



# Maritime Piracy Judicial Monitor

A EUROJUST Report



September 2013





## Maritime Piracy Judicial Monitor



## Foreword

The internationally acknowledged right to free passage in international waters is hampered by acts of maritime piracy in some parts of the world. From a European perspective, modern-day maritime piracy may appear to be an issue of no immediate concern to this region. However, the piracy attacks that have taken place off the coast of Somalia and in the Gulf of Aden in recent years have had a direct impact on European interests, be it by attacks on vessels sailing under the flag of a European State, by demanding ransom payments for the return of hijacked vessels and the safe return of crew serving on these ships, or by rescue operations involving the naval forces of Member States.

In 2009, the Dutch authorities requested Eurojust's assistance in a piracy investigation and prosecution to identify the legal obstacles related to the prosecution of these cases in Member States. At subsequent coordination meetings organised by Eurojust, practitioners from the judicial authorities acknowledged the need to exchange information and best practice on investigations and prosecutions in this field. In 2012, the College of Eurojust launched a project to produce a Maritime Piracy Judicial Monitor as an additional forum to report on challenges faced in piracy prosecutions and on the solutions found. The intention of this project was to support judicial authorities by sharing information and experiences that may be of interest in similar cases. Eurojust presents you with the Maritime Piracy Judicial Monitor as a result of this project.

We are confident that this Monitor will be considered a useful tool for practitioners as it contains an analysis of the legal framework applicable to piracy, the experience gained in bringing such cases to trial, as well as an analysis of a number of judicial decisions rendered by courts in several Member States. While individual States may have limited experience of cases in this very specific field, the prospects of building expertise are greater when information is shared among practitioners from across the European Union.

The Maritime Piracy Judicial Monitor is a Eurojust product intended for practitioners within the law enforcement sector and the judiciary. Dissemination is limited to the relevant stakeholders, including public bodies and entities fighting maritime piracy, and therefore recipients of the report are kindly requested not to further disseminate their copy. Finally, we thank the Member States' authorities for contributions to this report and our partners; Europol, Interpol and the third States that have shared their experiences. We hope you find much to your benefit in the first issue of the Maritime Piracy Judicial Monitor.

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# 1. Introduction

Modern maritime piracy and its related crimes have attracted considerable attention in the past few years. The geographical scope of piracy, the *modus operandi* of the criminal groups, their motivations, objectives and aims have been studied and analysed in detail by various international organisations, institutes, researchers and practitioners. Coordinated and complementary international response tools and mechanisms have been put in place and confirm that international cooperation is the only effective and successful instrument in the fight against maritime piracy.

Yet, law enforcement, prosecutors and the judiciary are often faced with complex legal issues when investigating and prosecuting alleged acts of piracy. National experience, often scarce and rather limited, can be considered in the broader context of a counter-piracy strategy that is intended to successfully tackle the problem at sea and on land. The continuous flow of information, the exchange of experience, effective coordination, firm response and local capacity building, are all among the tools often named as crucial in the wider context of cooperative and combined international efforts to prevent acts of piracy, disrupt criminal networks, rescue victims and bring to justice those who committed the acts of piracy, as well as those who financed, organised, directed and benefited from them.

Since 2009, Eurojust has hosted regular coordination meetings dedicated to the phenomenon of maritime piracy and its consequences for affected Member States. These coordination meetings provide a platform to exchange information on ongoing investigations and prosecutions, as well as on the obstacles faced by national authorities and best practice identified in each case.

The present Report has been produced within the context of the maritime piracy project launched by the College of Eurojust in 2012. Its objective is to strengthen prosecution cases by discussing common challenges, possible solutions and lessons learned. The Report provides an analysis of the relevant experience of Member States, gained from investigations, prosecutions and trials of maritime piracy cases. It integrates the overview of the legal framework applicable in these cases with the practical issues encountered by national authorities in the course of bringing suspected pirates to justice. It has been produced on the basis of input provided by the competent national authorities, as well as the research carried out at Eurojust.

The Report is not intended to cover all aspects of the judicial response to the maritime piracy phenomenon. Instead, it focuses on selected matters of interest that are identified and recognised by the national authorities as essential in maritime piracy cases.

## 2. Legal Framework

### 2.1. Definitions and Jurisdictional Basis under International Law

This section provides an overview of the definitions of maritime piracy and related offences, as well as the jurisdictional basis for the apprehension and prosecution of pirates, as established by international law.

The relevant provisions of the following major international treaties that address maritime piracy and related offences have been considered in this section:

- The Geneva Convention on the High Seas (1958) (the “1958 Geneva Convention”),
- The United Nations Convention on the Law of the Sea (1982) (the “UNCLOS”), and
- The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988) (the “SUA Convention”).<sup>1</sup>

Additionally, this section includes an outline of the special legal framework established by the United Nations (“UN”) Security Council Resolutions for international operations against piracy off the coast of Somalia, particularly the extended jurisdictional basis established within that framework.

#### 2.1.1. Definition of Piracy under International Law

##### *Definition of piracy under the 1958 Geneva Convention and the UNCLOS*

The 1958 Geneva Convention is the first modern codification of customary international law on piracy. Articles 14-21 of the 1958 Geneva Convention directly address piracy, and Article 15 provides for the definition of the crime.

The eight piracy related articles of the 1958 Geneva Convention were subsequently included in UNCLOS; the following definition of piracy is provided by Article 101 of the UNCLOS:

“Piracy consists of any of the following acts:

- (a) 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, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).”

This definition is generally accepted as a reflection of customary international law, which means that even States that are not parties to the 1958 Geneva Convention or the UNCLOS are bound by this definition.<sup>2</sup>

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<sup>1</sup> For the official texts and status of the treaties, see United Nations, Treaty Collection: The Convention on the High Seas (1958), The United Nations Convention on the Law of the Sea (1982), The Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988).

<sup>2</sup> A. Middelburg, *Piracy in a Legal Context: Prosecution of Pirates Operating off the Somali Coast*, Nijmegen: Wolf Legal Publishers (WLP), 2011, ISBN: 978-90-5850-634-4, p. 37; also J.M. Isanga, *Countering Persistent Contemporary Sea Piracy: Expanding Jurisdictional Regimes*, American University Law Review, Volume 59, Issue 5 – June 2010, pp. 1282-1283.

The definition contains several important criteria: 1) piracy must include criminal acts of violence, detention or depredation; 2) the act must be committed for private ends; 3) the act must be committed using a private ship; 4) the attack must be directed against another vessel; and 5) the act must take place on the high seas and other places outside the jurisdiction of any other State.<sup>3</sup>

The UNCLOS definition of piracy is seen by many commentators as narrow and lacking in effect. The limitations contained in the definition exclude a range of maritime crimes from the scope of the definition and, consequently, from the scope of the special jurisdictional rules applicable to piracy. Firstly, a significant limitation is the requirement that, in order to qualify as piracy, an act must be committed on the high seas or in an Exclusive Economic Zone. Accordingly, acts committed in the territorial waters of a State, as well as in archipelagic waters, internal waters and ports, fall outside the definition. Secondly, the two-ship requirement excludes acts of ship hijacking committed by crew members or passengers aboard the ship from the scope of the definition. Thirdly, the requirement that the act must be committed for “private ends” means that the presence of alleged religious, ethnic or political objectives can defeat the qualification of the act as piracy.<sup>4</sup>

### *Definition of violence at sea under the SUA Convention*

The SUA Convention provides for a broader definition of illegal violence at sea. It does not use the term “piracy” (therefore, it cannot be considered as altering the legal definition of piracy), but it includes piracy, armed robbery committed at sea and ship hijacking within the scope of its application. It also covers acts committed outside the high seas, acts where only one vessel is involved and acts where the motivation of the attack is not limited to “private ends” only.<sup>5</sup>

The definition of crimes covered by the SUA Convention reads as follows:

#### “Article 3

1. Any person commits an offence if that person unlawfully and intentionally:
  - a) seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
  - b) performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship; or
  - c) destroys a ship or causes damage to a ship or to its cargo which is likely to endanger the safe navigation of that ship; or
  - d) places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which endangers or is likely to endanger the safe navigation of that ship; or
  - e) destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act is likely to endanger the safe navigation of a ship; or
  - f) communicates information which he knows to be false, thereby endangering the safe navigation of a ship; or
  - g) injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f).

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<sup>3</sup> Middelburg, *op. cit.*, pp. 6-7; also C. Schaller, *Combating Acts of Piracy under International Law*, in Stefan Mair (Ed.) *Piracy and Maritime Security – Regional characteristics and political, military, legal and economic implications*, Stiftung Wissenschaft und Politik / German Institute for International and Security Affairs, Research Paper RP3, March 2011, Berlin, p. 57.

<sup>4</sup> Middelburg, *op. cit.*, pp. 7-8; also M. Sterio, *Fighting Piracy in Somalia (and Elsewhere): Why More Is Needed*, *Fordham International Law Journal*, Volume 33, Issue 2, 2009, pp. 386-387.

<sup>5</sup> Middelburg, *op. cit.*, pp. 10-11; also Sterio, *op. cit.*, pp. 387-388.

2. Any person also commits an offence if that person:
  - a) attempts to commit any of the offences set forth in paragraph 1; or
  - b) abets the commission of any of the offences set forth in paragraph 1 perpetrated by any person or is otherwise an accomplice of a person who commits such an offence; or
  - c) threatens, with or without a condition, as is provided for under national law, aimed at compelling a physical or juridical person to do or refrain from doing any act, to commit any of the offences set forth in paragraph 1, subparagraphs (b), (c) and (e), if that threat is likely to endanger the safe navigation of the ship in question”.

The SUA Convention, although it is referred to as an anti-piracy instrument, is rather intended to address international terrorism; it is listed on the UN website as an anti-terrorist convention.<sup>6</sup>

### 2.1.2. Jurisdiction under International Law to Apprehend Pirates

#### *Jurisdiction to apprehend pirates under the 1958 Geneva Convention and the UNCLOS*

Under customary international law and treaty law, any State has jurisdiction to apprehend pirates on the high seas. Both Article 19 of the 1958 Geneva Convention and Article 105 of the UNCLOS provide:

“On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. [...]”.

The straightforward application of universal jurisdiction pertains only to the crime of piracy in its strictest sense, as defined by Article 15 of the 1958 Geneva Convention and Article 101 of the UNCLOS.<sup>7</sup>

#### *Jurisdiction to apprehend pirates under the SUA Convention*

According to Article 4, paragraph 1 of the SUA Convention, States have jurisdiction to apprehend pirates anywhere, not just on the high seas:

“1. This Convention applies if the ship is navigating or is scheduled to navigate into, through or from waters beyond the outer limit of the territorial sea of a single State, or the lateral limits of its territorial sea with adjacent States”.

Thus, the SUA Convention provides for a broader scope of application of universal jurisdiction over maritime crimes than the 1958 Geneva Convention and the UNCLOS. However, the wording of Article 4, paragraph 1 of the SUA Convention requires that the vessel must be in international transit at the time of the commission of the act (meaning that it must be coming from or going to the high seas or territorial waters of another State). Acts committed on a vessel navigating solely through the territorial waters of a single State do not fall within the scope of the jurisdiction granted by the SUA Convention.<sup>8</sup>

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<sup>6</sup> United Nations, Treaty Collection, Text and Status of the United Nations Conventions on Terrorism.

<sup>7</sup> E. Andersen, B. Brockman-Hawe and P. Golff, *Suppressing Maritime Piracy: Exploring the Options in International Law*, a Workshop Report (The American Society of International Law / One Earth Future Foundation / The Academic Council of the United Nations System), p. 7.

<sup>8</sup> Sterio, *op. cit.*, p. 390.

### *Jurisdiction to apprehend pirates under UN Security Council Resolutions (on piracy off Somali territory)*

In order to address the situation off the coast of Somalia and, particularly, the possibility of Somali pirates taking advantage of the fact that the principle of universal jurisdiction over piracy only applies to acts committed on the high seas, the UN Security Council passed a number of legally binding resolutions (“SC Resolutions”) expanding the jurisdictional basis for the capture of Somali pirates for a limited period of time.<sup>9</sup> SC Resolutions 1816 (2008), 1846 (2008), 1851 (2008), 1897 (2009), 1950 (2010), 2020 (2011) and 2102 (2013)<sup>10</sup> authorise any nation patrolling the Gulf of Aden to enter Somali territory and to use force against pirates.

SC Resolution 1816, paragraph 7, authorised nations to “[e]nter the territorial waters of Somalia for the purpose of repressing acts of piracy and armed robbery at sea”, and “[u]se, within the territorial waters of Somalia [...], all necessary means to repress acts of piracy and armed robbery”. Therefore, the law enforcement jurisdiction (the authority to pursue and apprehend pirates) has been granted by this and the subsequent SC Resolutions; however, according to some commentators, it is debatable whether the SC Resolutions also provide for the basis of the adjudicative jurisdiction (the authority to prosecute suspected pirates).<sup>11</sup>

As of SC Resolution 1851, the authorisation to use military force was extended to include land-based operations against those Somali pirates who use Somali territory to plan, facilitate and undertake acts of piracy at sea. According to SC Resolution 1851, nations “may undertake all necessary measures that are appropriate in Somalia, for the purpose of suppressing acts of piracy and armed robbery at sea” (paragraph 6 of SC Resolution 1851).<sup>12</sup>

The above-mentioned SC Resolutions permit military action in Somali territory; such military action was earlier beyond the universal jurisdiction for the capture of pirates as authorised by customary international law and treaty law. Therefore, the SC Resolutions emphasized that they applied solely to Somalia and that they did not establish any new precedent under international law; moreover, the above-mentioned SC Resolutions were adopted with the prior consent of the Somali transitional government (e.g. Resolution 1816, paragraph 9).<sup>13</sup>

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<sup>9</sup> E. Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, American Society of International Law, ASIL Insights, Volume 13, Issue 2, February 6, 2009 (“[...] international law permits nations to act against foreign piracy only on the high seas. In the Gulf of Aden, where international shipping must pass through a narrow corridor, pirates are able to launch attacks in international waters and then quickly return to Somali territorial waters. The Council responded to this problem [...] by passing Resolution 1816, which authorizes nations to take action against pirates even in sovereign Somali waters. That resolution noted that it was passed with the consent of the government of Somalia ‘which lacks the capacity to interdict pirates or patrol and secure its territorial waters.’”)

<sup>10</sup> For an overview and full texts of UN Security Council Resolutions on piracy off the coast of Somalia, please see: United Nations, Division for Ocean Affairs and the Law of the Sea, United Nations Documents on Piracy. The more recent SC Resolutions can be found on the website of the UN Security Council.

<sup>11</sup> Middelburg, *op. cit.*, p. 40.

<sup>12</sup> Sterio, *op. cit.*, p. 389.

<sup>13</sup> *Ibid.*, pp. 389-390.

### 2.1.3. Jurisdiction under International Law to Prosecute Pirates

#### *Jurisdiction to prosecute pirates under the 1958 Geneva Convention and the UNCLOS*

It is considered that “[p]iracy is the original universal jurisdiction crime”;<sup>14</sup> under customary international law, piracy is viewed as a crime against all nations, and any State, acting as a global agent on behalf of all nations, can undertake prosecution of a pirate.<sup>15</sup>

International treaty law has narrowed the customary law concept of universal jurisdiction belonging to any State over prosecution of piracy. According to Article 19 of the 1958 Geneva Convention:

“[...] The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith”.

Article 105 of the UNCLOS repeats the same principle by specifically permitting the State that seized pirates on the high seas to subject the pirates to prosecution by its domestic courts.

Therefore, while any State can apprehend pirates, only the State that has apprehended the pirates has the jurisdiction to prosecute them; other States are not entitled to prosecute under the 1958 Geneva Convention or the UNCLOS.<sup>16</sup> However, other States are not precluded from exercising their national jurisdiction under other jurisdictional bases which they have established.<sup>17</sup>

The wording of Article 19 of the 1958 Geneva Convention and Article 105 of the UNCLOS indicates that the exercise of jurisdiction by the seizing State's courts is a possibility, not an obligation.<sup>18</sup>

#### *Jurisdiction to prosecute pirates under the SUA Convention*

Under the SUA Convention, according to Article 10, paragraph 1, States Parties to the Convention have the obligation either to prosecute the apprehended offenders or to extradite the persons accused of crimes covered by the Convention:

“1. The State Party in the territory of which the offender or the alleged offender is found shall, in cases to which article 6 applies, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case without delay to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State”.

Therefore, while the SUA Convention authorises the capturing State to prosecute pirates, it also allows for the transfer of pirates to third States. States willing to transfer captured pirates to regional partners, such as Kenya or Seychelles, may rely on the SUA Convention to justify such transfer.<sup>19</sup>

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<sup>14</sup> Middelburg, *op. cit.*, p. 36, also Kontorovich, *op. cit.*

<sup>15</sup> Sterio, *op. cit.*, p. 391.

<sup>16</sup> Sterio, *op. cit.*, p. 391, also Isanga, *op. cit.*, p. 1279.

<sup>17</sup> T. Treves, *Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia*, European Journal of International Law, Volume 20, Issue 2, pp. 399-414.

<sup>18</sup> A. Thorp, *Preventing and prosecuting piracy at sea: legal issues*, House of Commons Library – Standard Note 6237, 28 February 2012, p. 13.

<sup>19</sup> Sterio, *op. cit.*, p. 392.

## 2.2. Maritime Piracy Legislation in the Member States Concerned

The nine Member States that have contributed to this Report – Belgium, Denmark, France, Germany, Italy, the Netherlands, Spain, Sweden and the United Kingdom – have different national statutory regimes that criminalise maritime piracy and establish national jurisdiction over this type of crime. Some of these countries have adopted anti-piracy laws, where provisions defining the offence and establishing jurisdiction are included in a specific legislative act. Other countries rely on general criminal law provisions that define offences typically committed during a pirate attack and establish jurisdictional links for crimes committed abroad.

This section provides a brief overview of the national legal mechanisms in place, with a particular focus on the definitions of offences that constitute maritime piracy, and the forms of non-territorial jurisdiction applied by the states with regard to this crime.

For the purpose of this overview, the provisions establishing territorial jurisdiction have not been considered, except for the flag-State jurisdiction. The term “non-territorial jurisdiction” or “extra-territorial jurisdiction” has been used to refer to other types of national criminal jurisdiction which, besides territorial jurisdiction, are acknowledged under international law:

- nationality (or active personality) jurisdiction,
- passive nationality (or passive personality) jurisdiction (i.e. jurisdiction based on the nationality of the victim),
- protective jurisdiction (i.e. jurisdiction on the basis of the effect of the crime on the interests of the State),
- universal jurisdiction (i.e. jurisdiction assumed irrespectively of the place where the act is committed, the nationality of the perpetrator, and the nationality of the victim).<sup>20</sup>

The content of this section is based mainly on information received from Eurojust National Desks in response to Questionnaires regarding Eurojust cases 598/NMNL-2009 and 920/NMNL-2012. The compilation of national legislation on piracy of the Division for Ocean Affairs and the Law of the Sea of the UN was used as an additional source of information for Denmark, Germany, Italy and Spain.<sup>21</sup> Where any additional information available from open sources was used, the source of the information was indicated separately. This section does not constitute an exhaustive overview of national law provisions applicable to piracy cases. As is evident from the judicial decisions analysed in Chapter 4 of this Report, other legal provisions may also be applicable, depending on the circumstances of the case. The texts of legal provisions quoted in this section, with the exception of those that refer to the United Kingdom, are unofficial English translations.

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<sup>20</sup> M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Chapter II Overview of the modern jurisdictional regime, Section 3 Bases of jurisdiction recognised under international law, pp. 21-30.

<sup>21</sup> Additional source used: United Nations, Division for Ocean Affairs and the Law of the Sea, National Legislation on Piracy.



## 2.2.1. Belgium

### *Jurisdiction over acts of piracy*

The basis for jurisdiction exercised by Belgium over acts of maritime piracy is established by Article 3 § 2 of the Law of 30 December 2009 on the Fight against Maritime Piracy and Amendments to the Judiciary Code.<sup>22</sup>

Acts of maritime piracy committed on the high seas or in a place outside the jurisdiction of any State, or in a maritime area other than the high seas, if the committed acts constitute acts of piracy as provided by international law, can be prosecuted in Belgium with the following prerequisites:

- The acts of piracy have been committed against a Belgian ship; or
- The suspects have been arrested by the Belgian military.

The Federal Prosecutor is the only prosecuting authority in Belgium that is competent to prosecute acts of maritime piracy.

### *Description of criminal acts constituting piracy*

Belgium has a specific substantive law on maritime piracy, i.e. the Law of 30 December 2009 on the Fight against Maritime Piracy that contains a description of criminal acts constituting piracy and also criminalises the attempt, incitement and intentional facilitation of acts of piracy. Pursuant to Article 3 of the Law of 30 December 2009 on the Fight against Maritime Piracy:

- “§ 1 Piracy consists of any of the following acts:
- a) any illegal acts of violence, threat, detention or depredation, committed for private ends by the crew or the passengers of a private ship, and directed:
    - i) on the high seas, against another ship or against persons or property on board such ship;
    - ii) against a ship, persons or property in a place outside the jurisdiction of any State;
  - b) any act of voluntary participation in the operation of a ship with knowledge of facts making it a pirate ship;
  - c) any attempt, any act of inciting or of intentionally facilitating an act described in subparagraph a) or b).
- § 2. The acts of piracy, as defined in paragraph 1, committed by a warship or government ship whose crew has mutinied and taken control of the ship are assimilated to acts committed by a private ship.
- § 3. The acts referred to in paragraphs 1 and 2, committed in a maritime space other than the high seas, are assimilated to acts of piracy as defined in paragraphs 1 and 2, as far as provided by the international law”.

## 2.2.2. Denmark

### *Jurisdiction over acts of piracy*

In Denmark the jurisdiction over maritime piracy related offences is established by general provisions on extra-territorial jurisdiction contained in the Danish Criminal Code.

Section 8b of the Criminal Code provides that taking control of a ship by using unlawful coercion (as well as homicide, violence and bodily harm committed in conjunction with such taking of control), if committed outside the territory of the Danish State, can be prosecuted in Denmark if:

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<sup>22</sup> Wet van 30 december 2009 betreffende de strijd tegen piraterij op zee en tot wijziging van het Gerechtelijk Wetboek.



- The perpetrator is a Danish national/resident, or
- The perpetrator is present in Denmark.

In addition, the jurisdiction of the Danish State is established if the act is committed:

- On board a Danish ship outside the territory of another State (Section 6 of the Criminal Code),
- Within the territory of another State by a perpetrator who is a Danish national/resident, (requirements of dual criminality and severity of the criminal act apply) (Section 7 of the Criminal Code),
- Outside the territory of Denmark, irrespective of the nationality of the perpetrator, if the committed act violates an official duty incumbent on the perpetrator in relation to a Danish ship (Section 8 of the Criminal Code),
- Within the territory of another State, and is aimed at a person who is a Danish national/resident (requirements of dual criminality and severity of the criminal act apply) (Section 7a of the Criminal Code).

The State Prosecutor for Serious Economic and International Crime ("SAØIK") is the authority in Denmark competent to prosecute international crimes, including acts of maritime piracy.

### *Description of criminal acts constituting piracy*

Danish criminal law does not contain a specific definition of the crime of piracy; instead, reference can be made to other relevant provisions in the Criminal Code. The most relevant offence is described in Section 183a of the Criminal Code, which provides for criminal liability with regard to taking control of a ship or interfering with its manoeuvring by using unlawful coercion:

- “(1) A person who takes control of an aircraft, a ship or any other means of public passenger or cargo transport or interferes with its manoeuvrings, by using unlawful coercion as described in section 260 of this Act, shall be liable to punishment for any term extending to imprisonment for life.
- (2) The same penalty shall apply to a person who takes control of an offshore plant by using unlawful coercion as described in section 260 of this Act”.

Unlawful coercion is defined in Section 260, paragraph 1, of the Criminal Code, as follows:

- “(1) Any person who
  - 1) by means of violence or threats of violence, of considerable damage to property, of imprisonment or of advancing false charges of punishable or honour-related circumstances or of disclosing circumstances pertaining to privacy forces anyone to do, tolerate or abstain from something;
  - 2) by means of threats to report or disclose punishable circumstances or to advance true honour-related accusations forces anyone to do, tolerate or abstain from something insofar as the forcing cannot be considered duly reasoned by the circumstance that the threat pertains to;
 shall be guilty of illegal duress and be liable to punishment by fine or imprisonment for a term not exceeding two years”.

Other criminal offences that may be relevant to piracy related activities are included in Section 237 of the Criminal Code on homicide, Sections 244-248 on acts of violence and bodily harm, and Section 261 on deprivation of liberty.

The attempt to commit an offence is criminalised by Section 21 of the Criminal Code. Conspiracy, aiding and abetting, organising, facilitating and counselling are covered by Section 23 of the Criminal Code.

### 2.2.3. France

#### *Jurisdiction over acts of piracy*

Jurisdiction with regard to maritime piracy is established through general provisions on jurisdiction and specific provisions concerning maritime piracy.

According to the general provisions on jurisdiction (Articles 113-2, 113-3, 113-6, 113-7 and 113-8 of the French Penal Code), French law applies the principle of territoriality (on the basis of the flag of the ship) and the principles of active and passive personality.

The offence is deemed committed within French territory if it took place on board or against a French ship (Article 113-3 of the Penal Code).

The extra-territorial jurisdiction of the French State applies if the offence is committed:

- Outside French territory by a French national (dual criminality requirement applies) (Article 113-6 of the Penal Code),
- Outside French territory against a French national as the victim (Article 113-7 of the Penal Code).

In both cases, prosecution in France must be preceded by a complaint lodged by the victim or by an official indictment by the authority of the State where the offence took place (Article 113-8 of the Penal Code).

Specific provisions concerning maritime piracy are contained in Law No. 94-589 of 15 July 1994 on the Fight against Piracy, as supplemented by Law No. 2011-13 of 5 January 2011 on the Fight against Piracy and the Exercise of Police Powers in the Sea.<sup>23</sup> Article 1, paragraph I of Title 1 defines the applicability of this Law as follows:

- “I. This title applies to piracy under the UN Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, committed:
  - 1 On the high seas;
  - 2 In the maritime spaces outside the jurisdiction of any State;
  - 3 When international law allows, within the territorial waters of a State”.

Article 689-5 of the French Code of Criminal Procedure, and Article 5 of Law No. 94-589 of 15 July 1994 on the Fight against Piracy, establish universal jurisdiction over piracy committed on the high seas, when:

- The perpetrator took refuge in France, and the extradition of the perpetrator has been refused by the French authorities for special reasons (restrictively set up by Article 113-8-1 of the French Penal Code), or
- The perpetrator has been arrested by French law enforcement authorities, and no other State claims jurisdiction.

