Provisional

For participants only

13 June 2023

Original: English

International Law Commission
Seventy-fourth session (first part)

Provisional summary record of the 3624th meeting
Held at the Palais des Nations, Geneva, on Monday, 15 May 2023, at 3 p.m.

Contents

* Reissued for technical reasons on 7 August 2023.

Present:

Chair:	Ms. Oral
Members:	Mr. Akande
	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
	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 3.05 p.m.

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

Mr. Jalloh said that pirates had long captured the global popular imagination – as illustrated by the fact that a Hollywood franchise featuring an eccentric pirate had become one of the most successful film series in history – but also the attention of lawyers. Indeed, the topic of the regime of the high seas had been introduced at the Commission's first session in 1949, and seven of the draft articles concerning the law of the sea that the Commission had adopted in 1956, and which had guided the drafting of the 1958 Convention on the High Seas, pertained to piracy. That instrument's provisions on piracy had been reproduced nearly verbatim in the 1982 United Nations Convention on the Law of the Sea. So little, and yet so much, had changed in the past 75 years.

Concerning the introductory part of the first report, he agreed about the importance of the topics of piracy and armed robbery at sea, but it was worth noting that some States, including the Netherlands and Belarus, were of the view that piracy, at least as traditionally understood, had to all intents and purposes been eradicated or that the Commission had already dealt with topic. It was also noteworthy that the Commission itself, in 1984, had questioned the relevance of addressing the issue of piracy, expressing doubts as to whether, in the international community of the time, the offence of piracy constituted a threat to the peace and security of humankind.

The twenty-first century had nonetheless seen a dramatic resurgence of piracy – over 300 incidents a year since 2008 – not only in Africa but also in Asia, prompting the Security Council to take action. However, modern piracy was no longer the work of a lone actor or small group of actors seeking private gain; rather, it had become a phenomenon on an industrial scale reflective of the travails of modern States, particularly in terms of governance challenges. The new considerations raised by other members of the Commission, such as the potential for States to weaponize piracy for economic, political or other strategic gains, and the use of modern technological means, including drones, pointed to the need to address the topic in a comprehensive manner. Furthermore, as a problem of the global commons, tackling piracy was the responsibility of the entire international community, not only of the States directly concerned. Recognition of that shared responsibility explained the overall support in the Sixth Committee for the Commission to address the issue.

He wondered whether the Maritime Information Cooperation and Awareness Center, cited by the Special Rapporteur in paragraph 5 of his report, was the most authoritative source for statistics on piracy and armed robbery. The International Maritime Organization (IMO), for example, issued an annual report on acts of piracy and armed robbery against ships on the basis of the definition of piracy contained in the 1982 Convention. The IMO statistics, although not materially different from those produced by the Maritime Information Cooperation and Awareness Center, offered a slightly different perspective on the diminishing number of acts of piracy in the past few years.

He commended the Special Rapporteur for including the socioeconomic costs of piracy and armed robbery at sea in his report. In addition to the cost of stolen goods and ransoms, piracy also led to higher fuel costs, insurance premiums and charter rates. For instance, it had taken only 10 hijackings to cause an 11 per cent drop in exports between Asia and Europe, resulting in a loss of $28 billion. Furthermore, the navies of the European Union and the North Atlantic Treaty Organization spent over $1 billion a year on security measures alone.

He welcomed the Special Rapporteur's decision to organize the report by region, given the centrality of regional cooperation in the international community's efforts to prevent and suppress piracy. While in his view the law on piracy was primarily set out in the 1982 Convention, particularly in its articles 100 to 111, customary international law, regional treaties and case law were also relevant to the Commission's future work on the topic.

He joined a number of other members in questioning whether the Special Rapporteur should have paid special attention to the drafting history of the 1982 Convention in determining whether the proposals reflected customary international law. The main

constituent element of customary law was State practice, which should be assessed as a whole. In that connection, he drew attention to the Commission's 2018 work on the identification of customary international law, specifically conclusions 11 and 12 on the secondary status of treaties and resolutions of international organizations relative to State practice. For the analysis of piracy to be grounded in State practice, it might have been useful for the Special Rapporteur to delve deeper into State feedback at the beginning of the report, which, in addition to being standard practice, would have emphasized the importance of the views expressed in the Sixth Committee.

Recalling that the question posed in the report as to whether universal jurisdiction was mandatory or permissive in relation to piracy, he noted that, as seen in the debate in the Sixth Committee and several reports of the Secretary-General, most States – including China, which took issue with the very concept of universal jurisdiction – accepted that piracy was the classic example of a universal jurisdiction offence. Furthermore, he wished to underline that there was no evidentiary basis, even on a narrow interpretation of the 1982 Convention, for the Commission to consider that piracy was not a universal jurisdiction offence. The Commission should avoid introducing uncertainty in that regard. As a proponent of the consideration of the topic of universal criminal jurisdiction by the Commission, he wished to note that, irrespective of the conclusions the members drew concerning the universality of the crime of piracy, those conclusions should be without prejudice to how the Commission might consider universal jurisdiction in relation to other topics in the future.

Turning to the draft articles, he found the scope, as defined in draft article 1, generally appropriate for the topic. It was correct for the topic to encompass both piracy and armed robbery at sea, as both crimes were the object of the study, in keeping with the approved syllabus. However, as other members had suggested, it would be better to considerably shorten the provision by deleting the reference to "international law, the legislative, judicial and executive practices of States, and regional and subregional practices".

He fully supported the definition of piracy in draft article 2 (a) to (c), which reproduced the definition in article 101 of the 1982 Convention, which was itself almost verbatim the definition contained in the 1958 Convention on the High Seas. The Commission should give significant weight to the fact that, in the period between 1958 and 1982, the international community had opted not to revise the definition. Nevertheless, building on the broad survey of legislation and practices in the first report, the Commission should keep an open mind concerning the possibility of using a more nuanced definition that reflected customary international law rather than just the 1982 Convention.

He wished to express caution regarding article 2 (d): it might be useful to clarify at the beginning of the draft article or in the commentary that the Commission endorsed the 1982 definition of piracy and was proposing an addition to it. Doing so would also clarify whether the Commission was engaged in an exercise of codification or progressive development of the topic. A new definition of piracy would more likely be acceptable to States if the Commission proposed draft articles that they could use as a basis for negotiating a treaty.

He recalled that, in the debate in the Sixth Committee at the seventy-fourth session of the General Assembly, at least eight delegations – China, the Philippines, the Islamic Republic of Iran, Brazil, Austria, Belarus, the Netherlands and Poland – had explicitly stated that the Commission should respect and refrain from interfering with the existing legal framework on piracy. Malaysia, however, had been of the view that the current international framework was insufficient to curb piracy, which could open the door for the Commission to use the extensive review of State practice contained in the first report, and perhaps even to reconsider advancing a new definition of piracy more rooted in customary international law, to address the legal gaps identified by the Special Rapporteur.

