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International Law Commission
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Provisional summary record of the 3671st meeting
Held at the Palais des Nations, Geneva, on Friday, 24 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
	Mr. Grossman Guiloff
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Mr. Lee
	Ms. Mangklatanakul
	Mr. Mavroyiannis
	Mr. Nesi
	Mr. Nguyen
	Ms. Okowa
	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) (*continued*) (A/CN.4/770)

Mr. Huang said that the Special Rapporteur's excellent second report on the topic "Prevention and repression of piracy and armed robbery at sea" (A/CN.4/770) provided a comprehensive overview of relevant international, regional and bilateral practices, laying a solid foundation for the Commission's work on the topic, and contained a particularly impressive, in-depth discussion of regional and subregional practices in Africa. The report focused on the core issue of how to strengthen international cooperation, and its observations that the effectiveness of international cooperation depended on the domestic legislation of the States concerned and that the Commission should promote the harmonization of national laws with the existing rules of international law were in line with the syllabus and would steer the Commission's work on the topic in the right direction.

There was, however, room for improvement in the report, and the Commission should provide further guidance to the Special Rapporteur on matters such as methodology and the subjects to focus on. He wished to note three issues, in particular. First, the report's treatment of international cooperation, particularly in regions beyond Africa, had been insufficiently granular, and the Special Rapporteur had failed to use his comprehensive regional survey as the basis for a comparative analysis of the difficulties encountered in different regions, falling short perhaps of the requirement set out in the syllabus to keep in mind the concrete, practical and feasible nature of the topic. To allow for improved analysis of the strengths of and shortcomings in international, regional, subregional and bilateral cooperation, case studies should be conducted on the examples of piracy and armed robbery at sea that Member States and members of the Commission had supplied.

International Maritime Organization (IMO) guidelines and recommendations, while not binding, could be effective in guiding the practices of member States. For example, the 2020 operational guidelines issued by the Maritime Safety Administration of China for the prevention of piracy and armed robbery against ships had been developed in accordance with the 2009 IMO guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships and the 2015 IMO recommendations to Governments for preventing and suppressing piracy and armed robbery against ships. The operational guidelines combined the fundamental IMO guidelines and recommendations with the operational specificities of Chinese-flagged ships in international service and, *inter alia*, provided clear instructions on emergency preparedness for ships in waters with a high risk of piracy and outlined the steps to be taken in the event of an attack by pirates or armed robbers.

Second, the report failed to strike a balance between continuity and innovation. The Special Rapporteur had compiled a substantial amount of information, but the report lacked the rigorous legal analysis needed for the identification of important issues of international law that were uncertain or underdeveloped. The Special Rapporteur should propose appropriate solutions, within the framework of existing international law, to the specific issues that he had raised in the report, including the involvement of private security companies in the fight against piracy and armed robbery at sea. According to the International Chamber of Shipping and the European Community Shipowners' Associations, 23 flag States had adopted laws recognizing the lawfulness of the employment of private guards on merchant ships in connection with anti-piracy efforts, and the practice was gradually being accepted by an increasing number of States. However, the legal issues raised by the presence of armed guards on board merchant ships – such as how private security companies should be regulated by flag States, what type of coordination was required between flag States and coastal States and what limits existing maritime and human rights laws placed on such companies – required further investigation. Furthermore, the Commission's process for studying the topic and the final outcome of its work must be closely aligned with the actual needs of Member States. The Special Rapporteur should analyse the information that 23 Member States had thus far provided on domestic legislation, bilateral agreements and regional cooperation relevant to the topic. He should

then develop a more focused questionnaire that would allow the Commission to better understand Member States' requirements.

Third, the Special Rapporteur's plan for his future work, as outlined in the second report, included aspects of the topic that the Commission had already considered at its previous session, including the definition of piracy, and specific issues of criminal procedure, such as the admissibility of evidence. As such an overly broad approach seemed unlikely to provide effective guidance for the Commission's and the Special Rapporteur's future work, the Special Rapporteur should, in accordance with the syllabus, develop a step-by-step workplan that followed a clear logic and had well-defined priorities.

The draft articles proposed by the Special Rapporteur drew fully on the relevant provisions of the United Nations Convention on the Law of the Sea and other international conventions, with, for example, draft article 4 (1) largely following article 100 of the United Nations Convention on the Law of the Sea. However, as States' obligation to cooperate under that article and existing international law did not yet extend to combating armed robbery at sea, the formulation of draft article 4 (2) should be considered with caution.

Furthermore, there seemed to be a disconnect between the proposed draft articles and the rest of the second report. There had been no clear explanation, either in the report or in the Special Rapporteur's oral introduction of it, of the purpose of the draft articles. As some of them simply followed or reproduced provisions of the relevant international conventions, additional work would be needed before they could provide the added value hoped for by the Commission of promoting the harmonization of national legislation with the relevant international law and enhancing the effectiveness of international cooperation. He therefore hoped that the Special Rapporteur would conduct further, in-depth studies.