#### *Description of criminal acts constituting piracy*

French law does not contain a specific definition of maritime piracy; instead, the definition may be found by reference to provisions on other crimes within the French Penal Code, which can be applied for the purpose of prosecution of acts of piracy.

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<sup>23</sup> Loi No. 2011-13 du 5 janvier 2011 relative à la lutte contre la piraterie et l'exercice des pouvoirs de police en mer, qui est venue compléter une loi No. 94-589 du 15 juillet 1994.

Article 1, paragraph II of Title 1 of Law No. 94-589 of 15 July 1994, supplemented by Law No. 2011-13 of 5 January 2011, provides for offences that may constitute maritime piracy:

“II. Offences likely to be prosecuted under the conditions of this Title are:

- 1 Offences defined by Articles 224-6 to 224-7 and 224-8-1 of the Penal Code (*hijacking of aircraft or ship*<sup>24</sup>) involving at least a ship or aircraft against a ship or aircraft;
- 2 Offences defined by Articles 224-1 to 224-5-2 and Article 224-8 of the Penal Code (*kidnapping and illegal restraint*<sup>25</sup>) when they precede, accompany or follow the offences mentioned in paragraph 1;
- 3 Offences defined by articles 450-1 and 450-5 of the Penal Code (*conspiracy for an act of piracy*<sup>26</sup>) when committed in preparation for the offences referred to in paragraphs 1 and 2”.

Under French law, the attempt to commit a crime is criminalised by Articles 121-4 and 121-5 of the Penal Code, and these provisions are equally applicable to acts of piracy. Article 450-1 of the Penal Code criminalises conspiracy, which also applies to acts of piracy. The conspiracy provision requires that criminal intent to commit one or more preparatory acts has been established; however, neither the attempt nor the commission of an act of piracy is necessary for the provision to apply.

## 2.2.4. Germany

### *Jurisdiction over acts of piracy*

With regard to acts of maritime piracy committed outside German territorial waters, the German Criminal Code provides for the following jurisdictional links:

- The act is committed on a ship entitled to fly the federal flag or the national insignia of the Federal Republic of Germany (Section 4 of the Criminal Code);
- The act is committed abroad against a German citizen (Section 7, paragraph 1 of the Criminal Code);
- The act is committed abroad by a German citizen or a foreigner, who is later found on German territory and who is not extradited (Section 7, paragraph 2 of the Criminal Code).

The last two provisions, which express the principles of active and passive personality, require the additional condition that the committed act is a criminal offence in the place of its commission or that the place where the act is committed is not subject to any criminal jurisdiction.

Furthermore, German law also applies to crimes against particular internationally protected legal interests, regardless of the law of the place where the crime is committed (Section 6 of the Criminal Code), and this includes attacks against maritime traffic, as defined by Section 316c of the Criminal Code.

The provisions determining the German judicial authority competent to deal with maritime piracy related offences are contained in Section 10, paragraph 1, and Section 10a of the German Code of Criminal Procedure:

“Section 10

- (1) If the criminal offence was committed outside the territorial scope of this statute on a ship authorised to fly the Federal flag, the competent court shall be the court in whose district the ship's home port is located, or the port within the territorial scope of this statute first reached by the ship after commission of the offence”.

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<sup>24</sup> Text in italics added in order to explain the content of the legal provision mentioned.

<sup>25</sup> *Idem.*

<sup>26</sup> *Idem.*

“Section 10a

If no venue is established for a criminal offence committed at sea outside the territorial scope of this statute, the venue shall be Hamburg; the competent Local Court shall be Hamburg Local Court”.

### *Description of criminal acts constituting piracy*

The Criminal Code does not contain any specific crime of maritime piracy; however, it covers acts typically committed during a pirate attack, as follows.

“Section 316c, Attacks on air and maritime traffic

- (1) Anybody who
  1. uses force or attacks the freedom of decision of a person or engages in other conduct in order to gain control of, or influence the navigation of
    - (a) an aircraft employed in civil air traffic which is in flight; or
    - (b) a ship employed in civil maritime traffic; or
  2. uses firearms or undertakes to cause an explosion or a fire, in order to destroy or damage such an aircraft or ship or any cargo on boardshall be liable to imprisonment of not less than five years. [...]
- (2) In less serious cases the penalty shall be imprisonment of one to ten years.
- (3) If by the act the offender at least by gross negligence causes the death of another person the penalty shall be imprisonment for life or not less than ten years.
- (4) Anybody who in preparation of an offence under subsection (1) above produces, procures for himself or another, stores or supplies to another firearms, explosives or other materials designed to cause an explosion or a fire shall be liable to imprisonment of six months to five years”.

Moreover, acts of piracy may meet other definitions of crime contained within the Criminal Code, in particular robbery (Sections 249-251), extortion (Sections 253 and 255), deprivation of liberty (Section 239), kidnapping and hostage taking (Sections 239a and 239b), criminal damage to property (Section 303), as well as offences against life and bodily integrity (various Sections within Chapters 16 and 17 of the Criminal Code).

Neither the attempt nor preparatory acts to commit maritime piracy are specifically criminalised under German law; general criminal law provisions on attempt (Section 30 of the Criminal Code) apply.

## **2.2.5. Italy**

### *Jurisdiction over acts of piracy*

Italy does not exercise universal jurisdiction over acts of international maritime piracy. Acts committed on ships sailing under the flag of Italy are covered by Italian territorial jurisdiction. Certain forms of non-territorial jurisdiction, with regard to acts of maritime piracy, are established by Law No. 12 of 24 February 2009 regulating the “extension of Italian participation in international missions”.<sup>27</sup>

Pursuant to Article 5, paragraph 4 of Law No. 12 of 24 February 2009, Italy has extra-territorial jurisdiction over acts of piracy referred to in Articles 1135 and 1136 of the Italian Navigation Code and those related to them, in accordance with Article 12 of the Criminal Procedure Code, if the acts are committed against the Italian State, citizens or goods either on the high seas or in territorial waters covered by the European Union Naval Force Somalia – Operation ATALANTA (“EU NAVFOR”). In particular, Article 5, paragraph 4 of Law No. 12 of 24 February 2009 states that the above-mentioned

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<sup>27</sup> Law Decree No. 209 of 30 December 2008 (*Decreto-legge 30 dicembre 2008, n. 209, coordinato con la legge di conversione 24 febbraio 2009, n. 12*), converted into law (i.e. endorsed by the Parliament).

acts are punishable in accordance with Article 7 of the Italian Penal Code, which provides for the punishment of certain crimes committed outside Italian territory.

By virtue of Article 5, paragraph 4 of Law No. 12 of 24 February 2009, the Italian judicial authority competent to prosecute piracy and related acts committed on the high seas or territorial waters is the Ordinary Tribunal (i.e. the court of first instance) based in Rome.

### *Description of criminal acts constituting piracy*

Acts of maritime piracy are criminalised by Articles 1135 and 1136 of the Italian Navigation Code:

“Article 1135, Piracy

1. The Master or Officer of a national or foreign ship which commits acts of depredation against a national or foreign ship or its cargo or, for the purpose of depredation, commits violence against any person on board, shall be punished with imprisonment of ten to twenty years.
2. For all the other members of crew, punishment shall not exceed one third of the imprisonment term stipulated in paragraph 1; for everyone else the punishment shall be reduced by half.

Article 1136, Ship under suspicion of piracy

1. The Master or Officer of a national or foreign ship, illegally equipped with weapons and sailing without proper certification, shall be punished with imprisonment term of five to ten years.
2. Paragraph 2 of Article 1135 applies”.

Several other provisions of the Italian Navigation Code criminalise acts that may be relevant to maritime piracy, including Article 1137 on armed robbery and extortion at sea committed within Italian territorial waters, Articles 1138 and 1139 on seizure of a ship and an agreement to this end, including criminal liability for organisers and promoters of these acts, and Article 1141 on criminal damage to the vessel.

Furthermore, a description of the relevant offence of hostage taking can be found in Article 3, paragraph 1 of Law No. 718 of 26 November 1985 on Ratification and Execution of the International Convention against the Taking of Hostages (1979):<sup>28</sup>

- “1. Whoever, except in cases referred to in Articles 289-bis and 630 of the Penal Code, kidnaps a person or keeps in his power by threatening to kill that person, to hurt or continue to hold the person seized in order to compel a third party, whether it be a state, an international organisation, a natural or legal person or a community of individuals, to do any act or abstain from any act, making the release of the kidnapped person dependent of such action or abstention from the action, shall be punished with imprisonment of twenty-five to thirty years”.

The attempt is criminalised by Article 56 of the Italian Penal Code; this general criminal law provision is also applicable to the offence of maritime piracy.

## **2.2.6. The Netherlands**

### *Jurisdiction over acts of piracy*

The Netherlands has established universal jurisdiction for the crime of maritime piracy. This jurisdiction is based on Article 4 of the Dutch Criminal Code, which states that the Dutch Criminal Code is applicable to any person outside the Netherlands who commits acts of maritime piracy on the high seas, as referred to in Article 381 therein.

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<sup>28</sup> Legge 26 novembre 1985, n. 718.

In addition to this, the Netherlands applies other forms of extra-territorial jurisdiction that may be of relevance to an act of maritime piracy:

- Jurisdiction based on the flag-State principle (i.e. jurisdiction over crimes committed outside Dutch territory on board a Dutch vessel (Article 3 of the Dutch Criminal Code);
- Jurisdiction on the basis of the nationality principle (i.e. jurisdiction over an offence committed outside Dutch territory by a Dutch national (Article 5, paragraph 1, Section 2 of the Dutch Criminal Code);
- Jurisdiction based on the protective principle (i.e. jurisdiction over an offence committed by a Dutch or foreign national with the objective of compelling the Dutch government to do or abstain from doing any act, irrespective of whether the offence is committed within or outside the territory of the Netherlands (Article 4, Section 11 of the Dutch Criminal Code);
- Jurisdiction on the basis of the principle of active personality (i.e. jurisdiction over an offence committed by a foreign national outside Dutch territory if the offender is present on Dutch territory after the commission of the offence (Article 4a of the Dutch Criminal Code).

### *Description of criminal acts constituting piracy*

The specific legal provision on the crime of piracy is included in Article 381 of the Dutch Criminal Code:

“1. A person:

- (1) who enters into service or is serving as a master on a vessel, knowing that it is intended for or using it for the commission of acts of violence against other vessels on the high seas or against persons or property on board these, without being so authorised by a power engaged in warfare or without being part of the war navy of a recognised Power, is guilty of piracy and is liable to a term of imprisonment of not more than twelve years or a fine of the fifth category;
  - (2) who, aware of such purpose or use, enters into service as a crew member on such vessel, or voluntarily continues his employment after having become aware of such purpose or use, is guilty of piracy and liable to a term of imprisonment of not more than nine years or a fine of the fifth category.
2. Exceeding the limits of authorisation as well as possessing authorisations granted by each of the Belligerent Powers is equivalent to the absence of an authorisation”.

The attempt and the preparatory acts to commit piracy are also covered by the wording of Article 381.

## **2.2.7. Spain**

### *Jurisdiction over acts of piracy*

In respect of acts of maritime piracy, Spain exercises flag-State jurisdiction, active personality jurisdiction, passive personality jurisdiction and conditional universal jurisdiction.

The legal basis for Spain’s extra-territorial jurisdiction over maritime piracy is laid down in Article 23 of Organic Law No. 6/1985 of 1 July on the Judiciary,<sup>29</sup> as amended by Organic Law No. 1/2009 of 3

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<sup>29</sup> *Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial.*

November supplementing the Law on the Reform of the Criminal Procedure Legislation and amending Organic Law No. 6/1985 of 1 July on the Judiciary,<sup>30</sup> which reads as follows:

- “1. In the criminal law system, Spanish jurisdiction shall be applicable to cases of offences or crimes committed on Spanish territory or committed on board of Spanish ships or airplanes without prejudice to the terms of international treaties, to which Spain is a party.
2. In addition, it shall be applicable to cases of acts established under Spanish criminal law as crimes, even though they have been committed outside national territory, provided that those criminally responsible were Spanish nationals or foreigners who had acquired Spanish nationality subsequent to commission of the crime, and that the following requirements are fulfilled:
  - a) The act is punishable in the place of its commission, unless by virtue of an international treaty or a regulatory act of an international organization, to which Spain is a party, this requirement is not necessary;
  - b) The injured party or the Public Prosecutor files a complaint or action before a Spanish court;
  - c) The offender has not been acquitted, or granted amnesty, or sentenced abroad, and, in the last case, has not completed serving the sentence. If he has served it only partially, it shall be taken into account as proportionally reduced.
3. [...]
4. Spanish jurisdiction shall also be applicable to acts committed by Spanish nationals or foreigners outside national territory according to Spanish criminal law for one of the following crimes:
  - [...]
  - c) Piracy and illegal hijacking of airplanes”.

Furthermore, Article 23, paragraph 4 contains a provision establishing conditions for the exercise of universal jurisdiction by Spanish courts. The application of Spanish law on the basis of universal jurisdiction is limited to offences where the suspects are present in Spain or the victim is of Spanish nationality, or where the offence affects Spanish interests, and, in any case, where any other competent jurisdiction has not commenced proceedings to investigate and prosecute the committed offence.

The Criminal Chamber of the National Court, *Audiencia Nacional*, is the judicial authority competent to rule on international crimes, including maritime piracy (Article 65 of Organic Law No. 6/1985 of 1 July on the Judiciary).

### *Description of criminal acts constituting piracy*

The provisions on the prohibition and punishment of acts amounting to maritime piracy have been included in the Spanish Penal Code (also referred to as Organic Law No. 10/1995 of 23 November on the Penal Code<sup>31</sup>) by Law No. 5/2010 of 22 June on Amendments to the Penal Code,<sup>32</sup> which added Chapter V “Crime of piracy” to Title XXIV “Crimes against the International Community” of Book II “Felonies and their penalties”, as follows:

#### *“Article 616 ter*

Whoever, by violence, intimidation or deceit, seizes, damages or destroys an aircraft, ship or another kind of vessel or platform in the sea, or attacks persons, cargo or property found on board thereof, shall be convicted of the crime of piracy with a sentence of imprisonment of ten to fifteen years.

In all cases, the punishment foreseen in this Article shall be imposed without prejudice to the relevant ones for the felonies committed.

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<sup>30</sup> *Ley Orgánica 1/2009, de 3 de noviembre, complementaria de la Ley de reforma de la legislación procesal para la implantación de la nueva Oficina judicial, por la que se modifica la Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial.*

<sup>31</sup> *Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.*

<sup>32</sup> *Ley Orgánica 5/2010, de 22 de junio, por la que se modifica la Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal.*



#### Article 616 *quater*

1. Whoever, in the prevention or persecution of the acts foreseen in the preceding Article, resists or disobeys a warship or military aircraft or another ship or aircraft bearing clear signs that is identifiable as a ship or aircraft in the service of the Spanish State and that is authorised for such purposes, shall be punished with a sentence of imprisonment of one to three years.
2. Should force or violence be used in the conduct described above, the punishment of ten to fifteen years of imprisonment shall be imposed.
3. In all cases, the penalties foreseen in this Article shall be imposed without prejudice to the relevant ones for the felonies committed”.

The attempt to commit an offence is defined by Article 16, paragraph 1 of the Spanish Penal Code and is criminalised by Article 62 of the Spanish Penal Code.

### 2.2.8. Sweden

#### *Jurisdiction over acts of piracy*

The legal basis for extra-territorial types of jurisdiction, including universal jurisdiction, is stipulated in Chapter 2 “On the Applicability of Swedish Law” of the Swedish Criminal Code.

According to Section 2, paragraph 1 of that Chapter, a Swedish court may exercise jurisdiction over crimes committed outside the Swedish territory according to Swedish law where the crime has been committed by a Swedish citizen or an alien domiciled in Sweden (the requirement of dual criminality applies).

In addition, Section 3 of that Chapter indicates that a Swedish court may adjudicate piracy crimes committed outside Swedish territory if the crime is committed:

- On board a Swedish vessel (Chapter 2, Section 3, paragraph 1);
- In an area in which a detachment of the Swedish armed forces is present for a purpose other than an exercise (Chapter 2, Section 3, paragraph 2);
- In an area not belonging to any State, if the crime is directed against a Swedish citizen, a Swedish association or private institution, or an alien domiciled in Sweden (Chapter 2, Section 3, paragraph 5);
- If the crime is, among other things, hijacking, maritime sabotage, an attempt to commit such crimes, or a crime against international law (Chapter 2, Section 3, paragraph 6).

Crimes committed outside Swedish territory can be prosecuted only following the authorisation by the Government or a person designated by the Government, except for crimes committed on board a Swedish vessel (Chapter 2, Section 5).

#### *Description of criminal acts constituting piracy*

Swedish criminal law does not have a specific provision defining maritime piracy. The relevant offences are described in the Swedish Criminal Code, more specifically in Section 5a of Chapter 13 “On Crimes Involving Public Danger”, which provides for criminal liability for hijacking by means of unlawful coercion, destruction or damaging of a vessel or platform, and maritime sabotage:

“A person who, by means of unlawful coercion, seizes or interferes with the operation of an aircraft or a vessel used in civil commercial maritime traffic for the transport of goods and passengers, towing, salvaging, fish or other catch, shall be sentenced for hijacking to imprisonment of up to four years. The



same shall apply to a person who by unlawful coercion seizes a platform in the sea which is intended for activities in connection with the exploration or exploitation of natural resources or for some other financial purpose.

A person who in other cases:

1. Destroys or seriously damages such a vessel or such a platform as is mentioned in the first paragraph or an aircraft in traffic, or
2. Undertakes an action of a nature to present a danger to the safety of such vessel or such platform as is mentioned in the first paragraph or to the safety of such an aircraft during flight, shall be sentenced for maritime or air traffic sabotage to imprisonment of up to four years.

If the crime described in the first or second paragraph is considered to be gross, a sentence for a fixed term, of at least two and most ten years, or for life shall be imposed. In assessing whether the crime is gross, special attention shall be given to whether danger was thereby caused to a number of persons or whether the act was otherwise of a particularly dangerous nature”.

As indicated by Chapter 13, Section 12 of the Swedish Criminal Code, the attempt, preparation or conspiracy to commit hijacking or maritime sabotage are offences punishable in accordance with the provisions of Chapter 23 “On Attempt, Preparation, Conspiracy and Complicity” of the Swedish Criminal Code.

## 2.2.9. The United Kingdom

### *Jurisdiction over acts of piracy*

The United Kingdom has established universal jurisdiction with regard to maritime piracy.<sup>33</sup> The relevant statutory provisions can be found in the Aviation and Maritime Security Act of 1990, and the Taking of Hostages Act of 1982.

Under the Aviation and Maritime Security Act of 1990, Section 9, subsection 1, the general rule is that a person can be found guilty of the offence of piracy, as defined in Section 9 of the Aviation and Maritime Security Act of 1990, whatever his nationality and wherever the ship is at the time of the offence (there are exceptions, in some circumstances, for acts committed in relation to warships, naval auxiliary vessels, or vessels used in customs or police service). Similar provisions are also contained in Sections 10, 11, 12 and 13 of the Aviation and Maritime Security Act of 1990, which define other offences related to the safety of ships and fixed platforms.

Furthermore, Sections 1 to 3 of the Taking of Hostages Act of 1982 implement Article 5 of the International Convention against the Taking of Hostages (1979) and establish a basis for universal jurisdiction over hostage-taking offences committed by any person anywhere.

Proceedings for the offence under Section 9 of the Aviation and Maritime Security Act of 1990 can be instituted only with the consent of the Attorney General (Section 16, subsection 1 of the Act.). The prosecution of piracy and hostage taking is dealt with by counter-terrorism lawyers from the Crown Prosecution Service Headquarters.

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<sup>33</sup> Although the fact that the accused is a foreign national does not affect the jurisdiction of an English court, the English courts will be reluctant to assume jurisdiction when the alleged offence has no real connection with England and Wales (*Republic of Bolivia v Indemnity Mutual Marine Assurance Co. Ltd* [1909] 1 KB 785).

## Description of criminal acts constituting piracy

The law in each jurisdiction in the United Kingdom recognises the offence of piracy. Piracy is a long-existing common law offence, and its continued existence has been confirmed by a statutory definition.

The following is an overview of the current law in England and Wales; there may be small procedural differences in Scotland and Northern Ireland, but no differences of substance.<sup>34</sup>

The modern statutory definition of the offence of piracy adopts the UNCLOS definition word-for-word and can be found in Section 26, read in conjunction with Schedule 5 of the Merchant Shipping and Maritime Security Act of 1997, which provides that, for the purposes of any proceedings before a court in the United Kingdom in respect of piracy, Articles 101, 102 and 103 of the UNCLOS shall be treated as constituting part of the law of nations. That means that a court in the United Kingdom can apply the definition as if it was a domestic law provision.

“Merchant Shipping and Maritime Security Act of 1997, Schedule 5

Article 101, Definition of piracy

Piracy consists of any of the following acts:

- (a) 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, and directed –
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article 102, Piracy by a warship, government ship or government aircraft whose crew has mutinied

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

Article 103, Definition of a pirate ship or aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act”.

Section 1, sub-section 1 of the Taking of Hostages Act of 1982 defines the offence of hostage taking according to the International Convention against the Taking of Hostages (1979):

“Section 1

(1) A person, whatever his nationality, who, in the United Kingdom or elsewhere -

- (a) detains any other person (“the hostage”), and
- (b) in order to compel a State, international governmental organisation or person to do or abstain from doing any act, threatens to kill, injure or continue to detain the hostage, commits an offence”.

The United Kingdom has also incorporated the offences contained in the SUA Convention into domestic law. Part II “Offences against the Safety of Ships and Fixed Platforms” of the Aviation and Maritime Security Act of 1990, Section 9, sub-section 1, creates the offences of unlawful seizing of a ship and destruction or damage of a ship:

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<sup>34</sup> See *Archbold Criminal Pleading, Evidence and Practice*, paragraphs 25-38, p. 2332 onwards, for the most accessible reference for the offence, draft indictment, and penalties. Also see *Blackstone’s Criminal Practice*, which is written by the Crown Prosecution Service specialist lawyer and sets out the current criminal law for England and Wales.

“(1) A person who unlawfully, by the use of force or by threats of any kind, seizes a ship or exercises control of it, commits the offence of hijacking a ship, whatever his nationality and whether the ship is in the United Kingdom or elsewhere, [...]”.

In addition to this, offences dealing with the safety of ships and fixed platforms, which may be related to acts of maritime piracy, are stipulated by Sections 10, 11, 12 and 13 of the Aviation and Maritime Security Act of 1990:

- Seizure of a fixed platform by the use of force or threat (Section 10);
- Destruction or damaging of a ship or fixed platform, commission of an act of violence on board a ship or fixed platform, which is likely to endanger safe navigation (Section 11);
- Intentional destruction, damage, or interference with the operation of property used for the provision of maritime navigation facilities, which is likely to endanger safe navigation (Section 12);
- Threat to do an act in relation to a ship or fixed platform, as mentioned in Sections 11 and 12 above, in order to compel a person to do or abstain from doing any act (Section 13).

Relevant ancillary offences are also established by the Aviation and Maritime Security Act of 1990. Section 14, sub-sections 1 and 2 of the Act provide that, where a person (of whatever nationality) does any act outside the United Kingdom which, if done in the United Kingdom, would constitute, among other things, an offence of murder, attempted murder, manslaughter, culpable homicide or assault, such an act constitutes that offence if it is committed in connection with an offence committed or attempted under Sections 9, 10, 11, or 12 of the Act.

## 2.3. Conclusions

The treaties that have been examined in this Chapter establish the international legal anti-piracy framework: they define piracy and other acts of violence at sea, and provide the jurisdictional basis for States to prosecute such acts domestically.

The 1958 Geneva Convention and the UNCLOS are the treaties, which specifically define piracy and establish universal jurisdiction over this crime. However, it is important to emphasize that the application of universal jurisdiction belongs only to the crime of piracy in its strictest sense, as defined by these treaties.

The SUA Convention covers a wider scope of offences constituting violence at sea. The Convention provides the State that captured offenders with the possibility to choose either to exercise the criminal jurisdiction of the domestic courts or to transfer the captured offenders by using mutual legal assistance between States Parties to the Convention (“prosecute or extradite mechanism”).

The UN Security Council reinforced the international legal anti-piracy framework with SC Resolutions obliging coastal States that are parties to the SUA Convention to accept SUA offenders for prosecution unless the state can explain why the Convention does not apply. In addition, the applicable UN SC Resolutions reaffirm the power of naval forces to pursue pirates, in the case of Somalia even expanding these powers by authorising pursuit within Somali territory.

In addition to the above-mentioned international treaties, there are a number of other international legal instruments that do not constitute part of international law on piracy but, nevertheless, address crimes that may be of concern in relation to acts committed at sea: for instance, the International Convention against the Taking of Hostages (1979)<sup>35</sup> and the United Nations Convention against Transnational Organized Crime (2000)<sup>36</sup>.

The legislative distinction between acts of piracy and their supporting operations is important. The doctrine of universal jurisdiction according to international law underlies, in particular, acts of maritime piracy. While other legislative schemes may be used to prosecute high-level organisers who plan, finance and benefit from acts of piracy, establishing jurisdiction over these crimes may be far more complex than within the context of the physical act of maritime piracy.

The various Member States that contributed to the Report have established jurisdiction over the crime of piracy but apply different statutory regimes. With regard to the criminalisation of the actual offence, national legislation in some Member States provides a definition for the crime of piracy, while other countries apply general criminal law provisions in which offences that match the acts committed during piracy attacks have been defined. As elaborated in *Chapter 4. Judicial Decisions*, both Member States that have adopted specific piracy legislation and those that apply other provisions have successfully tried alleged pirates before their national courts.

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<sup>35</sup> United Nations, Treaty Collection, Text and status of the International Convention against the Taking of Hostages.

<sup>36</sup> United Nations, Treaty Collection, Text and status of the Convention against Transnational Organized Crime.

## 3. Legal Issues and Lessons Learnt

In order to gain a comprehensive insight into the legal issues faced in maritime piracy investigations and prosecutions, Eurojust prepared a special questionnaire that was sent out to the national authorities of the countries involved in an operational maritime piracy case at Eurojust. The replies received were analysed in detail, also within the context of discussions that have taken place during maritime piracy coordination meetings organised at Eurojust since 2009. The information shared during those coordination meetings has also been used in the analysis that follows.