He recognized that draft article 3 (a) and (b) reproduced the definition of armed robbery at sea contained in the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, which was consistent with the scope of the topic proposed in the syllabus. He was concerned, however, that that definition might be considered not to reflect State practice or acceptance by a wide, representative group of States. Indeed, that definition of armed robbery at sea had been adopted by only one State in

Africa and another in the Americas and the Caribbean, and by no State in Europe. On the other hand, there might be merit in using the definition for reasons of consistency, especially if the Commission was proposing articles that States would be invited to use as a starting point to negotiate a convention.

As for the form of the outcome of the Commission's work on the topic, he invited the Special Rapporteur to further explain why he believed draft articles were necessary. On the basis of the first report and the discussion in plenary, he envisaged four main options. The first, which would be consistent with the 2019 syllabus, was to proceed with the preparation of draft articles for a new stand-alone convention on the prevention and repression of piracy and armed robbery at sea. However, given the wide acceptance of the provisions on piracy contained in the 1982 Convention and the diversity of practice at the legislative and judicial levels, there could be risks if the Commission was seen to be using draft articles to amend the Convention without an express mandate from the General Assembly. On the other hand, if the Commission was to build on the template of its 2019 draft articles on prevention and punishment of crimes against humanity, it could offer a more specific and useful regime that would enable States to address modern forms of piracy and their dialectical and interdependent relationship to armed robbery at sea. At least two delegations in the Sixth Committee had expressed a preference for draft articles. If the Commission chose that path, he proposed that a definitional clause should be adopted, in line with the Special Rapporteur's suggestions, concerning general obligations, the obligation of prevention, non-refoulement, criminalization under national law, the duty to carry out investigations, the duty to take preliminary measures when alleged offenders were present in a State's territory, the protection of victims, witnesses and others, extradition, mutual legal assistance and dispute settlement. Such an approach would be in line with that taken by the Commission in the 2019 draft articles on prevention and punishment of crimes against humanity.

The second option, as some members had suggested, was to consider a treaty instrument to supplement the Convention similar to the draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of life in areas beyond national jurisdictions.

The third option was to adopt draft conclusions, while the fourth was to adopt draft guidelines. The latter would amount to recognition that there were already several important treaties in the area of piracy, and thus guidelines would be the most appropriate form for the Commission's contribution.

All the approaches had advantages and drawbacks. Whatever option was selected, it would be important for the Commission to be fully transparent about the basis for its choices and to clearly state the meaning it ascribed to the final form it selected. Like other members, he would find it helpful to hear more details of the Special Rapporteur's proposals for the future programme of work beyond his stated intention to focus on regional and subregional practices and General Assembly and Security Council resolutions. However, he recognized that the Special Rapporteur should be allowed a margin of appreciation as his work and thinking evolved.

In sum, he highly appreciated the Special Rapporteur's various proposals in the first report, which had shown that it was possible to engage in a substantial and systematic analysis of State practice in a short time frame. He fully supported transmitting the proposed draft articles to the Drafting Committee.

Ms. Ridings said that the background and statistics on the number of instances of piracy and armed robbery at sea contained in the Special Rapporteur's first report provided useful context for the Commission's discussions. Similarly, the memorandum prepared by the secretariat would be invaluable as the work on piracy and armed robbery at sea progressed.

As noted by the Special Rapporteur, piracy and armed robbery at sea were often seen in conjunction with other crimes, such as human trafficking, drug trafficking, illegal fishing and illegal migration. Piracy, which was increasingly becoming politicized, was recognized as a serious organized criminal activity with links to financiers, criminal gangs and others who organized, supported, facilitated and profited from piracy and armed robbery at sea.

The starting point for examining piracy was the United Nations Convention on the Law of the Sea, particularly articles 100 to 107 and article 58 (2). While the indication in the 2019 syllabus that the purpose was not to alter in any way the provisions of the Convention should remain the Commission's guiding consideration, it might nonetheless be appropriate to consider the codification and progressive development of international law in a manner that would assist States in preventing and suppressing piracy and armed robbery at sea. Consideration could be given, for instance, to aspects not governed by the Convention or to any ambiguities that could be clarified.

For example, article 100 of the Convention contained a duty to cooperate in the repression of piracy. In the *"Enrica Lexie" Incident* (*Italy v. India*), the arbitral tribunal had noted that article 100 did not stipulate the forms or modalities of cooperation States should undertake in order to fulfil their duty under that article. While the arbitral tribunal had indicated that article 100 did not necessarily imply a duty to capture and prosecute pirates, it had left some ambiguity as to the extent of the duty to cooperate in practice. Clarifying or complementing the provisions of the Convention might be appropriate, depending on the Commission's consideration of the Special Rapporteur's further analysis and the problems to be addressed under the topic. The Commission's work should both add value and be of practical assistance to States.

The Special Rapporteur identified certain shortcomings in the definition of piracy, the first being its geographical scope, which complicated any attempt to define the crime of maritime piracy on the basis of the place of commission of the crime. According to the centuries-old conception of piracy, piracy occurred on the high seas and, according to article 58 (2) of the Convention, in exclusive economic zones. The rationale for that was clear, namely that piracy took place outside the criminal jurisdiction of any single State. As had already been pointed out, universal jurisdiction was an exception to the usual principle of flag-State jurisdiction over vessels and, as such, was strictly defined. It enabled any State to exercise jurisdiction over the crime of piracy committed on the high seas. However, article 105 did not actually require any State to exercise such jurisdiction.

Where acts of piracy occurred in the territorial sea, archipelagic waters or internal waters of a coastal State, they were classified as armed robbery at sea. The State was fully able to exercise prescriptive and enforcement jurisdiction over such acts. It was not surprising, therefore, that the domestic legislation of some States equated piracy with armed robbery at sea, for it was the place of commission of the offence that was the determining factor. Since a coastal State could exercise its territorial jurisdiction in waters under its sovereignty and universal jurisdiction for acts committed outside its territorial jurisdiction on the high seas, she did not see the geographical scope of piracy as a limiting factor, provided that appropriate action was taken in the event of armed robbery at sea.

The second shortcoming was the use of the term "for private ends", the meaning of which had been the subject of much scholarly discussion. In his first report, the Special Rapporteur explained the difficulty of separating piracy motivated by profit and piracy motivated by political or ideological ends. The background provided by the Commission's discussions on the definition of piracy, as set out in paragraphs 43 to 51 of the memorandum by the secretariat (A/CN.4/757), lent support to the Commission's original intention, that piracy for private ends was to be contrasted with acts of a public or authorized nature. That would support the idea of a public/private dichotomy espoused by Mr. Paparinskis and the scholar Douglas Guilfoyle, rather than the personal/political dichotomy that was often considered as being the meaning of "for private ends". Given the widespread ratification of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, it would be useful to see how States viewed the relationship between acts of piracy and acts of terrorism.

The third shortcoming was that the definition of piracy in article 101 of the United Nations Convention on the Law of the Sea covered acts directed either against another ship or aircraft or against persons or property on board such ship or aircraft, otherwise known as the "two ships" requirement. It did not cover the situation of a person on board a vessel taking control of the vessel – as had happened in the *Santa Maria* incident in 1961 and the *Achille Lauro* incident in 1985 – or address the issue of the definition of a "ship" or the scenario of

an attack from or against a fixed platform or an attack from land, including through the use of drones.

