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International Law Commission

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Provisional summary record of the 3668th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 21 May 2024, at 10 a.m.

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Present:

Chair:	Mr. Vázquez-Bermúdez
Members:	Mr. Akande
	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
	Ms. Oral
	Ms. Orosan
	Mr. Ouazzani Chahdi
	Mr. Oyarzábal
	Mr. Paparinskis
	Mr. Patel
	Mr. Reinisch
	Ms. Ridings
	Mr. Ruda Santolaria
	Mr. Sall
	Mr. Savadogo
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

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

Prevention and repression of piracy and armed robbery at sea (agenda item 7) (A/CN.4/770)

Mr. Cissé (Special Rapporteur), introducing his second report on the topic "Prevention and repression of piracy and armed robbery at sea" (A/CN.4/770), said that the main aim of the report was to provide a factual and legal analysis of regional approaches to the two forms of crime at sea and to examine the different forms of cooperation between States. Such cooperation was provided for in article 100 of the 1982 United Nations Convention on the Law of the Sea, establishing the general obligations of States in respect of the prevention and repression of maritime piracy, and the content of that article was reflected in the draft articles proposed in his report. Draft articles 4 and 5 gave form to the obligations established in article 100, while draft articles 6 and 7 dealt, respectively, with criminalization under national law and the establishment of national jurisdiction. The latter two requirements were frequently referred to by the Security Council, the General Assembly and the International Maritime Organization (IMO), and also more generally within the framework of the regional organizations analysed in the report. Article 100 of the Convention, which enshrined States' legal obligation to cooperate without specifying the form and content of such cooperation, was the point of departure for the analysis of the different regional approaches to combating piracy and armed robbery at sea.

During the discussions at the Commission's seventy-fourth session, several members had expressed the view that cooperation between States was one of the most effective ways to eradicate the offences of piracy and armed robbery at sea. However, that proposition raised a question as to what meaning and content should be ascribed to the concept of cooperation, as envisaged in article 100. That article set forth States' duty to cooperate by providing: "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." However, the Convention did not specify the substantive content or the means of fulfilling that duty. In his analysis of regional approaches, he conformed to the spirit and the letter of that article, concluding that it was for States in the different maritime regions of the world that were exposed to the offences of piracy and armed robbery at sea to supply the meaning, the content and the substantive, conceptual and operational scope of the duty to cooperate in the prevention and repression of those offences within the meaning of article 100. His analysis, which encompassed the most relevant multilateral legal instruments related to the topic, as well as recommendations of the General Assembly and resolutions of the Security Council related to issues of cooperation in the prevention and repression of the offences in question, the general obligations of States, the principle of criminalization in national legislation and the need for States to establish jurisdiction in the context of regional, subregional, multilateral and bilateral cooperation, had found that such cooperation could take various forms that were legally binding to differing degrees.

The report had three main chapters. Chapter II covered the practice of international organizations involved in combating piracy and armed robbery at sea, including the United Nations, IMO and the North Atlantic Treaty Organization (NATO), whose operational responses in the Indian Ocean and off the coast of Somalia had contributed to a significant reduction in incidents of piracy. Chapter III examined the practice of regional and subregional organizations involved in preventing and repressing piracy and armed robbery at sea in Africa, Asia, Europe, the Americas and Oceania. Chapter IV examined bilateral practices relating to the prevention and repression of those offences.

The report included an examination of a number of specific regional initiatives for cooperation in addressing piracy and armed robbery at sea or maritime security in general, including the Caribbean Community (CARICOM) Maritime and Airspace Security Cooperation Agreement of 2008; the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia of 2006; the Memorandum of Understanding on the Establishment of a Sub-Regional Integrated Coast Guard Function Network in West and Central Africa of 2008; the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (Djibouti Code of Conduct) of 2009; the Code of Conduct concerning the Repression of Piracy, Armed Robbery

against Ships and Illicit Maritime Activity in West and Central Africa (Yaoundé Code of Conduct) of 2013; and the Charter on Maritime Security and Safety and Development in Africa (Lomé Charter) of 2016. The report also covered the cooperation initiatives undertaken by NATO for practical reasons in its operational responses at sea, which had proved to be highly effective in maritime regions where the safety of navigation was at risk, such as the Gulf of Guinea and off the coast of Somalia. The various legal instruments examined played a vital role in combating piracy and armed robbery at sea by establishing international rules, encouraging cooperation among States and setting out the general cooperation framework for preventing and repressing such illegal activities.

Although the task of defining the content and scope of cooperation under article 100 of the Convention fell primarily to States within the framework of regional and subregional organizations, the United Nations and its specialized agency IMO had historically also played a key role in the prevention and repression of piracy and armed robbery at sea. Various issues concerning international maritime affairs had been brought before the General Assembly, which had referred in a number of resolutions to the need for States to cooperate in combating acts of piracy and armed robbery at sea off the coast of Somalia and in the Gulf of Guinea. The General Assembly had made clear that cooperation was incumbent on all States, but in particular on coastal States in affected regions, and had urged them, in its resolution 53/32, "to take all necessary and appropriate measures to prevent and combat incidents of piracy and armed robbery at sea and to investigate or cooperate in the investigation of such incidents wherever they occur and bring the alleged perpetrators to justice". Through its resolutions, it had repeatedly recalled the crucial role of international cooperation at the global, regional, subregional and bilateral levels in combating threats to maritime security in general and acts of piracy and armed robbery at sea in particular and had called on States to fully implement the relevant IMO guidelines and resolutions.

The Security Council, for its part, had adopted a series of resolutions relating to issues of criminal law, including the obligation to criminalize piracy, judicial proceedings, the transfer of suspected pirates, detention, the need to conclude bilateral or regional agreements, the preservation of evidence, the conduct of investigations and the extradition of perpetrators. However, effective action in that regard could not be taken without the necessary cooperation between States through mutual legal assistance, as had been demonstrated when the Security Council had given exceptional authorization to States cooperating with Somalia to enter its territorial waters and use all necessary means to repress acts of piracy and armed robbery. The Council had, however, been careful to underscore that none of its resolutions on piracy in Somalia should be considered as establishing customary international law and that any measures taken thereunder should be consistent with international humanitarian law and international human rights law. Given that inter-State cooperation was viable and effective only if underpinned by national legislation, the Security Council had called upon Member States in the region of the Gulf of Guinea to criminalize piracy and armed robbery at sea under their domestic laws.

The role of IMO in efforts to combat piracy and armed robbery at sea had been of the utmost importance. In view of the resurgence of piracy, in addition to alerting the international community to the serious threat that such offences posed for maritime security, IMO had asked the Security Council to promote a swift, coordinated national and international response and to urge States to establish an effective legal jurisdiction to bring alleged offenders to justice. In accordance with its mission of ensuring the safety of navigation, IMO had drawn up rules and recommendations and developed international standards to regulate international shipping and prevent marine pollution and maritime piracy. It had also helped to facilitate regional cooperation in the fight against both forms of crime at sea, including by formulating codes, guidelines, agreements and directives on the prevention and repression of piracy and armed robbery at sea.

NATO had played an important part in the fight against maritime piracy and armed robbery at sea through naval operations carried out with the authorization of the Security Council acting under Chapter VII of the Charter of the United Nations. For example, in the Gulf of Aden and the surrounding area off the coast of Somalia, NATO had conducted Operation Ocean Shield between 2009 and 2016 thanks to cooperation between the warships of its member States. Such coordinated efforts and close cooperation had ensured that NATO

military operations had a major impact in terms of reducing the number of pirate attacks in the region.