The findings below reveal certain aspects of the obstacles encountered in the relevant national investigations and prosecutions and highlight some lessons that were learnt. Without being all-inclusive or applicable in all relevant cases, the findings help identify best practice and working solutions to issues at stake and illustrate the need for a comprehensive approach to maritime piracy investigations and prosecutions.

### 3.1. Identification of Suspects and Witnesses

#### 3.1.1. Identity

##### *Challenges*

The identification of suspects is crucial to effective and successful investigations and prosecutions. Determining the correct identity of individuals suspected of involvement in acts of piracy has been recognised as a challenge by some national authorities. In some cases, the authorities take the names suspects provide. However, the absence of official documents, on the basis of which the identity of suspects and/or witnesses can be determined, results in complications in the court procedures that follow. Names are often spelled phonetically, which may generate several versions of the same name and require thorough investigation and analysis of data in order to confirm whether different names refer to the same person. The illiteracy of some suspects presents another challenge, particularly when no identification documents are available.

Additionally, poorly maintained civil records hinder the confirmation of the identity of suspects, in particular, those from Somalia. At times, the attitude of some victims could be considered as obstructive to the authorities due to the sympathy felt for the pirates and related to the socio-economic background of the phenomenon, or due to lack of motivation to cooperate with the authorities.

Photographs of suspects taken by naval forces after a vessel has been taken under their control are sometimes considered as classified information and are therefore not available to use for identification purposes. Furthermore, difficulties in the identification of suspects lead to unawareness of possible criminal records, and thus obstruct the detection of persons repeatedly involved in acts of piracy or other criminal acts, the detection of links between cases and the identification of criminal networks.

Some national legal frameworks (e.g. France) do not require that naval forces intercepting a suspected pirate vessel determine the identity of the detained persons. Once the suspects are brought to French territory, they are remanded in custody and the verification of their identity can then be performed (in the presence of an interpreter, if necessary).

### *Lessons learnt and best practice*

Some national authorities (e.g. the United Kingdom) reported to have gained a fairly good understanding of Somali names, which usually consist of several elements (tribal and clan names, nicknames, and names related to a location). As indicated by the Netherlands, in the absence of other objective indicators, a working solution for determining the identity of suspects and/or witnesses involves checks on the spelling of the name during questioning, as well as on the possible nickname used. Furthermore, as reported at maritime piracy coordination meetings at Eurojust, pirates who were involved in more than one attack were, on several occasions, identified by victims through their photographs, or on the basis of forensic evidence obtained by cross-matching fingerprints in the Interpol database. In one case in Germany, a suspect was recognised from a photograph available on the Internet.

### **3.1.2. Language and Nationality**

#### *Challenges*

Generally, due to the fact that cases of piracy affect individuals of different nationality, a need for foreign investigations and international information exchange may arise. In addition, it has been recognised (e.g. by Spain) that the existence of different languages and dialects adds complexity to the investigation of relevant cases. However, no specific examples of issues related to the language spoken by the apprehended pirates have been pointed out.

Contact and communication with witnesses could also generate certain challenges. In one case, the national authorities were faced with difficulties related to the fact that potential witnesses on the boarded vessel only spoke Farsi, which, in the absence of an interpreter, made it impossible to record personal data correctly and take statements. Phonetic names and photographs used in the letter of request sent to Iran, together with some additional information on the timeframe and the harbour of departure, were not sufficient to trace witnesses. Furthermore, bilateral political relations between the two countries (the Netherlands and Iran) also played a certain obstructive role in this case.

### *Lessons learnt and best practice*

Shared experiences regarding Somali-speaking pirates reveal some best practice, e.g. the presence of an interpreter on board the vessel which intercepted the pirates (Belgium). Translations and interpretations during the court procedure are not considered a problem.

### **3.1.3. Age**

#### *Challenges*

The correct establishment of the age of suspects has crucial implications for the applicable procedures, the further progress of the proceedings and possible future sentencing. The lack of awareness among suspects concerning their own age, for various reasons, or the deliberate concealment of their real age in the hope of less severe penalties, pose serious challenges to national authorities. The absence of birth registration in Somalia, for example, has been indicated as a factor resulting in complications with respect to determining the age of the suspect and/or witness.

Nevertheless, in some instances the national authorities (as indicated by the Netherlands) need to make an assessment on a case-by-case basis whether the evidence is strong enough to bring an alleged minor to the Netherlands for trial. In general, the basic principle applied is that juveniles or minors are not transferred to the Netherlands for a court proceeding given the low sentence they may receive as well as the specific arrangements for juveniles or minors. When making the assessment for every juvenile/minor involved, the authorities also need to consider his specific role in the act of piracy as well as his specific actions (e.g. whether he only carried a weapon or he used it against victims and/or naval forces).

Resorting to medical/forensic expertise is often indicated as a practice when minority of age has been claimed by the suspect or his defence counsel (please see below for details). However, in some countries (e.g. the Netherlands), forensic examinations have been of little use, as the suspects could only be categorised in two groups: older than 18 years of age or younger than 32 years of age.

### *Lessons learnt and best practice*

As indicated by France, for example, while on the high seas and before the judicial phase of the proceedings has commenced, the minority of age of suspects (real, perceived or claimed) has no impact on the restriction and deprivation of liberty that may be imposed on them by naval forces.

Once suspects are brought to national territory, the national legal frameworks envisage procedures and tools to estimate their age. Even in the event of no problems with evidence, medical/forensic expertise is indicated as a common instrument to be applied when suspects claim to be minors. Such expertise may include several examinations, including bone examination (hand, wrist, jaw, collar bone, etc.). Its results are, however, not binding on the court. In Germany, for example, the hearing of the evidence relating to the age of the accused in the *MV Taipan* case lasted a few weeks, even though an assessment of age had already been made during the investigation, clearly indicating that the accused were at least 18 years of age. The benefit of the doubt was given to one defendant, considered to be 17 years old at the time of the crime.<sup>37</sup> In Belgium, a witness statement was considered as sufficient evidence for the court to determine the age of a suspect in the *Pompei* case, despite the medical expertise provided beforehand.<sup>38</sup>

If the suspect is established to be a juvenile or minor and this is recognised by the court, the national juvenile code is applied. In some countries (e.g. Italy), a specialised court for minors is competent to hear and rule on the case.<sup>39</sup>

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<sup>37</sup> For further details on the assessment and the decision of the court, please see 4.1.3. *Germany – MV Taipan*.

<sup>38</sup> For further details, please see 4.1.2. *Belgium – Pompei*.

<sup>39</sup> For further details on legal issues and practices related to suspects who are minors, please see 3.5.2. *Prosecuting Pirates who Claim to be Juveniles or Minors*.



## 3.2. Evidence

### 3.2.1. Data Sharing

#### *Challenges*

National investigations and prosecutions of maritime piracy cases are often faced with difficulties regarding data sharing and information exchange with naval forces. Some difficulties are rooted in the very nature of the interception operations. For instance, while at sea, the French maritime authorities may resort to their usual channels in order to request information on the ship and the pirates. There are, however, some difficulties experienced during this phase with regard to reporting to the judicial authorities at an early stage of the case, enabling the latter to anticipate the opening of an investigation.

Furthermore, on some occasions, rules regarding the classification of information have been quoted as posing challenges to cooperation in cases where a vessel has been intercepted by naval forces. Available operational data with classified content is often not provided to the investigating authorities, as military interests can sometimes be stronger than the prosecutorial interests (e.g. the *Dhow* case in the Netherlands).<sup>40</sup> In addition, challenges to cooperation arising from the probable cause requirement in the USA have also been pointed out in one instance (Belgium).

#### *Lessons learnt and best practice*

Due to the fact that no law enforcement officers are generally present on board naval vessels that intercept pirates, it has been proven essential to have short communication lines with naval forces. Various practical arrangements (e.g. an agreement between the Public Prosecutor's Office and the Ministry of Defence) are put in place in order to guarantee direct communication between the national authorities concerned when naval forces are in contact with pirates. This also ensures that the prosecution can acquire sufficient information to assess how to proceed. It has been noted that in some cases of classified data, the national authorities experienced no difficulties, as the necessary information was declassified in order to facilitate the prosecution in corroborating the evidence collected.

The international aspects of data sharing also have an important impact on the progress of maritime piracy investigations and prosecutions. Evidence collected by some countries can prove to be very useful to others, especially in cases where suspects are alleged to have repeatedly been involved in acts of piracy and/or other criminal activities. Specifically, cooperation with regional actors, e.g. Seychelles, Kenya, etc., is perceived as a top priority with a view to ensuring effective collection of evidence, including telephone data and information on cash flows.

In a broader context, the sharing of data such as photographs, fingerprints and other biometric data, has been consistently recognised as an essential and rewarding practice. The databases kept at Europol and Interpol are seen as important information pools that could help identify suspects and examine their criminal records, also with a view to indictment and sentencing (please see also 3.2.2. *Securing Evidence at the Crime Scene*).

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<sup>40</sup> For further details, please see 4.1.7. *The Netherlands – Dhow*.



### 3.2.2. Securing Evidence at the Crime Scene

#### Challenges

In addition to the issues with communication between the naval forces apprehending pirates at sea and the national investigating and prosecuting authorities, as mentioned in 3.2.1. *Data Sharing*, certain difficulties have been reported in relation to the intervention of naval forces, on the one hand, and the need to preserve the crime scene, which will be further exploited by the investigating authorities, on the other hand. Experience reveals that the risk of destroying evidence during military operations is rather prominent. As reported in one instance (Denmark), as a result of difficulties in securing the evidence, it was not possible to prove any connection between the weapons used and the pirates present on board the vessel. In the absence of evidence on who committed the attack on the naval forces, the case was dropped.

Moreover, due to the fact that the crime scene cannot be assessed professionally when and where the vessel is intercepted as no forensic experts are present, the collecting of evidence is further challenged and is often not performed according to the protocols and requirements of the investigating authorities. Interventions carried out by private security companies present on board vessels that have been attacked may also entail certain issues with evidence in future judicial proceedings.

In some cases, the proper crime scene investigation takes place only when the vessel reaches a certain port, often after a long voyage, during which evidence can be destroyed. In these cases objective factors, such as lapse of time and unfavourable weather conditions (high temperatures, moisture, etc.), also have a detrimental impact.

The classified nature of information related to operations and negotiations conducted by naval forces has also been recognised as a challenge in the context of evidence collection at the crime scene. This can further obstruct the securing of sound evidence relevant to the judicial inquiry. Additionally, legal limitations as to the powers of naval personnel present an important impeding factor. As noted by Germany, for example, data collection could be a problem, as members of the naval forces are not entitled to conduct an investigation according to the German Code of Criminal Procedure; therefore, the possibility to collect evidence against the will of suspects is limited.

Some additional challenges related to evidence collection are posed by the claims of suspects that they were in fact fishermen or even victims of piracy, or that they entered the high seas in an attempt to help fishermen in need. Such claims have been made even in cases where no fishing equipment was found on board the suspects' vessel.

Furthermore, affected commercial interests and possible damages to be suffered by the ship-owning companies, while the vessel is hijacked by pirates and later set ashore for investigation, may result in the unwillingness of those companies to reveal information to the competent national authorities. In some cases, this unwillingness could also be related to the fact that the ransom payments that ship-owning companies make may eventually end up with terrorist or criminal organisations.

In addition to securing evidence at the crime scene, problems with evidence in relation to money transfers have also been reported (e.g. by Sweden). The use of the Hawala banking system, as well as the lack of large amounts of money on official bank accounts or the lack of receipts from other money transfers, has created further difficulties in the investigation.

### Lessons learnt and best practice

As the first observations made at the crime scene have an impact on the quality of the subsequent judicial procedure as a whole, they need to be carried out swiftly and meticulously. While the priority of military operations at the time and shortly after interception has been recognised, the necessity to align these military operations with the needs of the investigation and prosecution that may follow requires a certain awareness and compliance with requirements and rules of procedure. The proper training of crews on how to avoid the possible destruction of evidence and the systematic training of naval personnel regarding the requirements of national criminal proceedings, as well as the requirements of countries that are likely to take over possible prosecution, have been pointed out as working solutions to the issues at stake (e.g. Belgium, Germany and the Netherlands).

On a number of occasions, experience regarding cooperation with naval forces has been assessed as good. As reported by the Netherlands, for instance, in addition to the training given to military forces, a public prosecutor is available at all times for commanders of marine vessels to provide instructions and advice. Another example was presented by France, where the maritime and judicial authorities maintain regular contact in order to improve their coordination.

Furthermore, several countries (e.g. Kenya) and organisations (such as the U.S. Naval Criminal Investigative Service) have developed guidelines as to the type of evidence required and the manner of collection. Such guidelines are considered very helpful, as by following them a case can be built and prosecuted in almost any country. If needed, the public prosecutor can provide additional instructions.

Exercises carried out on board naval vessels have also been pointed out as useful with regard to raising awareness and ensuring that certain procedural requirements are met (e.g. Denmark). Raising the awareness of judicial authorities is considered no less important. In 2010, for example, the French authorities reconstructed a piracy case from 2008 in order to enable the judges to gain an understanding of the circumstances and the *modus operandi* of the pirates.

In general, the use of instruments for mutual legal assistance has been quoted as best practice. Specific positive experience with third States, such as Oman, Djibouti and Kenya, has also been mentioned (e.g. by Germany).<sup>41</sup>

Cooperative approaches to collecting information and evidence have proven beneficial in a number of maritime piracy investigations. The sharing of information and intelligence, not only between the individual countries but also with international law enforcement bodies such as Europol and Interpol, has been recognised as crucial in the fight against maritime piracy and the criminal networks behind it. With the adoption of UN SC Resolution 1950 (2010)<sup>42</sup> and Council Decision 2010/766/CFSP,<sup>43</sup> the international community confirmed the importance of the two bodies. Council Decision 2010/766/CFSP, in particular, provides for the sharing, with Interpol, of information on suspected pirates collected by members of EU NAVFOR. This information includes fingerprints, nominal information and identification documents, as well as details of equipment used by the suspects. This allows crosschecks against Interpol's global database with a view to facilitating the identification, traceability and prosecution of suspects. Furthermore, the collaboration between Interpol and Europol in information exchange and analysis of piracy related material has already resulted in the

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<sup>41</sup> For more information regarding mutual legal assistance, please see 3.5.3. *Mutual Legal Assistance between States*.

<sup>42</sup> Resolution 1950 (2010) adopted by the Security Council at its 6429<sup>th</sup> meeting on 23 November 2010.

<sup>43</sup> Council Decision 2010/766/CFSP of 7 December 2010 amending Joint Action 2008/851/CFSP on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, Official Journal of the European Union, L327/49.

identification of links between a number of cases and individuals based on DNA, fingerprint and telephone analysis.<sup>44</sup>

In addition, the establishment of a joint investigation team (“JIT”) between the Netherlands and Germany has also been pointed out as a good practice that has reinforced national investigations of maritime piracy cases. The JIT was set up in November 2011 and is actively supported by Eurojust and also by Europol, which hosted the JIT on its premises until 1 July 2013. The JIT’s objectives include the enhancement of the flow of information, collection of evidence, identification of key players, etc. It is supported by the operational analysis carried out by Europol’s Focal Point Maritime Piracy and has a network of partners, including several Member States and EU NAVFOR, with which it exchanges information. It also cooperates with private partners such as risk consultants and shipping agencies.

### 3.2.3. Witnesses

#### Challenges

While certain positive experiences have been reported regarding the summoning and hearing of the most important witnesses (captain, chief mate), for example in the *MV Taipan* case in Germany, on several occasions it has been noted that witnesses are difficult to trace, especially due to the lack of a specific address of those involved or due to cooperation issues with their country of residence (e.g. Iran, the Philippines, India, Sri Lanka, etc.). In one particular example, the Dutch authorities that boarded the *Dhow* vessel were unable to take a statement from potential witnesses as they only spoke Farsi. Those potential witnesses could not be traced later.<sup>45</sup> In other cases (e.g. France), the testimonies of victims were not conclusive as to the role of each suspect or the victims’ statements minimised the suspects’ alleged responsibility. Further investigations into other potential witnesses were also unsuccessful.

#### Lessons learnt and best practice

The nature of proceedings (written or oral) has been pointed out as having an impact on the practical solution of the issues at stake. In cases where the court can base its judgment on written declarations without having to hear the witnesses again (e.g. Belgium), the challenges of summoning a witness have no impact on the outcome of the proceeding. In other cases, notice provided far in advance has been identified as a way to overcome the difficulties encountered in securing the presence of witnesses at the planned hearings.

According to a law adopted at the beginning of 2013 in Belgium, for example, the captain of a vessel sailing under the Belgian flag can draw up official records establishing facts of piracy. These official records are considered as evidence until proven otherwise.

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<sup>44</sup> European Union Decision endorses central role of INTERPOL against maritime piracy off Somalia, Media release, Interpol, 16 December 2010.

<sup>45</sup> For further details, please see 3.1.2. Language and Nationality.

### 3.3. Fair Trial Issues

#### 3.3.1. Timely Involvement of the Investigating Judge

##### *Challenges*

Fair trial issues in maritime piracy cases pose particular challenges due to the fact that the criminal activities take place at sea, often thousands of miles from the countries that investigate and prosecute. Generally, the suspects spend the first hours and days following detention on board naval vessels and it is naval personnel who need to ensure the timely involvement of the competent national authorities and compliance with the applicable rules and requirements. Failure to respect these requirements may result in procedural complications and future objections brought by the defence counsel during trial.

National legal systems apply similar principles and approaches to the terms and limitations of detention before the concerned individual is presented before a judge. As reported by Germany, for example, a distinction has been made between the situations in which the pirates can be identified and those in which identification is not possible. In the latter case, in-depth forensics need to be performed after the vessel is brought to shore and international arrest warrants will also be issued.

Some examples of the procedures and practices applied by national authorities are included below.

##### *Lessons learnt and best practice*

Member States have adopted certain procedures that are applicable to cases in which suspects are apprehended in international waters. Also, on some occasions national legislation has been amended to take into consideration the specifics of the phenomenon of maritime piracy and to ensure compliance with the standards for fair trials.

The importance of expedient information exchange among naval personnel, national law enforcement and prosecution authorities is often pointed out. In Belgium, for example, the commanders of naval vessels that capture pirates must immediately inform the federal prosecutor. If he decides to prosecute, he informs the investigating judge in Brussels. Then, within the 24 hours following the arrest, the investigating judge must hear the suspect or the persons who are able to expose the charges against the suspect. That hearing takes place by means of a videoconference.

In the Netherlands, the prosecution has adopted the practice of presenting the case to the judge in the absence of the suspects and without having interviewed them. This presentation is, however, attended by a defence counsel who represents the interests of the suspects. If the judge decides that the prosecution may proceed with the case, telephone contact is arranged between the defence counsel and the suspects on board the naval vessel.

In France, during the administrative phase of the proceedings, the restriction or deprivation of liberty applied by naval forces towards suspects is carried out after a French prosecutor has been informed, with the restriction implemented under the control of a judge. Problems in communication between the administrative and judicial authorities have been resolved by accurately identifying appropriate interlocutors.

Videoconferencing has also been mentioned by other national authorities as a solution to the issues that may arise as a result of strict rules and limited timeframes (e.g. in Italy, where the law requires that suspects are heard within 48 hours of their arrest).

### 3.3.2. Defence Counsel and Interpreter

#### Challenges

Respect for human rights and fair trial requirements are major concerns in some maritime piracy cases due to the extraordinary circumstances in the first hours and days that follow the alleged criminal acts and interception of the pirate vessel.

The timely involvement of defence counsel is a right of the detainee and an obligation of the national authorities. If existing national legal provisions or case law, such as the ruling of the European Court of Human Rights (“ECtHR”) in the case of *Salduz v. Turkey*,<sup>46</sup> are not complied with, procedural problems occur which may lead to setting aside statements taken by the naval forces (e.g. Belgium, Germany).<sup>47</sup> While the difficulties in guaranteeing the right to defence counsel on the high seas are recognised, the absence of such may well lead to rejection of evidence. Furthermore, access to interpreters, e.g. via videoconference, needs to be ensured if no interpreters are present on board the naval vessel that apprehended the suspects.

#### Lessons learnt and best practice

Working solutions to some of the issues above have been identified and applied in order to comply with the requirements and ensure the procedural rights of the detainees. In Belgium, for example, defence counsel is designated by the investigating judge. With the support of an interpreter, the defence counsel is allowed to converse confidentially with the suspect for 30 minutes before the beginning of the hearing, and also attends the hearing. After the hearing, a provisional arrest warrant is issued by the investigating judge and the suspect is taken to Belgium. The provisional arrest warrant is only valid for 24 hours upon arrival on Belgian soil and for a maximum of one month after being issued. As soon as the suspect arrives on Belgian soil, the usual procedure of provisional detention is applicable (rehearing within 24 hours, classic arrest warrant, presence of defence counsel at the first hearing, etc).<sup>48</sup>

Experience, as reported by the Netherlands and described in 3.3.1. *Timely Involvement of the Investigating Judge*, reveals that respecting the right of detainees to consult defence counsel before they are interviewed is almost impossible. Instead, a practice has been adopted to bring the case to the judge in the presence of defence counsel representing the suspects. If the judge decides that the prosecution may proceed with the case, telephone contact is arranged between the suspects on board the naval vessel and the defence counsel.

The required presence of defence counsel and an interpreter, in cases where the suspects do not speak the language of their captors, is often ensured by means of a videoconference. In these circumstances, strict timeframes for the establishment of such remote connections are applicable.

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<sup>46</sup> In the case of *Salduz v. Turkey* (Application No 36391/02), the European Court of Human Rights ruled that “in order for the right to a fair trial to remain sufficiently ‘practical and effective’, Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction” (§ 55). Source: European Court of Human Rights, Case of *Salduz v. Turkey* (Application No 36391/02), Judgment, Strasbourg, 27 November 2008.

<sup>47</sup> For further details, please see 4.1. *Selected Judgments*.

<sup>48</sup> The procedure is also described in the context of the case, included in 4.1.1. *Belgium – Pompei/Petra I*.

### 3.3.3. Detention on Board Naval Vessels

#### *Challenges*

Detention on board naval vessels often thousands of miles from national territory poses additional challenges, as these vessels are typically not equipped to function as prisons. Hunger strikes among the suspects, demands for better conditions, attempts to escape or jump overboard have been mentioned, as well as the lack of training of naval personnel to escort and counsel suspects.

A particular concern has been raised by the United Kingdom in relation to the lack of modern legislation on detention of suspects at sea or their transit to the United Kingdom via a third State after detention. Unlike the very detailed law which applies to arrest and detention within the United Kingdom, detention at sea is currently exercised under the doctrine of Royal Prerogative<sup>49</sup> or under common law.

#### *Lessons learnt and best practice*

In France, the restriction or deprivation of liberty applied by naval forces towards suspects only takes place after the prosecutor has been informed. Such measures are always implemented under the control of a judge who can decide on their extension beyond 48 hours. The suspects then have the right to a professional medical examination. They must be notified of the decision of the judge regarding the restriction or deprivation of their liberty in a language which they understand. Following the arrival on French territory and the launch of a judicial inquiry, the suspects enjoy standard procedural rights related to their status.

In Denmark, the national authorities have prepared a manual for naval forces on missions abroad. The manual balances the responsibilities for military actions and the responsibilities Denmark generally has with respect to the treatment of detainees.

As a whole, even though defence counsel have rarely objected or referred to detention facilities thus far, the possibility of growing attention to such issues could require certain measures to be taken in order to improve detention conditions and raise the awareness of prosecutors about the situation on board naval vessels.

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<sup>49</sup> A constitutional concept concerning, i.e. the authority under which British Armed Forces are deployed outside the United Kingdom.



## 3.4. Jurisdictional Issues

### 3.4.1. Relationship between Country of Origin and Prosecuting Country

#### *Challenges*

Jurisdiction in maritime piracy cases has been considered in detail in *Chapter 2. Legal Framework*. The overview below reveals certain aspects of the issues faced by national authorities when dealing with the international character and specifics of the criminal acts committed by pirates.

Undoubtedly, due to the cross-border nature of maritime piracy and the various approaches adopted by the different national legal systems, the clear establishment of the country that has jurisdiction and is willing to prosecute and bring to justice the suspected pirates is vital to the entire judicial process. Although universal or extraterritorial jurisdiction for piracy is applicable to most of the Member States mentioned in Chapter 2, some legal issues are still reported as presenting a challenge.

For instance, in the United Kingdom, within the framework of an investigation into a Dubai-based UK citizen alleged to have negotiated a ransom in Dubai, a question was raised as to whether the UNCLOS definition in Article 101 (c) – any act of inciting or of intentionally facilitating an act of piracy – can be tried in a court in England and Wales if the alleged criminal act took place within another country's jurisdiction. The debate on the issue is further affected by the concept of the newer offence of hostage taking, which is wide enough to enable a prosecution even if, as described above, the offence took place within another country's jurisdiction. In this case there may be concurrent jurisdiction with Dubai.

Furthermore, there is an ongoing discussion as to whether secondary participants in the crime of piracy can be tried under Article 101 (a) and (b) of the UNCLOS. In the example given, the suspect under investigation cannot be prosecuted if the authorities apply the principle that only participants outside of any jurisdiction can be tried under these provisions.

In addition to the jurisdictional issues that may arise in relation to acts of piracy, the competent national authorities may face other possible challenges associated with the particular incident and the specific actions of the parties involved. In the *Dhow* case in the Netherlands, for example, a specific question regarding the applicable jurisdiction was raised. As the criminal acts took place in Somali territorial waters and shots were fired by both sides during the interception, the possibility to exercise jurisdiction for (attempted) murder was debated.<sup>50</sup>

#### *Lessons learnt and best practice*

As defined in Article 101 of the UNCLOS, piracy takes place on the high seas or in a place outside the jurisdiction of any State. Therefore, the location of the criminal act and interception needs to be verified before accepting a case. The Netherlands, for example, has indicated that its naval forces have permission to operate in Somali territorial waters, but its universal jurisdiction for piracy applies only if the criminal acts have taken place in international waters. Otherwise, the criminal offence falls within the definition of an armed assault.

The importance given to joint international efforts, such as EU NAVFOR, is reflected in the approach adopted by Italy, for example, where, prosecution of acts of piracy within the scope of EU NAVFOR is possible even if neither of the two general conditions which determine the applicable jurisdiction is

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<sup>50</sup> For details, please see 4.1.7. *The Netherlands – Dhow*.

met (the attacked vessel should be sailing under the Italian flag or the victims should be Italian nationals).<sup>51</sup>

In the *Valdarno* case, for example, the vessel was attacked on the high seas and, following the intervention of the Italian Navy, the arrest of the pirates took place on the pirates' mother ship. The court, however, did not identify any jurisdictional problems, as it considered that the intention to commit piracy was clear.<sup>52</sup>

In cases where one country has jurisdiction and the suspects are arrested by or reside in another country, extradition may be requested. As indicated by Denmark, when the Danish national authorities have detained a suspect but Denmark does not have jurisdiction to prosecute, the Danish authorities can only prosecute if they have received and subsequently rejected a request for extradition issued by another country. However, this has not yet occurred. France, for example, has also reported universal jurisdiction over acts of piracy on the high seas in cases where the national authorities have arrested a suspect and no other State has claimed jurisdiction.