Additionally, the Commission's previous work and the principles and provisions of existing international law, including those set out in Security Council resolutions, should serve as the starting point for the study of the topic, rather than the end point. Discussion should not be reopened on issues on which consensus had already been reached, absent a genuine need to do so. He continued to support, as he had at the seventy-fourth session, the idea that the output of the Commission's work on the topic should be a set of draft articles that could serve as the basis for a convention. The Commission should, in the light of its discussions at the seventy-fifth session, further study that idea and take a clear position on it.

Regarding draft article 5, the most effective and feasible way to prevent and combat piracy and armed robbery at sea was for coastal States to adopt effective measures, including legislative, administrative and judicial ones, and to be responsible for the relevant prosecutions and trials. To ensure full respect for the sovereignty of coastal States and to account for the different conditions prevailing in each State, the phrase "in accordance with its capabilities" should be inserted in the *chapeau* of the draft article, after the words "in conformity with international law".

He agreed that States should be encouraged, as stated in draft article 6, to take the necessary measures to ensure that acts of piracy and armed robbery at sea constituted criminal offences. However, that draft article related to States' legislative jurisdiction in criminal matters and should be seen to be advocating the measures that it set out rather than mandating them. The word "shall" should therefore be replaced with "should" or "may" in paragraphs 1 to 6 of draft article 6.

Regarding the treatment of jurisdiction in draft article 7, a strict distinction should be made between piracy, which occurred in maritime areas outside States' jurisdiction and with respect to which universal jurisdiction could be exercised under international law, and armed robbery, which took place in a State's territorial sea and with respect to which, in keeping with the principle of sovereignty, only that State could exercise jurisdiction, with all other States needing to obtain its consent before entering its territorial sea for the conduct of law enforcement activities. Indeed, the Security Council resolutions that had authorized States cooperating with the Transitional Federal Government of Somalia to enter the territorial waters of Somalia and use all necessary means to repress acts of piracy and armed robbery at sea had emphasized the importance of compliance with the United Nations Convention on the Law of the Sea and stressed that the measures that they set out

were based on the consent of the local authorities and confined strictly to the territorial waters of Somalia. Practice with respect to international cooperation in preventing and combating armed robbery at sea was still scant. More needed to be learned about it, and greater account must be taken of the views of Member States. He supported the referral of the four draft articles proposed in the second report to the Drafting Committee.

Mr. Lee said that the Special Rapporteur's excellent second report, including its extensive survey of United Nations, regional and bilateral practices, provided a good basis for the Commission's discussion. The statements made by other members during the debate – particularly Mr. Savadogo's, which had contained a meticulous analysis of the report – had also been enlightening. He first wished to note the challenges posed by the use of a largely late-nineteenth-century or early-twentieth-century regulatory framework to address a fast-evolving twenty-first-century problem. As he had noted at the seventy-fourth session, despite the impression of a long pedigree created by the use of the expression *hostis humani generis*, the current law of piracy as codified in the United Nations Convention on the Law of the Sea was of fairly recent origin. However, the Convention reproduced, almost verbatim, wording from the relevant provisions of the 1958 Convention on the High Seas, which had in turn been based on the Commission's 1956 draft articles concerning the law of the sea, which themselves had relied heavily on the 1932 Harvard draft convention on piracy, now almost a century old.

As Mr. Paparinskis had noted, the starting point for the Commission's discussion seemed to be the firm consensus that the relevant provisions of the United Nations Convention on the Law of the Sea, including article 101, on the definition of piracy, reflected customary international law and that their normative integrity should thus be respected. The dutiful repetition of statements, including in article 1 (2) of the 2023 resolution of the Institute of International Law entitled "Piracy, present problems", to the effect that the Convention provisions on piracy reflected customary international law could not obscure the fact that the current law of piracy largely represented a nineteenth-century regulatory framework based on secondary opinion uncritically extrapolated from the rhetorical concept of *hostis humani generis*. Despite the general consensus on the customary nature of the relevant provisions of the Convention, there was, as shown in the memorandum prepared by the secretariat on the topic (A/CN.4/767), a powerful minority view calling into question the adequacy of those provisions.

In its work on the topic, the Commission was constantly reminded of the crucial premise that the Commission's work could not negatively affect the Convention's integrity and normative authority. The normative limits set by that premise were explicitly mentioned in the 2019 syllabus. In that connection, some members had seemed to emphasize the role of Convention provisions in preserving the *status quo*. Mr. Asada had, for instance, highlighted the strict limits set by the language of the relevant Convention provisions in his detailed analysis of draft article 6, and Mr. Forteau had made a similar point in his statement.

The role of the relevant Convention provisions should be revisited and properly situated. If it was to preserve the normative *status quo*, the Commission's room for manoeuvre would be very restricted and it would be difficult for it to meaningfully and productively carry out its mandate on the topic. He wished to note that the third preambular paragraph of the 2023 resolution of the Institute of International Law, in acknowledging that the Convention provisions reflected customary international law and that such provisions, whenever appropriate, could be "interpreted and applied in light of subsequent international practice and relevant rules of international law", implied that there was a need for an evolutive interpretation of the Convention provisions on piracy. The Institute had seemed to balance its respect for the customary status of the relevant Convention rules against the need to interpret and apply them in the light of subsequent international practice and relevant rules of international law.

