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Provisional summary record of the 3669th meeting

Held at the Palais des Nations, Geneva, on Wednesday, 22 May 2024, at 10 a.m.

Contents

***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
	Ms. Mangklatanakul
	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 10.10 a.m.

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

Mr. Nguyen said that he agreed with the Special Rapporteur's assertion in paragraph 1 of his excellent second report on the topic "Prevention and repression of piracy and armed robbery at sea" that the relevant State practice "did not have the required features of generality, consistency and uniformity to pave the way for a codification exercise". A prudent approach was therefore called for in addressing the topic. Furthermore, as piracy and armed robbery at sea were two fundamentally distinct concepts, with the differences between them in terms of the location of the crime and the relevant jurisdiction influencing the applicable law, the appropriate form of cooperation and the suitable prevention and repression measures for each, the Commission should be wary of attempting to impose universal jurisdiction or a single regime for the prevention and repression of both piracy and armed robbery at sea and should not create new laws for States.

The information that the report provided on the prevention and repression of piracy and armed robbery at sea was relatively comprehensive, facilitating the Commission's examination of emerging issues that were not adequately addressed in the United Nations Convention on the Law of the Sea, including armed robbery at sea. However, the analysis and the conclusions drawn in the report were not entirely satisfactory. In its analysis, the report focused on the practice of the most relevant international organizations involved in combating piracy and of regional organizations, addressed in chapters II and III, respectively, and bilateral practices were addressed in chapter IV; but the report did not pay sufficient attention to multilateral and subregional practices, despite the growing number of examples of the use of such practices in South-East Asia beyond the framework of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia. Such examples included the trilateral agreement signed by the Philippines, Malaysia and Indonesia in 2017 in response to a rising threat of piracy in the Sulu-Celebes Seas, the Malacca Straits Sea Patrol launched in 2004 by Indonesia, Malaysia and Singapore and the regular patrols conducted by China and Viet Nam in the Gulf of Tonkin.

International cooperation was needed to combat piracy and armed robbery at sea, but the specific features of the cooperation varied depending on the place where the crime occurred, the relevant jurisdiction and the capacity of coastal States. Such considerations had led the Commission at its seventy-fourth session to adopt separate definitions for the two crimes in draft articles 2 and 3. The definition of "piracy" had been drawn from article 101 of the United Nations Convention on the Law of the Sea and was considered to reflect international customary law, while that of "armed robbery at sea" had been based on the definition used by the International Maritime Organization and national practice. In waters outside the jurisdiction of any State, all States had the same rights and the same obligations to repress and cooperate in the repression of piracy. Within a State's internal waters, archipelagic waters or territorial sea, any cooperation with respect to the repression of armed robbery at sea must be based on respect for the sovereignty of the coastal State. That distinction in the practice should be made clear. Cooperation with respect to the repression of armed robbery at sea was a matter that should primarily be addressed under national law, in conformity with international law.

In its resolution 1816 (2008), the Security Council had authorized States to enter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea, subject to the following limitations: first, that the relevant actions were taken within a period of six months; second, that the States cooperated with the Transitional Federal Government; third, that their actions were consistent with those permitted on the high seas with respect to piracy under relevant international law; fourth, that States acted in a manner consistent with international human rights law; and fifth, that the actions must not be considered to establish customary international law. The resolution had been adopted on the basis of the Council's mandate to maintain international peace and security and a request from the Transitional Federal Government for assistance in repressing armed robbery at sea within its territorial waters and piracy in the international waters off the coast of Somalia for the safety of navigation. It was clear that the Security Council resolutions that called on States

to cooperate in combating piracy and armed robbery at sea in the waters off the coast of Somalia implicitly distinguished between acts that were carried out in waters within the jurisdiction of coastal States and those carried out in waters outside it.

A number of forums put in place in South-East Asia played a role in combating piracy and armed robbery at sea and could have been mentioned in the report. They included the Regional Forum of the Association of Southeast Asian Nations (ASEAN), the Council for Security Cooperation in the Asia Pacific, the ASEAN Association of Heads of Police and the ASEAN Coast Guard Forum. Such forums were effective because they involved not only information-sharing, external assistance, capacity-building and collaboration with international maritime stakeholders, but also direct cooperation between maritime law enforcement agencies that was based on the respect of all parties for the sovereignty of coastal States. In addition, numerous guidelines on combating piracy and armed robbery at sea had been adopted in Asia, including the Guidelines for Tug Boats and Barges against Piracy and Sea Robbery, the Guide for Tankers Operating in Asia against Piracy and Armed Robbery Involving Oil Cargo Theft, the Regional Guide to Counter Piracy and Armed Robbery against Ships in Asia, and the Guidance on Abduction of Crew in the Sulu-Celebes Seas and Waters off Eastern Sabah.

Given the requirement under draft article 2 (2) that the definition of "piracy" contained in draft article 2 (1) must be read in conjunction with article 58 (2) of the United Nations Convention on the Law of the Sea, which addressed the application of rules to the exclusive economic zone, proposed draft article 4 (1) should, to avoid any misunderstanding, be reformulated to contain two provisions, one on the obligation to cooperate in the repression and prevention of piracy on the high seas and in the exclusive economic zone and another on the obligation to cooperate with respect to combating armed robbery at sea within a State's internal waters, archipelagic waters and territorial sea. The use in draft article 6 (4) and (5) of the phrases "an order of a Government" and "a person performing an official function", respectively, was inconsistent with the definition in draft article 2 (1) of "piracy" as an act "committed for private ends by the crew or the passengers of a private ship or a private aircraft". The reason for that inconsistency should be clearly explained in the commentary.