Generally, in an effort to ensure a more efficient and coordinated approach to maritime piracy prosecutions, some Member States have established a centralised system at national level to deal with such cases. Some examples illustrating this structural approach are included below.

In Denmark, the State Prosecutor for Serious Economic and International Crime ("SAØIK") is nationally responsible for legal proceedings concerning international crimes such as genocide, crimes against humanity, war crimes, acts of terror and other serious crimes committed abroad. Maritime piracy, as well as kidnapping, hostage taking and extortion to pay a ransom for vessels, also fall within its competence. In Belgium, in compliance with the Law of 30 December 2009 on the Fight against Maritime Piracy, the Criminal Court of Brussels has the exclusive competence to hear piracy cases on offences committed outside Belgian territory if these offences were committed against a Belgian ship or if the suspects were apprehended by the Belgian military. In such cases, the Federal Prosecutor, who is the only competent authority to prosecute, must bring the case to the Court of Brussels if he decides to proceed with prosecution. In the Netherlands, the National Prosecutor's Office has competence in cases of maritime piracy. In the United Kingdom, piracy and hostage taking are dealt with by counter-terrorism lawyers from the Headquarters of the Crown Prosecution Service. A specialist lawyer is designated to monitor developments in international law and provide training to colleagues. Several defence counsel are known to have an interest in the subject; however, the UK system does not require a specialist judge. In Italy, in the absence of a centralised office dealing with piracy, the competence to prosecute belongs to the Prosecution Office in Rome.

Although specific in their nature, the various national approaches share some common attributes. Evidently, such centralisation of knowledge, expertise and experience as well as specialisation of competence or powers, may have considerable added value and contribute substantially to securing successful prosecutions.

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<sup>51</sup> For details, please see 2.2. *Maritime Piracy Legislation in the Member States Concerned*.

<sup>52</sup> For details, please see 4.2.4. *Italy – Valdarno*.



### 3.4.2. Casualties among Pirates

#### *Challenges*

The increasing violence used by pirates when hijacking commercial or leisure vessels and their firm resolution to pursue their objectives often lead to determined resistance in an attempt to avoid capture by naval forces. The life of hostages is frequently put at stake as a result of this resistance.

In the *Dhow* case, for example, several pirates were killed during the interception. This led to a lack of clarity with relation to handling the bodies of the dead pirates, as there was no national authority in Somalia which could take care of them.

#### *Lessons learnt and best practice*

In the event that resistance on the part of pirates leads to casualties, national authorities have an obligation to take care of the wounded. If, due to the nature of the injury, treatment cannot take place on board the vessel, a request for judicial assistance is necessary in order to obtain treatment at a hospital ashore.

In general, legal restrictions as to the use of lethal force to arrest suspects or in the defence of property are applicable (e.g. in the United Kingdom); therefore, lethal force may only be used in self-defence. In cases where the action taken by military forces has resulted in the death of a suspected pirate, a service inquiry will be conducted in order to establish the facts. On two occasions in the United Kingdom, the conclusions of the inquiry stated that the use of force was necessary in the given circumstances.

## 3.5. Other Legal Issues

### 3.5.1. Private Security Companies

#### *Challenges*

Some national legal systems allow for the presence of armed private security guards on board (commercial) vessels sailing under their flag (e.g. Italy, Belgium, Spain, the Netherlands and the United Kingdom). Such presence is foreseen as necessary to provide protection to the vessel and its crew. The employment of armed private security guards was earlier discouraged in the United Kingdom, but it is currently permitted to use such guards only to secure the defence of the vessel. In the event of judicial proceedings against United Kingdom operatives, they are to be heard by the United Kingdom authorities.

#### *Lessons learnt and best practice*

In the case of Belgium, a special law was adopted on 16 January 2013 that contains various measures regarding the fight against maritime piracy and regulates, *inter alia*, the terms and conditions of employment of private security guards on Belgian vessels. The law is envisaged to remain in force until the end of 2014, when evaluation is foreseen. The law establishes a legal framework for the intervention of private security guards on commercial vessels at risk of being attacked by pirates. It confirms the role of the captain as the authority on board and whose orders should be executed by the chief of the private security guards. The security guards are authorised to detain any person who boards the vessel without authorisation from the captain.

### 3.5.2. Prosecuting Pirates who Claim to be Juveniles or Minors

#### *Challenges*

As indicated in 3.1.3. *Age*, medical/forensic expertise is generally requested if the suspected pirates claim to be juveniles or minors. The results of any subsequent examination are, however, not binding on the court. In Germany, for example, three (initially five) accused persons in the *MV Taipan* case claimed to be juveniles or minors. The hearing of the evidence relating to their age lasted a few weeks, even though forensic assessment of their ages had already been made during the investigation. The court had to decide on the applicable law if the defendants were between 18 and 21 years of age. This eventually had an impact on the maximum penalty that could be handed down<sup>53</sup> (for details of the sentencing and arguments of the court, please see 4.1.3. *Germany – MV Taipan*).

The limitations of forensic expertise could also hinder prosecution cases. In the *Choizil* appeal case in the Netherlands, for example, claims were made by the defence counsel that a defendant was only 16 years of age at the time of the offence. Forensic expertise could only assess the age as being above 18 years or under 32 years. In that particular case, it could be established with certainty that the defendant was less than 32 years old.<sup>54</sup> As mentioned in 3.1.3. *Age*, the general approach adopted by the Dutch authorities, however, involves an assessment on a case-by-case basis to estimate whether the evidence is strong enough to bring an apprehended juvenile or minor to the Netherlands for trial.

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<sup>53</sup> Under the Juvenile Code, the maximum sentence is 10 years, regardless of the crime, except for murder under aggravated circumstances, where a maximum sentence of 15 years could be pronounced (the maximum of 15 years is the result of a recent amendment, made in December 2012).

<sup>54</sup> For details on the sentencing and arguments of the court, please see 4.1.6. *The Netherlands - Choizil*.

Juveniles or minors are seldom transferred to the Netherlands for court proceedings given the possible short sentence they may receive, as well as the specific arrangements for juveniles or minors.

Uncertainty about the actual age of suspects may result in their release (e.g. in Spain). An evaluation of age is, therefore, required and necessary in every case.

### *Lessons learnt and best practice*

National legal systems have certain rules and provisions applicable to suspects who are not yet of age. If it is estimated that suspected pirates are juveniles or minors, they can be tried according to the national juvenile code and/or be brought to a specialised court for minors. For instance, in the *Montecristo* case in Italy, some juveniles were convicted and sentenced to eight years in prison. There were no problems with evidence, but medical advice by a forensic expert was requested. The age of the defendants was estimated to be between 14 and 18 years; therefore, the Juvenile Court applied the national Juvenile Code.<sup>55</sup>

Another specific example is presented by the United Kingdom, where juveniles may be tried by a juvenile court between the ages of 10 and 17 years. The age limit in these cases applies at the time of the trial.

### **3.5.3. Mutual Legal Assistance between States**

#### *Challenges*

International cooperation in maritime piracy cases has been recognised as crucial to ensure an effective response to the criminal phenomenon. However, a number of policy and practical issues have been identified as hindering counter-piracy actions.

In cases where suspected pirates are arrested by foreign authorities and need to be extradited to the prosecuting country, for example, a speedy transfer is considered essential to be able to proceed with prosecution. The absence of an agreement or a treaty on the matter between the countries concerned may be a particular obstructing factor.

The transportation of suspected pirates to the country that will exercise its powers of jurisdiction may also raise certain issues, mostly related to the necessary arrangements with the authorities of the countries on the transportation route, especially in the absence of an agreement. In one case the suspect was carried by the military from one plane to another and stayed on board at every intermediary landing in order to avoid entering foreign territory. In other instances, in addition to close coordination among the various national actors involved (e.g. prosecution service, ministries of justice, foreign affairs and defence), several request for (legal) assistance were needed to ensure the successful transportation of suspects to the prosecuting country.

Obstacles in cooperation with the Somali authorities have been reported on a number of occasions. Practical issues, such as the lengthy extradition procedure from Seychelles, have also been indicated as obstructive. Furthermore, certain concerns have been raised in relation to post-trial transfers, the possibility of repatriation, or requests for asylum submitted following the conclusion of court proceedings or the completion of the prison sentence. The difficulty of ensuring the right of convicted persons to serve the penalty in their home country has been pointed out (e.g. by Spain) due to the

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<sup>55</sup> For details, please see 4.2.3. *Italy – Montecristo (juveniles)*.

problems in identifying their nationality or due to the fact that their home country is considered a “failed State”.

### *Lessons learnt and best practice*

In an attempt to find working solutions to some of the issues at stake, the EU and certain Member States have taken initiatives and established tools to improve international cooperation and achieve concrete results when problems of common interest have been identified. Although some legal assistance issues - even between countries participating in EU NAVFOR – have been acknowledged, in general, the benefits of international cooperation for the investigation and prosecution of maritime piracy cases (e.g. identification of suspects, collection of evidence, etc.), also mentioned above, are fundamental. Eurojust and Europol provide a platform for cooperation and coordination among national authorities dealing with maritime piracy cases and thus enhance the added value of shared knowledge and experience. As pointed out in 3.2.1. *Data Sharing*, the benefits of setting up the maritime piracy JIT between Germany and the Netherlands are undisputed.

Furthermore, certain shortcomings in the applied cooperation tools and practices could be overcome by fully exploring the existing legal basis. This was done in a Belgian case where the extradition of a suspect identified in Seychelles was at risk of not being implemented because of the absence of an extradition treaty between Belgium and Seychelles. In this particular case, the Treaty between the United Kingdom and Belgium for the Mutual Surrender of Fugitive Criminals signed at Brussels on 29 October 1901, as supplemented and amended by the Conventions signed at London on 5 March 1907 and 3 March 1911, offered a solution. This extradition treaty was also applicable to Seychelles following its independence in 1976.

In general, the roles of regional actors and local capacity building are recognised as essential to ensure an effective response to the maritime piracy phenomenon. One of the adopted approaches is to seek and support prosecution in the region. To facilitate the process, the United Kingdom, for instance, has seconded two permanent prosecutors to Seychelles since June 2010. Seven trials have thus far taken place, resulting in 70 convictions. Recently, as a result of the signed Memorandum of Understanding between the United Kingdom and Seychelles, the Regional Anti-Piracy Prosecution and Intelligence Coordination Centre (“RAPPICC”) became operational. RAPPICC is intended to target piracy leaders and financiers by bringing together experts from around the world and collecting and sharing relevant intelligence and information.

Moreover, other regional actors, such as Mauritius and Tanzania, also make a sustained effort to build capacity to prosecute piracy cases. In addition to the creation of *in situ* courts that will allow the prosecution to take place in the suspects’ country of origin, providing criminal justice advisors, enhancement of local prison capacities, and special training of law enforcement personnel to avoid human rights violations, are all among the measures mentioned as an attempt to support the effective prosecution and post-trial management of maritime piracy cases in the region.

### 3.6. Conclusions

Maritime piracy is a problem of international organised crime that requires a comprehensive and collaborative approach. Various political, economic, social, humanitarian and criminogenic factors have an impact on the maritime piracy phenomenon. The importance of targeting all these factors in a consistent manner has been commonly recognised.

The national authorities of Member States contributing to the present Report have identified a number of important issues faced during the investigation and prosecution of maritime piracy cases. Some good practices and solutions to these issues have also been pointed out.

While the identification of suspects and witnesses has been acknowledged as a challenge by some national authorities in their maritime piracy investigations and prosecutions, existing insufficiencies in the applied procedures, instruments and tools have also been recognised. Further to the good practices mentioned in *3.1. Identification of Suspects and Witnesses*, some additional opportunities created within the framework of international cooperation mechanisms have proven to be effective when used in maritime piracy cases, as they enable and reinforce strong prosecution cases and successful proceedings.

Sharing data (e.g. photographs, fingerprints and other biometric data) with Interpol and with Europol's Focal Point Maritime Piracy as quickly as possible has been recognised as bringing substantial added value to the investigation and collection of evidence, particularly in cases where suspects are involved in several attacks.<sup>56</sup> The positive experience of the German authorities, based on the recognition of a suspect from an online photograph, has triggered several proposals, including the launch of a common secure website containing photographs of pirates, managed under the auspices of Interpol. The Global Database on Maritime Piracy that is currently being established at Interpol is intended to assist Member States to "identify and arrest high-value individuals involved in Somali maritime piracy and to identify their assets".<sup>57</sup> In general, building coherent intelligence and analysis is considered key to the process of understanding the phenomenon and its specific elements and actors.

Securing strong evidence is the ultimate objective of criminal investigations. In maritime piracy cases, the difficulties in collecting evidence at a fragile maritime crime scene are often paired with strict procedural rules and requirements of criminal proceedings with regard to such evidence. A swift and professional response can only be ensured by proper awareness, close contact and efficient coordination among the relevant national authorities (naval forces, investigation bodies, prosecution offices).

Targeted training of naval personnel, who are typically the first to come in contact with suspected pirates, is essential for the initial crime scene examination. In addition to practical solutions, having interpreters on board naval vessels or sending advance notice to witnesses long before the hearing, ensuring statements and later the presence of foreign witnesses at the court hearings, can be facilitated if efficient tools of international cooperation are in place. Furthermore, international cooperation can enable national authorities to exploit information that would otherwise not be available to them. Information in Interpol's databases, for example, cannot always be used as evidence in maritime piracy cases but can assist the competent authorities to locate such evidence. These and other good practices, mentioned above, pave the way for solving evidence-related problems in a viable and efficient manner.

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<sup>56</sup> For details regarding data sharing, please see *3.2. Evidence*.

<sup>57</sup> For further information, please see Interpol's website.

Regardless of the circumstances of each case, human rights and fair trial requirements are central to criminal proceedings. The specifics of maritime piracy cases related to the fact that detention of suspects takes place thousands of miles off the territory of the country that will prosecute and bring them to justice, generate certain challenges for the national authorities concerned. In these cases, technology can come to the rescue ensuring, for example, by means of video conferencing, that the procedural requirements of national codes are complied with and judges, defence counsel and interpreters are involved in a timely and appropriate manner. However, the concerns that are sometimes raised regarding the conditions in which suspected pirates are held in detention on board naval vessels, remain and will need to be addressed adequately.

Similar to other crimes with an international element, piracy cases may generate considerably complex jurisdictional issues. The existence of a number of international legal instruments regulating the crime of piracy and related offences is no doubt an advantage. These instruments, some of which date back several decades, provide common definitions and rules that help codify the offences in national legislation. In addition to the appropriate and efficient legal basis, measures adopted at national level in order to centralise powers, competence, expertise and experience, can add greater value to maritime piracy prosecutions.

In an attempt to safeguard crews and economic interests, some legislative amendments have been introduced that regulate, *inter alia*, the use and powers of private security companies whose employees are stationed on board vessels. Although intended for self defence only, the presence and actions of such private security guards may have a further impact in relation to securing evidence, as discussed in 3.2.2. *Securing Evidence at the Crime Scene*, and thus generate certain challenges to effective investigation and prosecution.

The complexity of maritime piracy prosecutions may be further affected by a number of other problems with evidence and procedural issues. Often, age is used by suspects in an attempt to secure less severe punishment. In relation thereto, certain shortcomings in the policies and practices applied by national authorities as far as age assessment is concerned have been identified as problematic.

To address the above-mentioned challenges in a systematic and efficient manner, the integrated and complementary efforts of military, law enforcement, judicial and political players are needed at national level. As pointed out in several instances, due to the cross-border nature of maritime piracy, national efforts can be successfully reinforced by building strategic partnerships at international level. International cooperation and coordination are acknowledged as main instruments to effectively fight maritime piracy. In addition to the possibilities to cooperate in the sharing of information and evidence, as mentioned above, various tools and mechanisms have been put in place involving countries whose economic interests are at stake and important regional actors to enhance the cooperative setting of counter-piracy efforts. However, while the added value of those tools and mechanisms is evident, there is an outstanding need to reinforce the local capacity of those regional actors, as their role in the process is essential and indispensable.

Ultimately, as far as the criminal activities of pirates are concerned, a wider approach to fighting maritime piracy encompasses, *inter alia*, targeting financiers, organisers, negotiators and facilitators in addition to the actual perpetrators of piracy, tracing and confiscating the proceeds of crime, disrupting their logistics, etc. These efforts will contribute to breaking the “business model” of maritime piracy and countering all aspects of this criminal activity.

## 4. Judicial Decisions

For the past few years, maritime piracy cases have been brought before the domestic courts in several Member States. Most of the judgments in cases tried by these national courts were rendered in the period 2011-2012 and are, thus, recent. The objective of the present chapter is to provide an overview of the judicial decisions made in cases of maritime piracy at European level and to provide an insight into certain factual and legal issues that have given rise to discussion in the respective cases but also during the coordination meetings on maritime piracy held at Eurojust since 2010.

For the purpose of this chapter, a number of judgments submitted by national authorities within the framework of the questionnaire on maritime piracy mentioned in *Chapter 3. Legal Issues and Lessons Learnt*, as well as some decisions retrieved from open sources, have been analysed and summarised. This chapter is divided into two sections, the first containing judgments with more elaborate findings. The judgments are a good illustration of how the courts approach the basis for jurisdiction, problems with evidence, fair trial issues and sentencing in piracy cases. The greatest number of piracy cases has been tried by Dutch courts. Three of these cases have been analysed and are summarised below, together with the appeal judgments in one of the cases. Judgments from Belgium, Germany, Italy and Spain have also been analysed in detail.

The second section contains those decisions that were succinct and did not include a detailed discussion of factual or legal issues, among which is the decision to surrender suspects of maritime piracy from the Netherlands to Germany under the European Arrest Warrant (“EAW”). It may be pointed out that while all cases concern acts of maritime piracy, the word “piracy”, as defined by international law, has not been used consistently in that limited sense. For instance, the Dutch judgments use the terms “piracy” and “sea robbery” interchangeably.

The present chapter is not exhaustive. It focuses on those six countries that have submitted their judicial decisions to Eurojust, but does not necessarily cover all cases tried in a certain country. The cases included in this chapter have already been tried by a domestic court, either by a court of first instance only or by a court of first instance and a court of appeal.

A number of cases are ongoing in Member States. Among these are two Spanish cases, one concerning the fishing vessel *Izurdia*<sup>58</sup> and another case on an attack against a Spanish naval vessel, *SPS Patiño*.<sup>59</sup> All captured pirates are awaiting trial in detention in Spain. A case concerning the yacht *Lynn Rival* has been investigated but not yet tried in the United Kingdom. A French case concerning the *Tanit* will be subject to trial in 2013. The outcome of these and any other possible ongoing cases will be presented in forthcoming issues of the Maritime Piracy Judicial Monitor.

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<sup>58</sup> *Llegan a Torrejón los presuntos piratas que atacaron al 'Izurdia'*, Press Release, Ministry of Defence of Spain, 31 October 2012.

<sup>59</sup> *Los piratas que atacaron por error al buque 'Patiño', encarcelados en Madrid*, El País, 20 January 2012.



## 4.1. Selected Judgments

### 4.1.1. Belgium - *Pompei/Petra I*

**A. Procedure:** 1<sup>st</sup> Instance, Court of First Instance in Brussels (*Rechtbank van eerste aanleg te Brussel*, Case No FD.10.97.32/10), Belgium

**Date of decision:** 29 June 2011

#### *Introduction*

On 29 June 2011 at a public hearing, the 46<sup>th</sup> chamber of the Court of First Instance in Brussels handed down a judgment against one defendant who had been brought to trial in relation to the hijacking of the *Pompei* vessel that took place on 18 April 2009, and the attempted boarding of the *Petra I* vessel that took place on 29 November 2010. The *Petra I* flew the Sierra Leonean flag, but carried Belgian soldiers aboard. The *Pompei* sailed under the Belgian flag and navigated in international waters at the time of the incident. The Court of First Instance found the defendant guilty of hostage taking, taking control of the *Pompei* using deceit, violence or threats against the captain, and of the attempt to take control of the *Petra I*. The defendant was sentenced to ten years' imprisonment. Civil claims for physical, moral and financial damages were also brought by two victims of the attack on the *Pompei*, who held Belgian nationality, and their wives, as well as by *Pompei's* owners and insurance company. The Court of First Instance admitted some of the claims and ordered the defendant to pay several thousand euro in compensation to the victims.<sup>60</sup>

#### *The facts*

On 18 April 2009, the *Pompei* was hijacked by Somali pirates while sailing in international waters in the Indian Ocean, about 730 miles off the Somali coast and about 100 miles off Port Victoria, Seychelles. The pirates used one skiff and one larger boat to approach the *Pompei*. They were armed with automatic assault rifles, grenades and a rocket launcher. The hijacking was achieved by making threats and displaying weapons, as well as shooting towards the cockpit. After the pirates had taken control of the vessel, it sailed towards the Somali coast. Upon its arrival a few days later, negotiations lasting 71 days were initiated for the payment of a ransom. In the meantime, the crew was terrorised and threatened by the hijackers and the guards. The ransom, amounting to EUR 2.7 million, was dropped by a plane into the waters next to the vessel. The *Pompei* was then released to sail away.

Later, on 29 November 2010, a skiff with seven men on board attempted to enter the commercial vessel *Petra I* sailing under the Sierra Leonean flag and with Belgian military personnel on board as part of EU NAVFOR. At the time of the incident the vessel was in international waters in the Indian Ocean, between Mombasa, Kenya, and Mogadishu, Somalia. The military personnel on the *Petra I* triggered an alarm, which was intercepted by a Belgian frigate that was also part of EU NAVFOR. The pirate skiff then slowed down but remained in the vicinity. A helicopter took off from the frigate and reached the skiff. Ladders and weapons were thrown overboard from the skiff, and shots were fired from the helicopter to eliminate the automatic weapons on board the skiff. The seven men, who were then taken to the frigate, claimed they were on their way to South Africa and denied the possession of weapons or ladders, or the attempt to board the *Petra I*. Photographs of the detained were sent to the

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<sup>60</sup> For the purposes of the analysis that follows, only the criminal aspects of the case will be taken into consideration.



*Pompei's* crew. One of them was recognised as being one of the guards during the hostage situation on the *Pompei*. He was arrested and taken to Belgium. The others were liberated on a beach near Mogadishu, Somalia, as no State wanted to prosecute them.

### The charges

The defendant was charged with the following offences:

- A) Violation of Articles 66 and 347bis §§1 and 2 of the Criminal Code: hostage taking, meaning the arrest, detention or abduction of several persons (the captain and crew of the *Pompei*, sailing under the Belgian flag) as a guarantee for the execution of an order or a condition, including the preparation or facilitation of a crime or misdemeanour, the enabling of the escape of perpetrators or collaborators of a crime or misdemeanour, the ensuring of their release or the abolishment of their punishment.
- B) Violation of Article 33 of the Law of 5 June 1928: taking control of the *Pompei* using deceit, violence or threats against the captain.
- C) Violation of Article 3 §1, a) and c) of the Law of 30 December 2009 on the Fight against Maritime Piracy: attempt to take control of the *Petra I*.

### Jurisdiction/applicable law

The Court of First Instance determined that the applicable law with regard to the hijacking of the *Pompei* was the Law of 5 June 1928.<sup>61</sup>

With regard to the offence against *Petra I* (charge C), the Court of First Instance referred to Article 73 §4 of the Law of 5 June 1928, which established an explicit extraterritorial competence of the Belgian courts in cases where the person concerned was not to be found on Belgian soil. The latter was confirmed by Article 3 of the Law of 30 December 2009 on the Fight against Maritime Piracy, which refers to acts against Belgian vessels or suspects intercepted by the Belgian military, as was in fact the case with the *Petra I*. It had been decided to combine the two cases into one and give the Court of First Instance in Brussels the competence to proceed in accordance with the applicable legislation. Belgian jurisdiction was not contested by the defendant.

The Law of 5 June 1928 (Article 73 §1) established that the offences committed on board Belgian vessels were considered as having been committed on Belgian soil and could therefore be tried in Belgium. The principle of flag-State jurisdiction is also reiterated in Article 6 §1 of the 1958 UN Convention on the High Seas and Articles 92 §1 and 100 of the UNCLOS. The Court of First Instance considered both conventions applicable as the acts against the *Pompei* (charges A and B) were committed on the high seas.

### Fair trial

As there was no defence counsel present at the hearing of the defendant by the investigating judge, the defence claimed that the *Salduz* ruling<sup>62</sup> of the ECtHR was not respected. The Court of First Instance

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<sup>61</sup> The scope of the law was limited to acts of piracy against Belgian commercial and fishing vessels and did not cover leisure or military vessels not sailing under the Belgian flag. New legislation with a wider scope in relation to acts of piracy was adopted on 30 December 2009 and came into force on 14 January 2010.

<sup>62</sup> European Court of Human Rights, Case of *Salduz v. Turkey* (Application No 36391/02), Judgment, Strasbourg, 27 November 2008, also discussed in 3.3.2. *Defence Counsel and Interpreter*.

established that the defendant was apprehended by the Belgian military off the Kenyan coast and that his detention was in compliance with the International Covenant on Civil and Political Rights (“ICCPR”).<sup>63</sup>

Following the transmission of a provisional arrest warrant against the defendant, the course of the remote hearing of the defendant was monitored by the legal adviser on board the military frigate. According to the Court of First Instance, this provided a guarantee for the defendant that met the requirements in the *Salduz* ruling. From the oral reporting of the legal adviser it could be concluded that the hearing of the defendant proceeded without incident.

Upon arrival in Belgium, the defendant was immediately heard by the investigating judge. The hearing was followed by the issuing of a classic arrest warrant. The fact that the defendant was not accompanied by defence counsel during the hearing by the investigating judge did not automatically lead to the conclusion that the rights of the defendant were violated. Defence counsel was immediately assigned to the defendant after the classic arrest warrant was issued by the investigating judge. It was not considered plausible that abuse or coercion was used towards the defendant during the hearing or the further stages of the criminal proceedings. The Court of First Instance concluded therefore that the trial against the defendant retained its fair nature.