The Commission did not need to make a binary choice between preserving the *status quo*, on the one hand, and engaging in treaty-making and thus going beyond the normative framework of the Convention, on the other. As a *via media*, the Commission could, for example, take the following approach: first, decrease or eliminate ambiguities surrounding Convention provisions; second, enhance the semantic clarity of those provisions; and third,

fill the lacunae in some of the outdated provisions *praeter legem*, in other words, within the normative bounds of the Convention framework. The 2023 resolution of the Institute of International Law could be said to reflect such an approach. It was also an approach that the Commission had discussed in detail in its work on sea-level rise in relation to the law of the sea.

A second issue that he wished to raise related to the syncretic conflation of piracy and armed robbery at sea. In its work, the Commission must bear in mind the fundamental distinction between the high seas, on the one hand, and territorial, archipelagic and internal waters, on the other, and not conflate the two categories. As he had noted at the Commission's seventy-fourth session, Gilbert Gidel had, in his 1932 book *Le droit international public de la mer*, proposed a distinction between piracy under international law and piracy by analogy, particularly by analogy based on domestic law, and warned against confusing the two different categories of piracy. The plenary discussions had suggested that some significant problems with the proposed draft articles had resulted from such a conflation of piracy and armed robbery at sea.

Thirdly, he wished to address issues relating to the family resemblance between piracy and the core crimes under international law. The expression *hostis humani generis* was often employed as a rationale for universal jurisdiction in cases of piracy, as provided for in article 105 of the United Nations Convention on the Law of the Sea, creating, in his view, a misleading family resemblance between the crime of piracy, on the one hand, and the category of core crimes under international law, including crimes against humanity, on the other. As was well known, the notion of universal jurisdiction was frequently alluded to in discussions of the latter category. Some of the problems with the proposed draft articles that had been raised during the plenary discussions seemed to have resulted from a failure to pay sufficient attention to the risks posed by that family resemblance.

With respect to the proposed draft articles, the Commission should elaborate on article 100 of the Convention in draft article 4 (1), which largely reproduced article 100, by addressing the modalities of the cooperation to be carried out by States. In that regard, article 2 of the Institute of International Law resolution on "Piracy, present problems" – which provided five specific forms that the article 100 duty to cooperate could take – could serve as an example. For the purposes of such elaboration, the modalities of cooperation that the Special Rapporteur had addressed in other provisions, including draft article 5 – subject to the reservations expressed by Mr. Oyarzábal regarding the reference to "non-State actors" in draft article 5 (b) – article 6 (1) and (2) and the *chapeau* of draft article 7 (1), could be grouped together in one provision.

In draft article 4 (2), the Special Rapporteur might wish to reconsider the conflation of the different categories of piracy and armed robbery at sea. He had reservations as to whether it was necessary to make the clear distinction between prevention and repression noted by Mr. Asada. In the commentary to its resolution on "Piracy, present problems", the Institute of International Law had observed that the word "repression", if understood in a broad but not unusual sense, could include the prevention of acts of piracy before they were committed. In that regard, he could accept the Special Rapporteur's use of the two terms in a single phrase. As other members had noted, the phrase "whether or not committed in time of armed conflict" in draft article 4 (2) lacked relevance.

The modelling of draft articles 6 and 7 on draft articles 6 and 7 of the Commission's draft articles on prevention and punishment of crimes against humanity effectively framed piracy in the language of international criminal law. He, like many other members, questioned the advisability of such an approach. If his proposal to reformulate draft article 4 to mirror the language used in article 2 of the resolution of the Institute of International Law was taken up, and the adoption of national legislation establishing jurisdiction and implementing the obligations arising from the piracy provisions of the United Nations Convention on the Law of the Sea was included as a modality of cooperation in the repression of that crime, draft article 6 (1) and (2) would become superfluous and could be deleted. As currently worded, draft article 6 (3) largely overlapped with draft article 6 (2) (c) and could also be removed. He supported the suggestion to delete paragraphs 4 to 6 of draft article 6, since draft article 6 (4) and (5), which dealt with the criminal responsibility of subordinates acting under orders and of persons performing an official function,

respectively, simply did not apply to the crime of piracy, and draft article 6 (6) was effectively an amalgamation of provisions normally applicable to core crimes under international law that did not necessarily apply to the crime of piracy. The same could be said of draft article 7.

Although many suggestions had been made as to how the report in general and the proposed draft articles in particular could be improved, the Commission, in considering the way forward for its future work on the topic, should acknowledge the important contribution made by the Special Rapporteur, who had reinterpreted the piracy provisions of the United Nations Convention on the Law of the Sea in the light of contemporary developments. While the usefulness of draft articles 6 and 7 was open to debate, draft articles 4 and 5 contained an elaborate and updated interpretation of article 100 of the Convention that reflected, albeit incompletely, the analysis of United Nations, regional and bilateral practices set out in the report and could thus be referred to the Drafting Committee.

As summarized by Ms. Ridings, the Commission had three options before it: not to refer the draft articles to the Drafting Committee, to refer them to the Drafting Committee and proceed to work as usual, or to establish a working group with a mandate to prepare a road map for future work on the topic. He shared her view that the second and third options were not mutually exclusive and that the Commission should consider combining the two by referring only draft articles 4 and 5 to the Drafting Committee and setting up a working group to prepare a road map. However, if the option of referring only some of the draft articles to the Drafting Committee was incompatible with the practice of the Commission, then draft articles 4 to 7 could be referred to the Drafting Committee on a provisional basis and a decision on which of them should be taken up could be made later. The working group tasked with preparing a road map for future work on the topic would also work with the Drafting Committee in that scenario.

