the Commission should move forward on the topic.

The attention accorded in the report to regional situations and State practice was also impressive. It could be said, however, that the report devoted too much attention to those aspects, which accounted for most of its content. In addition, the thinking behind the research and the structure of the report could have two undesirable consequences. The first was that it was difficult to gain a thorough grasp of national legislation and case law related to the crime of piracy because the report did not provide a comprehensive overview of relevant laws and cases in individual States. For example, chapter III, concerning piracy and armed robbery at sea in Asia, failed to even mention two classic cases, one of which was the only case of piracy to have been adjudicated by a Chinese court.

In that case, which dated back to 2008, 10 Indonesian nationals suspected of hijacking a Thailand-registered oil tanker in Malaysian waters had been apprehended by Chinese police when they had attempted to dispose of the proceeds. After establishing jurisdiction, Shantou Intermediate Court had heard the case but, since piracy had at that time been neither defined nor penalized under the Criminal Code of China, the defendants could not be prosecuted on piracy charges and had instead been charged with robbery. Owing to the time elapsed since the events, the lack of solid evidence and the loss of key items of evidence, it had proved difficult to secure a conviction for robbery and, after nearly six months in detention, the suspects had been returned to Indonesia. The Government of Malaysia had requested their extradition to Malaysia to stand trial but the request had been denied, as there was no extradition agreement between China and Malaysia.

That case was archetypal in that it was linked to the definition of the crime of piracy, criminal jurisdiction in respect of the crime and conflicts of jurisdiction among multiple States. It merited examination, as it raised important legal issues such as universal jurisdiction over the crime of piracy and the territorial jurisdiction of the State where a crime of piracy took place. However, in the report, the only China-related case cited was a case dating back to 1873 in which the Judicial Committee of the Privy Council of the United Kingdom, which had been the final court of appeal, had heard an appeal against the hearing of the case by the Supreme Court of Hong Kong; a case that had arisen 150 years previously could hardly be presented as a study of the case law of China. Furthermore, the report inaccurately stated that

between the 1870s and the 1920s China had been “under British imperial rule”, whereas in fact China had never been a colony of the United Kingdom.

Another archetypal piracy case also omitted from the report was the *Enrica Lexie* case between India and Italy, which had begun in 2012 and dragged on until 2021. In that case, two Italian marines who had mistakenly shot two Indian fishermen while engaged in an anti-piracy escort mission in waters close to India had been arrested, prosecuted, tried and imprisoned under Indian anti-piracy and anti-terrorism laws, potentially facing the death penalty. The case had sparked a serious diplomatic dispute between Italy and India that had lasted for several years and had led Italy to initiate judicial and arbitral proceedings against India before the Permanent Court of Arbitration and the International Tribunal for the Law of the Sea.

That case raised complex international and domestic legal questions, including whether the unintentional killing of civilians in the context of anti-piracy operations constituted a criminal offence; whether those responsible bore criminal responsibility; and which State or States could exercise jurisdiction. It also touched on legal issues such as the immunity of warships and official acts of military personnel and the settlement of disputes between the States concerned. However, the report was silent on the case and, in paragraphs 166 and 167, concerning the case law of India, instead focused on *Gaurav Kumar Bansal v. Union of India & others*, in which the Supreme Court of India had heard a petition to intervene and expedite the release of Indian seamen taken hostage by Somali pirates in 2010, 2011 and 2012. The case was not strictly speaking a piracy case but rather a civil political claim, and the petition had in any case been dismissed.

Thus, an analysis and comparison of the cases cited by the Special Rapporteur and the cases omitted from his overview of practice in China and India raised questions as to the relevance and credibility of the regional and country-specific overviews presented in the first report. The extent to which the cases cited could be considered to represent and reflect the policy positions and judicial practice of the States concerned in respect of the prevention and repression of piracy and armed robbery at sea was not clear.