Mr. Asada said that the Special Rapporteur's otherwise excellent second report did not clearly distinguish between piracy and armed robbery at sea. That distinction was critical under international law because piracy was subject to universal jurisdiction while armed robbery at sea was subject to the coastal State's national jurisdiction. As he had previously underlined, the rules that applied to the two categories of crimes were qualitatively different and should not be confused.

The draft articles proposed by the Special Rapporteur in his second report seemed largely beyond the scope of the provisions of the United Nations Convention on the Law of the Sea and were therefore difficult to justify. Furthermore, as the proposed draft articles did not appear to be based on the practice discussed in the body of the report, there was insufficient evidence to assess whether they were supported by State practice.

As the definition of "armed robbery at sea" provisionally adopted by the Commission at its seventy-fourth session had been criticized in the Sixth Committee, he wished to make some comments regarding the relevant draft article, draft article 3. After a lively discussion as to whether the title of the draft article should be "armed robbery against ships", which would have limited the definition to acts against ships, or "armed robbery at sea", which, by referring only to the location of the acts, would have included acts against aircraft as well as those against ships, the Drafting Committee had decided on the latter formulation. As stated in paragraph (2) of the commentary to draft article 3, there was no substantive difference between piracy and armed robbery at sea as far as the conduct itself was concerned; therefore, in either case, the relevant conduct should include acts against either ships or aircraft.

However, despite the agreement reached in the Drafting Committee regarding the title of draft article 3, the text of that draft article referred to illegal acts of violence "directed against a ship or against persons or property on board such a ship", thereby limiting the definitional provision to violence against ships. As a result, there was a discrepancy not only between the title of draft article 3 and the provision that it contained, but also between the definition and the agreement and intent of the Drafting Committee. Notwithstanding that

agreement, the definition had been mechanically reproduced from resolution A.1025(26) of the International Maritime Organization. The root of the problem seemed to lie in the Drafting Committee's methods of work. As hastily adopted draft articles could later be found to contain errors, he would propose that, at a minimum, a written version of agreed wording should be circulated to Committee members before the adoption in principle. The definition of "armed robbery at sea" should be revisited before the end of the first reading.

One of the most important aspects of piracy that the Commission had recognized at its seventy-fourth session was perhaps "the evolving nature of modern piracy", mentioned in paragraph (4) of the commentary to draft article 2. Paragraph (10) of the same commentary referred to drones, unmanned aerial vehicles and maritime autonomous vehicles as new forms of technology that could be used for the purposes of piracy. Although that paragraph suggested that acts committed with such tools would fall within the definition of "piracy" contained in article 101 of the United Nations Convention on the Law of the Sea, the reference in article 101 (a) of the Convention to illegal acts of violence committed "by the crew or the passengers of a private ship or a private aircraft" seemed to reflect an assumption that acts of piracy were conducted with manned vehicles. The definition of piracy contained in article 101 and repeated in draft article 2 was not without problems in that regard, which were related to the circularity of the definition of piracy in the Convention between articles 101 (b) and 103.

He would appreciate further information from the Special Rapporteur on how the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia had become a legal framework, when many other regional frameworks for repressing piracy were non-legal; what the specific, practical advantages were of having a legal, as opposed to non-legal, framework; why two important regional stakeholders, Indonesia and Malaysia, were not parties to the Agreement; and what the negative consequences were, if any, of not being parties to it. He would also appreciate clarification regarding the legal status of the Charter on Maritime Security and Safety and Development in Africa. The report stated that it was intended to be a non-legally binding instrument, but it appeared to be an African Union treaty. Lastly, it would be helpful if the Special Rapporteur could further explain his comment in paragraph 71 of the report that article 9 of the Code of Conduct concerning the Repression of Piracy, Armed Robbery against Ships and Illicit Maritime Activity in West and Central Africa was rendered weak by its use of the word "may", rather than "shall" or "must", in connection with actions undertaken by certain officers, as it would seem difficult in such non-legally binding documents to obligate States to perform any actions.

Paragraphs 1 and 2 of draft article 4 appeared to be based, at least partly, on article 100 of the United Nations Convention on the Law of the Sea; however, they diverged from it in several respects. Article 100 provided for an obligation to "cooperate" in the repression of piracy, while draft article 4 (2) obliged States not only to cooperate, but also to actually "repress" piracy. In that regard, he wished to point out that, in the case of *"Enrica Lexie" (Italy v. India)*, an arbitral tribunal constituted under annex VII of the Convention had recalled that the duty to cooperate under article 100 did not necessarily imply a duty to capture and prosecute pirates. While article 100 of the Convention established an obligation to cooperate in the repression of piracy, paragraphs 1 and 2 of draft article 4 also established an obligation to cooperate in the prevention of piracy. The terms "repression" and "prevention" referred to distinct concepts. As was explained in paragraph (4) of the commentary to draft article 1, "prevention" was the act of stopping something from happening, while "repression" was the act of subduing or suppressing something that had already happened. There was no legal basis in the Convention for requiring States to prevent piracy. In order to bring draft article 4 into conformity with the Convention, it should be amended to read: "Each State undertakes 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. Each State should also undertake to cooperate in its prevention." Alternatively, that final sentence could read: "Each State is also called upon to cooperate in its prevention".