Collegiality was central to the work of the Commission. He wished to reassure the Special Rapporteur that the proposal to establish a working group had been put forward with the aim of helping him to better discharge his mandate. Accordingly, he wished to invite him to give careful consideration to that proposal.

Mr. Akande said that the Special Rapporteur’s second report on the topic usefully outlined international and regional approaches to cooperation in the prevention and repression of piracy and armed robbery at sea. While he would not address the draft articles proposed by the Special Rapporteur specifically, he wished to place on record that he agreed with many of the members who had raised issues regarding those provisions. At the current juncture, the Commission would do well to clarify the problems that it was trying to solve and the best means of solving them by drawing up a road map, as had already been suggested by many members.

Some consensus likewise needed to be reached on fundamental issues regarding the Commission’s work on the topic. While it had been agreed that the outcome of the Commission’s study should take the form of a set of draft articles, the Commission needed to settle the matter of the overriding purpose of those provisions. To his mind, the question was not whether the Commission was engaging in an exercise of codification or progressive development of international law, but rather whether the proposed draft articles in their entirety could form the basis of legal obligations flowing from a future treaty on piracy and armed robbery at sea and whether the Commission would also specify in those provisions modalities by which States could better cooperate in the prevention and repression of those crimes. In that connection, he noted that article 17 of 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) stated that, within five years of the entry into force of the Code, the participant States intended to consult, with the assistance of the International Maritime Organization, on the merit of developing a binding agreement. It would be useful to know what the outcome of those consultations had been.

The repression of piracy and armed robbery at sea through criminal prosecution, which had been addressed in the proposed draft articles, was not the only issue that fell within the scope of the topic. Going forward, the Commission should determine when and how it was going to elaborate on the duty to cooperate in the repression of piracy set out in

article 100 of the United Nations Convention on the Law of the Sea and on the prevention of piracy and armed robbery at sea, which was an integral element of the topic at hand. The Commission also needed to decide whether it wished to deal with piracy separately from armed robbery at sea in the draft articles. If it decided to take that approach, the draft articles as currently worded, which dealt with the two crimes jointly throughout, would need to be reworked. One option could be to address the issues of criminal repression, the obligation to cooperate and prevention as they pertained to each crime. Another could be to deal with armed robbery at sea at a separate session.

He also wondered whether the Commission planned to revisit the issues that had arisen concerning the interpretation of certain provisions of the United Nations Convention on the Law of the Sea, some of which had been touched upon briefly in the commentaries to the draft articles adopted at the Commission's previous session.

While he supported the proposal to convene a working group to discuss those issues and to develop a road map for future work on the topic, he believed that the working group should be set up before the proposed draft articles were referred to the Drafting Committee. The purpose of establishing such a working group should be to give the Special Rapporteur the opportunity to provide the Commission with more detailed guidance on the future programme of work for the topic and to agree on the way forward and on a common vision for the project.

Mr. Fife, thanking the Special Rapporteur for his informative and well-structured second report, which reflected both a global and a regional approach, said that piracy and armed robbery at sea, and the challenges that they posed, raised complex issues. He broadly supported the constructive criticism offered by other members of the Commission, which now needed to focus on clarifying the future direction of its work. The Commission had an opportunity to add value to a well-established body of law that had a unique historical pedigree. Indeed, piracy had long been of concern to States for the simple reason that it had early been recognized as a threat to the fundamental freedom of navigation on the high seas.

It was no coincidence that the preamble of the United Nations Convention on the Law of the Sea stated that the first objective of the legal order for the seas and oceans established by the Convention was to facilitate "international communication". Moreover, the preamble affirmed that matters not regulated by the Convention continued to be governed by the rules and principles of general international law. To ensure the realization of the freedom of the high seas protected by the Convention and customary international law, any genuine threats to that freedom needed to be addressed through effective regulation. The piracy provisions of the Convention constituted a well-established framework, which, undoubtedly, also reflected customary international law. To be of use to States and international organizations, any further provisions drafted by the Commission must fit neatly within that framework.

As he saw it, the Commission could add value in two ways: first, it could formulate additional provisions to clarify further the duty to cooperate in the prevention and repression of piracy, which should reflect the practices developed by States and international organizations to respond to new challenges and developments in that area; and, second, it could codify the legal bases for what could be referred to as an ancillary right to protect freedom of navigation on the high seas. In his view, there was ample practice demonstrating that the right to protect that freedom existed and could be enforced, provided that the fundamental requirements of necessity, proportionality and reasonableness were met. Such a right might even qualify as another "internationally lawful use of the sea" related to the freedom of the high seas, within the meaning of article 58 (1) of the United Nations Convention on the Law of the Sea. However, the right to protect freedom of navigation on the high seas, including through a naval escort and the potential use of certain physical means, was not unfettered. Limitations on that right derived notably from human rights obligations and elementary considerations of humanity. Nevertheless, the codification of that right could serve as an effective deterrent and could promote regional cooperation among law enforcement agencies, which, in turn, could support efforts to prevent and repress piracy. Given the problematic nature of some of the proposed draft articles, the Commission might consider drafting alternative language along the lines that he had described.