In Africa, Asia, the Americas, Europe and Oceania, regional approaches to combating various forms of maritime crime, including piracy and armed robbery at sea, had been based on the principle of cooperation as reflected in article 100 of the 1982 Convention. In Africa, which had been the region most affected by piracy and armed robbery at sea over the previous three decades, preventive and repressive measures had been taken first by individual States, through the adoption of national legislation, and then at the regional level, through the establishment of regional cooperation instruments to combat the various forms of maritime crime, including piracy and armed robbery at sea.

The main regional instrument in Africa, the Lomé Charter, had been adopted relatively recently and had not yet entered into force. The Charter reaffirmed the commitment of African States to combating maritime piracy and other illegal acts at sea and encouraged cooperation on maritime safety and security between African States and between those States and the international community. It recognized the need to strengthen the capacities of African States in terms of maritime surveillance, the patrolling of maritime spaces and coasts, and prevention and repression as responses to piracy and other forms of maritime crime and encouraged the establishment of regional information exchange centres to facilitate coordination. In the Charter, African States were called upon to harmonize their national legislation on piracy and were encouraged to adopt appropriate laws and regulations to combat piracy and other illegal activities at sea and to implement the relevant international instruments.

Two regional instruments had been adopted to strengthen cooperation specifically in the fight against piracy, armed robbery and other offences at sea, namely the Djibouti Code of Conduct of 2009 and the Yaoundé Code of Conduct of 2013. The aim of the former was to combat maritime piracy off the Horn of Africa, particularly in the Gulf of Aden and the western Indian Ocean, although the Code also encompassed the coastal States of the Red Sea. The substantive scope of the Code had been expanded to cover other illegal maritime activities such as human trafficking and illegal, unreported and unregulated fishing. In the Code, signatory States were invited to cooperate to the fullest possible extent in the repression of transnational organized crime in the maritime domain. The revised version of the Code also provided that States were to cooperate in sharing and reporting relevant information, interdicting ships and/or aircraft suspected of engaging in transnational organized crime, ensuring that persons committing or attempting to commit illegal acts at sea were apprehended and prosecuted, and facilitating proper care, treatment and repatriation for seafarers, fishers, other shipboard personnel and passengers affected by illegal activities at sea, while taking into account legal issues relating to the conduct of investigations, arrests, prosecutions and joint naval operations.

The Djibouti Code of Conduct was not yet legally binding. Its purpose was to strengthen regional cooperation in combating piracy and armed robbery at sea by reinforcing coordination between the navies of States parties. A particular aim was to facilitate prosecutions and, at the same time, resolve the issue of conflicts of jurisdiction during pursuits, arrests and trials. The duty to cooperate was well reflected in the Code, which required States to participate in arrangements or agreements on the prosecution or extradition of persons suspected of committing acts of piracy or armed robbery at sea. Another example of cooperation was the use of embarked officials on board ships to arrest pirates, particularly in situations where there was a conflict of jurisdiction between participating States.

The second African legal instrument concerning piracy and armed robbery at sea, the Yaoundé Code of Conduct, had a broad geographical scope encompassing two major regions, namely Central Africa and West Africa. It was thus applicable to the States of the Gulf of Guinea. Its general objectives included combating piracy, illegal fishing, maritime pollution, transnational organized crime at sea and other maritime threats. It was implemented by the three main subregional institutions, the Economic Community of West African States (ECOWAS), the Economic Community of Central African States (ECCAS) and the Gulf of Guinea Commission. Those institutions had been working to give operational content and scope to the concept of cooperation at sea, primarily through the establishment of regional

maritime security centres. As detailed in the report, there were four levels of implementation of the Code: the political level, the strategic level, the operational level and the national level.

Bilateral cooperation between the States of the Gulf of Guinea and international partners had strengthened the operational capacities of the African States concerned by facilitating their acquisition of new maritime and air resources to combat piracy and all forms of crime at sea more effectively. Such resources included naval and air platforms, patrol boats, rigid-hulled inflatable boats, drones, radar equipment, helicopters, maritime surveillance aircraft, landing craft, cameras and electro-optical systems. However, the effectiveness of regional cooperation in Africa was undermined by several obstacles, including the fact that the Yaoundé Code of Conduct was not yet a binding legal instrument, the persistence of maritime border disputes between several States of the Gulf of Guinea and the absence of laws criminalizing piracy and armed robbery at sea in several States of the Gulf of Guinea and in other African regions.

In Asia, a region that was also affected by piracy and armed robbery at sea, particularly in the south-east of the continent, the large number of straits and maritime zones that were heavily used by merchant ships made combating maritime piracy a major challenge. Efforts to combat those offences were centred on regional and international cooperation, the surveillance of pirate activities, deployment of naval forces, national capacity-building and the protection of ships and crews. The main regional legal instrument, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, had been concluded in 2004 by 16 Asian States. Unlike the Djibouti Code of Conduct and the Yaoundé Code of Conduct, the Regional Cooperation Agreement was legally binding by virtue of its status as an agreement and the fact that it required the parties to take measures to suppress acts of piracy and armed robbery against ships through information-sharing and mutual legal assistance. Many Asian countries had become parties, as had certain non-Asian States with interests in maritime safety in Asia, and the Agreement remained open for accession by other non-Asian States.

The Singapore-based Information Sharing Centre established under the Agreement served as a regional coordination centre for collecting and sharing information on piracy and armed robbery at sea and facilitated cooperation on maritime safety between the parties. A key element of the Agreement was that it provided for real-time information-sharing on incidents of piracy and armed robbery at sea. Such information was included in the database of the Information Sharing Centre and was used in the preparation of statistics; it was also essential for preventing maritime crime and facilitating a rapid response when incidents occurred. In addition, training sessions, exercises and workshops were organized under the Agreement in order to build the parties' capacity to combat maritime piracy.

The general obligations of the parties under the Agreement included taking effective measures to prevent and suppress piracy and armed robbery against ships, arresting suspects, seizing ships under the control of persons who committed such offences and providing assistance to victims. However, the Agreement also provided that, in the implementation of those general obligations, as defined in article 3, nothing prevented the parties from taking additional measures in their land territory. The Agreement also encouraged regional coordination by promoting close collaboration with other international and regional organizations, such as IMO and the Association of Southeast Asian Nations (ASEAN). It was clear that cooperation within Asia had been strengthened through communication, the sharing of information and best practices, and capacity-building.

Europe, meanwhile, had positioned itself as a global actor in maritime security through its maritime security strategy of 2014 and its follow-up action plan of 2018. While European waters were no longer infested with pirates, as they had been several centuries previously, merchant ships plying the world's seas under the flags of European States had been victims of acts of piracy and armed robbery at sea in maritime zones classified as dangerous for the safety of navigation and merchant shipping. Accordingly, Europe had assumed an increasingly central role in protecting freedom of navigation and international trade in maritime spaces. Over the previous three decades, it had been making its presence felt in the waters off the coast of Africa, particularly in the Gulf of Guinea and in the Indian Ocean off the coast of Somalia.

The Maritime Information Cooperation and Awareness Center (MICA Center), based in Brest, France, had played a major role in those developments, since it was responsible for collecting data and statistics on acts of piracy and robbery occurring on all the seas and oceans of the world through a system of voluntary naval cooperation involving the shipping industry. The Center's international focus had been demonstrated through its cooperation with foreign maritime security centres such as those in Singapore, New Delhi, Madagascar and Peru. The Center included the Maritime Domain Awareness for Trade reporting mechanism, which consisted of a set of measures to prevent maritime piracy, armed robbery and other offences at sea by sharing maritime information, allowing ships to identify themselves before their entry into port and alerting them to any incidents that occurred in a given maritime zone. The mechanism thus contributed to stability in the maritime zones of West and Central Africa by establishing contact between regional operational centres and the military forces present in the zone concerned, such as the Gulf of Guinea.