Moreover, the obligation of prevention and repression contained in draft article 4 (2) applied not only to "piracy", but also to "armed robbery at sea". Again, such an obligation went beyond the scope of States' obligations under the United Nations Convention on the Law of the Sea. There were no provisions in the Convention for armed robbery at sea, and

the Special Rapporteur had not provided any independent legal basis for an obligation to prevent and repress it. The simultaneous reference to both piracy and armed robbery at sea was a problem that arose throughout the proposed draft articles. It would have been preferable and more precise to address the two crimes in separate articles. In addition to going beyond the scope of obligations under the United Nations Convention on the Law of the Sea, the aforementioned aspects of draft article 4 departed from the syllabus for the topic (A/74/10, annex C), in which it was stated that, in taking up the topic, the Commission did not intend to alter the provisions of the Convention in any way. Additionally, it was unclear whether the reference to "crimes under international law" in draft article 4 (2) was necessary, especially since it was questionable whether "armed robbery at sea" could be considered to be a crime under international law. Lastly, the purpose of draft article 4 (3) was unclear. Private persons who committed acts of piracy or armed robbery at sea might well have their own reasons for committing such acts, but those reasons had no direct bearing on the actions of States or their obligation to cooperate in the repression of piracy. While paragraphs 1 and 2 of draft article 4 related to the obligations of States, paragraph 3 related to the obligations incumbent on private persons; the two sets of obligations were unrelated to each other. If the title of draft article 4, "General obligations", referred to the general obligations of States, paragraph 3 was quite simply out of context.

Regarding draft article 5, the title of the draft article referred only to "prevention", while its text mentioned both "prevention" and "repression", which was a problem in terms of consistency. Moreover, the *chapeau* of the draft article was almost identical to the text of draft article 4 (2) and, as such, also went beyond the scope of the obligations established in the United Nations Convention on the Law of the Sea. It was unclear why the phrase "in conformity with international law" featured in the *chapeau* of draft article 5, given that it was absent from draft article 4 (2); in any event, it was unnecessary in both provisions. It might be appropriate in draft article 5 (a), since that provision dealt with measures to be taken on the high seas as well as those to be taken in territories under a State's jurisdiction. Under international law, the nature and extent of a coastal State's jurisdiction was different in those two spaces.

Draft article 6 established an obligation to ensure that "piracy" and some related acts were punishable as crimes. Again, such an obligation went beyond the obligations established in the United Nations Convention on the Law of the Sea, article 105 of which authorized States to exercise universal jurisdiction over piracy but did not oblige them to do so. The same applied *a fortiori* in respect of piracy-related acts, armed robbery at sea and acts related to armed robbery at sea. There were several other aspects of draft article 6 that were not in conformity with the Convention, but he would not go into the details at present.

In draft articles 6 and 7, the modal auxiliary verb "shall" was used. Consequently, it was unclear whether the Special Rapporteur intended them to be legal obligations or something else entirely. Since it would be difficult to make them legal obligations, as they went beyond the scope of the United Nations Convention on the Law of the Sea, the modal auxiliary verb "should" or the phrase "is called upon" should have been used in each provision. That change would resolve some of the aforementioned issues. There was also some redundancy in paragraphs 1 and 2 (a) of draft article 6, as both provisions provided that acts of piracy and armed robbery at sea should be criminalized. Regarding draft article 6 (4), he doubted whether an offence committed "pursuant to an order of a Government" constituted piracy, which was defined as an illegal act of violence committed "for private ends". The same applied to paragraph 5 of the draft article, which referred to an offence "committed by a person performing an official function".

Draft article 7 could be understood as being related to the question of universal jurisdiction over piracy. However, establishing national jurisdiction was, strictly speaking, not necessarily an obligation under the United Nations Convention on the Law of the Sea, which merely authorized States to exercise universal jurisdiction over piracy. If the Special Rapporteur had extracted such an obligation from article 100 of the Convention, he should have used the modal auxiliary verb "should" or the phrase "is called upon". While the same did not necessarily apply to armed robbery at sea, since it was outside the scope of universal jurisdiction and the duty to cooperate under article 100 of the Convention, a similar provision in that regard could be appropriate, provided that it was a mere recommendation. He shared

Mr. Fathalla's concern that paragraph 3 of draft article 7 could allow States to exercise criminal jurisdiction in a broad manner that was not permitted under international law.

Generally speaking, it would have been useful if the Special Rapporteur had tried to elucidate the concepts of "cooperation" and "repression" under article 100 of the United Nations Convention on the Law of the Sea more thoroughly, as a basis for proposing draft articles 4 to 7. While he might be able to support the referral of draft articles 4 and 5 to the Drafting Committee, he was hesitant to state that draft articles 6 and 7 were ready for referral, since the information presented in the report was insufficient to allow the Committee to examine them. In that connection, Mr. Forteau's proposal regarding the establishment of a working group was an interesting one.

Mr. Sall said that, in his second report on the prevention and repression of piracy and armed robbery at sea, the Special Rapporteur listed a number of regional cooperation initiatives, some of which had led to the adoption of legal instruments. In reality, however, the fight against piracy and armed robbery at sea had given rise to subtle forms of transregional cooperation that evaded regional frameworks conceived from a purely geographical perspective. Cooperation in the prevention and repression of piracy was sometimes established between, for example, Asian or African States and European States, based on specific objectives and means that did not have any equivalent in cooperation initiatives between States in the same geographical area. Thus, regionalism in the fight against piracy was more complex than one could be led to believe by an overly static approach to the notion of "region", and hence of "regional cooperation". For example, the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia, concluded in 2006, was a legally-binding agreement that was open to non-Asian States; countries such as the United States of America and Germany had joined.