Surprisingly, the report did not refer to the specific recommendations made by the General Assembly in its resolution 78/69 on oceans and the law of the sea, adopted in December 2023, which called on States to promote maritime security by combating piracy, armed robbery at sea and other maritime crimes. The resolution arguably constituted a substantial programme of work covering topics such as cooperation, information-sharing and the adoption of national legislation. The Commission, as a subsidiary organ of the General Assembly, should, of course, take care not to duplicate the work already completed by the General Assembly but instead should build on that work. Interestingly, paragraph 133 of the resolution encouraged the United Nations Office on Drugs and Crime (UNODC) to continue to assist States in developing their national laws on piracy, which was an issue addressed in the proposed draft articles, while paragraph 156 of the resolution called on States to ensure freedom of navigation in accordance with international law.

It would have been useful if the report had highlighted two recent developments concerning UNODC. First, the 2009 Counter Piracy Programme had been expanded to become the Global Maritime Crime Programme, through which States received technical support to help them to prevent and prosecute a range of transnational maritime crimes, including armed robbery at sea, piracy and human trafficking. Second, the 2020 edition of the UNODC publication *Maritime Crime: A Manual for Criminal Justice Practitioners* contained recommendations based on an analysis of several cooperation arrangements and State practices in law enforcement, and underscored the importance of drawing a clear distinction between piracy and armed robbery at sea, both in terms of geographical scope and legal basis. Interestingly, the manual also included an analysis of several specific legal issues concerning the use of control measures, including boarding ships and the use of coercion in certain circumstances, and a chapter on shipriders. It was regrettable that no reference had been made to the manual in the report.

The report might also have referred to the European Union, which, as pointed out by Mr. Savadogo, was currently making a considerable contribution to maritime security through the European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (European Union Naval Force, Operation Atalanta) and the European Union maritime security operation to safeguard freedom of navigation in relation to the Red Sea crisis (Operation Aspides). The legal bases for the engagement by the European Union in such naval operations, which involved the participation of a number of non-European Union member States, and the mobilization of other European Union resources to support efforts to prevent and repress piracy and other maritime crimes were relevant to the Commission’s study.

By way of example, the European Union, through the European Earth Observation (Copernicus) Programme, provided satellite imaging services to enable information-sharing in real time within the framework of the Global Maritime Crime Programme. The satellite imaging services concerned were delivered through the European Maritime Safety Agency. While the Agency was referred to in paragraph 88 of the report, no mention was made of that mode of information-sharing and international cooperation. Interestingly, the mandate of Operation Aspides was, *inter alia*, to protect vessels against multi-domain attacks at sea, ensuring full respect for international law, including the principles of necessity and proportionality.

It was his understanding that the Commission was considering the draft articles proposed by the Special Rapporteur within the general legal framework established by the United Nations Convention on the Law of the Sea. If that was the case, the clear differences that existed between the legal bases applicable to piracy and armed robbery at sea must be respected and the consequent jurisdictional issues taken into account. More attention might instead be paid to enhancing cooperation in the prevention and repression of piracy and armed robbery at sea in a manner that fully respected those differences.

Contrary to what was suggested in draft article 6, armed robbery at sea, while a serious offence that could be prosecuted by the coastal State if committed in its territorial waters, was not and never had been an international crime comparable to the most serious crimes of concern to the international community, such as crimes against humanity, which would trigger particular international legal rules relating to, for example, the non-

applicability of a statute of limitations. He could not therefore support the referral of draft articles that conflated piracy and armed robbery at sea to the Drafting Committee.

Going forward, the Commission might wish to focus on producing draft articles that would serve to enhance deterrence of piracy and armed robbery at sea and cooperation among law enforcement agencies in combating those crimes. As he had outlined previously, the Commission might first wish to explore how the duty to cooperate in the repression of piracy established in article 100 of the United Nations Convention on Law of the Sea, and binding customary international law on the subject, could be translated into action, including through real-time information-sharing.

The Commission might also wish to consider codifying the legal bases for measures to protect freedom of navigation on the high seas and the limitations applicable to those measures. Inspiration could be drawn from the legal reasoning advanced in *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, where the Permanent Court of Arbitration had stated that the protection of a coastal State's sovereign rights was a legitimate aim that allowed the State to take appropriate measures for that purpose, provided that such measures fulfilled the tests of reasonableness, necessity and proportionality. That award had built on the judgment issued by the International Tribunal for the Law of the Sea in *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, in which the Tribunal had noted that "these principles have been followed over the years in law enforcement operations at sea". Thus, he considered that, by analogy, practice confirmed that certain measures could be taken by a flag State, on condition that they were necessary, proportionate and reasonable, to protect freedom of navigation on the high seas. Interestingly, the Commission, when considering the topic of "Law of the sea – régime of the high seas" in 1950, had noted that piracy was perceived to be such a threat to the general interest of communications on the high seas that it justified a departure from the otherwise absolute prohibition on interference in the navigation by another flag State.