Some of those issues had not gone unrecognized. Indeed, the *Achille Lauro* incident had led to the adoption of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, which addressed maritime terrorism on a single ship, and the potential for acts against fixed platforms was covered under the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. The question for the Commission was whether there were any gaps resulting from that shortcoming that still needed to be addressed. In reviewing the international legal frameworks for piracy and armed robbery at sea, it was necessary to consider other relevant international legal instruments, including the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocols, the International Convention against the Taking of Hostages and the United Nations Convention against Transnational Organized Crime. The different mechanisms relating to prescriptive and enforcement jurisdiction under each of those instruments must be considered in order to identify the extent of any gaps and the most appropriate way to address them.

As for the fourth shortcoming, it had been suggested that, in the light of the circumstances surrounding piracy, enforcement should not be the monopoly of States, but that any merchant ship should be able to respond immediately in self-defence. As Mr. Savadogo and Mr. Sall had explained, that ability involved complex issues related to private security personnel and the use of force, which merited particular attention. She therefore urged caution, so that the legal and other implications of the issues could be fully analysed.

The fifth and sixth shortcomings both concerned the extent of a State's duty to cooperate in the repression of piracy. Given the need to explain the precise content of the duty to cooperate; some of the considerations presented by Mr. Mavroyiannis could be usefully analysed in that regard.

She welcomed the regional approach taken by the Special Rapporteur, in particular his separate consideration of Oceania, given that the Pacific Ocean covered some 30 per cent of the Earth's surface. The differences found between the regions' domestic legislative practice regarding the definition, criminalization and penalization of piracy and armed robbery at sea were unsurprising, given that such practice was necessarily linked to the legislative system of each country.

Taking New Zealand as an example, she said that piracy was defined in the Crimes Act as any act amounting to piracy by the law of nations, thus incorporating the international legal definition of piracy. In a dualist system of incorporation of international law, the domestic legal capacity to exercise extraterritorial jurisdiction over acts of piracy obviated the need to specifically provide for universal jurisdiction. In any case, the Crimes Act should be read in conjunction with the Maritime Powers Act, which set out the powers for the enforcement of the State's criminal law in relation to certain extraterritorial offences committed outside New Zealand waters, including piracy. According to the latter Act, New Zealand could exercise enforcement jurisdiction over piracy committed in international waters and over piracy committed in the territorial waters of another State, provided it was with the consent of that State and subject to any conditions that State might impose. Such provision was consistent with the international legal requirement for consent to the exercise of jurisdiction in the territorial waters of another State.

Furthermore, it was stated in the Special Rapporteur's report that armed robbery at sea was neither defined nor criminalized in the national laws of New Zealand. However, since the criminal law of New Zealand applied in all places under its territorial sovereignty, any acts amounting to armed robbery that took place in the territorial sea or internal waters of New Zealand were effectively defined and criminalized. She agreed with Mr. Asada and Mr. Fife that States had the freedom to define crimes in their legislation provided the constraints of international law were respected; such freedom was inherent in prescriptive territorial jurisdiction. She was therefore not sure how the Commission should best use the survey of legislative and jurisprudential practice contained in the Special Rapporteur's report, especially as it appeared difficult to determine commonalities in the practice of States.

Regarding draft article 1, she would prefer a simple provision on scope in line with that proposed in the syllabus for the topic (A/74/10, annex C), a proposal that had been supported by other members, and most recently by Mr. Jalloh.

She failed to understand the inclusion, in draft article 2, of subparagraph (d), which supplemented the definition of piracy as set out in the 1982 United Nations Convention on the Law of the Sea and, in draft article 3, of subparagraph (c), which supplemented the definition of armed robbery at sea as set out in the Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships. Under draft article 2 (d), an act of piracy was defined as an act of piracy according to international law – a tautology – or by reference to how it was defined in domestic legal provisions, the diversity of which had been highlighted by the Special Rapporteur. As stated by Mr. Forteau, such a definition would bring domestic law into international law. In his report, the Special Rapporteur suggested that piracy as defined under domestic law would not give rise to universal jurisdiction, unlike piracy under the law of nations. However, it was not clear how he proposed to differentiate acts of piracy as defined in domestic law from acts of piracy as defined in international law. She was concerned that the proposed definitions would not further clarify the existing ones; she agreed with other members that the Commission should remain true to the definitions established in the 1982 Convention.

Recalling the large number of topics yet to be explored according to the syllabus, she said it was not clear which issues would be considered as the Commission's work on the topic progressed; she would appreciate additional information in that regard.

Mr. Tsend said that the duty to cooperate in the repression of piracy, as enshrined in article 100 of the United Nations Convention on the Law of the Sea, constituted the cornerstone of the existing international legal framework to prevent and repress piracy and armed robbery at sea. It was, in fact, the only anti-piracy provision in the Convention that imposed an obligation on States parties; all other such provisions in the Convention were aimed at helping States to fulfil that obligation. Consequently, the Commission's task was to propose practical recommendations to achieve better cooperation by States in preventing and repressing piracy and armed robbery at sea, taking into consideration State practice and lessons learned in international cooperation in the past decade.

The reluctance of seizing States to prosecute and adjudicate cases involving pirates and armed robbers in their own courts, in the exercise of universal jurisdiction under article 105 of the Convention – a reluctance that resulted in "capture and release" cases – was linked not only to the legal complexities of conducting criminal proceedings far from the place where an alleged crime had taken place and the human rights implications of exercising such broad jurisdiction, but also to political considerations involving potential asylum-seekers or simple calculations of expediency. As Mr. Asada had pointed out, there were also significant costs associated with exercising universal jurisdiction. The Commission should consider ways to ensure that the costs of ensuring maritime safety for all were shared equitably.

The Commission should take a cautious and gradual approach in the development of international law on the topic under consideration. Its work should be based on the relevant provisions of the United Nations Convention on the Law of the Sea and should strike a balance between innovation and stability. The much-criticized geographical limitation in the definition of piracy was intrinsically linked to national sovereignty and therefore untouchable, at least for the moment. National sovereignty was closely related to another element in the definition of piracy under the Convention, that of the "two ships" requirement, the deletion of which might encroach on the flag State's exclusive jurisdiction over other criminal offences committed on board its ship. The Special Rapporteur, in his report, stated that it was necessary to consider the usefulness of including the motive of the crime as one of the elements of maritime piracy; yet, excluding it could result in a situation where maritime terrorism was deemed to constitute a form of piracy and, consequently, where maritime terrorism cases were subject to universal jurisdiction. He shared the concern of other members who had cautioned against such a drastic departure from a carefully negotiated balance of interests.

While he understood the Special Rapporteur's choice of draft articles for the outcome of the Commission's work on the topic, he had reservations about revising the United Nations

Convention on the Law of the Sea or other legal instruments on the subject or even negotiating a separate treaty on piracy. He agreed with other members who had expressed a preference for a "soft law" approach. A draft code of conduct or practice or guidelines or recommendations with detailed commentaries could be helpful to Governments in developing harmonized legislation on piracy, and thus contribute to better international cooperation. In that connection, he looked forward to the Special Rapporteur's detailed legal and practical analysis, in his second report, of the numerous codes of conduct and model laws developed under the auspices of IMO, regional organizations or other international organizations.