A second tool for the prevention of maritime crime in the Gulf of Guinea was the Commander for the Atlantic Maritime Area, an institution that was part of a more comprehensive approach to combating maritime insecurity in all its forms, including not only piracy but also such offences as illegal fishing, drug trafficking and illegal immigration. The third European cooperation instrument, known as Shared Awareness and Deconfliction – Gulf of Guinea, had been adopted in 2021 following the publication, by the shipping industry, of the Gulf of Guinea Declaration on Suppression of Piracy, which was designed to support action by the States of the Gulf of Guinea to ensure the implementation of best practices relating to the safety of navigation, in particular measures to prevent piracy and armed robbery at sea.

European Union regulations on combating maritime piracy were implemented mainly by European Union member States in coordination with other international and regional organizations and were aimed at strengthening maritime security in European waters and ensuring the protection of ships sailing under the flags of States members of the European Union. In 2008 the European Union had launched Operation Atalanta, a naval operation aimed at combating piracy in the Gulf of Aden and along the coast of Somalia. Several countries of the European Union had contributed to the operation by deploying warships and maritime patrol aircraft. Other countries that were not European Union members had also taken part, providing resources and cooperating with European forces. The operation also had a role in training merchant ship crews in best practices for avoiding pirate attacks and for self-defence in the event of an attack. The operation had contributed to a considerable reduction in the number of pirate attacks in the region.

Through the European Maritime Safety Agency, the European Union played a key role in facilitating information-sharing and the response to incidents at sea. It had also put in place regulations aimed at strengthening the security of European ports that helped to combat piracy by preventing unauthorized access to ships and port facilities. The Agency's main objectives were to support the implementation of European Union maritime law, to strengthen maritime safety and to protect the marine environment. Its remit also included the prevention of pollution, ship surveillance, the coordination of responses to pollution incidents and the collection of data on maritime safety. The Agency worked in close collaboration with other agencies of the European Union, such as the European Environment Agency and the European Union Aviation Safety Agency, to ensure the consistency and coordination of actions in related areas. In addition to the European Union Naval Force, established in 2008, the European Union had set up a maritime surveillance network involving the national navies of the member States through various maritime surveillance centres.

As part of the international coalition against piracy, the European Union had adopted a strategy for the Gulf of Guinea in 2014, in addition to allowing for bilateral approaches between European States and African States whose maritime spaces posed risks for the safety of maritime navigation. The strategy, known as the Coordinated Maritime Presences initiative, was aimed at ensuring coordination between European navies in the Gulf of Guinea and the north-west Indian Ocean. Bilateral cooperation between the African States of the Gulf of Guinea and European States had helped to strengthen the operational capacity of African States to combat piracy. One example of such cooperation was the African Navy Exercise for Maritime Operations, which was led by France.

Research showed that the Americas in general, and Latin America in particular, did not face the same challenges with regard to maritime piracy as South-East Asia and Central and East Africa. Nevertheless, maritime safety concerns did exist in various parts of the Americas. Countries in the region had taken steps to strengthen cooperation on maritime and air safety and the surveillance of their waters. For example, the United States of America and Canada had established bilateral regulations on maritime safety and agencies responsible for enforcing them, including the United States Coast Guard and the Canadian Coast Guard. Other regional cooperation initiatives to strengthen maritime security in the Americas included the CARICOM Maritime and Airspace Security Cooperation Agreement of 4 July 2008, which was intended to be legally binding and to provide a framework for information exchange and other forms of cooperation in the fight against piracy, and the Operative Network for Regional Cooperation among Maritime Authorities of the Americas.

Oceania was a vast and diverse region that included numerous island countries, each with its own maritime safety challenges and concerns. Although maritime piracy was not as common there as in other regions, some parts of Oceania, particularly the South Pacific, had experienced incidents, most of them involving small fishing and other vessels.

The fight against maritime piracy and armed robbery at sea required close international cooperation, including in the form of bilateral agreements that dealt with issues such as joint maritime patrols, exchanges of information on suspicious activities at sea, the detention, prosecution and, where appropriate, extradition of suspected pirates, the establishment of specialized courts, the strengthening of cooperation in the area of maritime security and the fight against piracy, the provision of mutual legal assistance, the surveillance of waters and the coordination of responses to incidents of piracy. The various possible forms of cooperation – bilateral, trilateral, regional, subregional, multilateral and multinational – were not defined in article 100 of the 1982 Convention. In the different regions studied in the report, cooperation had significantly reduced the number of acts of piracy and armed robbery at sea. Regional regulations were vital to strengthen cooperation at sea and combat the two forms of maritime crime more effectively. However, the efficiency and effectiveness of any cooperation depended largely on the adoption of harmonized national criminal laws that complied with the rules of applicable general international law and the rules adopted by regional organizations to combat all forms of maritime crime. Regional, subregional and multinational practices and approaches were what gave content or meaning to cooperation between States. Such cooperation could impose legal obligations, as in the case of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia and the CARICOM Maritime and Airspace Security Cooperation Agreement, or it could take the form of a non-binding instrument such as the Djibouti Code of Conduct or the Yaoundé Code of Conduct.

In his third report, he proposed to conduct a detailed study of the doctrine on different issues relating to the prevention and repression of piracy and armed robbery at sea, which would involve reviewing doctrinal approaches to and academic writings on various legal matters, including prevention and repression, supervision of the activities of private maritime security companies, issues relating to domestic jurisdiction and the universal jurisdiction of States with regard to the prosecution and trial of suspected pirates, the transfer of suspected or convicted pirates, their extradition or prosecution, mutual legal assistance, adduction or admissibility of evidence before domestic courts, imposition of penalties, the non-applicability of statutory limitations to piracy and armed robbery at sea, respect for international human rights law in the context of court proceedings against individuals suspected of committing piracy or armed robbery at sea, competent courts, enforcement measures and provisions on liability and compensation.

He wished to put forward for consideration four draft articles. The justification for draft article 4, “General obligations”, was that, as indicated in the report, regional approaches to preventing and repressing piracy and armed robbery at sea were based on article 100 of the 1982 Convention. However, since the provision was too general in nature, it had been regional practices or approaches that had led to the effective operational implementation of the duty to cooperate laid down therein. In other words, such practices and approaches had given content, meaning and a genuine legal scope to the obligation. It had therefore been appropriate to undertake a study on regional approaches to cooperation.

The rationale behind draft article 5, “Obligation of prevention”, was that article 100 of the Convention made cooperation in the fight against piracy a legal obligation. The need for cooperation was further reflected in the regional approaches he had analysed and in resolutions and recommendations of the Security Council, the General Assembly and IMO, among other bodies. The obligation of prevention was set out in article 100 and had been addressed in the 2023 report on the subject by the Institute of International Law, which had expressed the view that it was not necessary to focus on the distinction between “prevention” and “repression”.

There could be no offences or punishments without criminalization. Draft article 6, “Criminalization under national law”, was consistent with chapters II and III of the report, which examined the fundamental role of international and regional organizations in requiring States to criminalize piracy and armed robbery at sea under national law as part of efforts to repress the two forms of crime.

The argument in favour of draft article 7, “Establishment of national jurisdiction”, was that resolutions of the Security Council and General Assembly and instruments adopted by regional organizations treated the establishment of such jurisdiction as a prerequisite for the prevention and repression of piracy and armed robbery at sea. It therefore seemed pertinent to devote a draft article to the matter.

By elaborating on his reasoning for proposing the four draft articles, he hoped to have made clear the link between them and the body of his report. The purpose of the draft articles was to elucidate the obligations of States, given that, in their resolutions and recommendations, the Security Council and the General Assembly had merely referred States to their primary obligations with regard to preventing and repressing piracy and armed robbery at sea.