### *Identification of the suspect and some further evidence*

The Court of First Instance considered that there was no doubt that the men on board the skiff attempted to take control of the *Petra I*. Among the evidence mentioned was a voicemail message on one of the seized mobile telephones, in which someone, possibly the investor of the pirates, encouraged them to proceed with the hijacking. In his statement, the defendant himself admitted that the intention was to hijack the *Petra I* and take it to Haradheere,<sup>64</sup> Somalia.

With regard to the hijacking of the *Pompei*, the defendant denied any involvement. None of the DNA samples taken upon arrival of the vessel in Oman could be linked to him; this, however, was not considered as surprising, as the vessel was quite large and some parts of it had already been cleaned by the crew before it arrived in Oman. The recognition of the defendant by the crew members was deemed crucial. Initially, he was recognised by four of them, based on photographs sent by email. Three confrontations with crew members were organised later and the defendant was recognised at two of these. One of the *Pompei* crew members, who had initially identified him on the photographs, claimed that it was not the same person when the confrontation took place.

The investigation into the telephone traffic revealed contact between the defendant and one of the known leaders of various pirate groups in Somalia. The results of the investigation eventually led to the identification of the two possible main organisers of the hijacking of the *Pompei*.

### *Sentencing*

The Court of First Instance ruled that all charges had been proven. At the sentencing stage, it took into account the role of the defendant in the incidents, his young age and the lack of a criminal record in Belgium. On the one hand, the Court of First Instance considered it evident that the defendant was not

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<sup>63</sup> International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 19 December 1966 and in force since 21 April 1983.

<sup>64</sup> According to open sources, the town has become notorious in recent times as hosting a cooperative of investors to fund offshore hijacking. For further information, please see *Somali sea gangs lure investors at pirate lair*, Reuters, 1 December 2009.

one of the organisers of the acts of piracy against the *Pompei* and *Petra I*. On the other hand, he could not merely be considered a victim of the economic and political situation in Somalia and the limited prospects that he might have there, as he made the deliberate choice to participate in acts of piracy and because he was very aggressive, which proved his dangerous mindset and lack of morality. The defendant was sentenced to ten years in prison and received also a pecuniary penalty.

Appeals against the decision of the Court of First Instance were submitted by the defendant, the prosecution and the civil parties. The analysis of the decision of the Court of Appeal follows below.

**B. Procedure: Appeal, Court of Appeal in Brussels (*Hof van beroep te Brussel*, Case No 2011FC5), Belgium**

**Date of decision: 15 February 2012**

*Fair trial and procedural issues*

The Court of Appeal recognised the territorial competence of the first instance judge. One of the charges was re-defined, yet the Court of Appeal considered that the facts described under the re-defined charge were the same as those under the initial indictment. The defendant was notified of the amendment and was able to adjust his defence accordingly.

Following the interception of the skiff and the arrest of the defendant, the federal prosecutor had initially decided not to prosecute the defendant for the acts committed on that day. It was only after the defendant's photograph was recognised by the *Pompei's* crew members as one of those who committed the acts under charges A and B that the investigating judge tasked with the investigation of those acts communicated to the captain of the Belgian frigate that the defendant should be detained within the framework of the investigation. A remote hearing took place the next day that was followed by the issuing of a preliminary arrest warrant. As mentioned above, upon the defendant's arrival in Belgium, the investigating judge issued a classic arrest warrant. The Court of Appeal ruled that there were no irregularities in the process of deprivation of liberty and preliminary detention.

The Court of Appeal stated that the first instance judge rightly concluded that there were a number of guarantees for the defendant at the deprivation of liberty and during the remote hearing. The fact that the defendant was not accompanied by defence counsel during the remote hearing and during some later hearings would not as such justify the inadmissibility of the criminal procedure.

The Court of Appeal did not consider it plausible that during those hearings unauthorised pressure was put on the defendant or that his vulnerable position was abused. The absence of defence counsel during the initial hearings was remediated by the decision not to take into consideration the statements made by the defendant in the absence of such counsel, as well as all investigation activities based on these statements, and the results and evidence thereof. In this manner, the rights of the defendant were safeguarded and the fair nature of the trial was considered to have been completely guaranteed.

*Sentencing*

The Court of Appeal upheld the conviction of the defendant and agreed with the findings of the Court of First Instance.

#### 4.1.2. Belgium - *Pompei*

**A. Procedure:** 1<sup>st</sup> Instance, Court of First Instance in Bruges (*Rechtbank van eerste aanleg te Brugge*, Case No FD.10.98.84/09), Belgium

**Date of decision:** 10 December 2012

##### *Introduction*

On 26 March 2011, on the high seas approximately 650 nautical miles (1 200 km) off the coast of Somalia, a Norwegian vessel intercepted six persons aboard a skiff, on which bullet impact marks and ammunition were found. Arrested for piracy, the suspects were taken to Mahe, Seychelles, where fingerprints were taken and compared to those stored on databases. The fingerprints of one of the six persons matched fingerprints found on the *Pompei*. He was recognised in photographs by different crew members of the *Pompei*.

On 10 May 2011, the Investigating Judge of Bruges issued an international arrest warrant, and the suspect was extradited to Belgium where a classic arrest warrant was issued on 23 May 2012.<sup>65</sup>

##### *The charges*

The defendant was charged with the following offences:

- A) Violation of Articles 66 and 347bis §§1 and 2 of the Criminal Code: hostage taking, meaning the arrest, detention or abduction of several persons (the captain and the crew of the *Pompei*, sailing under the Belgian flag) as a guarantee for the execution of an order or a condition, including the preparation or facilitation of a crime or misdemeanour, the enabling of the escape of perpetrators or collaborators of a crime or misdemeanour, the ensuring of their release or the abolishment of their punishment.
- B) Violation of Article 33 of the Law of 5 June 1928: taking control of the *Pompei* using deceit, violence or threats against the captain.

It has to be emphasized that the accusations refer to common criminal law, as the Law of 30 December 2009 on the Fight against Maritime Piracy was not yet in force at the moment the acts were committed.

The Court of First Instance established the Belgian jurisdiction over the facts committed on the high seas, as the *Pompei* was a merchant ship to which the Law of 5 June 1928 was applicable. As the ship had its port of call in Zeebrugge, the Court of First Instance of Bruges was competent.

##### *Trial*

The defendant claimed he was a minor at the moment of the acts, which was not contrary to the expertise demonstrated by the bone test that established that at the moment of the test in May 2012 he was approximately 19 years old. The Court of First Instance, when considering he was 18 or more in April 2009, based this claim on the interrogation achieved through the international request for

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<sup>65</sup> For more information regarding the absence of an extradition treaty between Belgium and Seychelles, please see 3.5.3. *Mutual Legal Assistance between States*.

judicial assistance at Seychelles, where a friend of the suspect declared he knew him since 1996, when they were 14 years old.

The defendant further claimed that he had nothing to do with the facts with which he was charged.

The Court of First Instance rejected his arguments, and condemned him, on the following grounds:

- Three members of the crew recognised him. Within this specific context, the Court of First Instance added that in the long period of time the crew was taken hostage, the victims had the time to become acquainted with their abductors (one of the crew members had actually treated and taken care of him) and could recognise him beyond any possible doubt.
- The fingerprints of the suspect were found on a DVD box aboard the *Pompei*.
- The witness statement at Seychelles declared that the defendant had been seen among the pirates aboard the *Pompei*, although it was the first occasion he had committed acts of piracy.

### Sentencing

The court passed a sentence of imprisonment of nine years.

#### **B. Procedure:** Appeal, Court of Appeal in Ghent (*Hof van beroep te Gent*), Belgium

**Date of decision:** 7 May 2013

The defendant lodged an appeal against this sentence, but one month later retracted it. The Court of Appeal in Ghent thus considered the grounds for the appeal by the Federal Public Prosecutor following the appeal of the accused. The Court of Appeal confirmed each and every point of the decision taken by the first judge in his motivation as well as concerning the punishment. The sentence of imprisonment of nine years was thus confirmed.

### 4.1.3. Germany - *MV Taipan*

**Procedure:** 1<sup>st</sup> Instance, District Court of Hamburg (*Landgericht Hamburg*, Case No 603 KLS 17/10, 7402 Js 30/10), Germany

**Date of decision:** 19 October 2012

#### *Introduction*

On 19 October 2012, the District Court of Hamburg rendered a judgment in a case involving ten Somali pirates who in 2010 had captured a container ship - *MV Taipan* - off the coast of Somalia. On 5 April 2010, the *MV Taipan* and its crew of 15 were travelling from Haifa to Mombasa, about 550 nautical miles east of the Horn of Africa, when the attack occurred. The accused attacked the ship with two small motor vessels carrying five men each. Armed with assault rifles, pistols, and anti-tank weapons, the accused opened fire against the bridge of the ship. There was no evident intent to kill the crew but the shooting merely served the purpose of bringing the ship under the control of the pirates. According to their common plan, the objective was to capture the ship and take the crew hostage in order to extort a ransom for the release of both the ship and the crew. However, the crew hid in a specially designed safe room before the accused entered the ship. From this safe room the crew later cut the power supply when they noted a change of course towards the Somali coast. About four hours after the capture, the *MV Taipan* was freed by the Dutch naval frigate *Tromp*. The accused were arrested and brought to the Netherlands, and from there extradited to Germany on 10 June 2010.<sup>66</sup> The accused were convicted of assault on maritime traffic and kidnapping for the purpose of extortion. The sentences ranged between six and seven years' imprisonment for seven of the defendants and two years under juvenile law for each of the three youngest pirates. As nine of the condemned persons lodged an appeal on points of law but subsequently withdrew their respective motions, the judgment of the District Court of Hamburg became legally binding.

#### *Jurisdiction*

The District Court of Hamburg established its jurisdiction in three ways. Firstly, it held that the German Criminal Code could be applied according to the passive personality principle enshrined in Article 7(1), which stipulates that German law can be applied to offences committed abroad against its nationals, especially if the place of offence is not subject to the jurisdiction of any State, as was the case here for an offence on the high seas. Two of the crew members were German nationals.

Secondly, the German Criminal Code could be applied according to the flag-State principle in Article 4, independently of the law on the place of offence, when committed on board a ship or aircraft that is legally entitled to fly the German flag at the time of the offence.

Thirdly, the German Criminal Code was applicable to assault on maritime or air traffic (Article 316c) for offences committed abroad against internationally protected legal interests (Article 6(3)). This is done irrespective of the law of the place of offence, according to the principle of universal jurisdiction. The District Court of Hamburg continued by outlining the public international law obligations according to the UNCLOS and the SUA Convention. It noted that historically, piracy was subject to universal jurisdiction and its prosecution according to the above-mentioned conventions could be seen as customary international law. It also highlighted that the principle of universal jurisdiction

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<sup>66</sup> For details, please see 4.2.5. *The Netherlands – MV Taipan (surrender)*.

could particularly be exercised when the place of offence could be considered a “failed State”, such as Somalia, which joined the UNCLOS at a previous time of effective statehood. Moreover, due to the other connections with Germany (victims, flag), the application of the principle of universal jurisdiction was by no means random.

In summary, German criminal law was applied on the basis of a combination of the principle of universal jurisdiction, the passive personality principle, as there were strong links to Germany, and the flag-State principle. Furthermore, the jurisdiction of the District Court of Hamburg was based on the fact that Hamburg was the home port of the *MV Taipan*.

### Procedural issues

#### a) No procedural barriers to prosecution

A number of issues related to the admissibility of the case were considered by the District Court of Hamburg. Firstly, it established that, despite some investigative difficulties that were common for offences committed abroad, these difficulties did not form a procedural barrier to prosecute in this case. Secondly, no procedural barrier to prosecution could be found in relation to the circumstances of the arrest. The District Court of Hamburg referred to Article 105 of the UNCLOS as the legal basis. Thirdly, no procedural barrier relating to the obligation to bring arrested persons promptly before a judge could be sustained, having regard to the European Convention on Human Rights (“ECHR”), German Basic Law, and Dutch extradition as well as criminal law. For this purpose, the judgment went into greater detail, establishing that there had been no substantial violation of Article 5(3) of the ECHR, which stipulates that everyone arrested or detained shall be brought promptly before a judge or other officer authorised by law. The District Court of Hamburg concluded that at the point of arrest, German Basic Law (Article 104) could not be applied, as the arrest was carried out by the Dutch Navy and prosecution had not yet been initiated in Germany.

On 12 April 2010, the Public Prosecutor’s Office of Hamburg issued EAWs as well as extradition requests for the suspects. Consequently, on 14 and 15 April, the accused were formally arrested in the Netherlands for the purpose of extradition. Therefore, from that point onwards the obligation to promptly bring the arrested before a judge needs to be seen in light of Article 5(1)(f) of the ECHR concerning the lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition. At this point, Dutch law concerning extradition was applicable and in the view of the District Court of Hamburg, no violations occurred here.

For the period from the arrest (5 April 2010) on the high seas to the arrest for the purpose of extradition (14/15 April 2010), nine to ten days passed, during which the Dutch Criminal Code was applicable. Insofar as a violation of the Dutch Criminal Code may have occurred during this period, it would nevertheless not have constituted a barrier for the German authorities to prosecute, as they would not have been in a position to determine whether a grave breach of legal principles that would pose an impediment to further prosecution had taken place. The District Court of Hamburg demonstrated this with reference to legal literature, according to which each case needed to be evaluated individually, subject to the seriousness of a potential breach. In general, the District Court of Hamburg made reference to case law of the ECtHR, which underlined the need for bringing a suspect “promptly” and not “immediately” before a judge. According to ECtHR case law, periods of more than four days are only acceptable in very exceptional circumstances and a shorter period is desirable. However, in the examples cited for arrest on the high seas, periods of 16 days (*Rigopoulos v. Spain*,



1999) and 13 days (*Medvedyev and others v. France, 2010*) were held to be in conformity with the ECHR.

The District Court of Hamburg remarked that, due to the circumstances of this case (arrest on the high seas by the naval forces of a foreign State), no quicker alternative would have realistically been feasible. Accordingly, no violation of the obligation to bring arrested persons promptly before a judge had occurred.

Moreover, the fact that the accused had been without a lawyer until arrival in the Netherlands could not be seen as a procedural obstacle; it may merely have had an impact on how the statements given on board the Dutch naval frigate could be used.

#### b) Evidence

The District Court of Hamburg discussed various issues relating to evidence, including the credibility of the statements of defendants and witnesses, expert opinions on weapons and on the *modus operandi* of Somali pirates. Highlighted below is the discussion around the possible contribution to the offence by individual defendants.

The fact that all of the accused were encountered on the *MV Taipan* by the Dutch Navy established that they were co-perpetrators of the offence, and this was supported by the witness statements of the Dutch officers and the pictures shown to the District Court of Hamburg. The examination of confiscated mobile telephones and SIM cards proved their common use among the perpetrators, which also defeated claims of forceful recruitment and proved that the pirates had contributed towards a common plan.

The manner of the attack could be established through the witness statements of three crew members who were the last to flee into the safe room, the damage on the *MV Taipan*, the video taken by a German Orion military aircraft, as well as on the basis of the statements of the two German investigators who inspected the ship and the weapons specialist of the German Federal Criminal Agency. However, it was not possible to establish the individual contribution of any of the defendants. This was also due to the fact that the weapons handed over to the German Federal Criminal Police in June 2010 had presumably not been stored adequately. Consequently, the impact of saltwater and their rusty condition did not allow for DNA or fingerprint analysis.

Moreover, the possible firing of one of the anti-tank grenades at the bridge of the *MV Taipan* and its possible entry point could not be determined by the District Court of Hamburg due to the fact that the authorities in Dubai undertook the forensic analysis of the *MV Taipan* and the German investigators were merely allowed to take photographs.

#### c) Age assessment

The District Court of Hamburg conducted age assessments for five of the ten defendants. Two were determined to be at least 21 and 25 years, but most probably even older. These defendants did not dispute the results. Two of the remaining three accused were concluded to be adolescents in the sense of Article 105(1(1)) of the German Youth Courts Law. The third defendant, having been given the benefit of the doubt, was considered to be 17 years of age at the time of the offence.



The procedure for age assessment can be outlined as follows, whereas not all steps may need to be applied to each accused, depending on their claimed age. For example, the most thorough form of assessment was applied to defendant X, who claimed to be 13 years of age and therefore not criminally responsible. The different steps taken in his case are outlined in the following paragraphs.

The first step is a medical examination undertaken by a paediatric radiology expert. In this instance, X-rays of the left hand are taken and the growth plates as well as the bone structure are considered. A comparison to sample X-rays of genetically universal maturity stages is made with the International Atlas of Greulich and Pyle. This allows for an age assessment with a probability of 95% and a tolerance margin of +/- two years. According to scientific opinion, no ethnic distinctions can be made and low socio-economic status would rather lead to a developmental delay, and therefore be advantageous to the defendant. According to this type of examination, defendant X was determined to be 19 +/- two years, and so certainly criminally responsible but possibly underage at the time of the offence.

The second step to further define age consists of two examinations. On the one hand, the development of the wisdom teeth gives insight into the age range between 18 to 21 years. On the other hand, the ossification of the collar bone allows an indication of age above 21 years.

Regarding the wisdom teeth radiology, the development of the roots of the teeth is decisive and not their break-through. The probability is again 95%, however, with a tolerance of +/- four years. Since minor ethnic differences are possible, another year would be deducted in this case. As a comparison, the internationally recognised classifications of Demirjian are used. According to this examination, defendant X was 23 +/- four years minus another safety year, so at least 18 years at the time of the offence.

Concerning the collar bone, its ossification and the closure of the growth plates are decisive. The comparison also takes place having regard to universal maturity stages. According to this examination, defendant X was 22 +/- four years, and therefore certainly 18 years of age at the time of the offence.

In a third step, the two expert reports of the hand radiology, on the one hand, and the radiology of wisdom teeth and the collar bone on the other hand, are evaluated by a forensic legal medicine expert who draws a final conclusion to be presented to the District Court of Hamburg.

In general terms, the District Court of Hamburg was convinced that low socio-economic standards would rather lead to a developmental delay and therefore be advantageous to the defendant.

For defendant X, the results of the hand, wisdom teeth and collar bone examinations led to the conclusion that he had certainly been at least 18 years of age at the time of the offence. Moreover, no indications for rare hormonal diseases that could speed up the development could be found in a previous general medical exam. The District Court of Hamburg also noted that the defendant did not grow in the two-year period from extradition to the last measurement in the youth detention facility. In this case, as well as in the cases of other accused, the documents provided by the defendant were not credible and could therefore not be relied upon by the District Court of Hamburg for an accurate age determination.

## Sentencing

The ten defendants were convicted of two counts, namely attack on civil maritime traffic according to Article 316c(1) and abduction for the purpose of blackmail according to Article 239a(1) of the German Criminal Code. The German Criminal Code foresees a penalty of five to fifteen years' imprisonment for these two offences. The seven adults were each sentenced to imprisonment of between six and seven

years and the three young adults/adolescents to two years each. In its motivation for the sentences, the District Court of Hamburg took a series of mitigating and aggravating factors into consideration for all defendants, but found that these balanced each other for the final outcome of the case.

In its findings on mitigating factors, the District Court of Hamburg pointed out that the difficult situation in Somalia had an impact on norm identification regarding justice and injustice by the accused. The alleged justifications for piracy, such as illegal fishery and toxic waste dumping in Somali waters by foreign companies, are widespread and have an impact on how piracy is perceived, although the actual occurrence of such practices could not be confirmed by experts in this case. The considerable length of the trial, including the environment of foreign (justice) culture and prolonged detention, was also viewed as a mitigating factor. Another mitigating factor was the special sensitiveness of the defendants towards detention. This meant that despite higher standards in certain respects (e.g. safety, food security, health care), their daily life was influenced by their worries and fears for (often dependent) family members they left behind and with whom frequent contact was difficult to maintain. Finally, the fact that all defendants had no criminal record, as far as the District Court of Hamburg was able to assess this, was considered to be a mitigating factor.

Conversely, the fact that all defendants had voluntarily joined the piracy organisation was considered an aggravating factor. This particular piracy organisation was only one of many that significantly endanger maritime civil traffic in the Indian Ocean in a long-term organised, logistically demanding, highly profitable, and extremely dangerous manner. Another aggravating circumstance was the fact that they brought the three crew members, who remained on the bridge the longest, into life-threatening danger. Moreover, the defendants were responsible for the severe damage that occurred on the ship as a result of their attack on the ship and the forced intervention of the Dutch Navy. The District Court of Hamburg found that, in addition to having committed assault on maritime traffic, the concurrent offence of kidnapping a substantial number of victims (15 crew members) was to be considered an aggravating factor. The fact that the kidnapping remained at the stage of an attempt was seen as a mitigating circumstance. Nevertheless, the plan foresaw the abduction of these victims for an unforeseeable time, for the purpose of extorting ransom payments.

For each defendant the District Court of Hamburg considered whether they confessed their participation in the offence early on and whether they belonged to ruling or suppressed clans in Somalia and took these factors into account in its findings.

Three of the ten defendants were sentenced to youth penalties (Article 17(2) of the Youth Courts Law). For one of them, the application of the Youth Courts Law stemmed from the fact that he was considered to be 17 years at the time of the offence. The other two were tried under Article 105(1)(1) of the Youth Courts Law, which provides for the application of juvenile criminal law to young adults where a young adult engaged in misconduct punishable under the provisions of general law and if the overall assessment of the perpetrator's personality, taking account of his living environment, demonstrated that at the time of the act he was still equivalent to a juvenile in terms of his moral and intellectual development. Juvenile law allows for imprisonment of between six months and ten years.

In addition to the mitigating and aggravating factors mentioned above, which applied to all defendants, the District Court of Hamburg outlined its special reasoning of the youth penalties separately. It took into consideration the positive development demonstrated by the three defendants during and after detention. Nevertheless, it considered the punishment necessary for pedagogic purposes. That they experience better living conditions now in Germany was not to be seen as a reward for their offences. As the accused had already spent two years in detention, pending extradition and during the trial, they were released after the judgment. The three young adults now live together in Germany, as

deportations to Somalia are not carried out at the moment. They are learning the language and hope to be able to work in Germany in the future.

#### 4.1.4. Italy - *Montecristo*

**Procedure:** 1<sup>st</sup> Instance, Corte di Assise of Rome (48819/11 R.G.N.R. (23609/11 R.G. G.I.P.; 4/12 Reg. Gen.; 23/12 R. inserz. Senten.)), Italy.

**Date of decision:** 27 November 2012 (release of the findings on 23 February 2013)

##### *Introduction*

On 27 November 2012 the First Instance Court in Rome, *Corte di Assise*, rendered a judgment in the case concerning the attack on the Italian vessel *Montecristo* in the Indian Ocean. It was the first time that pirates responsible for assaulting an Italian ship cruising in the Gulf of Aden and the Indian Ocean were brought before an Italian court. A total of twelve pirates were prosecuted. The leader of the pirates was sentenced to a nineteen-year imprisonment term, while seven other pirates were each sentenced to sixteen years in prison. Four of the accused had not reached the age of majority at the time of the crimes. The cases against the minors were heard by a separate court, which sentenced each of them to nine years in prison. For the judgment in the case against the minors, please see 4.2.3. *Italy – Montecristo (juveniles)*.

##### *Facts*

The pirates, all Somali nationals, were part of a very organised and structured group. During the attack on the *Montecristo*, the group applied more or less the same *modus operandi* as was always used to capture a ship. However, on this occasion the crew and the military forces operating under the international missions were able to prevent the capture of the *Montecristo*.

On 10 October 2011 the *Montecristo* was leaving the Gulf of Aden and was entering the Indian Ocean when the crew noticed a suspicious fishing vessel that later turned out to be the mother ship of the pirates. After the initial confirmation that an attack was ongoing, the crew of the *Montecristo* began the emergency procedure, which consisted of the following steps:

- call the captain on the bridge,
- begin manoeuvres to try to evade the pursuers,
- sound the general alarm and make contact with the military forces operating in the area.

The crew were called and brought to the protected area where they were able to maintain control of the ship's engines and rudder even while the pirates were on board the ship.

After two days, two ships from the international force operating in the Indian Ocean managed to rescue the *Montecristo* and its crew. The action was conducted by British marines in cooperation with the crew of a US naval ship. The Italian ship *Andrea Doria* arrived after the action to arrest the pirates and proceed with the first steps of the judicial process.

##### *Jurisdiction*

The First Instance Court in Rome based its jurisdiction on the UNCLOS. In addition, on the basis of Article 5 of Law No. 12/2009, the jurisdiction for all acts of piracy included in Article 1135 of the Navigation Code lies with the First Instance Court in Rome. Article 1 of Law Decree No. 61 of 15 June

2009 limits Italian jurisdiction to acts of piracy committed against Italy, Italian nationals or Italian vessels cruising in the area where international operations are ongoing. In this case, the First Instance Court in Rome had jurisdiction, as the pirates attacked an Italian vessel and its crew (mainly composed of Italian nationals) and as they were arrested by an Italian naval ship (*Andrea Doria*) operating within the framework of an international mission.

### Indictment

The indictment against the accused included the following charges and provisions:

- Piracy (Article 1135, paragraphs 1 and 2 of the Navigation Code);
- Kidnapping for terrorist purposes (Article 289bis of the Penal Code);
- Unlawful possession of war weapons (Law 02/10/1967 n. 895); Urgent measures for the protection of democratic order and public safety (D.L. 15/12/1979 n. 625).
- Concurrence of offences (Article 81 of the Penal Code); Inflicting damage (Article 635, paragraphs 1 and 2 of the Penal Code); Urgent measures for the protection of democratic order and public safety (D.L. 15/12/1979 n. 625).

Each crime was allegedly committed under aggravating circumstances (Articles 110, 112 and with regard to the crime of piracy, Article 61 of the Penal Code).

### Legal findings

#### a) Piracy

All the members of the group that attacked the *Montecristo* were caught in the act and were found guilty in relation to the crime of piracy.

#### b) Kidnapping for terrorism purposes

An interesting part of the judgment is the one relating to the crime of kidnapping. The charge was brought on the basis of Article 289bis which, in fact, contains the aggravating circumstance of terrorism for the crime of kidnapping.

The First Instance Court in Rome began its motivation by underlining the different nature of international terrorism compared to national terrorism. It is believed that international terrorism does not have the political purpose that is typical of domestic terrorism.