As a national legislator, he understood the difficulties that Governments encountered when faced with different or conflicting provisions in international legal instruments on the same subject matter. The uneasy relationship between the 1982 United Nations Convention on the Law of the Sea and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (the Rome Convention) was a case in point. Although the latter convention covered a broader scope of offences, there was nevertheless significant overlap with the provisions of the former convention. Unlike the 1982 Convention, the Rome Convention did not provide for the "two ships" and "private ends" requirement; considered attempts to commit an offence as an offence; and provided detailed jurisdictional and "extradition or prosecution" clauses. The national parliament of Mongolia had referred to both instruments, to which it was a party, in its recent deliberations on the revised Law on Maritime Activities and proposed amendments to other laws, including the Criminal Code. Ultimately, parliament had settled for a simple, but not very elegant, solution: paragraph 2 of article 15 of the Law on Maritime Activities, "Crime on board a ship", read: "In case a ship is subjected to an attack, [relevant provisions of the] United Nations Convention on the Law of the Sea and the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation shall apply." It had also been decided not to include a definition of piracy in the Criminal Code, and article 17.2 of the Criminal Code relating to robbery and article 13.3 relating to hostage-taking had been considered to be sufficient to cover the crime of armed robbery at sea. Many Governments, including that of Mongolia, would benefit from more streamlined and uniform international guidelines on such issues.

Regarding the lack of consistency in the national laws of States relating to the prevention and repression of piracy and armed robbery at sea, the Commission could contribute to improved international cooperation by proposing guidelines on how to best harmonize definitions of piracy in national laws. Guidelines on harmonizing sentencing and criminal procedure provisions on extraterritorial law enforcement could also be helpful to overcome difficulties associated with the highly fragmented legal landscape.

The Commission's most valuable contribution to international efforts to combat piracy might well come from its work on harmonizing difficult jurisdictional issues relating to the exercise of universal jurisdiction over piracy. Issues of legislative jurisdiction, enforcement jurisdiction and judicial jurisdiction over piracy could benefit from further clarification in the form of guidelines or recommendations.

It was important to note that there were different scholarly and practical perspectives on whether attempts to commit piracy should be criminalized and whether the threat of violence constituted an act of piracy. Issues relating to land-based aspects of piracy, including differing interpretations of territorial restrictions, or the lack thereof, on the acts specified in article 101 (b) and (c) of the 1982 Convention, were also important considerations.

He supported the suggestion that the Commission should consider the issue of attacks on fixed installations at sea and determine whether they could or should qualify as acts of piracy. Another important matter for the Commission to examine was the deployment of privately contracted armed security personnel aboard merchant ships. While some took the view that the legitimacy of such personnel had been confirmed following the United Nations Security Council's endorsement of their deployment, others questioned such personnel's legitimacy or the limits of their deployment. In any event, important questions regarding the methods and degree of the use of force by such personnel had been raised.

Ms. Okowa said that the Special Rapporteur had rightly drawn inspiration from national legislation and judicial practice in formulating his conclusions. As underlined in the

report, the legal definition of piracy had not been applied uniformly or consistently by States, and the distinction between piracy *stricto sensu* – relating to acts occurring on the high seas – and armed robbery at sea was not always maintained. However, there was room for disagreement on whether that was a real problem or whether the report simply highlighted a discrepancy with no real practical or normative implications. It was also worth bearing in mind that the 1982 United Nations Convention on the Law of the Sea was not a substantive criminal statute. Questions of evidence, burden of proof and modes of punishment were not specified, so that such questions were left to be worked out in the infinite variety of national legal traditions. Congruence in domestic implementation was rarely a goal of international law and it was not clear that it should be expected in the piracy regime either. Moreover, modern piracy varied considerably between regions. It would therefore be surprising and even undesirable to expect a uniform application of the law to such varied situations.

The Special Rapporteur, in his report and in his statement introducing the report, had endorsed the interpretation according to which acts of piracy were characterized by the motive of "private ends", rather than political or other ideological motives. Yet, the historical documents leading to the adoption of the 1982 Convention indicated that such a narrow interpretation was by no means universally shared; as recently alluded to by Mr. Paparinskis, the reason for the inclusion, in the definition of piracy, of the "private ends" requirement had been to distinguish between the private unauthorized use of violence and the public use of violence, which was the monopoly of States and recognized belligerents. Recognized belligerents were authorized to use force and therefore came within the ambit of the laws of war; unrecognized belligerents, irrespective of motive, could not use force. The fifth edition of *Oppenheim's International Law* supported such an interpretation and thus opened the door for an expansive reading of piracy to cover any unauthorized acts against ships on the high seas, irrespective of motive and even if undertaken in support of a political cause. While the "private ends" requirement was now more or less established law, it was in her view sensible and proper for the Commission to reopen the debate on the reach and meaning of that aspect of the definition of piracy as set out in article 101 of the 1982 Convention. The records of the Commission's debate on the topic "Law of the sea – regime of the high seas and regime of the territorial sea", which had led to the drafting of the Convention on the High Seas of 1958, indicated that there had been little discussion of the meaning or putative reach of the provision on "private ends". Similarly, the consideration of piracy during the negotiation of the 1982 Convention had been marginal, and the provisions on piracy in the Convention on the High Seas had simply been reproduced in articles 100 to 107 without much commentary. As Mr. Forteau had suggested, the Commission might wish to conduct a detailed study of the *travaux préparatoires* of both the Convention on the High Seas and the 1982 Convention as part of its consideration of the current topic.

While it was easy to concede that the provisions on piracy in the 1982 Convention needed to be clarified, it was also clear that the Convention was the result of a series of interrelated compromises, making it difficult to amend or renegotiate aspects of the treaty without unravelling the whole. Here, too, the Special Rapporteur needed to provide the Commission with a road map on how to navigate the sacrosanctity of the Convention while at the same time providing guidance on what forms of violence came within the ambit of article 101 of the Convention. The Special Rapporteur was right in noting that the regime established by the Convention was no longer the only source of law on violence at sea and that its provision limiting acts of piracy to a contextual situation of two ships had been supplemented by the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation. Equally relevant was the obligation of parties under the International Convention against the Taking of Hostages to criminalize hostage-taking under their domestic law and to punish offenders under national law. However, the relationship between the duties under that Convention and the regime established by the United Nations Convention on the Law of the Sea was unclear. Moreover, 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 on the Law of the Sea had a nearly identical number of parties, including those States particularly affected by piracy. Somalia, on the other hand, was not a party to the first two of those conventions, meaning that its obligations must be determined exclusively by the provisions

of the United Nations Convention on the Law of the Sea. Clarification of how the first two conventions related to the latter would therefore be particularly helpful.

It was in relation to the enforcement of obligations regarding piracy that the Commission could make a real difference. Specifically, the Commission should offer some substantive guidance on enforcement in relation to both piracy *stricto sensu* and armed robbery at sea. For instance, it would be useful to examine whether prevention and repression should focus exclusively on activities at sea or should also include initiatives on land.