Mr. Oyarzábal said that he would make a few general remarks about the report and the memorandum by the secretariat (A/CN.4/767) before putting forward some non-exhaustive suggestions for the proposed draft articles. The report presented a detailed and comprehensive study of the work of relevant international organizations and of international, regional and bilateral cooperation agreements aimed at preventing and repressing piracy and armed robbery at sea. It highlighted existing challenges and practices, which would be of great importance for the Commission’s future work on the topic. It also emphasized the value of international cooperation, which was key, particularly given the lack of capacity of certain States that were among the most affected by piracy and armed robbery at sea. He would have liked to see a more detailed explanation of how the developments described in the report had inspired the proposed draft articles and was therefore grateful for the additional details that the Special Rapporteur had provided in that regard in his introductory statement.

The memorandum by the secretariat provided insight into the legislative developments that had culminated in the inclusion of references to piracy in the 1958 Convention on the High Seas and the 1982 United Nations Convention on the Law of the Sea. It also dealt exhaustively with the essential elements of piracy and armed robbery at sea and contained citations to academic literature in different languages and by authors from different countries. It would have been useful to have received such a memorandum in advance of the Commission’s seventy-fourth session. In the interests of optimizing available resources, he trusted that, in its future work on the topic, the Commission would be cautious about the type of reports that it requested from the secretariat and about the timing of such requests.

He wished to reiterate a point that he had made at the previous session, namely that, in addressing piracy and armed robbery at sea, the Commission should draw on existing international instruments, in particular the 1982 Convention and relevant agreements adopted by IMO and other international and regional organizations, and on existing arrangements for cooperation and mutual legal assistance in the fight against transnational organized crime. Such instruments included the International Convention against the Taking of Hostages, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the United Nations Convention against Transnational Organized Crime. The 2009 Naples

Declaration on Piracy and the 2023 resolution on piracy adopted by the Institute of International Law could also be considered.

In any event, the 1982 Convention should serve as the starting point for the Commission's work on the topic. The Commission should expand on and complement articles 100, 105 to 107 and 110 of the Convention, among others, in order to help States and the competent international and regional organizations to deal with the new challenges posed by piracy and armed robbery at sea.

While there was consensus that piracy constituted an international crime, it did not necessarily follow that instruments aimed at preventing and punishing such crimes were applicable to piracy and armed robbery at sea, which were transnational in nature. He found problematic the approach of using the Commission's 2019 draft articles on prevention and punishment of crimes against humanity as a basis for addressing piracy and armed robbery at sea. A crime against humanity involved the commission of certain inhumane acts, such as murder, torture or rape, in a certain context. The acts had to be committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack, which might be perpetrated as a State policy. Generally speaking, piracy and armed robbery at sea could hardly be considered part of an attack directed against a civilian population, which was an element that distinguished crimes against humanity from isolated acts against individuals. Furthermore, piracy and armed robbery at sea could not, by definition, be committed by individuals acting on behalf of the State. The transnational nature of the two forms of crime implied the involvement of various States, insofar as the acts themselves took place, or their effects were felt, in more than one jurisdiction. In that sense, piracy and armed robbery at sea differed from other international crimes, which might also undermine international order and security but could take place and have effects in a single jurisdiction. Consequently, the provisions developed by the Commission to prevent and punish crimes against humanity, and the rationale behind them, could not simply be transposed to the fight against piracy and armed robbery at sea.

Regarding the proposed draft article 4, he supported the inclusion of a provision devoted exclusively to establishing the general obligations of States. However, he suggested that the obligation to cooperate and the obligations to prevent and repress should be addressed in a single paragraph. Failing that, the order of paragraphs 1 and 2 should be reversed. The phrase "whether or not committed in time of armed conflict" in paragraph 2 raised questions and should perhaps be deleted. The same phrase had been included in article 3 (2) of the draft articles on prevention and punishment of crimes against humanity, but for a specific reason. The law of crimes against humanity had evolved over time. Initially, such crimes had to have been committed in connection with an armed conflict, but that requirement had been dropped as a result of changes in international custom and the adoption of the Rome Statute. There seemed to be no reason to presume that the same logic should apply to piracy and armed robbery at sea. Moreover, the phrase appeared to have no relevance to the topic. In an international armed conflict, attacks carried out by government vessels could not be considered acts of piracy or armed robbery at sea. In a non-international armed conflict, whether an attack on a vessel constituted piracy or armed robbery at sea would depend on the purpose of the attack. If the attack was carried out for a public cause, it could not be considered as either of the two acts.

In draft article 5, which concerned the obligation of prevention, he would prefer to delete the words "and to repress" to avoid confusion. Moreover, the far-reaching scope of the measures provided for in subparagraph (a) could have significant implications in view of the broad freedoms enjoyed by States on the high seas and of their obligations with regard to piracy and other offences, potentially upsetting the balance achieved by the 1982 Convention. Subparagraph (b) contained a reference to "non-State actors". Given the leading role that such actors had taken on in recent decades, there could be little doubt as to their ability to contribute to ensuring the safety of navigation. However, extensive debates on the conceptualization of non-State actors had revealed a lack of academic consensus on the matter. There was no uniform definition of "non-State actors" or an agreed methodology for identifying or classifying them. Owing to the existence of a variety of non-State actors, definitions tended to vary depending on the environment in which the actors operated.

Accordingly, the Commission should carefully evaluate how and in what situations it referred to them.

Concerning draft article 6, for the sake of brevity, and without prejudice to other issues, he would comment only on paragraphs 4 and 5, which appeared to suggest that States had the capacity to commit acts of piracy and armed robbery at sea. However, the acts in question could be committed only by private entities, regardless of their political motive. He would thus prefer to delete the two paragraphs, which seemed not to coincide with the general and majority opinion on the subject as reflected in the two memorandums by the secretariat. More generally, he believed that States should adopt not only legislation but also "procedures" to prevent and punish piracy, and that the measures they took should be not only "necessary" but also "effective", as suggested by the Institute of International Law in its 2009 Naples Declaration on Piracy.

His understanding was that draft article 7 was a complementary corollary to draft article 6 that set out the criteria according to which States could exercise their jurisdiction in criminal matters, and that it did not authorize the exercise of enforcement measures by a State in the internal waters, archipelagic waters or territorial sea of another State, which was not permissible under the 1982 Convention. In any event, he would welcome clarification in that regard. Draft article 7 appeared to be comprehensive. Paragraph 1 (a) provided for territorial jurisdiction, paragraph 1 (b) for active personality jurisdiction and paragraph 1 (c) for passive personality jurisdiction, while paragraph 2 established a limited form of universal jurisdiction. Regarding paragraph 1 (b), the concept of "habitual residence" assumed different meanings under different laws, which could give rise to difficulties and loopholes that undermined the objective of the draft article. Furthermore, the term "stateless person" referred to a *de jure* concept based on the 1954 Convention relating to the Status of Stateless Persons, article 12 (1) of which stipulated that the personal status of a stateless person should be governed by "the law of the country of his domicile or, if he has no domicile, by the law of the country of his residence", rather than the person's country of habitual residence, as proposed by the Special Rapporteur in paragraph 1 (b). While he was aware that the 1954 Convention and the proposed draft articles addressed different topics and that matters dependent on personal status also differed according to the legal perspective adopted, following the approach of the 1954 Convention would contribute to consistency between the international instruments in force. Failing that, he would prefer to refer simply to "the law of the person's country of residence", bearing in mind that the concept of "domicile" had become uncommon.

Mr. Savadogo said that he wished to make a few general observations before turning to more substantive remarks. He had doubts about the approach taken in the report, which contained a great deal of useful information but resembled a document to be submitted to the General Assembly. Some highly relevant recent events, such as the launch of naval operations in response to the Red Sea crisis, were not reflected in the report.