A fundamental freedom enshrined in the law of the sea could not be rendered meaningless simply because the need for States to take certain protective measures to deter, prevent or respond to violent crime was not recognized. It was equally important for States to know and receive guidance on the limitations applicable to any right to take protective or repressive measures. As noted by the International Tribunal for the Law of the Sea in the *Saiga* case, in stopping a ship for the purpose of law enforcement, a sequence of measures should be followed, and the principles of proportionality and reasonableness should be respected in the light of the specific facts of the case.

In his view, those considerations should be reflected in the outcome of the Commission's study on the topic. The resolution entitled "Piracy, present problems" adopted by the Institute of International Law in August 2023 provided useful examples of how that could be achieved. In short, he was not convinced that the proposed draft articles were ready for consideration by the Drafting Committee. He concurred with other speakers that the substance of the report did not seem to support or explain the decisions made in formulating the draft articles. The suggestion that the Commission might set up a working group to determine the future direction of the topic was intriguing. If that suggestion was taken up, the working group, in delineating the issues that should be covered by the Commission's future work on the topic, should take into account the views expressed by members and make some reference to the UNODC publication *Maritime Crime: A Manual for Criminal Justice Practitioners*.

Mr. Mavroyiannis, thanking the Special Rapporteur for his informative yet concise second report on the prevention and repression of piracy and armed robbery at sea, said that the Special Rapporteur's introductory statement had been particularly helpful in explaining his methodological choices. He also commended the secretariat on its very useful memorandum.

There seemed, however, to be a disconnect between the rich presentation of regional practices in the report and the substantive content of the draft articles, with no clear transition between the two. More clarity was needed to ensure a natural progression from the content of the report to the draft articles, together with a sense of the direction and aim of the work. Furthermore, on a fundamental level, it would be beneficial to explore the

Commission's role and the purpose and added value of its work in the development and codification of international law as it related to the prevention and repression of piracy and armed robbery at sea.

The title of the topic resulted from the need to tackle an extremely serious and dangerous phenomenon that disrupted the freedom of navigation, affecting the safety and security of maritime routes, and that had serious economic and political consequences, while often casting doubt on the effectiveness of States in upholding law and order. The generally exogenous and external dimension of the prevention and repression of piracy and armed robbery at sea involved fundamental questions of international law and automatically necessitated international cooperation, or at least enhanced international coordination. The need for cooperation was addressed in article 100 of the United Nations Convention on the Law of the Sea, which thus formed the starting point for the Commission's discussions on the topic. However, as noted in the report, while article 100 stipulated the duty of States to cooperate in the repression of piracy, it offered little guidance as to how that might be done. Thus, one of the roles of the Commission and the draft articles should be to clarify States' customary international law obligations under article 100. The draft articles could thus offer user-friendly practical guidance for all relevant scenarios.

The challenge before the Commission was to describe the specific content of the duty to cooperate in the prevention and repression of piracy and armed robbery at sea, to organize the legal tenets of such cooperation and, where possible, to spell out some of its modalities – its legal nature, scope and implications. It should, furthermore, be borne in mind that the events or situations in question often occurred in a particular context of, for instance, lawlessness, armed conflict, upheaval or attempted secession. Questions of capacity and means, internal politics and relations between particular groups of States might also often be involved.

The second report was an invaluable contribution to meeting that challenge, in that it identified existing regional, subregional and multilateral approaches to cooperation, highlighting their different strengths and weaknesses. However, he agreed with other speakers regarding the use of the term "regional" in categorizing the cooperation between States. Defining cooperation in purely geographical terms, or as concerted action by local and regional actors, could lead to the Commission overlooking important cases of collaboration between States that did not necessarily identify themselves as regional partners. Furthermore, as had been highlighted by Mr. Savadogo and Mr. Sall, the distinction between international, regional and bilateral cooperation could be misleading as to the international law character of partial frameworks of cooperation. To avoid that pitfall, it might be preferable to adopt a more functional approach. Cooperation arrangements between States could be identified by the States' actions, rather than their geographical position; examples of such cooperation included operations led by the European Union and involving other participants, such as Operation Atalanta of the European Union Naval Force.

The second report contained many insights, but raised questions related to cooperation that must be addressed. First, the meaning of cooperating "to the fullest possible extent" in the context of the prevention and repression of piracy should be considered. Clarification was needed on the implications of the obligation to cooperate, such as whether cooperating "to the fullest possible extent" was a fixed mandate, or if expectations differed depending on factors such as States' capacity or geography. The Commission should ask itself whether cooperation involved a standard of due diligence or some other measure; whether the lack of clear manifestations of cooperation could be considered a violation of norms of international law; whether there was an obligation to attempt cooperation; whether it could be results-oriented; and whether there might even be a legal obligation to achieve concrete results.

Second, the wording of the draft articles must articulate the specific requirements incumbent on States in the context of cooperation, particularly in respect of the complicated jurisdictional questions involved. As to the issue of universal jurisdiction, although article 105 of the United Nations Convention on the Law of the Sea provided a definition in the context of piracy, the scope and functionality of the definition were not entirely clear. However, since the Convention did not mention armed robbery at sea, the Commission

should consider the implications of adding that dimension, in other words, how the two notions would coexist and whether they were intended to operate together.