Firstly, the EU Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA) (the "Decision"),<sup>67</sup> while not included in a national regulation, is directly applicable in Italy, as it was adopted within the third pillar of the EU. Article 1 of the Decision clearly establishes that acts such as kidnapping or hostage taking, seizure of aircraft, ships or other means of public or goods transport, manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons, can be considered as terrorist offences. These acts must be committed for the purpose of

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<sup>67</sup> Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), Official Journal of the European Communities, L164/3.

seriously intimidating a population, unduly compelling a government or an international organisation to do or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

The Decision, together with the provisions included in Article 170*bis and sexies* of the Italian Penal Code, is the legal framework on which the First Instance Court in Rome based its decision. In the opinion of the First Instance Court in Rome, piracy can be included in the definition of international terrorism because it is likely to affect the security of the means of transportation and determine decisions that the international community would otherwise not have taken. To support its findings, the First Instance Court in Rome affirmed that following the attack on the *Montecristo*, armed personnel were deployed on ships transiting the area affected by piracy. Furthermore, the crime of piracy developed a sense of fear in the population, which forced maritime companies to give preference to the circumnavigation of Africa rather than cruising off the Somali coast.

All factors considered, the First Instance Court in Rome concluded that the objective element of the crime included in Article 289*bis* of the Italian Penal Code was clearly proven, but it had some doubt about the subjective element. In this regard, the First Instance Court in Rome argued that it was necessary to prove that the suspects had acted in order to intimidate the population, or compel public authorities or an international organisation to do or refrain from doing something. In the opinion of the First Instance Court in Rome, this aspect was not fully proven. It believed, in fact, that the above-mentioned purpose was not taken into consideration by the pirates, who lived in a disadvantaged situation, in a country without a stable government and where piracy is most likely the only means of subsistence.

### Sentencing

For all these reasons, the First Instance Court in Rome decided to convict the defendants for the charges of assault, unlawful possession of war weapons, etc., excluding the aggravating circumstance of terrorism. The leader of the pirates was sentenced to 19 years' imprisonment and all the remaining defendants to 16 years' imprisonment each.

#### 4.1.5. The Netherlands - *MS Samanyolu (Cygnus)*

**Procedure:** 1<sup>st</sup> Instance, District Court of Rotterdam (*Rechtbank Rotterdam*, Case No LJN: BM8116), the Netherlands

**Date of decision:** 17 June 2010

##### *Introduction*

On 17 June 2010, the District Court of Rotterdam rendered a judgment in a case concerning acts of piracy in the Gulf of Aden. On 2 January 2008, the defendant, together with other pirates, attacked a Dutch vessel, the *MS Samanyolu*, in an attempt to hold the ship and its crew hostage. The group, armed and equipped with three automatic rifles, a rocket launcher and a ladder, opened fire on the ship's crew. Fortunately for the crew of the Dutch ship, the Danish naval ship the *Absalon* was able to intervene by intercepting and then detaining the suspects. The judgment summarised below concerns only one of the accused. However, it is also representative of the judgments against the other four defendants mentioned in the case. The defendant was found guilty of committing piracy in the Gulf of Aden as a crew member, in association with others, for which he received a prison sentence of five years.

##### *Jurisdiction*

Article 4 of the Dutch Criminal Code provides that the Netherlands has vested/universal jurisdiction in criminal proceedings involving acts of piracy. The UNCLOS and the SUA Convention both provide an added legal basis for jurisdiction in this particular case.

##### *Admissibility of the case*

The defence argued that the principle of equality had been violated and that the case was arbitrary, because in previous piracy cases the suspected pirates were simply released instead of being prosecuted. The District Court of Rotterdam acknowledged that incidents like these had occurred in the past. However, it also recognised that there had been other prior/ongoing cases where pirates operating in the Gulf of Aden had been prosecuted for their crimes. On the basis of this finding, the District Court of Rotterdam dismissed the argument on arbitrariness.

##### *Procedural issues*

The defence argued that the rights of the accused under the ECHR had been violated; more specifically, violations of Articles 5 (right to liberty and security) and 6 (right to a fair trial) had allegedly occurred. In this regard, the defence claimed that there was no legal basis for the detention onboard the Danish naval vessel, the defendant was not brought before a judge within a reasonable amount of time and the defendant did not have access to legal aid for an extended period of time. Consequently, the defence felt that the prosecutor should be barred from prosecuting the defendant in this case and/or the evidence should be dismissed and/or not taken into account when determining the length of the sentence.



The alleged violation of Article 5 of the ECHR concerned the legal basis for the suspect's detention between the time of the arrest on 2 January 2009 by the Danish Navy and the suspect's subsequent transfer to authorities in the Netherlands on 10 February 2009 for violation of Article 381 of the Dutch Penal Code (piracy). The District Court of Rotterdam deemed the detention lawful on the basis of Articles 100<sup>68</sup> and 105<sup>69</sup> of the UNCLOS and Articles 3<sup>70</sup> and 7<sup>71</sup> of the SUA Convention, to which both the Netherlands and Denmark are parties. It concluded that no violation of Article 5 of the ECHR took place regarding the suspect's detention and transfer to Dutch custody.

The defence also alleged that there had been a violation of Article 5, paragraph 3 of the ECHR concerning the right to be promptly brought before a judge. The suspect was arrested by the Danish authorities on 2 January 2009 and was brought before a Dutch investigating judge on 11 February 2009. The prosecutor did not contest this claim, and therefore the District Court of Rotterdam ruled that the time span of 40 days between arrest and appearance before a judge was indeed not prompt. However, the District Court of Rotterdam found that a clear commitment by both the Dutch and the Danish authorities in bringing the suspect before a judge in a speedy manner had been established. Furthermore, as the suspect was brought before a judge within one day of his transfer into Dutch custody, under the circumstances, the violation of Article 5, paragraph 3 of the ECHR that did occur, did not serve as a justification for barring prosecution in this case.

## Evidence

According to the defence, the ECHR stipulates that a suspect has the right to have a lawyer present during police interviews. Consequently, any statements made without the presence of a lawyer must be excluded from being used as evidence. As the suspect did not receive any legal aid in the 40-day period between his arrest and his appearance before the investigating judge, all statements made prior to this hearing should have been excluded as evidence.

The District Court of Rotterdam ruled that, while the suspect had the right to consult a lawyer prior to the first police interview, he did not have the right to have a lawyer present while the police conducted their interview. As the suspect did not have the opportunity to consult a lawyer prior to his first police interview, a breach of Article 359a of the Dutch Code of Criminal Procedure occurred. Subsequently, statements made by the suspect prior to the hearing of the investigating judge were not to be used as evidence during the trial.

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<sup>68</sup> Article 100 of the UNCLOS: "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."

<sup>69</sup> "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship ... or a ship ... taken by pirates and/or hijackers and under their control, and arrest the persons on board and seize the property on board. The courts of the State that carried out the seizure may decide upon the penalties to be imposed..."

<sup>70</sup> "Any person commits an offence if that person unlawfully and intentionally: (a) Seizes or exercises control over a ship by force or threat thereof or any form of intimidation; ... any person also commits an offence if that person ... attempts to commit an offence set forth in the first paragraph."

<sup>71</sup> "Upon being satisfied that the circumstances so warrant, any State Party in the territory of which the offender or the alleged offender is present shall, in accordance with its law, take him into custody or take any other measures to ensure his presence for such time as is necessary to enable any criminal or extradition proceedings to be instituted ... When a State Party, pursuant to this article, has taken a person into custody, it shall immediately notify the States which have established jurisdiction in accordance with Article 6, first paragraph, and whenever it finds this necessary any other States that may have an interest, of the fact that such person has been taken into custody and of the circumstances that warrant his detention."



## Sentencing

Given the gravity of the crime, the public prosecutor had originally sought a prison sentence of seven years. The imposed sentence was based on the seriousness of the offence, the circumstances in which the offence was committed and the personal circumstances of the defendant. As the judges articulated during the sentencing hearing, the increase in piracy in the Gulf of Aden had become a serious threat to the internationally acknowledged right to free passage in international waters. The decrease in the safety of ships sailing this route has led to serious economic consequences that could be felt all over the world. In addition, piracy has hindered the humanitarian situation in Somalia by making it increasingly difficult to deliver the much-needed supplies provided by international relief organisations. Piracy is therefore a serious offence and should be dealt with firmly. Although the defendant and his co-defendants were operating purely with their own financial gain in mind when carrying out the attack, the current economic and humanitarian situation in Somalia should also be taken into account when determining the severity of the sentence. However, the District Court of Rotterdam concluded that the personal circumstances of defendants could not serve to justify the commission of punishable offences. The fact that a violation of Article 5, paragraph 3 of the ECHR had occurred did not affect the length of the sentence.

In his summons the defendant had originally been charged with participating in piracy as a leader. However, as there was no legal and convincing evidence of this charge, the public prosecutor pleaded for an acquittal of the defendant of this charge. Instead, the District Court of Rotterdam convicted him of participating in piracy as a crew member. Had the defendant been found guilty of participating in piracy as a leader, he would have faced a maximum prison sentence of 12 years according to Article 385 of the Dutch Criminal Code. Conversely, a conviction for participating in piracy as a crew member warrants a maximum prison sentence of nine years. The prosecutor was unsuccessful in achieving the seven year sentence that he sought with the District Court of Rotterdam deciding to hand out a sentence of five years with a deduction of the time served in pre-trial detention.

#### 4.1.6. The Netherlands - *Choizil*

##### *Preliminary remarks*

On 12 August 2011, the District Court of Rotterdam rendered a judgment in a case involving five Somali pirates. The case mainly concerned an attack against the *Choizil*, a sailing ship. The accused and their co-pirates threatened the crew of the sailing ship by pointing machine guns and rocket launchers at them. The pirates boarded the ship and took possession of it. During the attack brute force was used. The pirates illegally restrained and kidnapped part of the crew. Ultimately, they proceeded to gross extortion. After some time, the defendants, together with other persons, intended to hijack another ship. The accused and their co-pirates put out to sea in three ships and brought weapons and ladders with them. On that occasion, the event did not lead to acts of violence thanks to action taken by the Dutch Navy. The accused had also been present during the supplying of a Pirate Action Group (a "PAG"), which was spotted by the Dutch naval vessel *HMS Amsterdam*. Soon after, the defendants were arrested by the Dutch Navy.

The judgments in two cases concerning these events have been summarised below. In both cases the accused were convicted by the District Court of Rotterdam. The cases were appealed and on 20 December 2012, the Court of Appeal of The Hague rendered its judgment in the cases concerning the *Choizil*. The judgments summarised below are related to two of the accused, an alleged crew member of the pirate ships and the skipper of a pirate ship, whose roles in the criminal acts were different. The two cases are representative of all judgments in the *Choizil* case.

##### 4.1.6.1. The Netherlands - *Choizil* (crew member)

**A. Procedure:** 1<sup>st</sup> Instance, District Court of Rotterdam (*Rechtbank Rotterdam*, Case No LJN: BR 4930), the Netherlands

**Date of decision:** 12 August 2011

##### *Introduction*

Case No BR4930 concerned a suspect charged with involvement in piracy committed on more than one occasion. Violence was allegedly used on one occasion.

##### *Challenges concerning the summons, the indictment and the reliability of a witness*

The defendant challenged the validity of the summons for being insufficiently factual and for lacking clarity. This claim was rejected. The defendant successfully challenged other parts of the indictment, most importantly, his alleged participation in the crime of piracy as the skipper of the pirate ship. The District Court of Rotterdam also agreed with the defendant that the statements made by one of the co-accused were unreliable.

##### *Proof of piracy*

The defendant was charged with piracy on the basis of Article 381 of the Dutch Criminal Code. The provision on piracy distinguishes between those who committed the crime as skipper of a ship used

for acts of piracy and those who enlist on the ship as crew members. The present judgment concerns a suspect who enlisted as a crew member.

Article 381 requires that the accused knew that the vessel on which he served was intended to be or used to commit acts of violence on the high seas. The District Court of Rotterdam reasoned that there was no requirement to prove any personal involvement of the accused in the acts of violence. What was required was proof of the vessel being used to commit violence. In order for the provision to apply, the accused should have served on the vessel at the time of the act of violence being committed or he should at least have had knowledge of the acts of violence committed by his co-pirates.

The main evidence to establish that the vessel on which the defendant served had been used to commit acts of violence was the recognition of the accused by the captain of the attacked sailing ship, the *Choizil*. Having established the presence of the accused, the District Court of Rotterdam had to consider whether he was effectively involved in the attack which constituted the crime of piracy. The evidence demonstrated that no one left or came on board the ship between the attack on the *Choizil* and its arrival at one of the islands off the coast of Somalia. It followed from this that the accused was present during the attack. There was no evidence that the accused was involved in the events against his will, nor any indication that he was not aware of the destination of the ship that took him to the *Choizil*. In fact, his presence at the supplying of a PAG with fuel, ladders and weapons had also been established. Accordingly, the District Court of Rotterdam found that the accused must have known that he was serving on a ship intended for the commission of violent acts against other vessels, in accordance with the requirements of Article 381 of the Dutch Criminal Code.

The District Court of Rotterdam recognised that although the acts that were proven to have occurred did not constitute violence as such, the threat of violence could not be considered separately from the context in which it was expressed. The District Court of Rotterdam held as follows:

“The acts took place within the scope of the Defendant and/or his co-accused boarding the *Choizil*, after which they climbed over the railing of the small ship, physically overpowered the three passengers and took possession of the ship. In that context all the acts, viewed together, were carried out with such force, that the free passage of the vessel *Choizil* and the safety of the people and the property that were on board the ship, were endangered. Viewed in this way, the acts may be considered to be acts of violence within the meaning of Article 381 *Sr* [Dutch Criminal Code].”

According to the defendant, he was sick and weak during the attack and until his arrest. He further claimed that he did not notice what was going on. Considering the evidence on the course of events, the District Court of Rotterdam found this claim highly implausible. It was thus established that the accused was involved in the attack on the *Choizil* which took place at the end of October 2010. The District Court of Rotterdam also found that the defendant continued to serve on board a vessel with the intention to commit piracy after the attack on the *Choizil* and up until he was arrested. The District Court of Rotterdam considered the intended hijacking of other ships as an independent fact and, consequently, the accused was found guilty of committing piracy twice.

## Sentencing

As with the case concerning the *MS Samanyolu*, the District Court of Rotterdam confirmed the gravity of the crime of piracy and stressed the need for a prison sentence of considerable length. Whilst importance was also attached to the fact that two crew members of the *Choizil* were still missing at the time of the judgment and millions of dollars in ransom money had been demanded for them, this was not considered to be of fundamental importance to the determination of the sentence. The District

Court of Rotterdam also confirmed that the circumstances of the accused could not be a justification to commit acts of piracy.

Finally, the District Court of Rotterdam found that while the circumstances in previous cases were similar to the present case, there were some distinguishing factors.<sup>72</sup> The manner in which the violence was used, the organised way in which the acts were committed and the number of acts of piracy committed distinguished this case from previous ones in a negative sense. Having considered all the relevant aspects, the District Court of Rotterdam sentenced the defendant to seven years in prison.

**B. Procedure:** Appeal, Court of Appeal of The Hague (*Gerechtshof 's-Gravenhage*, Case No LJN: BY6938), the Netherlands. (First instance: Case No BR 4930)

**Date of decision:** 20 December 2012

### Introduction

The decision by the District Court of Rotterdam of 12 August 2011 concerning the crew member in the *Choizil* case was appealed by the defence.

### Jurisdiction

The Court of Appeal concluded *ex officio* that the Netherlands could exercise jurisdiction in cases of piracy committed both within and outside the territorial waters of Somalia. The basis for jurisdiction was Article 4 of the Dutch Criminal Code, which defines the applicability of Dutch law to crimes committed outside the Netherlands. In accordance with Article 94 of the Constitution, the Court of Appeal had to consider whether prosecution in this case would not violate rules of international law. It found that the provisions in the UNCLOS were limited to acts taking place on the high seas, and as such could not be applied to crimes committed in the territorial waters of Somalia. More far reaching powers to act were laid down in a number of UN SC Resolutions, more specifically resolutions 1816, 1838, 1846, 1851 and 1950. These resolutions provided for a possibility to exercise jurisdiction over crimes committed in the territorial waters of Somalia, but for a limited period of time. The power to exercise jurisdiction covered the period of the acts committed in the present case.

As support to Resolution 1816, the European Union Naval Coordination Cell ("EU NAVCO") was established. Of importance for the jurisdictional basis in piracy cases was that the tasks of this military coordination were to be exercised under Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast.<sup>73</sup> Article 12(1) of the Council Joint Action gives the following power to a Member State:

"On the basis of Somalia's acceptance of the exercise of jurisdiction by Member States or by third States, on the one hand, and Article 105 of the United Nations Convention on the Law of the Sea, on the other hand, persons having committed, or suspected of having committed, acts of piracy or armed robbery in

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<sup>72</sup> Several judgments rendered by the District Court of Rotterdam, 17 June 2010, including case No LJN BM8116, the *Cygnus* case.

<sup>73</sup> Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast, Official Journal of the European Union, L 301/33.

Somali territorial waters or on the high seas, who are arrested and detained, with a view to their prosecution, and property used to carry out such acts, shall be transferred:

- to the competent authorities of the flag Member State or of the third State participating in the operation, of the vessel which took them captive, or
- if this State cannot, or does not wish to, exercise its jurisdiction, to a Member States or any third State which wishes to exercise its jurisdiction over the aforementioned persons and property.”

With this additional document supporting the exercise of jurisdiction in Somali territorial waters or on the high seas, the Court of Appeal concluded that the Netherlands had jurisdiction in cases such as the present.

### *Procedural issues*

The largest part of the motivation concerned procedural challenges presented by the defendant. A number of these will be discussed below.

#### *a) Prosecutorial discretion*

The decision to prosecute the defendant was considered to have violated two principles of importance to Dutch Criminal Procedural Law: the principle of opportunity and the principle of equality. According to the first principle, a crime will be punished only if the prosecution of that specific crime is considered opportune. The defendant claimed that prosecution in this case was not opportune, as no Dutch interests were involved. Consequently, the prosecutor should have lost his right to pursue the case. The Court of Appeal dismissed this claim and pointed out that piracy constituted a serious threat to the right to free passage in international waters. The Netherlands, as a seafaring country, has an economic interest in undisturbed shipping. In addition, the Netherlands actively participates in international military missions in the Gulf of Aden and has an international obligation to act in these waters and also to take action required in the interest of criminal justice.

The defendant claimed that the principle of equality had been breached because in similar cases the suspects had been released without a trial. The Court of Appeal dismissed the claim and held that a comparison between the facts of the present case and other similar cases could not easily be made, as the case was only the second piracy prosecution in the Netherlands in years. As such, a consistent pattern in the decision to prosecute could not be identified. Together with the broad discretionary powers of the prosecutor, the decision to prosecute in this case could not be seen as arbitrary.

#### *b) Fair Trial*

The defendant alleged that his right to a fair trial had been breached; firstly, because some of the suspects who had been arrested had not been heard before they were released. According to the defendant, these suspects could possibly have provided exculpatory statements. The Court of Appeal dismissed the argument by stating that not necessarily every single witness of the defence had to be heard, as long as the equality of arms between the defence and the prosecution was guaranteed. In this case, the defendant had already been assisted by counsel before the release of the potential witnesses. He therefore had a possibility to request their hearing but did not do so.

Secondly, the defendant claimed that he had been heard without auditory or audiovisual recording of the hearings and that he had not been cautioned of his right to counsel before these hearings. The Court of Appeal found that the required recordings had not been made, but also that this did not significantly influence the right of the defendant to a fair trial. Before the substantive hearings the defendant had been in contact with his defence counsel. Although the defence counsel was not present during the hearings, he had been invited to attend and had decided not to be present. Despite the absence of the defence counsel the defendant provided a statement with the assistance of an interpreter. The Court of Appeal thus dismissed the claim regarding the breach of the right to a fair trial and held that considering the circumstances during the arrest and the initial hearings, any procedural errors made by the prosecutor were not such that they would negatively influence the interests of the defendant.

### *Proof of piracy*

The District Court of Rotterdam had found the defendant guilty of complicity in piracy, committed on several occasions. His involvement in the attack on the *Choizil* had been established. On appeal the defendant challenged the admissibility of the statements made by certain witnesses that served as important evidence of his involvement in this and other intended attacks. The Court of Appeal found the statements of the main witness concerning the *Choizil* attack unreliable and acquitted the defendant of these charges. For the same reason, the Court of Appeal also acquitted the defendant of two other charges, according to which the defendant served on ships that were used to commit acts of violence against other vessels.

However, the Court of Appeal found it established that the defendant was present during the supplying of a PAG with fuel, ladders and weapons. The defendant was part of a group of individuals who intended to hijack ships on the high seas. He willingly joined this group and knew that the vessel on which he served was intended to commit acts of violence. Accordingly, the defendant was convicted of piracy under Article 381, but was acquitted of all other charges.

### *Sentencing*

In its findings on the appropriate sentence, the Court of Appeal paid attention to the personal circumstances of the defendant and the difficult situation in Somalia in general, but stressed the serious character of the established facts. Against this background severe punishment was justified. A long prison sentence also reflects the international dimension of prosecution and sentencing in piracy cases and sends out a clear signal to potential perpetrators. Having acquitted him of several charges, the Court of Appeal reduced the seven-year imprisonment sentence rendered by the District Court of Rotterdam and sentenced the accused to four years and six months in prison.

#### 4.1.6.2. *The Netherlands - Choizil (skipper)*

**A. Procedure:** 1<sup>st</sup> Instance, District Court of Rotterdam (*Rechtbank Rotterdam*, Case No LJN: BR4931), the Netherlands

**Date of decision:** 12 August 2011

##### *Introduction*

Case No BR4931 concerned a suspect charged with the use of violence and piracy as the skipper of the pirate ship. The accused in the present case challenged the summons, the indictment and the reliability of a witness. As the reasoning of the District Court of Rotterdam was similar to the findings in the case concerning the crew member, reference is made to that judgment of the District Court of Rotterdam, as summarised above.

##### *Proof of piracy*

The District Court of Rotterdam found that the participation of the accused in the crime of piracy had been established. The evidence against the suspect included his own statement that he had intended to commit piracy and that he was the leader of the pirate skiff. There were other statements to corroborate the suspect's own statement.

The defence argued that while the accused had gone to sea for the purpose of committing piracy, he had been forced to do so. His acts were caused by duress resulting from serious threats against the accused and his direct family, to which he could not reasonably have been expected to offer resistance. The District Court of Rotterdam rejected this argument by stating that the accused was the leader of the pirate ship and actively assisted in organising supplies for the PAG of which he was the leader. This behaviour created the impression of the pirates using professional working methods. In addition, the accused had stated that he had participated in piracy on several occasions, that he knew how to handle automatic weapons and that he became involved in piracy in order to earn money. In light of these facts, the District Court of Rotterdam considered it less likely that the defendant and his family had been threatened. In addition, there was no other evidence to support the claims of duress.

The District Court of Rotterdam found that there was insufficient evidence to establish that the suspect had been involved in the use of violence. The statement of a co-accused to this effect had not been corroborated. The prosecutor also requested that the accused be acquitted on this charge.

##### *Sentencing*

The accused was convicted of piracy in his role as the skipper of the pirate ship. At the sentencing stage, the District Court of Rotterdam found that the defendant in this case played a more important role than that of the crew members who simply executed orders. The defendant was in a position to give the other pirates orders on behalf of the leaders ashore. In addition, the accused participated in a well-organised network of pirates. The District Court of Rotterdam also considered the convictions and sentencing in piracy cases dating from 2010. In contrast with those cases, the case at hand concerned organised piracy activities, of which the accused was the leader. The District Court of Rotterdam recognised that the personal circumstances of the accused and the general situation in Somalia were difficult. However, this could only marginally be taken into account when determining the appropriate punishment. Having acquitted the accused of the use of violence, the District Court of



Rotterdam did not find the demand of the prosecutor of ten years justified and handed down a sentence of five years and six months.

**B. Procedure:** Appeal, Court of Appeal of The Hague (*Gerechtshof 's-Gravenhage*, Case No LJN: BY6943), the Netherlands. (First instance: Case No BR 4931)

**Date of decision:** 20 December 2012

### *Introduction*

The decision by the District Court of Rotterdam of 12 August 2011 concerning the skipper in the *Choizil* case was appealed both by the defence and the prosecution. Several parts of the present appeal judgment contains content identical to the judgment of the Court of Appeal concerning the crew member, as summarised above. Accordingly, the jurisdiction of the District Court of Rotterdam and the description of the facts and circumstances will not be discussed in the following. Reference to the judgment concerning the crew member will also be made with regard to other issues.

### *Fair trial*

The defence claimed that the prosecution had violated the right of the accused to a fair trial, as laid down in Articles 5 and 6 of the ECHR. Firstly, the prosecution allegedly violated two central principles of Dutch Criminal Procedural Law: the principle of opportunity and the principle of equality, by deciding to prosecute the defendant. In this regard, reference can be made to the findings of the Court of Appeal of The Hague in the judgment against the crew member, as these were identical to the findings in the present case. Secondly, the accused claimed to have been deprived of his right to liberty under Article 5 when allegedly arrested without the procedure provided by law. The Court of Appeal, in the present case, referred to Article 105 of the UNCLOS and Articles 3 and 7 of the SUA Convention and considered that these provisions provided sufficient legal basis for the arrest of persons involved in acts of piracy. Thirdly, the principle of equality of arms between the defence and the prosecution had allegedly been violated. Among other things, the accused asserted that he had not been given the opportunity to hear certain witnesses who could have provided exculpatory evidence. On similar grounds as in the judgment regarding the crew member, the Court of Appeal dismissed this argument and found no violation of the principle of equality of arms. With regard to the argument that the accused had been deprived of his right to consult defence counsel before the police interviews, the Court of Appeal acknowledged that an error had been made and decided that any statements made prior to the first consultation with his defence counsel were to be excluded from the evidence.

### *Piracy as the skipper*

The Court of Appeal confirmed the conviction of the defendant for his role in the acts of piracy rendered by the District Court of Rotterdam. However, the Court of Appeal found that the prosecutor had not established beyond reasonable doubt that the accused had acted as the skipper on the pirate vessel.<sup>74</sup> There was reason to believe that the various individuals had acted as steersmen/mates and

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<sup>74</sup> Article 85 of the Dutch Criminal Code defines a skipper.



had been involved in taking decisions that generally were taken by the skipper. The precise division of tasks between the crew on the skiff had not been established to a sufficient extent; consequently, the accused was acquitted of the part of the indictment which charged him of piracy as the skipper.

### *Sentencing*

In the absence of sufficient proof regarding his role as skipper, which was considered as an aggravating factor, the defendant was convicted as one of the crew members. The sentence was reduced by one year to four years and six months. Having been acquitted of the use of violence at the trial stage, the sentence on appeal was lower than that of the other accused (the crew member).