He would appreciate clarification on a number of points, including the use of the terms "maritime regions" and "multinational". In paragraph 67, reference was made to "community law", a term that should be used with the utmost caution. Community law constituted a legal order of its own that was integrated into the legal systems of member States. Its key features were its primacy over domestic law and the fact that individuals could seek redress for violations of their rights under community law. He doubted that the African mechanisms mentioned in the report were integrated to the extent required for community law.

In paragraph 77, reference was made to "the ASEAN code of conduct on piracy". However, no such code of conduct had yet been adopted, despite the existence of a declaration to that end. Moreover, the Djibouti Code of Conduct had been replaced by the Jeddah Amendment of 12 January 2017.

Concerning future work on the topic, he was of the view that "a detailed study of the doctrine on different issues", as referred to in paragraph 100, could support but not replace an analysis of regional agreements and other relevant texts. The adduction or admissibility of evidence before the courts and the imposition of penalties were issues that did not fall within the scope of the topic. More importantly, he doubted that the four proposed draft articles fell within that scope either.

His final general observation was that, in the report, reference could usefully have been made to the 1932 draft convention on piracy prepared under the auspices of Harvard Law School and to the 2023 work of the Institute of International Law, in particular the report entitled “Piracy, Present Problems” and the accompanying resolution, composed of 10 articles.

Substantively, the report did not really raise the legal issues that characterized the topic at hand, although it was those points of law that should inspire the draft articles. For example, it should be noted from the outset that States retained essential regulatory powers in the prevention and repression of piracy and armed robbery at sea, but those problems inherently required international cooperation. Article 100 of the 1982 United Nations Convention on the Law of the Sea established the duty for all States to cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State. The purpose of that clause was twofold: to protect public order at sea and to defend the particular interests of States in those areas. The phrase “to the fullest possible extent” seemed to take account of cases where cooperation in the repression of piracy was impossible, particularly for developing countries lacking appropriate means of military coercion or for “failed States” that no longer had government structures capable of controlling their territory. In any event, article 100 must be read in conjunction with article 300, which required States to fulfil in good faith the obligations assumed under the Convention.

In connection with the topic at hand, clarification of the qualifier “regional” was in order. Chapter VIII of the Charter of the United Nations dealt with “regional arrangements” without defining the concept. The same was true of the numerous references to “agreements” and “arrangements” in the 1982 Convention. The literature distinguished between “geographical regionalism”, “regionalism by category” and “functional regionalism”, the last of which was most relevant to the topic at hand, in that it concerned the regulation of activity in a specific maritime sector that could transcend geographic zones. By cooperating closely and continuously at the regional level, States could effectively prevent and repress piracy and armed robbery at sea. In order to understand the role of regional cooperation in the fight against illegal acts at sea, cooperation at the international level must first be addressed.

Global cooperation was based on a number of international treaties, at the heart of which was the 1982 Convention. Other relevant multilateral legal instruments included the International Convention against the Taking of Hostages, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and the United Nations Convention against Transnational Organized Crime.

Security Council resolution 1816 (2008) had marked a normative advance in that domain. In paragraph 3, the Council urged all States to cooperate with each other, with IMO and, as appropriate, with the relevant regional organizations in connection with, and share information about, acts of piracy and armed robbery in territorial waters and on the high seas, and to render assistance to vessels threatened by or under attack by pirates or armed robbers, in accordance with relevant international law. That resolution combined “piracy” and “armed robbery” in a single formula and provided that both should be addressed by the same measures of repression. The Special Rapporteur’s report also referred to the IMO Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships, which incorporated the definition of piracy set out in article 101 of the 1982 Convention and extended its material scope by introducing the innovative concept of “armed robbery”.

The effectiveness of the duty to cooperate was dependent on its content. In that connection, in the arbitral award in the case concerning *The “Enrica Lexie” Incident*, the arbitral tribunal of the Permanent Court of Arbitration had noted that article 100 of the Convention did not stipulate the forms or modalities of cooperation that States should undertake in order to fulfil their duty to cooperate. It had cited the commentary to article 38 of the International Law Commission’s draft articles concerning the law of the sea, the forerunner of article 100, which stated 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 and that obviously the State must be allowed a certain latitude as to the measures it should take to that end in any individual case. The tribunal had gone on to note that the duty to cooperate did not necessarily imply a duty to prosecute pirates, but rather that

States could include in their national legislation provisions on the extradition of pirates and mutual assistance in criminal matters and could conclude bilateral and multilateral agreements or arrangements in order to facilitate such cooperation.

Unlike article 101 of the 1982 Convention, whose provisions covered acts of piracy committed on the high seas or in "a place outside the jurisdiction of any State", Security Council resolution 1816 (2008) extended criminal jurisdiction over the territorial sea to third States. The right of hot pursuit, exercised on the high seas by the coastal State from its internal waters, territorial sea or contiguous zone in response to a violation of its laws and regulations, was a classic rule codified by article 111 of the Convention. The right of hot pursuit ceased as soon as the ship pursued entered the territorial sea of another State. Meanwhile, under paragraph 7 of resolution 1816 (2008), third States were permitted, with the authorization of the coastal State, to "[e]nter the territorial waters … for the purpose of repressing acts of piracy and armed robbery at sea, in a manner consistent with such action permitted on the high seas". Many regional instruments reproduced that provision. In addition, the resolution established that activities undertaken pursuant to the authorization in paragraph 7 should "not have the practical effect of denying or impairing the right of innocent passage to the ships of any third State" and that the authorization should "not be considered as establishing customary international law".

With regard to cooperation mechanisms established by international institutions, the General Assembly had encouraged, in successive resolutions on oceans and the law of the sea, "international cooperation at the global, regional, subregional and bilateral levels in combating, in accordance with international law, threats to maritime security, including piracy, armed robbery at sea …". IMO, the International Maritime Bureau (IMB) and the International Criminal Police Organization (INTERPOL) had adopted mechanisms relevant to the topic under discussion.

In terms of regional practice, there were various agreements and arrangements on piracy and armed robbery. Regulatory instruments aimed at the prevention and repression of piracy and armed robbery were broader in scope than article 101 of the 1982 Convention, which, of course, covered only piracy. Specific instruments included the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia of 2004, which supplemented the Declaration on the Conduct of Parties in the South China Sea of 2002. Also worth mentioning were the Djibouti Code of Conduct and its 2017 revision, the Jeddah Amendment, and the Yaoundé Code of Conduct.

The repression of piracy and armed robbery at sea was also covered in more general instruments on safety at sea, such as the CARICOM Maritime and Airspace Security Cooperation Agreement of 2008, one of the objectives of which was the prevention of piracy, hijacking and other serious crime. The 2016 Lomé Charter included definitions of the terms "pirate ship" and "ship". The latter term could include maritime drones, which would expand the definition of the offences covered by the topic under consideration.

An analysis of regional agreements and arrangements showed that they contained preventive, enforcement and repressive measures. The preventive measures were based on article 100 of the 1982 Convention. For example, under article 2 of the Yaoundé Code of Conduct, signatories had an obligation to cooperate "to the fullest possible extent". Similarly, article 2 of the Jeddah Amendment to the Djibouti Code of Conduct established a duty for participants to cooperate "consistent with their available resources and related priorities". Neither instrument established a binding agreement.

Enforcement measures could involve intervention by naval forces and coercive action, including the "seizure of a pirate ship or aircraft", in line with article 105 of the 1982 Convention. The 2008 Memorandum of Understanding on the Establishment of a Sub-Regional Integrated Coast Guard Function Network in West and Central Africa established an obligation for States parties to combat piracy and armed robbery. It provided that the goal of the Network was to facilitate joint efforts for the protection of human life, the enforcement of laws, the improvement of safety and environmental protection at sea. It also provided that coastguard facilities could be authorized to carry out enforcement measures in a foreign sector.