Another example was the Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden (the Djibouti Code of Conduct), revised in 2017 in Jeddah. The Code, which was not legally binding, had been adopted with a view to combating piracy off the Horn of Africa and was intended to bring together the coastal States of the Indian Ocean, the Gulf of Aden and the Red Sea. However, in April 2024, the European Union, which had been involved in combating piracy in the Red Sea, had become an "observer" of the Code. The European Union's strategy for preventing and repressing piracy was essentially extraterritorial; its maritime forces operating in and out of the Red Sea operated under its Common Security and Defence Policy. In such situations, a distinction could be made between the maritime forces of coastal States that were victims of the proliferation of piracy, and maritime "aid and assistance" forces.

Transregional cooperation revealed both the global nature of the threat posed by piracy, and the inequality of States involved in its prevention and repression. In its Naples Declaration on Piracy of 10 September 2009, the Institute of International Law had noted the "lack of capability of some coastal States to comply with their responsibility to ensure safety of navigation in the territorial sea and to take effective steps, within their territory, including internal waters, to prevent acts of piracy and other acts of violence at sea". Security Council resolution 1816 (2008), on the situation off the coast of Somalia, was a grim illustration of precisely that reality, in that it authorized third States to "enter the territorial waters of Somalia 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 with respect to piracy under relevant international law".

The cited examples of transregional cooperation demonstrated that between universal cooperation and regional cooperation *stricto sensu* – in other words, cooperation confined to a given geographical region – there was a third type of cooperation. Instead of a material or geographical understanding of the notion of "region", the Commission could have chosen a more functional viewpoint that was less strictly determined by geographical space and territory. The topic of preventing and repressing piracy might provide an opportunity to break with the usual geographical approach, in favour, for example, of an approach based on legal instruments adopted and their contents. In any case, the regional approach did not fully reflect the reality of the fight against piracy and armed robbery at sea.

The study of regional cooperation was interesting not only because it revealed that piracy was not as rampant in some places as in others, but also because it showed that the specific nature of the threat of piracy in a given place could lead to specificities in the normative framework developed to combat it. The question was one of finding ways to harmonize those cooperation frameworks. It would have been useful for the report to have addressed that central issue. In that regard, he wished to refer to an element of African practice, first highlighting two facts that attested to the gravity of the issue on the African continent.

Firstly, the Security Council had adopted resolutions specifically devoted to piracy in Africa, in general, and in the Gulf of Guinea, in particular, notably resolutions 2018 (2011) and 2039 (2012), with an emphasis on regional cooperation. Secondly, piracy had been established as an international crime in the African Union's Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the Malabo Protocol), which granted criminal jurisdiction to the proposed African Court of Justice, Human and Peoples' Rights. The definition of piracy in the Malabo Protocol was the same as that contained in the United Nations Convention on the Law of the Sea and the African Charter on Maritime Safety and Security and Development in Africa, although the Protocol could be seen as lagging behind the latest international developments in the area, since it referred only to piracy and not to armed robbery.

In 2008, the Maritime Organization of West and Central Africa had adopted a memorandum of understanding on the establishment of a subregional integrated coastguard network in West and Central Africa. The memorandum's philosophy was based not on a desire to merge unilateral approaches, as was often the case, but on a desire to pool the means of combating piracy, to establish a "network" with the aim of implementing "appropriate regional maritime security policies to safeguard maritime trade from all forms of unlawful acts". The network comprised four zones, each made up of four to six States and headed by a coordinator, themselves led by a chief coordinator. The stated aim was to establish "law and order at sea" based on joint maritime cooperation and surveillance measures. The memorandum applied both in times of peace and in the event of a crisis, such as acts of piracy, marine pollution or illicit trafficking. Article 26 of the memorandum stated that when such events occurred "in territorial waters under jurisdiction of a given zone, and requiring an external assistance, the Maritime Authority approaches at once the Principal Coordinator of the zone and informs the agency or agencies with responsibility for national coastguard functions". An action plan annexed to the memorandum was then implemented. It also established a right of hot pursuit applicable under conditions that differed in certain respects from the rules of current international law.

That example was interesting for at least two reasons. Firstly, it demonstrated that the fight against piracy could also be conceived of in terms of combining resources and not only in terms of harmonizing unilateral practices, going beyond the simple organization of competing jurisdictions into a more institutional, integrative approach. The pooling of resources could also give rise to anti-piracy subsystems with diverse and autonomous approaches. Secondly, it highlighted the need to preserve the freedom to enter into agreements to prevent and repress piracy, which should also encompass the freedom to continue devising ambitious mechanisms in that regard. In practical terms, recognizing such a possibility would mean including a "without prejudice" clause in any attempt to codify State practice, indicating that there was nothing to prevent States from developing, within other frameworks, more rigorous rules for the prevention and repression of piracy and armed robbery at sea, provided that such rules were compatible with their other international obligations.

Lastly, the report would been enriched had the Special Rapporteur made clear the distinction both between preventive and repressive measures and between actions that took place in territorial waters, and therefore fell within States' jurisdictions, and actions that took place on the high seas. Preventive measures followed a different logic from repressive measures. They involved eradicating the structural causes of piracy or the factors that facilitated it, and their objectives had less of a sense of urgency. That was the purpose, for example, of the capacity-building measures that were sometimes undertaken in the context of collaboration between the North Atlantic Treaty Organization (NATO) and certain States

in the Horn of Africa or on the coast of the Indian Ocean, or in the context of the participation of the United States of America in the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia. It was also the purpose of the classic obligation in the area of the prevention of piracy and armed robbery at sea, namely, information exchange.