The second undesirable consequence of the structure of the report was that, owing to the focus on regional and country-specific situations, the analysis of overarching legal issues related to piracy was insufficient. The report did not follow the scope and the methodology proposed for the topic in the syllabus, it lacked a clear direction and much of the primary research material collected had not been fully analysed and used effectively. The thinking behind the draft articles attached to the report was also insufficiently explained. Moreover, because the Special Rapporteur’s research had been conducted in parallel with the research carried out by the secretariat, the Special Rapporteur had been unable to incorporate into his report the historical review of the Commission’s consideration of piracy-related topics contained in the memorandum by the Secretariat. He hoped that the Special Rapporteur's second report would remedy that omission.

Turning to some of the core issues addressed in the report and recalling the long history of piracy, he noted that the resurgence in acts of piracy witnessed at the start of the twenty-first century explained the necessity of the topic’s consideration. According to the global piracy report issued by the Piracy Reporting Centre of the International Maritime Bureau, a new record for attacks, hijackings and hostage-taking by pirates had been set in 2010. In that year, there had been a total of 445 pirate attacks around the world, 53 vessels had been hijacked and 1,181 persons had been taken hostage by pirates. Piracy was particularly rampant in the Gulf of Aden and the waters around Somalia, owing to the country’s unique geographic location, turbulent domestic situation, high level of poverty and stunted economic development, which had given rise to piracy as an industry involving a chain of activities. Somali pirates were the biggest threat to the safety of international shipping and one of the key factors affecting the regional situation in the Middle East and Africa. Acts of piracy were also on the rise in Indonesia, the South China Sea, the Bay of Bengal, Nigeria and the Caribbean region, and off the coast of South America.

The increase in pirate attacks had led the Security Council to take action under Chapter VII of the Charter of the United Nations and adopt a series of resolutions to encourage all countries to cooperate in preventing and repressing piracy, and acts of piracy in the Gulf of

Aden and the Strait of Malacca had been curtailed to a certain extent as a result. However, piracy continued unchecked in waters unprotected by armed escorts and thus warranted continuing attention. It was for that reason that he had actively supported the topic's inclusion in the Commission's programme of work from the outset and would continue to participate actively in its consideration, including by supporting the proposition that the Commission's final output on the topic should be draft articles that might form the basis for a convention.

With regard to the point of departure for the Commission's work on the topic, he noted that piracy had been a key issue on the Commission's agenda since its establishment. At its very first session, the Commission had selected the regime of the high seas as one of the three topics for codification to which it would give priority, and the repression of piracy was a core element of that regime. As detailed in the memorandum by the Secretariat, the Commission's work on the topic "Regime of the high seas" had been reflected in the relevant provisions of the 1958 Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea. In fact, in addition to national legislation and legal practice, there were many global and regional instruments that together provided a basic international legal framework for international cooperation in repressing piracy. In his view, the results of the Commission's previous research on piracy and related issues, along with applicable principles and provisions of international law, including Security Council resolutions, should provide the basis and starting point for the current work.

Issues that had been discussed and on which the Commission had reached a consensus should not be reopened or re-examined unless there was an absolute need to do so. For example, the debate over whether acts of piracy should be limited to acts committed for private ends had long been settled. According to previous definitions of the crime of piracy, acts of piracy could be committed only by persons on board ships acting for private ends, and acts involving mutinies of the crew on board warships or military aircraft should be regarded as acts committed by private ships. Stateless ships were not necessarily pirate ships; they were treated as pirate ships only if they engaged in acts of piracy. In paragraph 48 of the report, the Special Rapporteur appeared to question "the usefulness of including the motive of the crime as one of the elements of maritime piracy", even though the question was clearly addressed in provisions of the 1982 United Nations Convention on the Law of the Sea and any attempt to modify those provisions could lead the Commission into considerable difficulties. At the same time, however, the Commission should move with the times; its output should add value to the existing framework.

He accepted the Special Rapporteur's view regarding the need to distinguish between piracy and armed robbery at sea. The report stated, in paragraph 38, that it was essential to clarify the definition of maritime piracy and to distinguish between that concept and the crime of armed robbery at sea, and that the clarification should be based on an examination of State practice from the legislative and judicial perspectives and according to a regional approach. Historically, the main difference between piracy and armed robbery at sea had lain in the nature of the seas on which the acts took place and the types of jurisdiction over different areas. Acts on the high seas were piracy and acts in the territorial sea of coastal States were armed robbery. According to long-standing international practice, the scope of all States' jurisdiction over piracy was limited to the high seas and areas outside the jurisdiction of any State. Within areas of national jurisdiction, when an armed robbery took place in the territorial sea or the contiguous zone, it was generally handled according to domestic laws. Thus, the 1982 Convention defined only the crime of piracy and left the treatment of acts of armed robbery committed in the territorial sea to the discretion of States.