Similarly, article 6 of the Yaoundé Code of Conduct permitted the pursuit of a ship "in or over the territory or territorial sea of any coastal State" provided that the permission of that State had been obtained. The right of pursuit in the State's territorial sea and especially on its land was the most innovative aspect of that provision. The Jeddah Amendment contained similar provisions. More broadly, article 7 (1) of the CARICOM Maritime and Airspace Security Cooperation Agreement stated that: "This Agreement constitutes permission by each State Party for the Security Force vessels and Security Force aircraft of any other State Party, on giving notice, to patrol its waters and airspace in furtherance of this Agreement." That could be seen as a derogation from article 111 of the 1982 Convention governing the right of hot pursuit, which "ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State". The CARICOM Agreement specified that the vessel conducting the pursuit must, in addition to its national flag, also fly the CARICOM flag.

The reference to a ship flying the flag of an organization was not new. It was provided for in article 93 of the 1982 Convention and article 7 of the 1958 Convention on the High Seas. The vessels participating in Operation Atalanta flew the European Union flag. In a similar vein, in order to ensure freedom of navigation in the context of the Red Sea crisis, the United States had initiated Operation Prosperity Guardian in December 2023. At the same time, the European Union had deployed a naval force under Council Decision (CFSP) 2024/583 of 8 February 2024 on a European Union maritime security operation to safeguard freedom of navigation in relation to the Red Sea crisis (Operation Aspides). That operation also used vessels flying both national and European Union flags.

The utility of operating under two flags might not be immediately apparent, since warships and other government ships operated for non-commercial purposes enjoyed immunities under the 1958 Convention on the High Seas and the 1982 Convention. That question had been addressed by the International Tribunal for the Law of the Sea in the "*ARA Libertad" Case (Argentina v. Ghana)* of 2012 and the *Case concerning the Detention of Three Ukrainian Naval Vessels (Ukraine v. Russian Federation)* of 2019. The "dual flag" solution made it possible to maintain, through the national flag, a reference to a "flag State" and consequently to the civil and criminal laws of that State, as well as to the prescriptions contained in the treaties to which that State was a party, while indicating that the vessel in question was in the service of an international organization.

Enforcement measures could require the use of force. Article 14 of the CARICOM Agreement stipulated, however, that the use of force pursuant to the Agreement must in all cases be in strict accordance with the applicable laws and policies and the minimum reasonably necessary under the circumstances. The International Tribunal for the Law of the Sea had declared in the *M/V "SAIGA" (No. 2)* case that "the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances". That point had already been made very forcefully in the arbitration cases concerning *SS I'm Alone (Canada v. United States)* and *The Red Crusader (Denmark v. United Kingdom)*. That jurisprudence had been echoed in the award in the arbitration regarding the delimitation of the maritime boundary between Guyana and Suriname of 2007. In the same vein, the decision whereby the European Union force had been deployed in response to the Red Sea crisis (Council Decision (CFSP) 2024/583) referred to respect for the "principles of necessity and proportionality" in the use of force.

Repressive measures involved the arrest, prosecution and transfer of pirates. The arrest of pirates was governed by article 105 of the 1982 Convention, which stated: "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft". Council Joint Action 2008/851/CFSP established that Operation Atalanta would provide protection to vessels chartered by the World Food Programme, including "by means of the presence on board those vessels of armed units of Atalanta, in particular when cruising in Somali territorial waters". That raised the question of whether the arrest of suspected pirates by law enforcement officers or privately contracted armed security personnel on board merchant ships was consistent with the requirements of article 107 of the 1982 Convention, according to which only warships or military aircraft could carry out a seizure.

The transfer of pirates, whereby a State in whose territory a person who had already been prosecuted or sentenced by the judicial authorities of another State was found transferred him or her to that State, was governed by the bilateral or regional treaties to which both the requesting and requested States were parties. Provisions to that effect were included in the Jeddah Amendment to the Djibouti Code of Conduct and the Yaoundé Code of Conduct. The Lomé Charter included an article on judicial and legal cooperation. Under the CARICOM Agreement of 2008, persons who had committed or were suspected of having committed one of the offences in question could be arrested in application of the CARICOM Arrest Warrant Treaty. General regional instruments on extradition could be applied to the offences of piracy and armed robbery, including the European Convention on Extradition, the Inter-American Convention on Extradition, the Southern African Development Community Protocol on Extradition and the Model ASEAN Extradition Treaty. At the bilateral level, Kenya and the Seychelles had concluded agreements with the European Union, among others, on the extradition of arrested persons.

In conclusion, he believed that the Special Rapporteur's important study needed further work, and he stood wiling to assist him and the secretariat if they so wished.

Mr. Fathalla said that, at the outset, he would like to express his thanks to the Special Rapporteur for his comprehensive report.

He would begin by noting that, while he appreciated the inclusion of Security Council resolutions in the study, he doubted that they were relevant to the scope of the proposed draft articles. The Security Council had no normative role. Council resolutions adopted under Chapter VII of the Charter of the United Nations were limited in scope and focused on specific cases. They could not, in his view, serve as a basis for the drafting of a legal text. The Council's mandate was to identify threats to international peace and security, not to establish international law itself. However, its resolutions were a good example of international cooperation.

Similarly, the resolutions of the General Assembly were not normative texts and therefore could not be used as a basis for drafting a text of that nature. However, those resolutions were relevant in the sense that they established certain principles that could be used in the Commission's work.

While NATO was cited as an example in the report, its relevance to the scope of the draft articles under consideration was limited to the enforcement of Security Council resolutions. As noted in paragraph 34 of the report, NATO involvement in the fight against maritime crime was based on the authorization of the Security Council under Chapter VII; it therefore did not provide a basis for the drafting of a legal document. On the other hand, the example of ASEAN was helpful, as it was based on a binding legal framework that could be useful for the current draft articles. Similarly, the work of IMO was of paramount importance, as it provided a solid basis for the fight against maritime crime and the safety of navigation, for example through the adoption of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

There was a need to distinguish between piracy and armed robbery at sea, which differed in terms of jurisdiction, applicable law and the form of international cooperation. With regard to jurisdiction, piracy occurred on the high seas, whereas armed robbery occurred within the territorial jurisdiction of a State, which meant that the applicable law for armed robbery at sea would be the national law of the State concerned. International cooperation was also different in the two cases. It was much broader in the case of piracy, which occurred outside the jurisdiction of a State. Cooperation in connection with armed robbery at sea was based mainly on bilateral or multilateral agreements, as it occurred within the jurisdiction of a State.

With regard to cooperation among international organizations, he fully agreed with the Special Rapporteur's conclusion in paragraph 99 that such cooperation was necessary in order to reduce the incidence of maritime crime. In that paragraph, the Special Rapporteur emphasized the need for cooperation and coordination between various international and regional organizations, stating that, "in the various regions studied, these different forms of cooperation have made it possible to reduce significantly the number of acts of piracy and armed robbery at sea". Such an approach should be reflected in the draft articles.

He appreciated the fact that draft article 4 (1) was devoted exclusively to piracy. It took into account the difference between piracy and armed robbery at sea. While the paragraph was based on article 100 of the 1982 United Nations Convention on the Law of the Sea, it added the element of prevention. Such an addition was very useful, since the Commission's role was not only to repeat what was already contained in other legal instruments, but also to develop international law in the light of new facts and developments. He therefore proposed that the paragraph should include a reference to a customary norm of international law, since it would address all subjects of international law, not only States. As one of the most important developments in international law had been the intervention and active participation of non-State actors, the draft article should reflect that development and include the general obligations of actors other than States.