The prosecution of modern pirates – a right of States, but not an enforceable duty under international law – entailed security risks, given the connection between pirates and land-based criminal gangs. Many European States who apprehended pirates were reluctant to prosecute them on their own territories, sometimes owing to a lack of legislation, but in many cases owing to a fear of security risks, including the risk that the pirates in question might seek asylum in the country of prosecution. As a result, those States had concluded a series of memorandums of understanding with countries such as Kenya, to hold trials of pirates in those countries. An equitable regime should not focus solely on technical and economic assistance but should also provide for the equal sharing of security-related risks; the Commission might wish to provide guidance in that regard. Its work could also outline a detailed framework of cooperation between States on matters such as training on the evidentiary requirements of a successful prosecution of piracy, as there was considerable variation in how national legal systems approached matters of evidence. Cooperation could extend to strengthening the naval capacity of coastal States and effective anti-money-laundering measures that would deter the investment of the proceeds of piracy.

In his 2019 syllabus and first report, the Special Rapporteur had expressed a preference for draft articles, while keeping an open mind as to the final outcome. He had also declared his intention not to depart from the relevant provisions of the United Nations Convention on the Law of the Sea. However, although the proposed draft articles took article 101 of the Convention as their point of departure, it was difficult to see how the ambitious objectives of the syllabus could be achieved without unravelling some seemingly settled questions such as the meaning of “private ends”, which had proved a major source of difficulty in terms of domestic implementation.

She supported the referral of the proposed draft articles to the Drafting Committee, taking into account the comments made in the debate.

Mr. Lee said that the Special Rapporteur had produced an excellent first report that constituted a solid basis for discussion by the Commission. In particular, his identification and in-depth discussion of the shortcomings of the current law of piracy were tremendously valuable for the future work of the Commission. His extensive survey of State practice, including the relevant national jurisprudence, was also to be commended.

It was evident that no State was immune from the global threat posed by piracy. As a major trading State that relied heavily on the oceans for its economy, the Republic of Korea had fallen victim to a number of piratical acts in the recent past. In 2011, five suspects of Somali nationality had been tried and convicted by the Korean courts on the charge of armed robbery at sea, as provided for in the Korean Criminal Code. The exercise of adjudicative jurisdiction had been based on the passive personality principle, as the Republic of Korea did not criminalize the act of piracy in its domestic legislation. That exercise had highlighted some of the legal and practical problems encountered by States that decided to prosecute suspected pirates or armed robbers at sea.

The current law of piracy, as codified in the United Nations Convention on the Law of the Sea, and the idea of the crime of piracy being subject to universal jurisdiction were of fairly recent origin. Until the middle of the nineteenth century, the expression *hostis humani generis* had largely been a rhetorical concept designed to disparage piracy rather than a maxim that could serve as the foundation of the institution of universal jurisdiction. It had only been during the latter half of the nineteenth century that the institution of universal jurisdiction over piracy had been firmly established in international law, with a clear definition of piracy itself.

The current law of piracy largely represented a nineteenth-century regulatory framework based on, not actual State practice, but secondary opinion uncritically extrapolated from the rhetorical concept of *hostis humani generis*. That framework had faced its first serious "stress test" only in the early twenty-first century. That "stress test" had revealed a serious gap between the fundamentally nineteenth-century or early-twentieth-century regulatory framework, on the one hand, and the fast-evolving twenty-first-century practice of piracy, as illustrated by the use of drones by pirates, on the other. The Commission was currently expected to fill or at least effectively manage that substantial gap; hence it faced the enormous task of operationalizing the rather outdated and ambiguous provisions of the 1982 United Nations Convention on the Law of the Sea relating to piracy in the light of post-1982 practices and developments, without eroding the integrity and normative authority of the existing regime under the Convention. The Commission was engaged in a very delicate balancing exercise, as Ms. Okowa had pointed out.

In carrying out its task, the Commission should bear in mind the essential premise that its work must not negatively affect the integrity or authority of the 1982 Convention. The normative limits set by that premise were explicitly mentioned in the 2019 syllabus. As a number of members had already pointed out, the crucial importance of that premise was also borne out by the statements made in the Security Council at the time of the adoption of the various resolutions on acts of piracy and armed robbery against vessels in territorial waters and the high seas off the coast of Somalia in 2008.

There were two normative limits that merited special attention. First, a distinction should be drawn between the high seas and the territorial, archipelagic and internal waters where the fundamental principle of territorial sovereignty applied to armed robbery committed in those waters. The Special Rapporteur's first report set out some of the serious practical problems that resulted from the distinction between piracy and armed robbery at sea. However, he harboured reservations about the option of weakening that fundamental distinction, as derived from the 1982 Convention. He recalled that Gilbert Gidel had, in his 1932 book *Le droit international public de la mer*, proposed a distinction between piracy under the law of nations, on the one hand, and piracy by analogy based on domestic law, on the other, and had proceeded to warn against confusing the two different categories of piracy. The same caution had been signalled by Judge Moore in his dissenting opinion in the 1927 *Case of the S.S. "Lotus" (France v. Turkey)*.

Another basic principle under the current law of piracy was that the exercise of universal jurisdiction was permissive, not mandatory. One could be tempted to heighten the normative strength of universal jurisdiction over piracy by turning it from a discretion into a duty. However, such a move would overstep the existing principle of the United Nations Convention on the Law of the Sea. As pointed out by Mr. Asada, the gap between reality and norms under the present regime should be addressed, not by going beyond the Convention framework, but rather by strengthening the duty of cooperation, as provided for in article 100, in the light of, among other things, recent practice in Somali waters.

The key mechanism in addressing the question of piracy was universal jurisdiction, a concept founded on the close cooperation between international and domestic law. Under the United Nations Convention on the Law of the Sea regime, piracy was defined in international law but enforced at a municipal level via implementing domestic legislation. For the mechanism of universal jurisdiction over piracy to function properly, therefore, domestic implementing legislation was essential. However, as the Special Rapporteur's first report clearly showed, a large number of States had not enacted such legislation. Even among the States that had been implementing domestic legislation, there was wide diversity in the content of such legislation, in particular with regard to the definition of piracy. In several resolutions, the Security Council had urged States to criminalize piracy under their domestic laws. The Commission could help to address the crucial question of the criminalization of piracy by making recommendations and promoting the harmonization of domestic laws by proposing the key elements to be contained in them.

The Commission should focus on incorporating the post-1982 developments into an updated legal regime on piracy which was responsive to contemporary needs and developments. For instance, there had been some debate over whether the adjudicative jurisdiction under article 105 of the 1982 United Nations Convention on the Law of the Sea

could be exercised only in the *forum deprehensionis*. As Mr. Paparinskis had pointed out, important judicial decisions dealing with piracy had been rendered by the arbitral tribunals in the *Arctic Sunrise* and *Enrica Lexie* cases. Other members had pointed to the need to consider the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the International Convention against the Taking of Hostages when updating the law of piracy and armed robbery at sea. The practice of using privately contracted armed security personnel and the interface between that practice and innocent passage also needed to be considered. Post-1982 developments could be incorporated into an updated regime on piracy by various methods available to the Commission: it could reinterpret the relevant provisions of the 1982 Convention in light of subsequent practice, identify customary international law or rely on subsidiary means for the determination of rules of international law.