Measures to repress piracy and armed robbery at sea ranged from legislation aimed at criminalizing those practices, to police action, the recording of offences, protection measures and, where necessary, intervention by naval forces. Under the terms of Security Council resolution 1816 (2008), any coercive action taken to thwart acts of piracy could be considered to constitute "repression" of such acts.

However, a different legal regime would apply depending on whether the acts of piracy or armed robbery were committed in territorial waters or on the high seas. It was thus imperative to determine which regime would apply to actions undertaken by States, whether acting alone or in cooperation with others. That issue was decisive as, in some cases, it could affect the very definition of piracy. For example, under the United Nations Convention on the Law of the Sea, an act of piracy could be committed only on the high seas or "in a place outside the jurisdiction of any State". To include acts of piracy alleged to have taken place in territorial waters, the term "armed robbery" had been inserted in the title of international agreements against piracy, such as the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia. An in-depth comparative analysis of the different legal regimes for the prevention and repression of piracy and armed robbery at sea might usefully be included in a future report on the topic.

Some of the language used in the proposed draft articles, such as the term "criminalization" in the title of draft article 6 and the expression "if that State considers it appropriate" and the term "surrender" in draft article 7 (1) (b) and (2), respectively, struck him as problematic. The draft articles proposed also contained several omissions. For example, the title of draft article 5 referred only to the "obligation of prevention", whereas the text of the provision mentioned both the prevention and repression of piracy and armed robbery at sea. For its part, draft article 6 failed to distinguish between "criminalization", the precise legal term appearing in the title, and the establishment of "criminal offences", referred to in the text of the provision itself.

Certain provisions of the proposed draft articles were arguably superfluous. For instance, draft article 5 (b), on cooperation with other States and actors, which was already covered by the general obligation to cooperate set forth in draft article 4 (1), and draft article 6 (4), on the criminal responsibility of subordinates who were ordered to commit acts of piracy or armed robbery at sea, which was already covered by draft article 4 (3). Lastly, the obligation to cooperate or to provide judicial assistance needed to be spelled out more explicitly and in greater detail.

Mr. Grossman Guiloff, thanking the Special Rapporteur for his valuable second report, said that the references it contained to the different legal texts setting out the legal and normative framework applicable to the topic, while useful, could have been strengthened by linking them to actual practice in the field of cooperation.

Regarding the scope of the report, there seemed to be a discrepancy between the Special Rapporteur's stated objective and the report's thematic focus. Indeed, analysis was less focused on cooperation in the prevention and repression of the crimes of piracy and armed robbery at sea and more focused on examining various international and regional cooperation initiatives concerning piracy, such as the exchange of information, training programmes, technical assistance and joint maritime operations.

Thus, despite being the focus of the draft articles proposed by the Special Rapporteur, the criminal aspects of piracy and armed robbery at sea were addressed in only a few paragraphs of the report and in a general manner. For example, it would have been useful to learn more about the status and outcome of the audit conducted by the legal subcommittee of the Southern African Regional Police Chiefs Cooperation Organization of the laws of its member States relating to extradition and about any recommendations made on how to facilitate the extradition of perpetrators of acts of piracy in the region. Additional information on the criminal rules contained in the Supplementary Act on the Conditions of Transfer of

Persons Suspected of Having Committed Acts of Piracy and Their Associated Property and/or Evidence and on the specific obligations imposed by that law on the member States of the Economic Community of West African States would also have been helpful. The report might also have included an analysis of the recommendations related to cooperation in the repression of acts of piracy, armed robbery and other illegal maritime activities contained in the Djibouti Code of Conduct. The criminal aspects of piracy and armed robbery at sea should be taken up in a future report to enable the Commission to hold a more informed discussion on the content of the draft articles proposed. While the practice identified and discussed by the Special Rapporteur in the report was undoubtedly valuable, in his opinion, there was a disconnect between the Special Rapporteur's reasoning and the draft articles submitted for consideration.

Some of the terminology used in the report was likewise problematic. For example, it would be helpful to clarify whether, in the context of cooperation initiatives, the terms "multinational", "multilateral" and "international" each had a distinct meaning or whether they were used interchangeably. The definition of piracy, too, should be further clarified, and the Commission should seek to provide more specific guidance on concepts such as "private ends", "vessels" and "ships", taking into account the impact of new technologies on the safety of navigation.

As mentioned in paragraph 13 of the report, the General Assembly had raised the controversial issue of the legality of the use of private security companies at sea in the prevention and repression of piracy. While the report provided no further details, the issue perhaps warranted further study and discussion by the Commission, using as a basis the non-binding instruments mentioned by the Special Rapporteur. To his mind, the issue related to the enforcement of anti-piracy rules and was an area in which practical guidance could be provided to States, particularly States that allowed private security companies to operate on vessels flying their flag.