The report appeared to suggest that the two crimes, of piracy and armed robbery at sea, were considered as substantively identical, with jurisdictional scope being almost the only distinction between them. Certainly, the Security Council, in its resolution 1918 (2010), as well as in its previous resolutions concerning the situation in Somalia, had reaffirmed that "international law, as reflected in the United Nations Convention on the Law of the Sea … sets out the legal framework applicable to combating piracy and armed robbery at sea …" The intention behind the use of that language was that armed robbery at sea should be treated similarly to piracy, but presumably only in the context of the situation related to international peace and security that underpinned the resolutions.

However, he was not convinced that jurisdiction was the only difference between piracy and armed robbery at sea. As noted in the memorandum, scholars had questioned whether the "private ends" requirement or the "two-ship" requirement of piracy applied to armed robbery at sea. The definitions in the IMO Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, the Djibouti Code of Conduct and the Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia also differed in respect of the two-ship requirement. There were therefore no grounds for believing there was a two-ship requirement in respect of armed robbery at sea. The Special Rapporteur should perhaps give further consideration to his current conceptualizations of those two crimes. The question of who should decide whether an act of piracy or one of armed robbery at sea had been committed also merited further investigation, with the aim of producing an authoritative statement on the matter.

The matter of "hot pursuit" might seem straightforward where a pirate ship was spotted in territorial waters and then pursued on to the high seas. However, the reverse, where a pursuit began on the high seas and the pirates then entered the territorial waters of the coastal State, was less clear. A pursuit might also extend into the territorial waters of two different States or begin in the territorial waters of one State and then move into those of an adjacent State. A situation might also arise where a report and a reasonable belief indicated that a ship might have been involved in an act of piracy, and the ship then entered the territorial waters of a coastal State. The possibility of a criminal act constituting both piracy and armed robbery at sea because the ships involved moved between areas with different legal regimes during the commission of the crime also merited consideration. The Commission might wish to clarify such issues in order to give legal certainty to States willing or under an obligation to cooperate in tackling piracy or armed robbery at sea.

The various Security Council resolutions that had been cited by different speakers were of great interest in legal discussions and provided an interesting perspective on the issues raised. However, a note of caution should be sounded as to their use in the Commission's output, especially if they had been adopted under Chapter VII of the Charter of the United Nations. The resolutions were exceptional, as the Security Council itself had made clear in the wording of resolution 1816 (2008), in which it explicitly declared that the resolution should not "be considered as establishing customary international law". It had further emphasized the exceptional nature of its decision by stating that the authorization applied "only with respect to the situation in Somalia" and, additionally, "upon receipt of the letter … conveying the consent of" the Transitional Federal Government of Somalia. Such resolutions were widely debated among scholars because of the sensitive sovereignty issues involved; caution should therefore be exercised when deciding whether to mention them in the output.

He congratulated the Special Rapporteur on his work in "steering the Commission's ship" on the topic and for the excellent foundation he had laid in a critical area of the Commission's work.

Mr. Nesi said that the second report, with its detailed analysis of the relevant legal instruments and practices, and the memorandum together formed a valuable tool for the Commission's consideration of the topic at hand. He also appreciated the effort the Special Rapporteur had made to analyse the subject in a synthetic way, since a shorter report often helped the Commission members to make more detailed comments.

However, there were, as other speakers had noted, several problems in relation to the content of the report and the general approach followed. A fruitful discussion on the topic of cooperation of States in the prevention and repression of piracy and armed robbery at sea should begin with a clear understanding of the intended outcome of the Commission's work. It was difficult to understand the statement, in paragraph 1 of the report, that "State practice did not have the required features of generality, consistency and uniformity to pave the way for a codification exercise", as the references elsewhere in the report to "draft articles" gave an indication as to the expected outcome. It would, on the contrary, seem that the Special Rapporteur had taken inspiration from and mirrored the provisions of other international agreements. However, it also seemed that the scope of the outcome had been expanded, including with the introduction of further obligations not grounded in the practice described in the report.

In respect of the draft articles, as he had indicated the previous year, he did not agree with the inclusion of armed robbery at sea in the scope of the topic. Furthermore, and as other speakers had noted, the Special Rapporteur should be very cautious about extending the conclusions on the obligations of States to cooperate with regard to acts of piracy to cover acts falling within the definition of armed robbery at sea. While there was general agreement on the existence of an obligation to cooperate in the repression of piracy, in line with article 100 of the United Nations Convention on the Law of the Sea, neither the practice reflected in the report nor that described in the memorandum covered armed robbery at sea. The wording should therefore be drafted with an awareness of the need to differentiate between the obligations of States in relation to piracy and those in relation to armed robbery at sea. That distinction should, as Mr. Forteau had pointed out, be based on a more detailed analysis of legal materials and practice, in order to pre-empt criticism of the Commission's working methods in its future consideration of the topic.