The Commission should propose ways to strengthen the duty to cooperate as provided for in article 100 of the 1982 Convention. It had been pointed out that the normative density of the law of piracy was rather low, given, for example, the discretionary nature of universal jurisdiction over piracy, and the lack of a legal duty for States to enact implementing domestic legislation on piracy. Some recent practices, such as international cooperation coordinated by the United Nations Office on Drugs and Crime in Somali waters, could be relied on to strengthen article 100. Practices relating to regional or subregional cooperation, such as the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, should also be considered by the Commission.

The Commission should address the practical problems encountered by States in acting on universal jurisdiction over piracy. Conspicuous among them were human rights considerations, as amply demonstrated by some cases before the European Court of Human Rights, such as *Ali Samatar and Others v. France*. A similar issue had arisen in the prosecution of Somali suspects before courts in the Republic of Korea. It was evident that such concerns had not been properly addressed by the law of piracy as codified in the United Nations Convention on the Law of the Sea. The problems faced by States in connection with piracy included problems in obtaining evidence, transporting witnesses, obtaining translations and dealing with suspects who claimed asylum. The Commission could make recommendations on those questions based on human rights law and standards, the relevant jurisprudence and the best practices of States.

Given the wide range of subjects with which the Commission could be dealing in its work on the topic, and given the normative limits set by the United Nations Convention on the Law of the Sea, he wondered whether the form of the outcome proposed by the Special Rapporteur – draft articles – was really the most appropriate choice. The Commission might like to consider a more flexible form of outcome, such as draft guidelines.

Regarding the draft articles proposed by the Special Rapporteur, he supported the definitions contained in draft articles 2 and 3, except for draft article 2 (d) and draft article 3 (c), which could, in his opinion, be covered by article 101 (c) of the United Nations Convention on the Law of the Sea, as had been suggested by the United States Court of Appeals in its 2013 judgment in *United States of America v. Ali*. He supported sending the draft articles to the Drafting Committee, taking account of the present debate.

Mr. Akande said the Commission must first identify the problems that it was trying to solve in the legal regulation of piracy and armed robbery at sea, and then consider how it was best placed to solve those problems. The Commission was dealing with phenomena that were already regulated by widely ratified multilateral treaties, notably the United Nations Convention on the Law of the Sea, and there was little appetite for changing the provisions of that Convention. However, that did not mean that there were no gaps or ambiguities with regard to the legal regime governing piracy where guidance or clarification could be provided or even advances might be achieved. In that regard, he wished to commend the Special Rapporteur on highlighting the shortcomings of the applicable international legal framework. The six problems identified by the Special Rapporteur could be grouped into three categories: problems that would require a change in the United Nations Convention on the Law of the Sea; problems that did not require any modification of the Convention but where guidance as to its interpretation might be useful; and problems to which the Convention did not provide a solution or did not elaborate on the solution.

With respect to the first category, the Special Rapporteur argued in paragraph 45 of his report that defining piracy based on geographical criteria and linking it exclusively to the high seas was restrictive and out of step with modern forms of piracy, since those modern forms defied borders and boundaries at sea. The Special Rapporteur was, of course, correct that the kinds of act that would constitute piracy if committed on the high seas could be, and were, committed in territorial waters and other waters within national jurisdiction. It was for that reason that there was the concept of armed robbery at sea. If the point was that the Commission should ensure that there was an international regime governing armed robbery at sea, he looked forward to seeing how the Special Rapporteur proposed to do that. However, if the suggestion was that the regime governing such acts committed in waters under the sovereignty of the State should be equated with the regime of piracy which applied only in the high seas, that was a more difficult proposition. It was not clear to him that the fact that there were different regimes for piracy and armed robbery at sea was a shortcoming. There were particular reasons why the international community had developed the regime of piracy to deal with acts committed on the high seas that did not apply to acts committed within national jurisdiction. There was no gap of jurisdiction when the act was committed in internal waters or in the territorial sea, as there might have been with regard to acts committed on the high seas.

The Special Rapporteur expressed the view, in paragraph 49 of his report, that the fact that the definition of piracy under article 101 required the presence of two ships was problematic. In order for the definition of piracy to be fulfilled, the acts in question must be committed by the crew or passengers of a private ship directing their acts against another ship. If the question was “What is a ship?”, that was simply an interpretative problem, but if the suggestion was that piracy might occur even where there were not two “ships” as defined by law, that was a more difficult proposition.

He wished to recall that the syllabus for the topic stated that the Commission’s objective would not be “to seek to alter any of the rules set forth in existing treaties, but would include whether and how States best implement their treaty obligations”. As the Special Rapporteur indicated, States did not always incorporate the provisions of the United Nations Convention on the Law of the Sea into their national law. However, there had been no suggestion that States had any appetite to modify the Convention’s provisions on piracy, and in particular its definition of piracy. More importantly, as the Special Rapporteur himself noted, the current regime regarding piracy was one that was permissive – States were permitted, but not obliged to, take action to repress and prosecute pirates. Thus, the use of definitions that were not exactly in line with the Convention was not necessarily inconsistent with international law, as long as States were not going beyond the permission given them. For that reason, it was not clear that the issue of States not using the Convention’s definition of piracy was best resolved by suggesting changes to that definition.

With regard to the second set of problems, concerning the interpretation of the Convention, the Commission could indeed do fruitful work. The Special Rapporteur noted a number of areas where the legal regime of piracy remained uncertain. For example, he noted that the phenomenon of piracy was not one that was strictly confined to activities on the high seas and was one that defied boundaries. Activities in support of piracy could occur elsewhere, for example, in waters under the sovereignty of a State, or even on land. Questions had arisen in national case law as to whether a natural person fell within the definition given in article 101 (c) and could be convicted of piracy if he or she had not been present on the high seas but had facilitated the commission of acts of piracy that had occurred on the high seas. Indeed, one might wonder, in the age of unmanned vehicles that could be operated from elsewhere, whether the prohibition of participation in the operation of a pirate ship only applied to persons physically on board the ship or also applied to persons in other maritime zones or on land. Those might indeed be questions on which the Commission’s work could produce useful guidance within the basic structure of the United Nations Convention on the Law of the Sea.

A similar problem noted in the shortcomings section of the report was the question of what it meant to say that the illegal acts which amounted to piracy were committed for “private ends”. The Special Rapporteur was right that case law was unclear both as to the meaning of the term and as to whether it was possible for private ends and political motivation

to coincide. However, the Special Rapporteur also speculated that it might be necessary to consider the usefulness of including motive as one of the elements of the crime of maritime piracy. To the extent that such an exercise went beyond providing guidance on the interpretation of the United Nations Convention on the Law of the Sea and might be seen as questioning its definition, he doubted that the Commission's undertaking of such work would be regarded as helpful.

The third category of problems, those to which the Convention did not provide a solution, comprised the last two shortcomings identified by the Special Rapporteur, namely that the Convention permitted every State to seize a pirate ship and to exercise judicial jurisdiction over pirates but did not require any State to prosecute, and the tendency by States to take the absence of national legislation as justification for the failure to prosecute. To those shortcomings, one might add the absence of a suitably developed framework for cooperation with regard to armed robbery at sea, and the fact that, while the Convention required States to cooperate in the repression of piracy, it did not say how. On all those issues, the Commission might wish to suggest a more detailed regime for the establishment of national jurisdiction over acts both of piracy and armed robbery at sea, in addition to proposing a more detailed framework for cooperation. Those were matters of practical importance where there would be no question of modifying existing treaties but where additional rules that were consistent with such treaties could perhaps be proposed.