Paragraph 24 of the report stated that the Security Council had called on States to cooperate in the investigation and prosecution of all persons responsible for committing acts of piracy and armed robbery at sea off the coast of Somalia, including accomplices. That statement was based on Security Council resolution 1950 (2010), which called for the investigation and prosecution not only of the perpetrators, but also of anyone who incited or facilitated an act of piracy. However, that call to action applied only in respect of acts of piracy or armed robbery occurring "off the coast of Somalia". The action recommended in Security Council resolution 1976 (2011) was likewise subject to that geographical limitation. While those resolutions did not create general obligations regarding the investigation and prosecution of acts of piracy, they did contain useful normative guidance that warranted further analysis.

Paragraph 25 of the report asserted that a State that had arrested a pirate could only legitimately exercise jurisdiction if it had adopted national legislation criminalizing the offence in question. While he agreed with the Special Rapporteur's logic, he wished to clarify, firstly, that, even in the absence of national legislation criminalizing piracy or armed robbery at sea as autonomous offences, a State could still take legal action against the suspect on the basis of other criminal offences that might be applicable depending on the circumstances of the case, such as robbery or assault, if they were committed in its territorial waters. That would also be true in the event of attacks carried out against individuals. Secondly, he wished to recall that, while a State might not be able to prosecute a person for piracy if that crime was not specifically defined in its national legislation, it could still proceed to extradite the person in question if its national law did not require the criminal offence to be absolutely identical in both the requested and requesting State in order for the dual criminality rule to be satisfied. He also wished to point out that, in some States, such as the United States of America, customary law was directly applicable and that violations of customary law could be established, and remedial action ordered, in the absence of national legislation criminalizing the offence in question. One example of such practice was the *Paquete Habana* case, which had been decided by the Supreme Court of the United States.

In chapter III of the report, which examined various regional cooperation initiatives to combat piracy and armed robbery at sea, it was stated that the provisions of the Djibouti Code of Conduct could help to resolve conflicts of jurisdiction that might arise between States

involved in the prosecution of piracy and that “shiprider agreements”, under which law enforcement officials, or “shipriders”, from a cooperating State were authorized to embark on the patrol vessels or aircraft of another State to facilitate the investigation and prosecution of persons detained for acts of piracy and armed robbery off the coast of Somalia, had a key role to play in the resolution of such conflicts. However, piracy was a crime that was subject to universal jurisdiction, meaning that any State could arrest, investigate and prosecute persons suspected of having committed that crime on the high seas without general international law establishing an order of preference among them. Thus, a State that arrested a suspected pirate was not generally obliged to waive its right to investigate and prosecute him or her. Of course, the conclusion of a binding international agreement could accord a preferential right to investigate and prosecute to a particular State, such as the State of which the suspect was a national. It would be interesting to hear the Special Rapporteur’s thoughts on that matter.

In his view, the Djibouti Code of Conduct did not alter the general rule on the absence of an order of preference. It was not a legally binding instrument and did not oblige a State that had arrested an alleged pirate to hand him or her over to the authorities of another participant State. Article 5 (7) of the Code merely stated that the seizing State could, subject to its national laws and in consultation with other interested entities, waive its primary right to exercise jurisdiction and authorize another participant State to enforce its laws against the ship and/or persons on board. Moreover, the Code did not indicate that the presence of armed officers on a ship belonging to another participant State altered that general rule, since the relevant provisions of the Code stated that such officers could act only to the extent that they were authorized to do so by the flag State of the ship in question.

As noted in paragraph 75 of the report, article 3 of the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia established a general obligation for States parties to prevent and suppress piracy and armed robbery against ships and to seize ships or aircraft used for committing piracy or armed robbery against ships and to seize the property on board such ships. That provision should naturally be applied in accordance with article 105 of the United Nations Convention on the Law of the Sea. While article 105 of the Convention authorized the courts of the State that had seized the pirate vessel to decide the penalties to be imposed and the action to be taken regarding the vessel and the goods on board, it also expressly provided that the rights of third parties acting in good faith must be safeguarded, which he considered to be a general principle of law. That subject might usefully be taken up in a future report on the topic.

Regarding the Commission’s future work on the topic, he would be grateful if the Special Rapporteur could clarify, during his summing up of the debate, which aspects would be addressed in his third report. As had been suggested by himself and other members, the report might helpfully include a study of the criminal aspects of the prevention and repression of piracy and armed robbery at sea; the confiscation of pirate vessels and the property on board; the consequences of a pirate vessel’s retaining or losing the nationality of the flag State under article 104 of the United Nations Convention on the Law of the Sea; issues relating to compensation and the repatriation of victims; and States’ obligations in relation to the operation of private security companies on board vessels authorized to sail on the high seas.

It was clear that proposed draft articles 4 to 7 were based on the analogous provisions of the Commission’s draft articles on prevention and punishment of crimes against humanity and had been influenced by the provisions of the Rome Statute of the International Criminal Court. However, the Special Rapporteur had departed from the wording of the original provisions without, in his opinion, providing sufficient background or explanations to enable the Commission to assess the necessity or appropriateness of the changes introduced. That issue should also be addressed in a future report.

While proposed draft article 4 (1) established for States an “obligation to cooperate” in both the prevention and repression of piracy, article 100 of the United Nations Convention on the Law of the Sea established a duty for States to cooperate in the repression of piracy only. The Special Rapporteur might explain his reasoning for using the word “obligation” as opposed to “duty” and the legal basis on which States could be compelled to cooperate in the prevention of piracy. He had doubts as to the validity of the assertion made in draft article 4 (2)

to the effect that armed robbery at sea, like piracy, was a crime under international law. While the United Nations Convention on the Law of the Sea and the Convention on the High Seas obliged States parties to repress piracy, they did not oblige States parties to repress any acts of armed robbery that might occur in territorial waters. To his knowledge, such an obligation was not provided for in any international agreement. The report did not contain any information that might allow him to conclude that the obligation to repress armed robbery at sea had become a customary rule of international law or that it constituted a crime under international law. That question perhaps merited further discussion and analysis by the Commission.