#### 4.1.7. The Netherlands - *Dhow*

**Procedure:** 1<sup>st</sup> Instance, District Court of Rotterdam (*Rechtbank Rotterdam*, Case No LJN: BX9986), the Netherlands

**Date of decision:** 12 October 2012

##### *Introduction*

On 12 October 2012, the District Court of Rotterdam rendered a judgment in a case involving nine suspected Somali pirates. The men were suspected of piracy (count 1 of the indictment) and the attempted murder of Dutch marines (count 2 of the indictment). The case concerned a Dutch naval vessel involved in an international anti-piracy mission, which had located the suspects in the Somali Sea on an Iranian fishing vessel, named the *Feddah*. The vessel was known to have been hijacked and when the Dutch naval vessel approached the *Feddah* for the purposes of inspection, the result was a violent and armed confrontation, during which shots were fired both from the *Feddah* and the Dutch naval vessel. All suspects were found guilty of committing piracy. However, they were acquitted of the charges pertaining to attempted murder, as it could not be established who fired the shots in the direction of the marines. The judgment summarised below concerns only one of the accused but is representative of all the rulings in this case. In the present case, the District Court of Rotterdam imposed a prison sentence of four and a half years.

##### *Jurisdiction*

Article 381 of the Dutch Criminal Code criminalises piracy and the jurisdiction in relation to this crime did not give rise to challenges by the defence. However, the jurisdiction for attempted murder (count 2) was challenged by the defence. The defence recognised that for the purposes of implementation of the 2005 Protocol ("Protocol") to the SUA Convention, the Dutch Criminal Code had been amended. Article 4(8(a)) of the Dutch Criminal Code now covers crimes committed outside the Netherlands against vessels sailing under the Dutch flag. However, in the opinion of the defence, the Netherlands has traditionally been reticent when it comes to the establishment of extraterritorial jurisdiction. Accordingly, it should be assumed that when amending the law, the legislator did not want to introduce a broader jurisdiction than that authorised and obliged by the SUA Convention and its Protocol. Following this line of argument, the District Court of Rotterdam should not have had jurisdiction related to the attempted murder under Article 2 of the SUA Convention, as this provision excludes the applicability of the SUA Convention to warships and ships owned or operated by a State when these ships are used as naval auxiliary or for customs or police purposes. Furthermore, the District Court of Rotterdam should not have had jurisdiction, as the indictment concerned offences that took place in Somali territorial waters, which were not covered by Article 4, paragraph 1 of the SUA Convention.

In its considerations, the District Court of Rotterdam held that with regard to attempted murder, Article 8(4(a)) of the Dutch Criminal Code applied to those who commit a crime outside the territory of the Netherlands, *inter alia*, attempted murder against a vessel sailing under the Dutch flag. The marine vessel in question was to be considered as a vessel sailing under the Dutch flag. Referring to Article 94 of the Constitution of the Netherlands, the District Court of Rotterdam held that the provision in the Dutch Criminal Code should only be disregarded if it violated codified rules of public international law. No such violation had been established in this case. If it could be considered that a

broader jurisdiction had been established than that foreseen by the SUA Convention and its Protocol, this did not automatically mean that Article 94 violated the treaty and, consequently, could not be applied.

The District Court of Rotterdam pointed out that Article 6(5) of the SUA Convention explicitly provided that this treaty did not exclude any criminal jurisdiction exercised in accordance with national law. If the legislator had intended to link the SUA Convention with national law to the extent that any form of jurisdiction that was not provided for by the SUA Convention would be excluded, this would have been explicitly regulated, as was done in other sections of the Dutch Criminal Code. The District Court of Rotterdam further held that there was no reason to assume that the legislator never intended to make it possible to try someone for a crime such as the attempted murder, which was closely connected to the act of sea robbery/piracy. In fact, the preparatory work for the amendment of the Dutch Criminal Code showed that, while the Protocol was primarily intended to cover acts with a terrorism purpose, it may also be relevant in relation to piracy.

The District Court of Rotterdam did not give any significance to the fact that the Protocol only entered into force after the crimes took place, as had been pointed out by the defence. The applicability of the amended provisions in the Dutch Criminal Code had not been made dependent on the entry into force of the Protocol for the Netherlands, which meant that the application of the amended provisions were not restricted by the Protocol and, consequently, did not influence the jurisdictional basis of the Netherlands in this case. As the District Court of Rotterdam found that the basis for jurisdiction had been established, it did not consider any other possible basis for jurisdiction in this case.

### *High seas*

Based on a witness statement, the planned destination of the pirate vessel was outside territorial waters and the vessel was first encountered outside/beyond territorial waters. For the District Court of Rotterdam, this constituted sufficient evidence to find that the aim of the vessel was to commit violent acts on the high seas (and so not within territorial waters). The destination of the vessel was not affected by the fact that it was located within Somali territorial waters at the time of the action carried out by the Dutch Navy.

### *Procedural issues*

#### *a) Inadmissibility claims*

The defence raised a number of alleged procedural errors in this case. These errors were related to the questioning of the suspects, the disclosure of evidence by the prosecution, the holding of the suspect in custody without a legal basis, and the impossibility of cooperation with members of the Dutch Navy. According to the defence, these errors should have led to the inadmissibility of the case (under Dutch law, the Prosecutor would have lost his/her right to pursue the case). The District Court of Rotterdam found that the defence had not presented enough reasons to conclude that errors had, indeed, been made or that any possible errors made would have to lead to the inadmissibility of the case.

#### *b) Prosecutorial discretion*

The defence presented three additional claims to have the case declared inadmissible. The first claim concerned the decision of the prosecutor to release the hijacked Iranian vessel, the *Feddah*, with

potential witnesses and accomplices on board. The District Court of Rotterdam found that the decision had not been made by the prosecutor, but pointed out that even if such had been the case, it would have been within his prosecutorial discretion to make this decision.

The second claim concerned the decision to prosecute in this case, while in similar cases the suspects had been released without trial. In general, piracy cases are only tried if a Dutch interest is involved and, as no such interest was identified in the case at hand, the defence asserted that the prosecutor made an error in this regard. Thirdly, the defence alleged that an arbitrary and therefore unfair distinction had been made between the suspects who had been arrested. With regard to the second and third claims, the District Court of Rotterdam held that such decisions fell within the discretion of the prosecutor and that a court could only carry out a very limited review of decisions taken within the prosecutorial discretion.

The District Court of Rotterdam found that not enough evidence had been presented to show that similar situations had occurred earlier. In the *MV Taipan* case, the suspects had not been prosecuted, but the case had been transferred to another jurisdiction to be prosecuted there.<sup>75</sup> Accordingly, the circumstances of the two cases were not comparable.

### c) Cooperation with the Navy

The defence counsel had encountered problems in cooperation with the Dutch Navy and held that the military interests had played a greater role than the interests of criminal justice in this case. The District Court of Rotterdam found that in such cases the investigation could not be carried out without considering the important interests of national defence. The District Court of Rotterdam took this fact into consideration when establishing whether enough evidence had been presented to prove the crimes of piracy and attempted murder.

### Co-perpetration of piracy and attempted murder

The defendant was charged as a co-perpetrator of piracy and attempted murder. With regard to the charge of acting as a co-perpetrator, proof of the actual use of violence or the intention of the defendant to use violence was not necessary; it sufficed to know that the vessel had the aim of committing acts of violence. The District Court of Rotterdam found that the defendant had acted as part of a group on board the *Feddah*, which had a leader and a division of tasks. These circumstances indicated that the group cooperated closely and with knowledge of the destination and the aim of the vessel.

Although co-perpetration in committing piracy was proven, the accused could not be held responsible for the shooting incident without additional facts and circumstances that would prove the accused was also responsible as a co-perpetrator in the shooting incident. In this case, there was insufficient evidence to find that the accused was involved in the execution of the shooting incident or to infer that the accused was involved in its planning or organisation. The simple fact that the accused may have been present on board the vessel at the time of the shooting incident did not prove his involvement in the crime of attempted murder.

A conviction for attempted murder would in this case have been based solely on facts and circumstances that served as a basis for the conviction of piracy. According to the District Court of

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<sup>75</sup> Please see 4.1.3. *Germany – MV Taipan* on the outcome of the trial in Germany.

Rotterdam, such basis was too general and did not respect the principle of individual criminal responsibility, which constitutes the starting point in Dutch criminal law. Accordingly, the defendant was acquitted of attempted murder.

### *Sentencing*

In its findings on the appropriate sentence, the District Court of Rotterdam stressed the seriousness of the crime. However, as in its previous judgments, the District Court of Rotterdam found that they could not be seen as a justification for the commission of criminal offences. Having considered the sentences in similar piracy cases, it sentenced the accused to four and a half years in prison.

The length of the sentence in this case confirms the sentencing range in similar cases in the Netherlands. All of the accused were given sentences ranging from four and a half to five and a half years.

#### 4.1.8. Spain - *Alakrana*

**A. Procedure:** 1st Instance, Criminal Chamber of the National Court (*Juzgado Central de Instrucción n. 1, Audiencia Nacional* – 4<sup>th</sup> Section, File 93/09, Investigation 97/09), Spain

**Date of decision:** 3 May 2011

##### *Introduction*

On 3 May 2011, the Criminal Chamber of the National Court, *Audiencia Nacional* (the “Criminal Chamber”), rendered a judgment in a case concerning two pirates apprehended by the Spanish Navy. The defendants faced trial for their participation in the kidnapping of the 36-member crew of the *Alakrana*, a fishing ship sailing under the Spanish flag, between 3 October and 17 November 2009. The incident took place 400 nautical miles (740 km) North-West of Seychelles island of Mahe near the coast of Somalia.

The public prosecution service brought the following charges:

- One charge of criminal association, as contained in Articles 551.1 and 517.2 of the Spanish Penal Code. For this count the prosecutor requested two years of imprisonment for each defendant;
- 36 counts of illegal detention under Articles 163 and 164 of the Spanish Penal Code, for which the prosecutor requested punishment of 12 years of imprisonment for each count for each defendant (a total of 432 years of imprisonment each);
- One charge of robbery with threat and violence against people and use of a weapon, as contained in Articles 242.1 and 242.2 of the Spanish Penal Code, for which the prosecution requested the Criminal Chamber to sentence each defendant to four years of imprisonment.

Parallel to the request of the public prosecution service, charges of terrorism and participating in an armed group, among other crimes, were brought by way of private prosecution. The private prosecution also requested pecuniary compensation and the complementary punishment of prohibition to exercise civil liberties for the defendants.

The Criminal Chamber found it established that on 2 October 2009, 12 heavily armed pirates on board skiffs approached the *Alakrana*, boarded the ship by force and restrained its crew. All crew members were requested to hand over their personal valuables and instructed to sail the fishing ship to the mother ship of the pirates in the vicinity. Both defendants were present on the mother ship. Two days later, in an exchange of fire with members of the international naval forces present in the area, the two defendants were wounded, apprehended and then transferred to Spain.

The other pirates menaced the hostages by simulating executions and beating them with their weapons to obtain the liberation of their two associates. The 36 crew members were freed after 47 days following payment of a ransom.

##### *Admissibility of the case*

Both defendants denied all the accusations and requested the preliminary dismissal of the trial on a number of grounds, some of which are discussed in the following: a) lack of competence of the Criminal Chamber due to the age of one of the defendants; b) lack of jurisdiction of the Spanish courts to try these facts; c) lack of communication of the documents related to the payment of the ransom; d)

admission of statements not included in the preliminary investigation as evidence in trial, and failure to admit certain statements of witnesses into evidence, as proposed by the defence.

#### a) The age of one of the defendants

One of the defendants declared himself to be underage at the moment of the facts. After a forensic examination, the Criminal Chamber referred his case to the Central Court for Minors, for further forensic examination. The prosecutor appealed the referral to the Central Court. The Court of Appeal, following forensic evidence provided by the prosecution office, concluded that the accused was older than 18 years and confirmed the competence of the Criminal Chamber.

#### b) The jurisdiction of the Criminal Chamber

The defence further challenged the jurisdiction of the Spanish courts in general. Such jurisdictional issues had already been addressed by the same Criminal Chamber in two preliminary verdicts of 2 November 2009 and 9 December 2010. On this point, the Criminal Chamber concluded that Article 23, paragraph 1 of the Organic Law on the Judiciary (Ley Orgánica del Poder Judicial) provided for the jurisdiction of the Spanish courts to prosecute crimes committed on Spanish soil or on Spanish ships and airplanes.

In addition, the Criminal Chamber confirmed its interpretation of the jurisdictional basis of the Spanish courts on the basis of Article 6(1)(a) and 6 (2)(b) and (c) of the SUA Convention, Article 105 of the UNCLOS, Council Joint Action 2008/851/CFSP of 10 November 2008 and UN SC Resolutions 1814, 1816 and 1838.

Having solved the issue of Spanish jurisdiction, the Criminal Chamber addressed the competence of the Audiencia Nacional to hear this case. It confirmed the competence by referring to Article 65 of the Organic Law on the Judiciary, which gives the Audiencia Nacional competence to prosecute crimes committed outside of national territory when national law or international agreements stipulate the jurisdiction of Spanish courts.

#### c) Access to documents

One of the claims raised by the defence referred to the classification by the Spanish government of the documents related to the payment of the ransom to liberate the hostages, arguing that without access, the rights of the defence were violated.

The Criminal Chamber established that any request for information was rejected, either due to the absence of information held by the police or to the classification imposed by the Council of Ministers disallowing the release of information (National Intelligence Centre).

In its preliminary ruling on the admission of evidence dated 14 December 2010, the Criminal Chamber had stated that the information had been handled in conformity with jurisprudence, which declared lawful the non-declassification of information when: a) the security of the State could be at risk; b) the declassification could lower the credibility of Spain and its foreign relations; c) declassification could mean a risk to the efficiency, sources, means and operative proceedings of the National Intelligence Centre or the physical integrity of its officers and their siblings; and d) declassification in a criminal trial could lead to the dissemination of the personal data of the incumbents due to the principles of



contradiction and publicity. During the trial it was demonstrated that the owner of the vessel did not pay a ransom; instead, the ransom was paid by a body of the government which then classified the information using the arguments indicated in case law.

#### d) Admissibility of witness testimonies

The defence asked that testimonies of crew members that were not included in the preliminary investigation should not be admitted as evidence. The Criminal Chamber reasoned that the crew provided statements during the preliminary investigation, more specifically in November 2009, after investigators had visited some of the crew members in their homes for this aim. The Criminal Chamber found that those statements could not be used due to technical defects, but argued that this fact did not invalidate their value as evidence.

Referring to the preliminary ruling on the admission of evidence, the Criminal Chamber refused to admit as witnesses the Minister of Foreign Affairs, the Minister of Defence, the Spanish Ambassador in Kenya or the lawyer previously in charge of the defence.

#### *Charges considered by the Criminal Chamber and Arguments of the Defence*

In its decision, the Criminal Chamber considered that the facts presented to it would constitute the crimes of a) criminal association, as provided in Article 515 of the Penal Code; b) illegal detention, as provided in Article 163(3) in conjunction with Article 164(2) of the Spanish Penal Code; c) crimes against moral integrity, as provided in Article 173(1) of the Penal Code; and d) robbery with violence and threats, as provided in Articles 242(1) and 242(2) of the Penal Code.

The defendants argued that they had been kidnapped by the pirates while peacefully fishing and that they were forced to provide assistance to the kidnappers. In its ruling, the Criminal Chamber qualified this argument as improbable, as there were no traces of fishing gear or instruments on the mother ship. In fact, substantial amounts of fuel and weapons were retrieved.

Regarding the qualification of the facts considered by the Criminal Chamber and the evidence related to each charge, the decision underlined the following:

- With regard to the count of criminal association, the Criminal Chamber pointed out that according to existing jurisprudence (sentence from the Supreme Court 234/2001 of 3 May, 50/2007 of 19 January or 503/2008 of 17 July), the elements of the crime require: a) multiple subjects to execute a determined activity together; b) the existence of an organisation capable of carrying out the activity; c) permanence; and d) that the aim of the organisation is to commit crimes. The Criminal Chamber assumed that through the depositions of the crew members of the *Alakrana*, the boarding of the fishing vessel was prepared in advance. This could be inferred from the utilisation of a ship to reach the high seas, to transport 14 persons, to carry numerous barrels of fuel, etc. The testimonies of the hostages also showed a high level of organisation in taking control of the *Alakrana*, where certain subjects managed different aspects of the kidnapping (planning, negotiation with the authorities, control over the hostages, etc).
- Regarding the 36 counts of illegal detention, the Criminal Chamber reasoned that although the defendants did not materially board the *Alakrana* and left the fishing vessel just two days after the kidnapping, they were in charge of sailing the mother ship, the transportation of

their accomplices and the escorting of the *Alakrana* and its crew to the shores of Somalia. In the ruling of the Supreme Court of 22 December 2010, it was held that everyone who participated in the commission of a criminal act in an organised manner shared criminal responsibility on the basis of the principle of solidarity. According to this principle, everyone who contributed to achieving criminal aims in an efficient manner should be considered an author of the crimes. Having considered the deposition of witnesses on the organisation of the pirates, the Criminal Chamber found that the requirement had been fulfilled.

- Concerning the 36 charges of crimes against moral integrity, the Criminal Chamber found that acts such as the simulation of execution should be considered as degrading treatment. The act of taking away a few hostages and menacing them until they were freed by the authorities, as well as the impediment of the use of sanitary facilities (shower, toilet, etc.), were also to be considered as degrading treatment. The above reasoning, in combination with the consideration made on the counts of illegal detention, made the defendants co-authors of the violation of the moral integrity of the hostages.
- Finally, the charge of robbery with threat and violence was proven on the basis of the statements of the hostages. According to these statements, the pirates forced them to hand over their valuables and the money available on the ship. However, the Criminal Chamber considered that because none of the parties addressed the qualifying elements of this crime (threat and violence), the Criminal Chamber, following the accusatory principle, could only make findings in relation to one single count of robbery instead of the 36 charges brought against the pirates.

Concerning the other criminal charges brought by the private prosecution, the Criminal Chamber decided to dismiss the counts of terrorism, belonging to an armed group, damage to the ship and torture.

The Criminal Chamber cited the definitions of terrorism in Article 2 of the International Convention for the Suppression of Terrorist Bombings<sup>76</sup> and in Article 2 of the Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), which had been applied in a previous judgment of the Spanish Supreme Court. Having considered the facts of the case, the Criminal Chamber concluded that the crimes committed did not pass the threshold required for an act to qualify as terrorism, nor did the aim pursued by the perpetrators match the qualification of terrorism.

With regard to the charge of belonging to an armed group, as requested by the private prosecution, the Criminal Chamber reasoned that this charge could only be brought within the context of a terrorist group. As the charge of terrorism had been dismissed, the Criminal Chamber also dismissed this charge.

## Sentencing

The Criminal Chamber convicted both defendants of four different crimes:

- On the count of illegal association, the Criminal Chamber condemned each defendant to two years' imprisonment and a fine of 12 months at the rate of EUR six per day;

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<sup>76</sup> United Nations, Treaty Collection, Text and status of the International Convention for the Suppression of Terrorist Bombings.

- Regarding the 36 charges of illegal detention, the Criminal Chamber sentenced each defendant to 36 penalties of 11 years of imprisonment each;
- On the charge of robbery with threat and violence, the Criminal Chamber condemned each defendant to five years, as requested by the private prosecution, and,
- On the 36 charges of crimes against the moral integrity of people, punishable by imprisonment of between six months and two years, the Criminal Chamber sentenced each defendant to 36 penalties of six years each.

Regarding compensation and indemnity of the victims, the Criminal Chamber estimated that compensation of EUR 2 500 for each crew member would cover their material losses. As indemnity for the moral damage derived from the kidnapping, the Criminal Chamber estimated a sum of EUR 100 000 for each of the victims. This amount had to be paid by the defendants together. The Criminal Chamber ordered each of the parties to the trial to cover their own legal expenses.

## **B. Procedure: Appeal, Supreme Court (*Tribunal Supremo*, Case No 8470/2011), Spain**

**Date of decision: 12 December 2011**

The decision issued by the Criminal Chamber of the National Court was challenged through “*Casación*” actions by two of the defendants; two members of the private accusation and the prosecution office. The Supreme Court (*Tribunal Supremo*) admitted the appeals and produced a decision acquitting the appealing defendants of the charges of “crimes against the moral integrity of people”. The arguments raised by the defence, the private accusation and the prosecution service were dismissed by the Supreme Court.

The appeal was based on an undue consideration of the law regarding the principle of retroactive application of the disposition more favourable to the defendant and for an alleged mistake made during the trial in assessing the evidence contained in documents.

According to the defence, at the moment of drafting the decision, the legislation covering piracy was already in force and its application would have implied a lesser penalty for the defendants. In this respect, the Supreme Court found that the charge of piracy presented by the prosecution was evidenced during the trial, and the effect of the legislation would not have meant the imposition of a lesser sentence.

Concerning the second argument raised by the defence, the alleged mistake regarding the assessment of the evidence presented during the trial relates to documents produced during the alleged conversations between the pirates and the Spanish government concerning the possible liberation of the hostages (from the Spanish government side) and the two defendants (from the “pirates” side). The Supreme Court reasoned that in the case under analysis, the Court of First Instance had assessed the documentation presented by the parties. However, the Court of First Instance had not received the documentation on the conversations between the pirates and the Spanish government, as the Spanish government had deemed it classified. The Supreme Court reasoned that an appeal should have been made challenging the decision to make the documents classified, and dismissed the argument.

Nevertheless, the Supreme Court reviewed the participation of the defendants in the facts presented during the trial and found that the inhumane and degrading treatment that the hostages received had been applied by the pirates after the two defendants had been detained by the Spanish authorities

(one of them was wounded). The Supreme Court reasoned that the two appellants could not have participated in these events as they were not present on the hijacked ship. For this reason, the Supreme Court acquitted the two appellants of the charge of “crimes against the moral integrity of people”, reducing the penalty by six years for each defendant.

## 4.2. Court Decisions in Brief

### 4.2.1. France - *Carré d'As*

**A. Procedure:** 1<sup>st</sup> Instance, Juvenile Court of Paris (*Cour d'Assises des mineurs de Paris*, 1<sup>ère</sup> section, Case No 11/0002, arrêt criminel), France

**Date of decision:** 30 November 2011

The case concerned the hijacking of a yacht called *Carré d'As* in the Gulf of Aden in September 2008. The pirates allegedly kidnapped two individuals on board the sailing boat, took control of the vessel and removed a boat engine from it. They also robbed the victims of cash and other valuables. A case was brought against six defendants, among whom one was a minor at the time of the offence. His case was referred to a juvenile court.

Firstly, all of the defendants were charged with conspiracy. Secondly, some were charged with the hijacking of a vessel using violence or threats. Thirdly, some defendants were charged with stopping (*arrêter*), kidnapping, detaining or illegally restraining the two individuals concerned in this case. The defendants allegedly acted in an organised manner. Finally, some defendants were charged with theft or alternatively armed robbery.

The defendants were not convicted of conspiracy, but the Court of First Instance found that the crimes had been committed in an organised manner, which under French law is considered an aggravating factor. The organised character of the activities was demonstrated, for instance, by the distribution of tasks and profits, including when supplying the boats used by the pirates.

The Court of First Instance also established that the detention or confinement had continued until more than seven days had passed since the victims were abducted. Under Article 224-1 of the French Penal Code, the maximum punishment for the crime of stopping, kidnapping, detaining or confining a person is twenty years' imprisonment. However, if the hostages are liberated voluntarily by the kidnappers within seven days of the abduction, the maximum penalty is considerably lower, more specifically five years in prison and a fine.

The Court of First Instance convicted five of the six defendants. One defendant was acquitted of all charges. The only minor in this case was convicted on the charge of detaining or confining the two individuals and sentenced to four years in prison. The remaining four defendants received sentences of between six and eight years.

**B. Procedure:** Appeal, Juvenile Court of Seine and Marne (*Cour d'Assises des mineurs de Seine et Marne* Section 1, Case No 09/2013,), France

**Date of decision:** 1 February 2013

The judgment in the piracy case concerning the *Carré d'As* yacht was appealed by the Public Prosecutor and was heard by a Juvenile Court of Appeal, the *Cour d'Assises des mineurs de Seine et Marne*. The case against one of the defendants was separated from the case against the other five.

The Court of Appeal concurred with most of the findings of the Court of First Instance. It considered the charges of conspiracy but found that the constitutive elements of conspiracy were not different from those that characterised the aggravating circumstance of having committed a crime in an organised manner. Accordingly, the defendants were acquitted of this charge.

With regard to one of the two defendants who were sentenced to eight years in prison by the Court of First Instance, the Court of Appeal found that he had not stopped (*arrêter*) the victims, nor had he stolen an engine from the boat. Accordingly, the sentence of this defendant was reduced to seven years in prison.

The other sentences were upheld, as was the acquittal of the defendant who also was found not guilty by the Court of First Instance.

#### 4.2.2. France - *Le Ponant*

**Procedure:** 1<sup>st</sup> Instance, Cour d'Assises of Paris, France

**Date of decision:** 14 June 2012

In April 2008 a cruise ship called *Le Ponant* was attacked by pirates off the coast of Somalia. The crew members were held hostage and a ransom payment was made. A case against six pirates involved in these events was heard by the *Cour d'Assises* of Paris.

Firstly, all six defendants were accused of having stopped (*arrêter*) and of illegally restraining several persons as hostages for the purpose of receiving ransom money. Secondly, one defendant was charged with hijacking a vessel. The defendants allegedly acted in an organised manner, which under French law constitutes an aggravating factor. Thirdly, the accused were charged with conspiracy and, finally, all of the defendants were accused of theft committed in an organised manner.

The Court of First Instance considered the characteristics of the aggravating factor of acting in an organised manner. It found that this aggravating circumstance affected all the participants after it had been established that the acts of each pirate contributed to the acts carried out by the group. It was not necessary to establish that everyone had intended to participate in these acts. Following this reasoning, the Court of First Instance found that the aim of the organised group in this case was to commit the hijacking of a vessel for the purpose of extorting a ransom. In addition, the Court of First Instance found that the aggravating factor of acting in an organised manner could be applied cumulatively with conspiracy.

The hostages were released only after more than seven days had passed since their capture. As in the case of *Carré d'As*, this was relevant to sentencing.

The Court of First Instance acquitted two of the defendants of all charges due to lack of evidence. The other accused received prison sentences ranging from four to ten years. The longest sentence was pronounced against an accused who was found guilty of: 1) ship hijacking; 2) the arrest, detention and illegal restraint of several individuals for more than seven days, the crime having been committed in an organised manner; 3) theft committed in an organised manner; and 4) conspiracy. One of the defendants was convicted of complicity in the arrest, detention and illegal restraint of several individuals and was sentenced to four years in prison.