Concerning draft article 4 (2), his view was that armed robbery at sea should be addressed in a separate paragraph. Although armed robbery at sea was mainly covered by national law, both piracy and armed robbery should be dealt with under international law as well, leaving the question of criminalization to draft article 6. Furthermore, he did not see how the existence of an armed conflict was relevant to compliance with the obligation to prevent and repress armed robbery at sea. The reference to armed conflict in paragraph 2 was therefore redundant, as armed robbery at sea would always be considered as such, regardless of whether it occurred during an armed conflict.

He fully agreed with the content of draft article 4 (3), as there could be no justification for the commission of piracy or armed robbery at sea.

With regard to draft article 5, the Commission should distinguish between armed robbery at sea and piracy, as the prevention of those two forms of maritime crime was different. The prevention of armed robbery at sea was primarily a matter for national law, although national law should certainly be in conformity with international law. In the case of piracy, on the other hand, the obligation of prevention was governed mainly by international law, since piracy took place outside the jurisdiction of States. He proposed that the wording in the *chapeau* of the draft article should be amended to read "in conformity with both national and international law", since the offence of armed robbery at sea occurred within the national jurisdiction of States, meaning that the reference to international law alone was not appropriate and national law should also be mentioned.

While he agreed with the Special Rapporteur that subparagraph (a) of the draft article should take both armed robbery and piracy into account, the applicability of the preventive measures listed to each of the two forms of maritime crime should be clearer, as they differed in terms of jurisdiction and the applicable law.

In subparagraph (b), the term "competent" should be deleted from the phrase "competent intergovernmental organizations", as cooperation should involve all organizations, and the words "as appropriate" already appeared in the subparagraph. In addition, the subparagraph suggested that States should cooperate with non-State actors with an interest in the safety of maritime navigation. He fully agreed with the inclusion of non-State actors in cooperation to tackle maritime crime, but the requirement of having "an interest in the safety of maritime navigation" should be more clearly defined. Otherwise, if insurgents and armed groups claimed to have such an interest, the provision might appear to create an obligation for the State to cooperate with them. There should be more specific criteria to define which non-State actors had an interest in the safety of maritime navigation. The paragraph should reflect recent developments and should include individuals, business entities and non-governmental organizations among the non-State actors having such an interest.

In draft article 6 (1), which provided that States should take measures to ensure that piracy and armed robbery at sea constituted criminal offences, he proposed the addition of the phrase "as defined in the present legal instrument" to qualify the criminalization of piracy and armed robbery at sea in national legislation. The aim was to reduce fragmentation and increase harmony between the definitions in different jurisdictions, as suggested by the Special Rapporteur in paragraph 99 of the report. Given that both piracy and armed robbery at sea should be criminalized, he agreed that both should be mentioned in paragraph 1.

With regard to paragraph 2, the wording seemed to suggest that committing, attempting, ordering, soliciting, aiding and abetting acts of piracy or armed robbery at sea were of the same gravity, which was not the case. He proposed the addition of the qualifier "knowingly" before the word "assisting" in paragraph 2 (c), as assisting in or contributing to an act of piracy or armed robbery at sea could be done unintentionally. For example, an individual could rent a boat to someone without knowing that the person intended to use it to commit an act of piracy.

He doubted whether the reference in paragraph 4 to an "order of a Government" was helpful, as it seemed to suggest that piracy and armed robbery at sea might be committed pursuant to an order of a Government. That might not be consistent with draft article 2 (1) (a), which stated that piracy was committed for private ends by the crew or the passengers of a private ship. If the acts could be attributed to the State, they would not be regarded as piracy or armed robbery at sea; instead, they would fall under other categories of crime, such as aggression.

The wording of draft article 6 (5) seemed ambiguous. It suggested that an official of a State could commit an act of piracy or armed robbery at sea in his or her official capacity, which would create uncertainty as to the nature of the act. He proposed that the phrase "in his or her personal capacity" should be added after the words "committed by a person performing an official function".

The phrase "any statute of limitations" in paragraph 6 was vague and needed clarification. It might exclude any mitigating circumstances for the punishment of maritime offences. As he had indicated with regard to paragraph 2, the different degrees of engagement in the commission of acts of piracy and armed robbery at sea had different levels of gravity and should be treated accordingly. For example, the mere attempt to commit an act of piracy or armed robbery or assistance in such acts should not be equated with the commission of the act itself. Therefore, he suggested that the end of the paragraph should be amended to read "taking into account their respective gravity".

In draft article 7 (1) (a), the phrase "a territory under its jurisdiction" was redundant, as it went without saying that when an offence was committed in the territory of a State, it fell under that State's jurisdiction. Paragraph 1 (b) usefully mentioned stateless persons who were habitually resident in a State for the purposes of establishing jurisdiction. However, it would also be helpful to include all residents of the State because, for example, some residents might be refugees who were not stateless. Therefore, the final clause of the subparagraph should be amended to read "a resident of that State who habitually resides in that State's territory". In general, draft article 7 (1) should indicate the order of preference for the exercise of jurisdiction in the event of conflicting jurisdictions. He found the current order to be appropriate, as subparagraphs (a) to (c) referred, respectively, to territorial jurisdiction, active personality jurisdiction and passive personality jurisdiction.

He found draft article 7 (3) to be inappropriate, since it could allow States to exercise jurisdiction with regard to armed robbery at sea committed in the territory of another State on the pretext of their respective national laws. The crucial point was to distinguish between armed robbery at sea, which was committed in waters under the jurisdiction of States, and piracy, which was committed on the high seas. National laws should not allow States to exercise their jurisdiction in other States. He therefore suggested that paragraph 3 should be limited only to piracy, excluding armed robbery.

Lastly, in relation to the future programme of work for 2025, he supported the proposal contained in chapter VI of the report.

Mr. Forteau said that he was grateful to the Special Rapporteur for his report and his detailed introductory statement and to the secretariat for its excellent memorandum. The topic of piracy and armed robbery at sea was both crucially important and highly complex, as shown by the discussion thus far, and the Special Rapporteur was to be commended for having taken on the challenge of addressing it. Because of the topic's importance and complexity, it was crucial for the success of the Commission's work that the Special Rapporteur and the other members should proceed on the basis of a clearly defined methodology. That was particularly imperative in relation to the aspects explored in the second report, which touched upon practical and sensitive issues in relation to prerogatives

and interests of States in security matters and aspects of domestic criminal law. In view of the importance of the methodological aspects of the topic, he would focus his remarks on issues of method and procedure and would reserve for later his observations on the substance of the second report.

In his statement at the seventy-fourth session (A/CN.4/SR.3620), he had expressed reservations about referring the draft articles proposed by the Special Rapporteur to the Drafting Committee too early. The Commission had nonetheless decided to refer draft articles 1 to 3 to the Committee, but by doing so had put it in a difficult position, which had then had repercussions on the process of adopting the commentaries in the plenary Commission. His proposal at the previous session had been that, before referring the draft articles to the Drafting Committee, the Commission should identify the main themes and future direction of the study. One possibility was to prepare a road map or general framework, as the Commission had usefully done in the past for other topics. A working group could be set up specifically for that purpose. In repeating that proposal at the current session, for reasons which he would explain and which were backed up by some of the comments made by other members, he wished to make clear, to avoid any misunderstanding, that it was in no way intended to substitute such a working group for the Special Rapporteur or to prevent the Drafting Committee from doing its work. It was simply a matter of creating an appropriate forum for discussion in which the Special Rapporteur would have the opportunity to specify and clarify the general direction of the study in order to facilitate the substantive discussions and drafting work at a later stage. It should be recalled that the Commission, in its 1996 recommendations on its methods of work, had envisaged the possibility of establishing such working groups to assist the Drafting Committee, particularly in defining the "direction" of the work on the topic.