More recently, new developments had arisen. The surge in acts of piracy and armed robbery committed in national territorial waters such as those of Somalia had been accompanied by a descent into anarchy in some territorial seas under the exclusive jurisdiction of coastal States, owing to domestic instability in the States with jurisdiction that had resulted in insufficient efforts at repression or outright impunity and thus required urgent international intervention and cooperation. The logical result of those developments was that prevention and repression efforts should accord equal importance to acts of piracy committed on seas outside the jurisdiction of any State and armed robberies committed in internal waters within national jurisdictions.

From the jurisdictional point of view, however, it remained essential to draw a strict distinction between acts of maritime piracy committed on seas outside national jurisdictions and acts of armed robbery committed within territorial waters. While universal jurisdiction could be applied to the former under international law, only the principle of State sovereignty applied to the latter; no country could enter the territorial sea of another State for the purpose of administering justice without the consent of the coastal State concerned. It was noteworthy in that connection that, in a series of resolutions in which it had authorized States cooperating with the transitional Government of Somalia to enter the country's territorial waters in order to use all necessary means to repress piracy and armed robbery, the Security Council had at the same time stressed the importance of abiding by the provisions of the 1982 Convention and the need to seek the Government's consent for implementation of the measures set forth in its resolutions and to contain States' actions strictly within the territorial waters of Somalia. As there was still insufficient practice concerning international cooperation in preventing and repressing armed robbery at sea, the Commission should endeavour to identify further cases of such practice, particularly by seeking input from Member States.

Concerning the establishment and strengthening of an international judicial mechanism for prosecuting pirates, he noted that, as international anti-piracy operations had increased, it had become clear that greater legal cooperation between States was urgently needed. According to the 1982 Convention, all States had jurisdiction over acts of piracy committed on the high seas; they also had the right to escort ships and to use military means to combat piracy on the high seas. Furthermore, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation required all States parties to cooperate in preventing and repressing piracy and established an *aut dedere aut judicare* obligation in respect of pirates to ensure the imposition of judicial sanctions. However, experience showed that establishing an international judicial mechanism to rule on crimes of piracy could be a major challenge for international cooperation.

When pirates were apprehended in waters outside national jurisdiction, States tended to opt for one of three possible courses of action. One option was to hand the pirates over to the Government of their country of origin. The United Nations Office on Drugs and Crime and the United Nations Development Programme were currently supporting the strengthening of prison systems in countries such as Somalia with a view to ensuring that convicted pirates were imprisoned in accordance with applicable international human rights law. A second option was to return the pirates to the apprehending country for adjudication; the national courts of the United States of America and Germany, for example, had tried Somali piracy cases. The third option was to transfer the pirates to a third country through extradition, judicial cooperation or other means. Many States chose to cooperate with Kenya and Yemen, among other countries. However, the large numbers of pirates being transferred to third countries increased the burden on the courts and prisons of those countries. For example, on one occasion the Kenyan authorities had temporarily suspended the prosecution of arrested pirates for precisely that reason.

In response to that situation, proposals for the establishment of a special international court to rule on crimes of piracy had been put forward. Those proposals had been supported by a number of countries and organizations, but most States believed that the timing and conditions were not yet right. The establishment of such an international court would raise complex political, legal and financial issues and was not feasible in the short term. On the other hand, the establishment of a hybrid court with some international aspects but operating under the judicial system of coastal countries might be more practical and feasible. The Commission might therefore wish to suggest some appropriate solutions for establishing and strengthening an international judicial mechanism for prosecuting pirates.

He would refrain from making specific comments on the proposed draft articles until they were considered by the Drafting Committee but agreed that they should be referred to the Committee.

The meeting rose at 12.15 p.m.