He suggested that the Commission should focus its efforts on the second and third categories of problem. Like other members, he would be glad to hear the Special Rapporteur's thoughts on the specific problems that he would like the Commission to deal with in the future. As the Commission could fruitfully focus on both providing clarity on existing rules of law and developing new rules not inconsistent with existing treaties, a set of draft articles, as proposed by the Special Rapporteur, seemed the appropriate outcome to the Commission's work, although he was happy to keep an open mind on that subject.

Mr. Laraba said that the Special Rapporteur's lengthy report provided a stimulating overview of the history of piracy in international relations and international law. The interest shown in piracy by States and jurists had clearly fluctuated according to the prevalence of piracy at any given time. It was interesting to note, for instance, that, since its establishment in 1923, the Hague Academy of International Law had offered only one course on the subject – *La répression de la piraterie*, by Vespasien Pella in 1926 – at a time when great importance was attached to the fight against piracy. The topic had attracted the Commission's interest because it was again of undeniable importance, as the report showed.

In his first report, the Special Rapporteur touched only briefly on the resolutions of relevant international organizations, including those of the General Assembly and the Security Council, as they would be a focus of the second report. It might be argued that the analysis of those resolutions could have been carried out at the same time as the examination of the treaty law applicable to piracy in the introduction. However, the Special Rapporteur explained his preference for a regional approach and, indeed, the number of pages devoted to the study of domestic law – two thirds of the total – clearly reflected that approach.

The Special Rapporteur had taken on two tasks: setting out his own vision for the topic and presenting the national laws of States in five regions. From an analytical point of view, the report went straight to the heart of certain aspects of the subject and was full of valuable information on both the general international law of the sea and national laws. However, rather than focusing on the shortcomings of the applicable international legal framework, it might have been preferable to undertake a more detailed analysis of articles 100 to 107 of the United Nations Convention on the Law of the Sea.

The Special Rapporteur's review of national laws in the various regions was certainly objective; he merely presented the relevant legal provisions without analysing or commenting on them. For example, in paragraph 67 of the report, it was stated that article 253 of the Penal Code of Gabon provided that the illegality concerned "the seizing or taking of control ... of a mobile or fixed platform located on the continental shelf". In so doing, the Gabonese legislator had extended the crime of piracy to mobile or fixed platforms located on the continental shelf. Similarly, in paragraph 80, reference was made to the Criminal Law Code of Zimbabwe, which had extended the crime of piracy to "the sea as a single and integrated

space". By presenting the information in that way, the Special Rapporteur allowed Commission members to make up their own minds about the status and relevance of those national laws. In any case, it would not have been possible for him to conduct a detailed analysis of the domestic law of the 101 States that provided a definition of maritime piracy.

By focusing on the domestic law of States, the Special Rapporteur had highlighted one of the most worrying aspects of the topic, namely, how effective articles 100 to 107 of the United Nations Convention on the Law of the Sea would really be if they were not backed up by national laws. In paragraph 40 of the report, the Special Rapporteur rightly pointed out that the applicable law was both general or conventional international law and the domestic law of States that had adopted legislation on the prevention and repression of piracy and armed robbery at sea. In that respect, he recalled jurist Antonio Cassese's position that the legal provisions on piracy required States to cooperate to the fullest possible extent because international law could not entirely govern the process of implementing the rules it created and must entrust that task to States. Of course, States were free to decide how to incorporate international conventions into their domestic law and had a degree of latitude when it came to the domestic implementation of their international obligations. However, many provisions of the United Nations Convention on the Law of the Sea required national measures for their implementation.

The importance of national legislation in the application of conventions depended largely on how detailed the convention was. It should be recalled that the United Nations Convention on the Law of the Sea had originally been considered a framework convention which set forth general rules that were to be elaborated upon and applied through national legislation and regulations. However, the situation had evolved considerably since the 1980s, and the Convention now coexisted with other instruments on the law of the sea and growing practice that was linked to other areas of international law. In some cases the provisions of the Convention were sufficiently precise that they could be considered directly applicable, while others were vaguer and thus required implementing legislation.

In terms of the lessons to be drawn from the analysis of national legislation in the report, the Special Rapporteur stressed that the legislation was very diverse. It should be noted that the articles of the Convention on the repression of piracy did not attach quantitative or qualitative importance to domestic aspects. In quantitative terms, there was only one direct reference to domestic law, in article 104 on the retention or loss of the nationality of a pirate ship or aircraft. It might be tempting to conclude that domestic aspects had simply not been of great concern at the time, but in fact the implementation of articles 100, 102, 105 and 107 would by implication require recourse to domestic law.

Despite the use of the term "national legislation" to refer to all of the domestic laws covered in the report, there were formal and substantive differences between them. It was clear that, rather than adopting special laws to combat piracy and armed robbery, the majority of States favoured addressing piracy in specific provisions of their criminal or maritime codes, with the focus on the establishment of penalties rather than definitions.

With regard to the six shortcomings of the applicable international legal framework outlined in paragraphs 44 to 55 of the report, it should be noted that the more usual term used in legal writings was "gaps"; the word "shortcomings" suggested the need to amend certain aspects of the Convention. However, the Special Rapporteur had clearly indicated that that was not his intention.

With regard to the outcome of the Commission's work on the topic, in his 2019 syllabus the Special Rapporteur had stated that the objective of the topic could be to develop draft articles on the prevention and repression of piracy and armed robbery at sea but that, if it became apparent, as work progressed, that the topic was best developed simply as guidance to States with respect to the implementation of existing international obligations, then the outcome might be changed to "conclusions" or "guidelines". During the debate in the Sixth Committee, a number of States had supported the idea of drafting a new convention, but others had been more reserved on that point. The Commission would have to take a decision on that once the Special Rapporteur had clearly presented his views on the matter. As noted in paragraph 31 of the report, the Commission might propose the codification of emerging customary rules, an approach aimed at the progressive development of international law on

piracy, or the consideration of both codification and progressive development in a single legal instrument.

In conclusion, he supported referring the three proposed draft articles to the Drafting Committee.

Ms. Galvão Teles said that the Special Rapporteur's well-documented first report was very informative and included comprehensive information on the history of piracy, as well as national legislation and case law, based on an interesting regional approach. As noted in the report, the added value of the Commission's work on the topic would be to reinforce and codify emerging customary rules on piracy and progressively develop the law on other acts of violence endangering the safety of international navigation, such as armed robbery at sea. The Commission should, in her view, proceed with caution when extending, by analogy, some well-established rules on piracy to armed robbery at sea. It should be mindful of the fundamental differences between the two types of criminal conduct, especially their geographical application.