Such an approach would be particularly fruitful for the current topic for two reasons.

The first concerned an issue of synchronization. The Special Rapporteur's reports had been organized according to the documentary sources studied: the first report had covered national legislation, the second had covered the practice of international organizations and regional and bilateral approaches and the third, to be submitted in 2025, would cover teachings ("doctrine"), as announced in paragraph 100 of the second report. At the same time, however, the draft articles proposed each year were organized by theme. Thus, each year the Commission was asked to take a position on draft articles without yet having all the relevant material at its disposal. At the current session, for example, the Commission was being asked to discuss draft articles on cooperation, prevention, criminalization and jurisdiction even though the Special Rapporteur had not yet studied all the relevant material on those issues. Furthermore, the documents examined in the second report did not really shed light on the draft articles proposed in the report. Under articles 15 and 20 of its statute, the Commission was to adopt texts based on State practice, judicial decisions and relevant doctrine and must therefore analyse each of those three elements in connection with each draft article. In those circumstances, if the draft articles were referred to the Drafting Committee too early, the texts and commentaries adopted could subsequently prove to be disconnected from the conclusions to be drawn from the subsequent study of other relevant material.

Indeed, such a situation might already have arisen. The current memorandum by the secretariat (A/CN.4/767) contained many pertinent elements that had not been available to the Commission when it had discussed and adopted the commentary to draft article 2, "Definition of piracy", at the previous session, and it could well be that, as a result, the commentary was retrospectively problematic. He wondered, for example, whether paragraph (6), on the expression "committed for private ends", of the commentary to draft article 2 corresponded exactly to what the memorandum set out in paragraphs 86 to 100. Similarly, it was unclear whether paragraph (12), on the "two ships" requirement, of the commentary to draft article 2 was compatible with the documents examined in paragraphs 106 *et seq*. of the memorandum.

In those circumstances, it might be necessary to establish a working group at the current session to reassess the commentaries to draft articles 1 to 3 to ensure that they were compatible with the conclusions to be drawn from the material set out in the memorandum by the secretariat. That would also enable the Commission to take account of the resolution on piracy adopted in 2023 by the Institute of International Law and of the comments made

by States in the Sixth Committee, which had asked for the commentaries to be further substantiated and for certain issues to be analysed more in depth.

The second reason was that the general direction of the study had yet to be defined, as had been noted in the Sixth Committee at the seventy-eighth session of the General Assembly. There was still uncertainty as to whether the aim was to codify existing law, progressively develop the law or engage in a treaty-making exercise. At the preceding session, the Chair of the Drafting Committee had highlighted the need to determine the exact form of the outcome to be produced under the topic; the time had come for the Commission to do so.

That question was related to the very purpose of the second report, which indicated several times that article 100 of the 1982 United Nations Convention on the Law of the Sea was silent, insufficient or imprecise on the content and the means of fulfilling the duty to cooperate in the fight against piracy and that it was for States and international organizations to fill that gap. That would mean proposing that States should adopt a new legal instrument, which was also implied by the wording of the newly proposed draft articles. However, in summing up the debate on the topic at the previous session (A/CN.4/SR.3625), the Special Rapporteur had said something quite different, indicating that in his view "it would be possible to develop law on maritime piracy without affecting existing instruments".

The second report did not specify whether the draft articles proposed at the current session were an exercise in codification, progressive development or treaty-making. Paragraph 99, in particular, was silent on that point. Paragraph 37 stated that the "state of regional law concerning efforts to combat piracy and armed robbery at sea varies among the different maritime regions of the world", which cast doubt on the possibility of a universal approach. In contrast, the Special Rapporteur had indicated in his introductory statement that the draft articles he was currently proposing would simply codify regional practices. Furthermore, while the Special Rapporteur said that he did not want to affect existing instruments, draft articles 4 to 7 clearly went beyond what was provided for in article 100 of the 1982 Convention and were in fact tantamount to amending or at least supplementing the Convention. That would place the Commission's work in the sphere of treaty-making at the universal level rather than progressive development. The Special Rapporteur had also referred in his introductory statement to the aim of harmonizing national criminal laws, which was an entirely different exercise.

Such ambiguity should be removed before work continued in the Drafting Committee: it should be made clear whether the Commission was codifying and progressively developing the law without affecting existing instruments, proposing a new universal legal instrument that complemented or even amended existing instruments, or harmonizing national laws.

Furthermore, the themes to be addressed and the way in which the draft articles were to be structured required clarification. First, the work programme contained in chapter X of the Commission's report on its seventy-fourth session (A/78/10) provided that the Special Rapporteur's third report would consist of an "analysis of trends in academic writings and the views of learned societies on the topic, as well as the resolutions of the General Assembly and Security Council", and that the draft articles would be completed on first reading. However, that was not reflected in paragraph 100 of the second report, which announced the study in 2025 of an impressive list of substantive issues, the consideration of which seemed impossible to complete in a single year. Second, those issues included themes that the Special Rapporteur had previously excluded from the scope of the topic. For example, the Special Rapporteur had stated at the 3625th meeting, in response to Mr. Asada's observations, that he did not intend to propose that the scope of universal jurisdiction should be extended to armed robbery at sea. Yet draft article 7 (2) as proposed in the second report provided for the principle of *aut dedere aut judicare*, and thus a form of universal jurisdiction, in respect of that offence, although the Special Rapporteur had given no justification for that proposal. Similarly, the Special Rapporteur had stated in 2023 that the issue of penalties would not be the subject of an in-depth study or a draft article, but paragraph 100 of the second report included penalties among the issues to be addressed in the Special Rapporteur's future work.

Third, it was crucially important to decide whether the draft articles should deal with piracy and armed robbery at sea in a unified manner, under the umbrella of one and the same regime, or in separate parts, taking into account the differences between those two types of

offences. The Special Rapporteur seemed to have decided to apply the same regime to both of them in draft articles 4 to 7, which was a questionable choice. The second report did not explain the basis on which the Special Rapporteur had decided to take that approach. It was, however, a decision with far-reaching consequences for the direction that the Commission's work on the topic would take. For example, he doubted that universal jurisdiction could be extended to armed robbery in the territorial sea, as draft article 7 (2) suggested. That did not follow from customary law and, if it was to be proposed by way of progressive development, it must be justified in detail, given that it would limit the sovereignty of States in criminal matters. Similarly, draft articles 4 (3) and 6 (6), which provided that no circumstances of any kind whatsoever could be invoked as a justification of those offences and that the offences must not be subject to any statute of limitations, undoubtedly applied to the most serious acts of piracy but could not apply to all types of armed robbery at sea, no matter how minor. Furthermore, it was doubtful whether that provision mirrored the criminal legislation in force in many countries.

In conclusion, notwithstanding the richness and importance of the research undertaken by the Special Rapporteur, the Commission had a choice to make among three options at the current session. The first was to refer the draft articles directly to the Drafting Committee after the plenary debate, which he did not consider possible in the light of what he had just explained. The second was to wait for the Special Rapporteur's third report in 2025 before moving forward with the work on the topic, as had apparently been suggested by a previous speaker. The third, which was his preferred option, was to adopt a middle way and to set up, before the Drafting Committee began to consider the new draft articles, a working group to assess whether amendments should be made to the commentaries adopted in 2023 and to draw up a precise road map to be followed by the Commission and the Drafting Committee so that they could proceed efficiently in the work on the topic.

The Special Rapporteur would certainly be able to derive maximum benefit from such a working group, which would ultimately enable the Commission to complete its work on the topic more quickly. He wished to reiterate his thanks to the Special Rapporteur and the secretariat and to assure the Special Rapporteur once again of his full cooperation.

The meeting rose at 12.50 p.m.