He noted that the irrelevance of whether the act was committed in time of armed conflict, noted in draft article 4 (2), was a well accepted view and suggested that it could be reiterated in the commentary.

In respect of proposed draft article 5 (a), which required States to prevent piracy on the high seas, as well as within their own jurisdictions, it was important to remember that part VII of the United Nations Convention on the Law of the Sea provided for a jurisdiction on the high seas that was more limited than in States' territorial waters or contiguous zones. The wording of the draft article should thus not give the impression that they could take the same measures on the high seas as in areas under their jurisdiction.

He was unsure that the wording of paragraph 3 of draft article 6 was appropriate, as it contained some modifications compared to the analogous text in the draft articles on prevention and punishment of crimes against humanity. He would welcome clarification from the Special Rapporteur in respect of that divergence, as the proposed text established other forms of participation that seemed to overlap with those mentioned in draft article 6 (2) (c), and addressed the responsibility of superiors in much less detail.

In draft article 7, he questioned the reference in paragraph 2 to the obligation to extradite "or surrender" an alleged offender, as the latter term applied to the transfer of a person to the jurisdiction of an international court. The reference would thus only be of use if an international court had been established with jurisdiction for the crime of piracy, which might happen at a regional level. It would also be helpful to clarify the rules to be followed if multiple different claims of jurisdiction were to arise on the basis of the different grounds provided for in draft article 7 (1).

Mr. Reinisch, thanking the Special Rapporteur for his informative second report, said that its chapters II and III offered very interesting information on the actual work done by organizations and States in combating piracy and armed robbery at sea on a regional basis. That work involved preventive action and prosecutorial cooperation, which had led to the establishment of specialized criminal courts to which persons suspected of having committed the relevant crimes could be handed over by the States that conducted maritime patrols in affected areas.

In chapter V, the Special Rapporteur drew lessons from his analysis of the practice that might be relevant for the suggested guidelines. He noted, for example, that, while practical cooperation had led to a significant reduction in occurrences of piracy and armed robbery at sea, there were still shortcomings in their effective prevention and repression because of the widespread lack of specific national legislation criminalizing such acts.

However, as other speakers had mentioned, there was otherwise hardly any relationship between the thrust of the report and the proposed draft articles. Furthermore, as Mr. Forteau had mentioned, the compatibility of proposed draft articles 1 to 3 with the secretariat's memorandum needed to be checked and, most importantly, clarity was needed as to the purpose of the topic: whether it was intended to be considered as codification, progressive development or treaty-making. He thus thought that Mr. Savadogo's suggestion, to wait for the following year's report before deciding on further steps, was of interest, as was the establishment, suggested by Mr. Forteau, of a working group with a mandate to assess amendments to the previous year's commentary and to work on a road map or general framework for addressing the topic.

The absence in the report of any background to or explanation of proposed draft articles 5, 6 and 7 made it difficult for the Commission to find any policy justification for

them; he would thus not be in favour of referring them to the Drafting Committee. However, if the Commission were to decide otherwise, it should note that the far-reaching obligation, proposed in draft article 5 (b), for States to cooperate with "non-State actors with an interest in the safety of maritime navigation" went beyond cooperation with States or international organizations; he questioned whether that would be acceptable to all States. Furthermore, for purposes of consistency, the term "intergovernmental organizations" – although it had been used by the Commission in the past to define "international organizations" – should be replaced with "international organizations".

The wording of draft article 6 implied an obligation to criminalize piracy and armed robbery at sea under national law. However, paragraphs 4 and 5 seemed to go beyond the scope of the current study, apparently contradicting the definition of piracy provided in article 101 of the United Nations Convention on the Law of the Sea, according to which piracy was "any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft … on the high seas against another ship or aircraft". That definition meant that a Government could not commit, order or engage in any act of piracy. Furthermore, pursuant to articles 4 to 8 of the articles on responsibility of States for internationally wrongful acts, if a government official were to "order" a subordinate to commit an act of piracy, as suggested in paragraph 4 of the proposed draft article, that would automatically make the act attributable to the State and thus not covered by the definition of piracy. The inclusion of those two provisions should therefore be reconsidered.

The basis for the establishment of national criminal jurisdiction described in draft article 7 might be considered too broad. While quasi-universal jurisdiction might be accepted for piracy, as the wording of paragraph 3 might allow, it could not, according to customary international law, be extended to armed robbery. If that suggestion was intended to constitute progressive development, that should be made explicit. However, as many speakers had remarked, it seemed likely that the problem resulted from piracy and armed robbery being treated under the same regime in the proposed draft articles.

Mr. Galindo said that the report was descriptive rather than prescriptive, in that it outlined the current state of affairs regarding piracy and armed robbery at sea, focusing on various regional and international initiatives, legal frameworks and cooperative efforts, but failed to offer any actionable recommendations for the future. That was perhaps a result of the lack of specific guidance or detailed strategies for addressing the gaps and challenges identified, which was characteristic of an overly descriptive approach and made the proposed draft articles less effective than they might have been.