As to the definition of "piracy", she was of the view that the Commission should retain the wording of article 101 of the 1982 United Nations Convention on the Law of the Sea as the basis for the definition and avoid including other elements. The definition contained in the Convention, which itself reproduced the wording of article 15 of the 1958 Convention on the High Seas, had not only remained consistent over the years but already reflected customary international law at the time of its adoption. The only innovation of that definition in relation to the pre-1958 formulation was the reference, by way of analogy, to aircraft. By ensuring consistency with the definition in the 1982 Convention, the Commission would also secure the application of the different rules on the prevention and repression of piracy enshrined in it, as well as other rules of customary international law that depended on that definition.

Bearing that in mind, she was doubtful about the need to add subparagraph (d) in the proposed draft article 2. Although she understood the Special Rapporteur's reasons for making the proposition, she believed that including acts that were defined and punished as "piracy" under the municipal laws of various States but that did not constitute piracy under international law would create more problems than it would solve. Firstly, it was not clear what effects such an approach would have on rules and measures that depended on the existence of an internationally agreed definition of piracy. For instance, how could States exercise universal jurisdiction, under customary international law, over acts not considered piracy under international law? What would be the consequences for judicial cooperation in that area? How would the rules on the seizure of pirate ships and aircraft on the high seas and the rules on hot pursuit apply in relation to States with a broader definition of piracy? In her view, the Commission should avoid dealing with such complicated questions. Secondly, by excessively broadening the scope of the definition, the Commission would risk not only diluting the well-established international legal framework on piracy, but also infringing on fundamental norms of international and comparative criminal law, especially the principle of legality, or *nullum crimen sine lege*.

The same cautious approach should apply to the proposed definition of "armed robbery at sea" in draft article 3 (c). As noted by the Special Rapporteur, the main difference between the crimes of piracy and armed robbery at sea seemed to be their geographical – and therefore jurisdictional – scope. Hence, the definition of armed robbery could reproduce the same material elements as the definition of piracy, while placing primary responsibility for its prevention and repression on the State in whose internal, archipelagic or territorial waters the acts took place. That material parallel between piracy and armed robbery would also help the Commission when devising common rules on both types of criminal conduct.

On closer examination, some expressions in draft article 3 seemed to render the definition dangerously broad. Apart from the issues with subparagraph (c), the inclusion of the words "threat thereof" in subparagraph (a) and the simultaneous criminalization of incitement or intentional facilitation in subparagraph (b) were bound to produce situations of uncertainty. For instance, under those provisions, an individual could be charged with armed robbery at sea for inciting or intentionally facilitating the threat of an illegal act of violence committed for private ends and directed against a ship.

In sum, she believed that the Commission should maintain the definition of article 101 of the 1982 United Nations Convention on the Law of the Sea, while carefully defining armed robbery at sea. Instead of having an open definition, the Commission could interpret and apply the relevant provisions of the Convention in the light of subsequent practice, Security Council resolutions and other relevant rules of international law, in particular those enshrined in the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, the 1979 International Convention against the Taking of Hostages and the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its 2005 Protocol.

When devising rules on the exercise of criminal jurisdiction over piracy and armed robbery, the Commission should be mindful of the differences in the nature of both criminal acts. As a complement to the customary right to exercise universal jurisdiction over pirates, an *aut dedere aut judicare* clause in relation to armed robbery at sea could be included. The Commission could also address and flesh out the duty to cooperate to the fullest possible extent in the repression of piracy, as provided for in article 100 of the 1982 Convention. In that regard, it could encourage the adoption of national legislation implementing all the obligations arising from the Convention's provisions on piracy, in particular the obligations to subject convicted pirates to appropriate penalties; to promote international assistance in proceedings relating to piracy and armed robbery; and to facilitate the extradition or transfer of suspected or convicted pirates, as appropriate.

Likewise, the Commission could encourage the conclusion of appropriate bilateral and multilateral agreements or arrangements providing for measures of international cooperation in the prevention and repression of piracy and armed robbery at sea, such as the surveillance and escorting of ships, the establishment of safe transit corridors, the early disruption of attacks, the sharing of police information, boarding by law enforcement officials of other States, the provision of training in avoidance, evasion and defensive techniques, the drawing up of maritime security plans and the establishment of regional anti-piracy centres.

Moreover, the duty to cooperate in that context could include the conclusion of appropriate bilateral and multilateral agreements or arrangements addressing international legal assistance in proceedings relating to piracy and armed robbery at sea, including the extradition and transfer of suspected or convicted individuals. It could also cover cooperation with and within competent intergovernmental institutions and, as far as reasonable and practicable, urgent action by ships or aircraft such as seizing a pirate ship, arresting suspected pirates and rescuing victims of piracy where necessary to prevent or repress acts of piracy.

As pointed out by the Special Rapporteur, despite their status as *hostis humani generis*, pirates remained under the protection of human rights law. Enforcement actions taken by State agents against suspected pirates were considered to be the exercise of jurisdiction by that State over the suspected pirates, thus bringing them within the scope of application of the International Covenant on Civil and Political Rights and applicable regional human rights treaties such as the European Convention on Human Rights. Such exercise of jurisdiction would usually be on the basis of the extraterritorial application of human rights obligations, although it could be argued that it was on the basis of territoriality, depending on one's view of the nature of flag-State jurisdiction.

Unlike the actions of State agents, however, action taken by private military or security contractors aboard private vessels would often not be attributable to a State. Accordingly, in such cases the relevant obligation would be the obligation to protect human rights rather than the obligation to respect human rights as in the former case. The flag State and the State in which the private military or security company was registered would both bear the obligation since the suspected pirate would be subject to their jurisdiction under human rights law.

It might be appropriate for the Commission to assess how those States could discharge their obligations to protect the human rights of suspected pirates when they were affected by the actions of a private military or security company. Flag States should take measures aimed at ensuring compliance by private military and security companies aboard ships of their nationality with human rights law, and States of registration of private military and security

companies must take measures aimed at ensuring compliance by such companies registered in their State with human rights law. What was less clear, however, was the content of the measures required. Although the Montreux Document elaborated on the measures States could adopt as good practices with regard to private military and security companies, the Commission might wish to consider the measures that should be taken specifically in the maritime context to provide clarity on the implementation by States of their existing human rights obligations. That guidance could be informed by the recent Geneva Declaration on Human Rights at Sea.

Regarding the structure of the report, it would have been useful if the Special Rapporteur had explained more clearly the reasons for the proposed draft articles so that the reader would not have to search for them in earlier parts of the report. As to the future programme of work, it would have been helpful to have a clear indication of the main framework for the work of the Commission on the topic and the Special Rapporteur's plans for the future consideration of the topic.

Concerning the outcome of the project, she was as yet undecided as to whether draft articles would be the most appropriate form. As the Special Rapporteur had noted, the outcome could take the form of draft articles, conclusions or guidelines. A decision on whether it would be more appropriate to develop a new convention or to draft guidance for States on the implementation of their existing international obligations would depend on how work on the topic progressed. She would therefore reserve her position on the proposed draft article 1, on the scope of the draft articles. In the meantime, she would be grateful if the Special Rapporteur could clarify what was meant by "in view of international law, the legislative, judicial and executive practices of States, and regional and subregional practices" at the end of draft article 1.

In conclusion, she supported referring all the proposed draft articles to the Drafting Committee, taking into account the debate in the plenary.

The meeting rose at 6 p.m.