#### 4.2.3. Italy - *Montecristo* (juveniles)

**Procedure:** 1<sup>st</sup> Instance, Juvenile Court of Rome (*Tribunale per i minorenni di Roma*), Italy

**Date of decision:** 16 June 2012

On 16 June 2012, the Juvenile Court of Rome issued a judgment against four defendants who were under the age of eighteen when they took part in the attack on the *Montecristo*.<sup>77</sup>

Each defendant was sentenced to nine years imprisonment. The indictment and the motivation given by the Juvenile Court of Rome are the same as those for the adults of the group, except for some important issues related to the assessment carried out by the consultant of the Juvenile Court of Rome to determine the age of the accused.

When the suspects were arrested in the Indian Ocean by the Italian Navy, they were not in possession of personal identification documents. As a result, for some of them it was necessary to proceed with a medical examination in order to assess their age and if they were chargeable according to Italian law.

The examination was carried out by a consultant appointed by the Juvenile Court of Rome. He carried out several general clinical examinations, including X-rays of wrists and teeth and an examination of the genitals. The report concluded that all subjects had an age of 14 years and 4 months with a variability of +/- 312 days (an age between 13 years and 5 months and 15 years 4 months and 12 days). Accordingly, the defendants were tried as juveniles.

#### 4.2.4. Italy - *Valdarno*

**Procedure:** 1<sup>st</sup> Instance, Judge for Preliminary Investigations in Rome (*GIP*), Case No 2418/12 R.G.P.M. (1371/12 R.G. G.I.P.; Sent. N. 2503/2012), Italy

**Date of decision:** 4 December 2012

On 4 December 2012, the Judge for Preliminary Investigations issued a simplified sentence in the case regarding eleven Somali nationals accused of the attack against the Italian tanker *Valdarno*. This judgment was issued on the basis of Article 444 of the Italian Code of Criminal Procedure. This means that in the case of an agreement between the prosecutor and the defence counsel on the punishment, and subject to the agreement of the judge, no formal trial will begin. The sentence will be considered final after the expiration of the terms agreed to. Interested parties can request the case to be appealed to the Supreme Court before the time has elapsed.

The attack took place on 17 January 2012, two hundred nautical miles off the coast of Oman. A group of pirates tried to approach the *Valdarno*. The immediate reaction of the captain, who ordered full speed and a zigzag course, impeded the approach. The *Valdarno* sent an SOS message, which was received by the Italian naval frigate *Grecale*. The Italian naval vessel, having verified that the tanker and its crew were in good condition, began an examination of the mother ship of the pirates.

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<sup>77</sup> For the related judgment against the rest of the offenders in this case, please see 4.1.4. Italy – *Montecristo*.



Eleven Somali pirates were found on board the mother ship, a Yemeni fishing boat, the crew of which was held hostage. The pirates were transferred on board the *Grecale*. Once on board, with the use of videoconferencing, the arrest was validated by the judge in Rome.

This was the second case regarding pirate attacks against Italian vessels. All the pirates were sentenced to three-and-half years in prison. The sentences were significantly lower than in the *Montecristo* case. The main difference between the two cases was that the act of hijacking in the present case remained at the stage of an attempt, as the pirates were not able to board the *Valdarno*, while the pirates in the *Montecristo* case were convicted of the act of piracy and several other crimes.

#### 4.2.5. The Netherlands - *MV Taipan* (surrender)

**Procedure:** Surrender Procedure, District Court of Amsterdam, International Legal Assistance Division (*Rechtbank Amsterdam, Internationale rechtshulpkamer*, Case No. LJN: BM6780), the Netherlands

**Date of decision:** 4 June 2010

The Dutch authorities were requested by the Public Prosecution Office of Hamburg, Germany, to surrender 10 suspects arrested for piracy.<sup>78</sup> The Dutch Navy had arrested them on the high seas off the coast of Somalia after seizing the German containership *MV Taipan* and brought them to the Netherlands. The subject of this judgment is the demand to surrender one suspect, dated 15 April 2010, which was based upon an EAW issued on 9 April 2010. This surrender judgment can be seen as representative for all 10 suspects arrested in this case.

The EAW requested surrender based on the initiation of a criminal investigation against the claimed person under the criminal law of Germany. Germany claimed jurisdiction as the flag State and due to the fact that two victims were German nationals. However, the EAW stated that the ship sailed under the flag of the Bahamas and clarification was needed by the prosecutor to correct this. According to the defence, the ship sailed under the Liberian flag, which led them to dispute the overall accuracy of the document. The District Court of Amsterdam stressed the principle of mutual recognition and concluded that it should be able to rely on the information received by the issuing authority and assume that its claim of jurisdiction was legitimate.

The EAW was issued for three offences, for which the test of dual criminality did not apply insofar as the offences were punishable by detention of a maximum period of at least three years in the issuing State. It concerned the following offences: 1) kidnapping, illegal restraint and hostage taking; 2) racketeering and extortion; and 3) unlawful seizure of aircraft or ships. All offences fulfilled the penalty requirement under German criminal law.

The District Court of Amsterdam further assessed the arguments brought forward by the defence and the prosecution on the question of whether there was an ongoing criminal investigation in the Netherlands, which would pose grounds for refusal to surrender the claimed person. In this context, the defence claimed that the manner in which the interviews were conducted suggested a criminal investigation.

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<sup>78</sup> Please see 4.1.3. *Germany – MV Taipan* on the outcome of the trial in Germany.

The District Court of Amsterdam held that the person requested for surrender was not subject to Dutch prosecution within the meaning of Article 9 of the Dutch Surrender of Persons Act and that the arrest could not be referred to as such. The duration of Dutch custody was relatively short considering that the suspect was arrested on the high seas and needed to be brought by ship to Djibouti, from where he was taken to the Netherlands by air. Upon arrival, he was arrested pursuant to Article 21 of the Surrender of Persons Act in relation to the German EAW of 9 April 2010. The District Court of Amsterdam pointed out that there were no indications that the Dutch authorities intended to prosecute the suspect themselves. The fact that he was questioned on board the Dutch naval vessel on a number of occasions did not infer an intention to prosecute as such, as the interviews were merely for the purpose of identification and military intelligence, particularly since the officers had received an explicit order from the Dutch prosecutor not to conduct any interviews pursuant to criminal law. The possibility that the Netherlands would also have jurisdiction did not constitute grounds to refuse surrender to Germany.

The District Court of Amsterdam found that all requirements of the Dutch Surrender of Persons Act had been satisfied, and therefore ordered the surrender of the person requested for surrender to Germany for the purpose of the criminal investigation initiated by the Public Prosecution Office of Hamburg.

### 4.3. Conclusions

While maritime piracy is an old and internationally recognised crime, experience of prosecuting acts of piracy in modern times has been very limited. As the increasing number of piracy incidents in the past years, in particular in the area off the coast of Somalia, caused a threat to free passage in international waters and to the security of crews, some European countries initiated prosecutions against pirates apprehended in action. There has been a lack of interest in prosecuting pirates far from where the offences took place, *inter alia*, due to the expense and political sensitivities involved, and yet the alternative - to release the pirates after capture - has also been considered as unsatisfactory. Interestingly, the fact that some pirates were released without trial while others were tried was brought forward by the defence in the Dutch cases (*Choizil*, *Dhow*, *MS Samanyolu*) as giving rise to discriminatory treatment. The argument was not successful but indicates that a decision to prosecute in these cases is sensitive. At the same time, a decision not to prosecute may also become subject to criticism.

The analysis of the judgments included in this chapter focused on certain factual and legal issues that are of particular interest to cases of maritime piracy, most prominently, the jurisdictional basis for prosecution. Whereas some courts assumed jurisdiction without addressing the issue in their decision, the court in the *MV Taipan* case discussed the jurisdictional basis and found that it could try the case on the basis of universal jurisdiction and two forms of extra-territorial jurisdiction. Several courts (*Pompei/Petra I*, *Montecristo*, *Alakrana*, among others) held that a jurisdictional basis for trying the case either could be found in international treaties, most importantly the UNCLOS and the SUA Convention. They also based their jurisdiction on a combination of international treaty provisions and specific domestic legal provisions. In the *Choizil* and the *Alakrana* cases, however, the court referred to Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the coast of Somalia, implementing the SC Resolutions mentioned in *Chapter 2. Legal Framework*. As these resolutions permitted military action within Somali territory, the courts were not restricted by the provisions of the UNCLOS and the SUA Conventions which limit jurisdiction to acts committed on the high seas.

Some defendants raised claims of violation of their human rights, more specifically, the violation of their right to liberty and to a fair trial under the ECHR (*Pompei/Petra I*, *MV Taipan*, among others). In general, the courts in these cases recognised that the accused brought up a valid point, but the circumstances of the case were so different and more challenging than in other cases that, for instance, action on the part of law enforcement authorities to bring the accused before a judge more quickly would not have been possible.

The age of the suspected pirates, the consequences of being a juvenile or minor and the assessment of age, created some difficulty in several cases. Some prosecutors apparently only brought charges against pirates who had reached the age of majority, and in so doing circumvented the problem of minors. Other courts (*Carré d'As*, *Montecristo*) referred the case to a juvenile court. The *MV Taipan* judgment included the most detailed findings on the assessment of age, which may prove informative in similar cases.

With regard to sentencing, the judgments show a huge variety, ranging from the maximum penalty of 30 or 40 years (due to the cumulative sentencing practice in Spain) at the top end (*Alakrana*), to two years of imprisonment as the most lenient sentence for juveniles (*MV Taipan*). The discrepancy may partly be explained by differences in the criminal acts committed. Another reason is obviously

differing sentencing practices within Member States. Interestingly, some of the accused in the *Montecristo* case were charged with kidnapping for terrorism purposes. Terrorism was considered as an aggravating circumstance. This aggravating factor could not be proven but, nevertheless, the leader of the pirates was convicted to 19 years' imprisonment, which constitutes one of the harshest sentences in the cases discussed in the present chapter. Terrorism charges were also brought in the *Alakrana* case. However, the accused were not convicted of this crime and, accordingly, the long prison sentences handed down were unrelated to the terrorism charges. Several Dutch cases have already been tried and while the charges in these cases have differed, it is clear from these judgments that all the sentences fall within the same sentencing range.

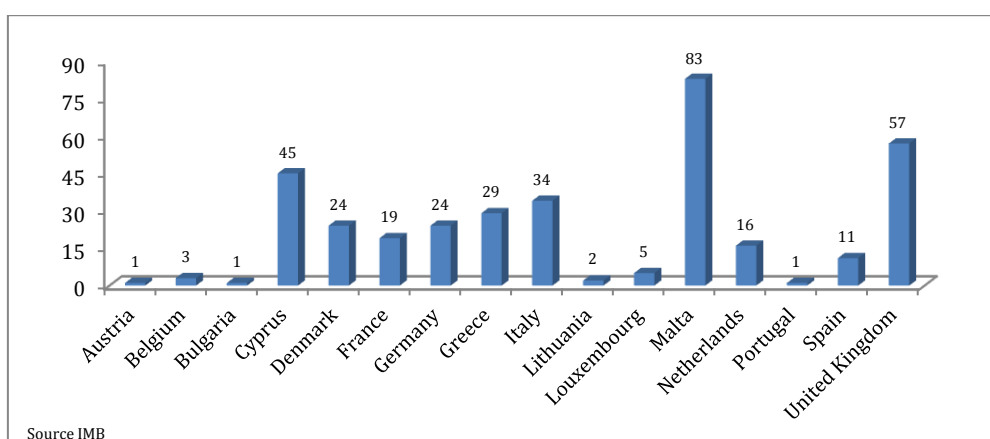
In general, the courts stressed the severity of piracy as a phenomenon and pointed out that, while the societal and personal circumstances of the pirates were often terrible, this fact could not justify acts of piracy, nor could it be given much weight at the sentencing stage. It may be noted here that all of the cases covered by this chapter concerned the prosecution of those who participated in the actual attempted or successful capture of a vessel. None of the cases targeted the facilitators of the crime, although the gravity of their role in the acts of piracy is likely to be higher than that of the pirates executing the crime. The fight against modern maritime piracy would profit from the successful prosecution of the facilitators of the crimes, as well as the money launderers involved, in addition to the prosecution of those who physically carry out the attacks.

## 5. Figures on Maritime Piracy Incidents and Prosecutions

This chapter is intended to provide a brief overview of the impact of pirate activities against ships sailing under the flag of Member States in the territorial waters of Somalia and its adjacent areas (Gulf of Aden).

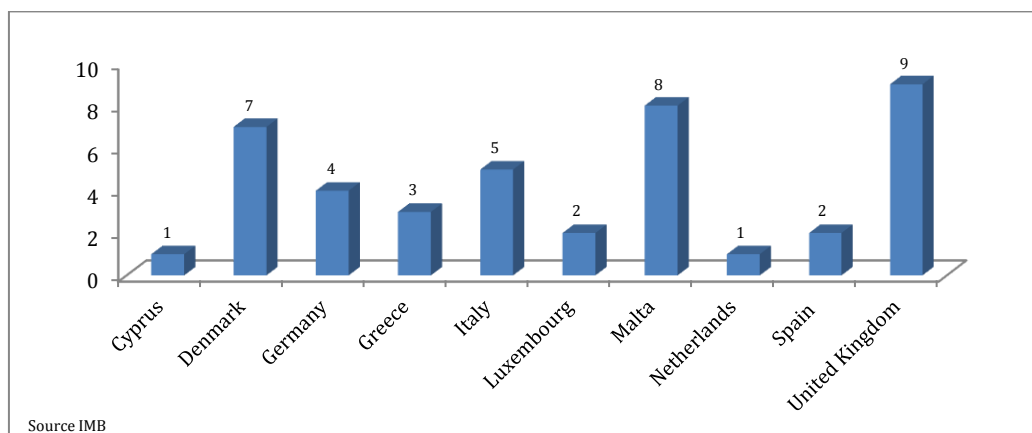
The International Maritime Bureau (“IMB”), a specialised branch of the International Chamber of Commerce (“ICC”), records all maritime piracy incidents worldwide. In its 2012 report on the issue, the IMB counted a total of 1 884 incidents against ships since 2008.<sup>79</sup> These incidents were either attacks or attempted attacks by maritime pirates. The reported incidents do not necessarily constitute acts of piracy as defined by international or domestic law. Although the report claims that the number of incidents has decreased in the last year, the number of incidents worldwide in 2012 still reached 297. According to the same source, during the last five years it is believed that Somali pirates have been involved in 413 incidents, 26 of which occurred in 2012.

With regard to the number of ships attacked between 2008 and 2012, the same document reports a total of 355 incidents that were perpetrated against vessels flying the flag of a Member State.



**Figure 1 - Number of incidents involving vessels registered in Member States 2008 - 2012**

According to the IMB’s 2012 report, a total of 42 incidents against ships sailing under the flags of Member States were registered.



**Figure 2 - Number of incidents involving vessels registered in Member States - 2012**

<sup>79</sup> ICC International Maritime Bureau, Piracy and Armed Robbery Against Ships, Report for the period 1 January – 31 December 2012.

Regarding suspected pirates that have been transferred to national authorities, the Counter Piracy Programme of the United Nations Office on Drugs and Crime (“UNODC”) entitled, “Support to the Trial and Related Treatment of Piracy Suspects”, which focuses on specialised anti-piracy courts in Somalia and other States in the region, indicates that 23 jurisdictions have initiated prosecutions against suspected pirates surrendered to their authorities by the international force present in the territorial waters of Somalia and its adjacent areas. The report states that 1 190 suspected pirates were transferred for prosecution to national judicial authorities worldwide during the period 2008-2012.<sup>80</sup>

Country	Number of piracy prosecutions
Belgium	2
Comoros	6
France	22
Germany	10
India	119
Italy	20
Japan	4
Kenya	164
Korea (Republic of)	5
Madagascar	12
Malaysia	7
Maldives	41
Netherlands	33
Oman	32
Seychelles	124
Somalia (Puntland)	290
Somalia (South Central)	18
Somalia(Somaliland)	94
Spain	8
Tanzania	12
United Arabs Emirates	10
United States of America	28
Yemen	129

Figure 3 - Number of piracy prosecutions by country 2008-2012

These numbers include the cases presented in Chapter 4 of the present Report.

<sup>80</sup> *Counter Piracy Programme, Support to the Trial and related Treatment of Piracy Suspects*, Issue Ten: Dec 2012, UNODC, p. 8.

## 6. Final Conclusions

The Maritime Piracy Judicial Monitor (“MPJM”) was developed with the objective of improving the likelihood of successful prosecutions in maritime piracy cases by sharing information on present challenges and solutions. That said, the present Report is not meant to reflect on all aspects of the problems that maritime piracy presently causes.

As the present Report constitutes the first issue of the MPJM, there was a need to set the stage for further discussion by providing an overview of the applicable legal framework both at the international and national level. Accordingly, *Chapter 2. Legal Framework* outlines both the basis for jurisdiction and the definitions of piracy or other acts applied in piracy cases.

Maritime piracy is generally recognised as being one of those crimes that can be tried on the basis of universal jurisdiction in the strict sense, i.e. jurisdiction irrespective of where the act was committed, the nationality of the perpetrator, and the nationality of the victim. However, on the basis of the overview provided in *Chapter 2. Legal Framework*, the laws of the Member States included in this Report provide for a number of possibilities to exercise extra-territorial jurisdiction in cases concerning acts of piracy, which means that having recourse to universal jurisdiction is not an essential factor for prosecution. Nevertheless, universal jurisdiction was mentioned as one of the jurisdictional bases on which the case could be tried in at least one of the cases analysed in *Chapter 4. Judicial Decisions* of this Report. The fact that states have not necessarily encountered problems in finding a basis for jurisdiction to prosecute piracy cases should be distinguished from jurisdictional issues that may arise between countries when, for instance, one State claims jurisdiction to prosecute and the suspects were arrested by another State.

The term “piracy” is commonly used to describe attacks against vessels committed for private ends. However, the criminal law of several Member States does not include a definition of the crime of piracy. Instead, acts of piracy are charged under a variety of provisions contained in the Criminal Codes of these states. Based on the analysis of judgments in *Chapter 4. Judicial Decisions*, the lack of a definition of piracy does not appear to have hindered Member States from prosecuting acts of piracy. However, it may be pointed out that the cases contained in this Report only involved pirates who physically participated in the attacks or attempted attacks and did not target those who incited or facilitated the crimes, or those who benefitted from this criminal activity.

The prosecutors who participated in the coordination meetings held at Eurojust have recognised the importance of sharing their experiences in prosecuting piracy cases. Such experiences encompass both problems encountered and lessons learnt in the course of a case. In *Chapter 3. Legal Issues and Lessons Learnt* of this Report, a first attempt was made at collecting such experiences and identifying best practice. Some issues and practices stand out in this regard, as they are clearly significant to any successful prosecution. One of these practices is the importance of international co-operation in sharing data such as photographs, fingerprints and other biometric data. The assistance of Interpol and of Europol’s Focal Point Maritime Piracy has been very valuable in this regard. The Global Database on Maritime Piracy that is being set up is an initiative which may prove to be of great added value in identifying individuals involved in piracy activities and their assets. Whereas data sharing is promoted, there are still great challenges in securing strong evidence at the crime scene, most often at sea, in demanding circumstances. The training of naval personnel is essential in order to ensure correct and timely evidence gathering. Effective international cooperation tools can be of help in securing statements or the presence of foreign witnesses at court hearings.



The complexity of piracy prosecutions is increased by the difficulty of establishing the age of pirates, who tend to be young people, in some cases claiming to be minors. The cases analysed in *Chapter 4. Judicial Decisions* show that States have tried young pirates under the Juvenile Code or referred the case to a Juvenile Court. The challenge is the assessment of age, as the limitations of forensic expertise can hinder the prosecution of piracy cases.

Another growing issue in relation to the piracy phenomenon in general is the use and powers of private security companies employed to ensure the security of vessels and their crews. In order to address safety issues on board commercial vessels, some States have amended their legislation to allow the use of private security companies.

With regard to the above, the present Report identifies some important common challenges faced by prosecuting authorities. However, a more detailed account of the lessons learnt is clearly dependent on the input on best practice from all Member States that have experience in piracy investigations and prosecutions or have been affected by piracy attacks against vessels sailing under their flag. Identifying best practice is also important in a broader context than that of the European Union. It is generally recognised that conducting piracy prosecutions in national courts in a region close to where the piracy activities are taking place would be preferable to prosecutions in distant foreign countries. Capacity building in the region is seen as one of the key factors in preparing willing States to conduct prosecutions. Developing best practice in Europe could contribute to this capacity building effort.

Additionally, the experiences with the JIT on maritime piracy between Germany and the Netherlands were addressed during the coordination meetings and may be included in a second issue of the Report. Europol hosted the JIT and may provide input for analysis on best practice developed during the joint investigations. Another important issue for prosecutors that has not been touched upon thus far is tracing the source of information gathered and validating the accuracy of this information. Gathering information for the purpose of providing evidence during trial proceedings involves difficulties. However, if the information cannot be traced to its original source, problems with evidence may follow. Europol has identified and outlined the problem of handling information concerning piracy where multiple players are involved, where the information streams are variable and where the information itself stems from a variety of sources. Europol's expertise would be of great assistance in the effort to develop best practice on the use of information concerning piracy and to including this knowledge in the MPJM.

Interesting lessons learnt were also drawn from the judicial decisions analysed in *Chapter 4. Judicial Decisions*. In addition to the assessment of the age of pirates, of which an overview of one case was provided, some other common features could be identified. In several cases, claims related to possible human rights violations were made. On the one hand, the courts in general recognised that the circumstances in which piracy is committed make it difficult to comply with time limit requirements of the law of criminal procedure. On the other hand, the judgments show that despite any difficulties in these cases, the human rights concerns related to the right to liberty and the right to a fair trial cannot be overlooked at any stage of a piracy case. At the same time, both the sentences rendered in these cases and the explicit statements of the courts provide proof of the severity of maritime piracy.

Cases that are currently being heard and upcoming cases will be assessed in subsequent issues of the Report. It will be of interest to see whether prosecutions will address aspects of piracy other than the physical attack of vessels, such as the possible money laundering involved where ransom payments have been made. Targeting the facilitators may become crucial in the efficient fight against the phenomenon of piracy in the future. The figures on piracy show a decrease in incidents, at least in the Gulf of Aden. Nevertheless, the impact of maritime piracy on free passage in international waters and

on the shipping industry has not diminished. The increasingly professional nature of pirate groups means that prosecution of the suspected pirates, being the “foot soldiers”, will not be sufficient. In this regard, subsequent issues of the MPJM can include aspects that go beyond those discussed in the present Report. Whereas limitations in domestic law are not the main reason for difficulties in piracy prosecutions, an analysis of how broader piracy legislation could contribute to targeting facilitators could be useful. Profiting from the expertise of Interpol may be useful in this respect, for instance, as concerns information on non-Member States, most notably the recently adopted piracy legislation of Mauritius.

The compilation of experiences shows that combating piracy successfully and ensuring convictions in piracy cases requires integrated and complementary effort on the part of the military, law enforcement and judicial authorities, as well as political players at national level. The present Report proves that the MPJM can be a useful link in collecting lessons learnt through legislation, investigation and prosecution, but also in capacity building in the field of maritime piracy in its broadest sense. As the European Union’s judicial cooperation unit, Eurojust is best placed to request this type of information from Member States. Eurojust has the expertise and capacity to analyse the collected input and report on themes related to maritime piracy for the use of all interested parties.



## List of Abbreviations and Sources

EAW	European Arrest Warrant
ECHR	European Convention on Human Rights, Council of Europe, available at <a href="http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf">http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf</a>
ECtHR	European Court of Human Rights, website <a href="http://www.echr.coe.int/echr/homepage_EN">http://www.echr.coe.int/echr/homepage_EN</a>
EU	European Union, website <a href="http://europa.eu/">http://europa.eu/</a>
EU NAVCO	European Union Naval Coordination Cell
EU NAVFOR	European Union Naval Force Somalia – Operation Atalanta, website <a href="http://eunavfor.eu/">http://eunavfor.eu/</a>
ICC	International Chamber of Commerce, website <a href="http://www.iccwbo.org">http://www.iccwbo.org</a>
ICCPR	International Covenant on Civil and Political Rights, available at <a href="http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf">http://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf</a>
IMB	International Maritime Bureau, website <a href="http://www.icc-ccs.org/icc/imb">http://www.icc-ccs.org/icc/imb</a>
JIT	Joint Investigation Team
PAG	Pirate Action Group
RAPPICC	Regional Anti-Piracy Prosecution and Intelligence Coordination Centre, Seychelles
SAØIK	State Prosecutor for Serious Economic and International Crime, Denmark, website <a href="http://www.anklagemyndigheden.dk/Sider/statsadvokaten-for-saerlig-oekonomisk-og-international-kriminalitet.aspx">http://www.anklagemyndigheden.dk/Sider/statsadvokaten-for-saerlig-oekonomisk-og-international-kriminalitet.aspx</a>
SUA Convention	Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, available at <a href="http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf">http://treaties.un.org/doc/db/Terrorism/Conv8-english.pdf</a>
UN	United Nations Organisation, website <a href="http://www.un.org/">http://www.un.org/</a>
UNCLOS	United Nations Convention on the Law of the Sea, available at <a href="http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf">http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf</a>
UNODC	United Nations Office on Drugs and Crime, website <a href="http://www.unodc.org/">http://www.unodc.org/</a>



## Appendix: Methodology and Staff Acknowledgements

### Methodology

The present Report has been produced in the context of the maritime piracy project launched by the College of Eurojust in 2012. Its objective is to strengthen prosecution cases by discussing common challenges, possible solutions and lessons learnt. In order to collect the necessary information, two questionnaires were used. The first questionnaire, which focussed on the jurisdiction of Member States to prosecute acts of piracy, was sent out within the framework of a general case on maritime piracy in 2012. The second questionnaire was addressed to those Member States that participated in the coordination meetings on a maritime piracy operational case. It contained questions on the substantive law and definitions of the crime of piracy in Member States. In response to the questionnaire, the national authorities also provided court decisions on acts of piracy that have been rendered by their domestic courts. In addition to these court decisions, judgments from open sources were used. With regard to the Report as a whole, the project team consulted open sources in order to complement the information received from national authorities.

The selected sources were analysed and summarised for all chapters in this Report - on piracy legislation, legal issues and lessons learnt, judicial decisions and figures on piracy prosecutions.

The draft report was verified with the contributing Member States.

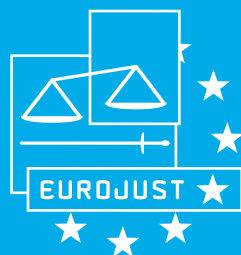
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