He wished to offer a word of caution against the statement in paragraph 17 that the Security Council had, in certain resolutions, authorized Member States to take coercive measures to combat maritime piracy and thereby established a legal framework that derogated from the United Nations Convention on the Law of the Sea by authorizing States to enter the territorial waters of Somalia in exercise of the right of hot pursuit, as that implied that the resolutions listed were derogations from existing international law. As elaborated on in the 2006 report of the Commission's Study Group on fragmentation of international law, in international law there was "a strong presumption against normative conflict". He recognized the sensitivity of the issue, including from a legal perspective, but considered that it could not, without careful consideration, be presumed that the Security Council had identified a normative conflict and that its resolution derogated from an international convention of such importance as the Convention on the Law of the Sea.

Rather, the resolutions showed that the Security Council was interpreting the Convention in the light of the Charter of the United Nations. As Judge Kooijmans had explained in his separate opinion on the 1998 decision of the International Court of Justice on the preliminary objections in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*: "It is generally agreed that the Security Council has full competence under chapter VII to determine that a factual situation constitutes a threat to international peace and security and that it may take the necessary legally binding measures to counter that threat, but that it has no competence to determine the law, whereas it has been

questioned whether the Council can modify the law when applying it to a particular set of facts."

He also suggested caution in respect of the wording of paragraph 35, which stated that practices for combating maritime piracy and armed robbery at sea derived "from international law; from a combination of domestic and international law; or from regional or subregional law": the phrasing might be taken to suggest that regional and subregional law was not international law.

He disagreed with the statement in paragraph 41, and repeated in paragraph 45, that the Charter on Maritime Security and Safety and Development in Africa (the Lomé Charter) was intended to be a non-legally binding instrument. He was of the view that the Charter was a ground-breaking instrument precisely because it was the first continent-wide legally binding framework that advanced the blue economy and the maritime security agenda. Although, unfortunately, it had not yet entered into force, that did not mean that it was not a binding instrument; it could, however, contain non-binding provisions.

Unlike the Lomé Charter, the Djibouti Code of Conduct, discussed in paragraph 51, was explicitly non-binding, as stipulated in its article 15 (a). He therefore suggested that the phrase "once the Code has been ratified by a State party" in paragraph 51, was inaccurate; it should have read "once the Code has been signed by a State", so as to reflect the document's status and the wording of the Code itself.

Finally, in paragraph 73 of the report, it was stated that the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia was a binding instrument "by virtue of its name ('Agreement')" and the fact that it required States to take certain measures to suppress piracy. It was important to note that, as explicitly stated in article 2 of the Vienna Convention on the Law of Treaties, it was not the designation of an instrument that made it a treaty.

The proposed draft articles seemed to be somewhat disconnected from the rest of the document: while there was an extensive discussion in the main body of the report about existing mechanisms and the need for cooperation among States and international bodies, there was no adequate link back to that in the proposed draft articles. Nor was there any clear transition to the specific prescriptions or legal frameworks proposed in the draft articles. Thus, the report did not provide sufficient elements for the Commission to have a substantive discussion on the proposed draft articles.

For instance, draft article 4 introduced the obligation for States to cooperate fully in the prevention and repression of piracy, but that obligation was not grounded in the detailed discussions or findings laid out in the earlier sections. The problem was highlighted in the second paragraph by the possible conflict with the principle of legality, and the fact that the third paragraph seemed to deny that circumstances precluding wrongfulness could be applicable to those breaches. Although *lex specialis* could establish the inapplicability of certain circumstances precluding wrongfulness, as the Commission had recognized in its 2001 commentaries to the articles on responsibility of States for internationally wrongful acts, such inapplicability should be viewed with caution.

Proposed draft article 5, which addressed the obligation of prevention, was another instance of the disconnect between the report and the proposed draft articles. While the report described preventive measures and cooperative efforts among States and organizations, it stopped short of suggesting general preventive obligations or providing a basis for such obligations. However, even without that disconnect, draft article 5 (b) would still, in his view, be a major cause for concern. Its inclusion of "other organizations or non-State actors" in the list of entities with which the States undertook to cooperate when repressing piracy and armed robbery appeared to suggest that a State might delegate its powers to prevent and repress piracy and armed robbery at sea.

Likewise, while the report discussed the need for harmonized legal frameworks and mentioned the importance of criminalizing piracy, it did not provide any thorough analysis or recommendations as a basis for the wording of draft article 6, which listed specific acts that States must criminalize. Draft article 7 followed the same pattern, prescribing specific

jurisdictional measures that States should adopt, without there being any detailed analysis or findings in the report on which they might be based.

As they were thus not explicitly linked to specific problems, gaps or recommendations identified in the earlier sections of the report, the proposed draft articles did not appear to form a coherent culmination of the information and analysis presented, which risked limiting the effectiveness of the outcome of the Commission's work on such an important issue.

Programme, procedures and working methods of the Commission and its documentation (agenda item 11) (*continued*)

Mr. Jalloh (Chair of the Working Group on methods of work) announced that the Working Group on methods of work was composed of Mr. Akande, Mr. Asada, Mr. Forteau, Mr. Galindo, Mr. Grossman Guiloff, Mr. Huang, Mr. Lee, Ms. Mangklatanakul, Mr. Mavroyiannis, Mr. Nesi, Mr. Nguyen, Ms. Orosan, Mr. Oyarzábal, Mr. Paparinskis, Mr. Patel, Mr. Ruda Santolaria and Mr. Vázquez-Bermúdez, together with Ms. Ridings (Rapporteur), *ex officio*.

The meeting rose at noon.