He thus supported the suggestion made by Mr. Forteau and other speakers that the general approach to the topic should be reconsidered, possibly through the establishment of a working group tasked with identifying the relevant legal questions and reconsidering the scope of the topic. The inclusion of armed robbery at sea could hinder the Commission's contribution to the development of a common legal framework for piracy. The working group could support the Special Rapporteur in developing a more granular approach grounded in a clear differentiation between the two offences. He thus encouraged the Special Rapporteur and the Commission, in the future work on the topic, to take account – as other speakers had suggested – of the 2023 resolution of the Institute of International Law on "Piracy, present problems", which offered some extremely important reflections on the topic.

Mr. Jalloh, thanking the Special Rapporteur for his second report on the topic and the secretariat for the memorandum, commended him, as many previous speakers had done, on the various positive aspects of the report. The topic of piracy was of critical importance to the international community, particularly in the light of its evolving nature and significant global impact. Piracy in its modern state, driven by shifting geopolitical dynamics, was a persistent problem that entailed substantial socioeconomic costs extending far beyond the immediate victims of attacks. Together with armed robbery at sea, it posed serious threats to international security and trade that affected not only coastal States, but all States. The Commission's work on the topic was thus an opportunity to add value for all States.

In his first report, the Special Rapporteur had set out the problem of piracy comprehensively, with a global mapping of State practice and legislation from each of the five regions of the world. In the second report, he had built on that work, describing the relevant practice of international and regional organizations such as the United Nations, including the Security Council and General Assembly, the International Maritime Organization and the North Atlantic Treaty Organization. Beginning with the obligations of States under article 100 of the United Nations Convention on the Law of the Sea, which provided that all States should "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 report described how, over the previous two decades, States and regional and international

organizations had given substantive content to that general principle of international cooperation, and highlighted the means by which they fulfilled that duty.

As he had suggested the previous year, the Commission might, in its future work, usefully address piracy by drawing broadly on the approach it had taken to the topic of the prevention and punishment of crimes against humanity. In doing so, it must make clear that its intention was to develop a set of articles that would eventually be sent to States as a basis for negotiating a treaty that would apply horizontally among States. Such a treaty would complement the existing international legal framework, including the United Nations Convention on the Law of the Sea and the various initiatives by States, international organizations and other bodies, which were well catalogued in the second report. However, in taking the draft articles on crimes against humanity as a possible model, the Commission must take account of the specificities of the topic of piracy, rather than simply repeat the wording of the earlier text, as seemed to have been done in the second report.

Secondly, as other speakers had noted, there was a need to carefully assess the best way of proceeding with the topic. In particular, Mr. Forteau, supported by many other members, had again proposed that a working group should be set up with the task of further outlining the direction the Commission wished to take on the topic, before possibly referring the draft articles to the Drafting Committee. In that context, the Commission's attention had been drawn to the 1996 statement regarding the role that working groups could play in "addressing and if possible resolving particular deadlocks".

There were, as Ms. Ridings and other speakers had mentioned, three possible paths that the Commission could take: the first option was to refer the draft articles proposed by the Special Rapporteur to the Drafting Committee; the second was not to do so. It seemed that the majority of speakers either favoured the second or had not expressed an opinion. While it was understandable that the Special Rapporteur should wish to have the proposed draft articles referred to the Drafting Committee, the goal at that point would be to finalize the text, and many members had expressed doubt as to how much drafting work could be accomplished in the current session, given the disconnect between the report and the proposed draft articles. It was clear that, in either case, the Commission should also proceed with the third option, of establishing a working group on the topic with the specific purpose of assisting the Special Rapporteur in planning his future work and thus gaining a better overview of the topic before referring the text to the Drafting Committee.

The third option would not be a new experience for the Commission: as noted in the tenth edition of *The Work of the International Law Commission*, it had, on no less than 43 previous occasions, established working groups after the appointment of a Special Rapporteur for the purpose of, *inter alia*, considering specific issues or determining the direction of future work on a topic. For instance, in 1962, it had set up a subcommittee tasked with submitting a preliminary report containing suggestions concerning the scope and approach of a future study. In 1998, when considering the first report of the Special Rapporteur on the topic "Unilateral acts of States", the Commission had decided to establish a working group to consider the scope and form of future work on the topic and make some recommendations as to the preferred content of the second report. More recent examples included the working groups, both established in 2022, on protection of the environment in relation to armed conflict and on immunity of State officials from foreign criminal jurisdiction – in both cases because of the absence of the initial Special Rapporteur.

The establishment of a working group thus offered a promising path forward. It might usefully be of limited membership, consisting of approximately five people and including at least one representative from each region, to ensure a comprehensive understanding of the topic and a collaborative approach to moving forward. The Special Rapporteur would, of course, take part and would, in fact, be a key player in the group, which might be chaired either by the Special Rapporteur himself or, given his many responsibilities, by another member, as the goal of the working group would be to assist the Special Rapporteur. The appointed Chair should be someone with a strong understanding of the topic; the question of language might also need to be considered, since the reports of the Special Rapporteur were prepared in French.

He thanked the Special Rapporteur, whose excellent guidance and commitment to the topic had been clear in his proposal of the topic for addition to the Commission's long-term programme of work and had continued with the preparation of a very good first report. The outcome would undoubtedly be an important contribution to the guidance available to States and the international legal community on the question of the prevention and repression of piracy and armed robbery at sea.

The meeting rose at noon.